

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi - 110 066.**

**Date of Hearing: 15.11.2018
Date of Pronouncement: 13/12/2018**

Appeal No. E/51186, 52737-52738/2018-DB

[Arising out of Order-in-Appeal No.IND-EXCUS-001-APP-483-484-17-18dated 29/12/2017 passed by the COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE(Appeal)]

VARUN ENTERPRISES

Appellant

Vs

C.C.E. & S.T.-INDORE

Respondent

Appearance

Shri R.K. Varma, Adv

for the appellant

Shri Ubhap Sengraj ,(DR)

for the respondent

CORAM

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR.BIJAY KUMAR, MEMBER (TECHNICAL)

Final Order No:53386-53388/2018

Per: Bijay Kumar

1. This order disposes of the following three appeals as under;
 - (1) Appeal No. E/51186/2018-EX(DB) – filed by M/s Varun Enterprises
 - (2) Appeal No. E/52737/2018-EX(DB) – filed by the C.C.E. & S.T.-Indore
 - (3) Appeal No. E/52738/2018-EX(DB)- filed by the C.C.E. & S.T.-Indore
2. These appeals arise out of the Order-in-Appeal No. IND/EXCUS/001/APP/483-484/17-18 dated 29.12.2017.
3. The brief facts of the case are that the appellant/ assessee, M/s Varun Enterprises, Indore, having Central Excise Registration No.

AADHN5568HXM001,are engaged in the manufacture of refined lead ingots, lead ingots and litharge falling under Chapter 78 of the Schedule to Central Excise Tariff Act, 1985, by using raw materials such as old and used batteries procured from 'Kabadies'. Acting on the intelligence that the appellant/ assessee is indulging in clandestine removal of goods using "Kacha Parchi" i.e. rough slips, the searches were conducted at the factory and residential premises of the proprietor of firm, namely, Shri Narender Aggarwal on 16/7/2013, which resulted into recoveries of various incriminating documents including rough diaries, wherein the entries were found to be made in pencil indicating the unaccounted procurement of inputs and clandestine removal of goods. During the search operation in the factory premises the stock-taking of the finished goods as well as raw-material were also conducted, which resulted into excess unaccounted quantity of raw-material, namely, of ingots of lead weighting 23,740 kgs and 30,627 kgs of refined lead ingots. Accordingly, these were seized on the belief that the excess stock found was kept with intention of manufacture and clearance of the excisable goods in a clandestine manner, without payment of Central Excise duty.

4. In addition, the investigations were also conducted for the quantity of inputs as well as finished goods found to be mentioned in the note pads and the various diaries recovered from the residential premises of the

proprietor. Accordingly, the two Show Cause Notices were issued to the appellant;

1.IV(6) 16/2013/Prev/29161-164 dated 31/12/2013

2.V(78)15-01/2015/Adj-1/22047-48 dated 14/12/2015.

5. Both the Show Cause Notices were adjudicated by the Additional Commissioner, Central Excise(HQ) Indore, vide a common Order-in-original No. 84-85/ADC/CEX/IND/2016-17 dated 27/2/2017, vide which the demands were confirmed as per the show Cause Notices. On appeal, vide the common impugned order, Ld. Commissioner(Appeal) partially confirmed the demand as upheld by the Lower Adjudicating Authority, and gave partial relief to the appellant/assessee in respect to the amount mentioned in the impugned order. Against the demand confirmed by the impugned order the appellant/assessee is in appeal and against the demand dropped by the impugned order, Revenue is in appeal before us.

6. Ld. Advocate on behalf of the Appellant would submit that the demand of Rs. 1,36,50,463/- raised in the SCN and confirmed in Order-in-Original was based on the entries made in note pads, writing pads and various number of pocket diaries recovered from the residential premises of the proprietor/appellant. The Department, after scrutiny of the aforesaid documents and recording of the statement of the proprietor and Manager-Cum-supervisor of the appellant, concluded that the appellant had

clandestinely manufactured and cleared the finished goods i.e. lead Ingots. It was also held that these documents contained figures relating to procurement of old and used batteries, details of supplier, clearance of finished goods and also other details. The Department worked out the demand by taking the total purchases shown in these documents and worked out the production of lead ingots by taking hypothetical yield of 45 % without any basis.

7. The proprietor of the appellant Shri Narender Aggarwal, in his statement has clearly stated that all the entries in the diary were accounted for and all the dispatches which were made under the Central Excise invoices.
8. It was also stated by the Ld. Advocate that in the impugned order the document recovered are quite explicit and contained the details pertaining to purchases of batteries and dispatch of finished goods. However, the Department has not conducted any inquiry with the supplier of battery, buyers of finished goods, transporter, excess use of electricity etc., to collect independent evidence, for the sustenance of the alleged, clandestine removal. The Department has not conducted any investigation, but relied only on the entries made in notepad and private diaries. The demand was confirmed merely by recording the statements and assuming the details contained in aforesaid document pertaining to the clandestine removal

without any independent corroboration at the buyer's end, or transporter and payments from buyer etc.

9. Ld. Advocate on behalf of the appellant/assessee also submitted that out of 19,60,580.70kgs of scrap the quantity of 9,25,749.615 kgs of total lead was assumed to be recovered considering the percentage yield to be 45% of this quantity. Out of 9,25,749.615kgs, the quantity of 4,86,037.500 was found cleared clandestinely as per recovered record. For balance quantity of 4,39,712.115kgs, there was no evidence of clandestine clearance. And, therefore, the Commissioner(Appeal) has confirmed the demand of Rs. 74,54,743/- involved on the quantity of 9,25,749.615 and dropped the demand of Rs. 61,95,720 involved on quantity of 4,39,719.65. The Commissioner(Appeal) has observed in his order as under;

“Though the date of battery wise procurement of scrap was available, no attempt appears to be made by the investigation to calculate actual quantity of lead recovery from the battery scrap. Simply investigation has concluded that the scrap of 1960580.700 kgs would have resulted into production of 882261.351 kgs of Lead assuming the yield to be 45 % without any justification for the same.”

10. It is also submitted that Ld. Commissioner(Appeal), while observing as above has confirmed the part of demand, adopting the same reasoning. When every detail was available in diaries, the Department should have collected

cogent and tangible evidence rather than confirming the demand on assumption and presumption. The scrap purchased itself was not verified and also yield of 45 % was assumed without any basis. It is his submission that based on the reasoning adopted by the Ld. Commissioner (Appeal) in the impugned order, the entire demand should have been set aside by him which appears to have not been done. Ld. Advocate relied upon the following case laws in support of his contention;

(1) ***Arya Fibres Pvt. Ltd. vs. Commissioner of C. Ex., Ahmedabad-II***, reported as 2014(311) ELT 529(Tri.-Ahmd).

(2) ***Continental Cement Company vs. Union of India***, reported as 2014(309) ELT 411(All.)

(3) ***Mittal Pigment Pvt. Ltd. vs. Commissioner of Central Excise, Jaipur***, reported as 2018(360) ELT 157(Tri.-Del)

(4) ***Commissioner of Custom, C.E. & S.T., Ghaziabad vs. Union of India***, reported as 2018(360) ELT 29(All.)

11. Accordingly, Ld. Advocate prayed for allowing of the appeal filed by the appellant and rejecting the appeals filed by the Revenue.

12. Ld. DR on behalf of the Revenue has supported the impugned order to the extent of demand confirmed, however, contested the demand dropped in the impugned order. It was submitted that in this case there is an admission from the proprietor of the assessee/appellant and also payment of Rs. 60 lakhs was made on voluntary basis of accepting the clandestine removal of the goods. Therefore, he is of the opinion that the commissioner(Appeal)

has erred in partially dropping the demand and partially confirming the demand in the impugned order.

13. Against this background, we have heard Ld. Advocate and Ld. DR and also perused the appeal records.

14. The issue involved in this case is regarding the clandestine removal of the goods by the appellant/assessee. The entire case is made out on the basis of voluntary statement of the appellant/ assessee and entries made in note pads and pocket diaries. The Department has examined the transporters, namely, Shri Nanakchand Batra (statement dated 24/12/13) and Shri Sunder Batra (stated dated 24/12/13). These statements of the transporters have not confirmed the transportation of alleged goods. In their statements, the transporters have deposed that they have not maintained any record regarding the goods transported by them and nothing more. These statements in itself do not indicate that the appellant/assessee is engaged in clandestine removal of goods. It has been held in the various decisions that clandestine manufacture and clearance of goods is a very serious charge and required to establish by the Revenue on the following grounds;

- “(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inference or unwarranted assumption;
- (ii) Evidence in support thereof should be of:

- (a) Raw materials, in excess of that contained as per the statutory records;
- (b) Instance of actual removal of unaccounted finished goods(not inferential or assumed) from the factory without payment of duty;
- (c) Discovery of such finished goods outside the factory;
- (d) Instances of sale of such goods to identical parties;
- (e) Receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturer or persons authorized by him;
- (f) Use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;
- (g) Statement of buyers with some details of illicit manufacture and clearance;
- (h) Proof of actual transportations of goods, cleared without payment of duty;
- (i) Links between the documents recovered during the search and activities being carried on in the factory of production; etc.”

15. Reliance is placed on the decision in the case ***M/s Continental Cement Company, M/s Mittal Pigment Pvt. Ltd. and M/s Arya Fibres*** (supra). In the case of ***M/s Continental Cement Company***, Hon'ble High Court has laid down that there must be clinching evidence for establishing the clandestine clearance and the same cannot be based on assumption and presumption only. Hon'ble Court laid down certain parameters in this regard. Relevant para of the decision of the Hon'ble Court supra is extracted as under –

12. *Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be*

confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions.*

16.No such investigations have been conducted by the Department, in the light of the observations made by Hon'ble High Court, to make a foolproof case for the clandestine removal of the goods as alleged in the two Show Cause Notices. Regarding the seizure case, we find that only the excess stock has been found in the factory. But the same was not removed and was lying there itself. This in itself will lead into inference that such and intention to remove the goods in a clandestine manner. It is also on record that Department has allowed the provisional release of seized goods on bank guarantee and Bond. These provisionally released seized goods have been released subject to their entry in the statutory records. In such a situation there could not be any scope of clearance of seized goods without payment of duty.

17. So far as the second show cause notice is concerned, we find that the same has been issued by and made answerable to Principal Commissioner of Indore and, however, the adjudication was done by the Additional Commissioner without any indication that the Adjudicating Authority has changed during the course of adjudication proceedings. This in itself would have been reason to drop the demand raised by the Show Cause Notice. However, the appellant has not raised this plea in the appeal, and therefore, we ignore the same and do not take cognizance of that.

18. In view of our above findings we held the appeal filed by the Revenue deserve to be dismissed and appeal by the appellant/assessee is required to be upheld.

19. Accordingly, we allow the appeal of the appellant and dismiss the appeal filed by the Revenue. The appellant will be entitled for the consequential benefits as per law.

(Pronounced in open court on 13/12/2018)

(Anil Choudhary)
Member(Judicial)

(Bijay Kumar)
Member(Technical)