

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI.**

Date of Hearing:09.10.2018

Date of Decision:08.01.2019

Excise Appeals Nos.53179-53180/2016-EX(DB)

[Arising out of Order-in-Original No.ALW-EXCUS-O-I-O-COM-44/16-17 dated 22.09.2016/23.09.2016 passed by the Commissioner, Central Excise, Alwar].

Shri Ajay Kumar Malhotra (Director  
M/s.Rathi Steel (Dakshin) Ltd.

...Appellants

Rep. by Shri Bipin Garg, Advocate for the appellant.

Vs.

CCE, Alwar

....Respondent

Rep. by Shri R.K. Mishra, DR for the respondent.

**CORAM :** HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)  
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Final Orders Nos.50019-50020/2019

**PER ANIL CHOUDHARY:**

The present two appeals have been filed by M/s Shri Rathi Steel (Dakshin) Ltd. and Shri Ajay Kumar Melhotra, Director against the Order-in-Original No. ALW-Excus-O-I-O.-COM-44/16-17 dated 22.09.2016 passed by the Commissioner of Central Excise & Service Tax Alwar. As both the appeals are arising out of same Order, they are being taken together for decision.

2.1 The brief fact of the case are that M/s Shri Rathi Steel (Dakshin) Ltd. (Appellant No.1) are engaged in the manufacture of TMT bars. On the basis of some intelligence to the effect that the steel manufacturing units, including the Appellant No.1, were evading Central Excise duty by suppressing production and removing TMT bars without Invoices and payment of duty with collusion of transporters, the Central Excise Officers searched the business premises of

M/s. Pahalwan Goods Carrier, Bhiwadi and M/s Shree Transport, Bhiwadi on 30.11.2012 and 05.12.2012 respectively. The officers resumed certain documents from the premises of M/s Pahalwan Goods Carrier. Nothing was resumed from the premises of M/s Shree Transport.

2.2 A show cause notice dated 01.05.2015 has been issued for demanding Central Excise duty amounting to Rs.4,53,29,015/- and imposing penalty on the Appellants, alleging that on comparison of documents recovered from the transporter with the sales shown by the Appellant in their statutory records, it was found that the Appellants had issued invoices and paid duty only on some of the consignments and in many cases, the clearance of goods were not found entered in their statutory records. Shri Mahipal Yadav, Proprietor of M/s Pahalwan Goods Carrier has stated in his statement dated 29.08.2013 that his firm was mainly engaged in the transportation of the goods manufactured by the units of the Rathi Group.

2.3 The learned Commissioner, under the impugned Order dated 22.09.2016, has confirmed the demand of duty and imposed penalties on both the Appellants holding that right to cross-examination is not an absolute right and denial of cross-examination of Shri Mahipal Yadav cannot lead to violation of principles of natural justice as the request for his cross-examination is a ploy to further delay the adjudication proceedings. The learned Commissioner has recorded the finding that the Register resumed from the premises of the transporter has reliability as it contained the details of actual clearances as there is no reason for anyone to scribble entries in their register hypothetically. The Register is trustworthy as it had

records of clearances, some of which were also found recorded in the records of the Appellant.

3.1 Shri Bipin Garg, learned Advocate has contended that though the intelligence said to be gathered by the officers indicated evasion of Central Excise duty by the Appellant, the officers have not searched/visited the factory premises of the Appellant on 30.11.2012. He, further, submitted that even after coming to know about alleged evasion of duty by the Appellant from the records resumed from the premises of the transporter, the officers had taken no action to search the premises of the Appellants. In his statement dated 01.03.2013, Appellant No.2 Shri A.K. Malhotra, Director has categorically stated that the Appellant Company had not removed any goods clandestinely and the records resumed from the transporter are not Appellant Company's records nor prepared by any employee of the Appellants. In this regard, the learned Counsel has relied upon the judgment in **CCE Vs Vishwa Traders Pvt. Ltd., 2013 (287) ELT 243 (Guj)** wherein the Hon'ble Gujarat High Court has held that as the stock of raw materials and finished goods were tallying on the date of visit of officers and nothing was found which could show purchase of unaccounted raw material, it cannot be alleged that the Assessee had manufactured or removed the goods clandestinely. The Hon'ble Supreme Court has dismissed the appeal filed by the Revenue as reported in **2014 (303) ELT A24 (S.C.)**.

3.2 The learned Advocate emphasized that the entire case has been made against the Appellants on the basis of documents recovered from the premises of a third party. It is settled law that the allegation of clandestine manufacture and removal of goods cannot be levelled on the basis of documents resumed from a

third party unless the same is corroborated by independent and cogent evidence. In this regard he relied upon the following decisions:-

- (i) **Emmtex Synthetics Ltd. Vs CCE, 2003 (151) ELT 170 (Tri-Del)**
- (ii) **Kedarnath Silk Mills Vs CCE, 2006 (195) ELT 58 (Tri).**
- (iii) **Charminar Bottling Co. Pvt. Ltd. Vs CCE, 2005 (192) ELT 1057 (Tri).**
- (iv) **Rutvi Steel & Alloys Vs CCE, 2009 (243) ELT 154.**
- (v) **Surya Alloy Industries Ltd. Vs U.O.I., 2014 (305) ELT 340 (CAL).**

3.3 The learned Advocate also referred to the judgment in the case of **CBI Vs V.C. Shukla, 1988 (3) SCC 410**, wherein the Supreme Court has observed that entries made in the books shall not alone be sufficient evidence to charge any person with liability. Entries, even if relevant, are only corroborative evidence and require independent evidence as to trustworthiness of those entries necessary to fasten liability.

4.1 The learned Advocate submitted that in the present matter, there is no independent corroboration of the records of the third party by way of recording statements of any truck drivers, who had allegedly transported the goods, statements of any so-called buyers whose names appeared in GRs [bilty] resumed from transporter premises and statements of any worker/employee of the Appellants. He relied upon the decision in the case of **Rama Shyama Papers Ltd. Vs CCE, 2004 (168) ELT 494 (Tri-Del)**.

4.2 The learned Advocate contended that the mere fact that the documents recovered from transporter's office contain the entries in respect of which Appellants had issued Invoices and which were accounted for in their records does not, rather cannot, lead to the conclusion that all entries in the said records pertained to the Appellants. The onus of proof is on the Department by bringing independent and cogent corroborative evidence linking the said entries with the removal of goods from the Appellants factory. No such link has been adduced by the Department at all. In the case of **Shri Laxmi Industries Vs CC & CE Hyderabad-IV, 2016 (336) ELT 681 (Tri-Hyd)**, the case was made against the Appellants on the basis of documents seized from the residence of input supplier and his statement. The Tribunal has allowed the appeal holding that whole case is based upon third party private records and statement of such third party. Tribunal held that "In the absence of independent evidence, the charges levelled against the Appellant is not sustainable."

4.3 The learned Advocate also contended that though the learned Commissioner has passed the impugned Order holding that the resumed register from transporter's premises is tangible evidence to substantiate clandestine manufacture and clearance and relying upon the statement of Mahipal Yadav, proprietor of transport firm, neither the copy of the said register was provided to the Appellants nor the cross-examination of the Proprietor was allowed. Thus, the impugned Order has been passed in gross violation of the principles of natural justice. He relied upon the following judgments:-

**A. For Not Providing Documents.**

- (i) Kothari Filaments Vs C.C. (Port),  
2009 (233) ELT 289 (SC).**

(ii) **Harshvardan Rajnikant Triveni Vs U.O.I.,  
2014 (308) ELT 464 (Guj).**

(iii) **Santogen Silk Mills Ltd. Vs CCE,  
2013 (295) ELT 218 (Tri).**

**B. For Not Allowing Cross Examination.**

(i) **Andaman Timber Industries Vs CCE,  
2015 (324) ELT 641.**

(ii) **CCE Vs Parmarth Iron (P) Ltd.,  
2010 (260) ELT 514 (ALL).**

(iii) **Basudev Garg Vs C.C.,  
2013 (294) ELT 353 (Del)**

5 Finally the learned Counsel submitted that there is no evidence at all about procurement of raw material and clearance of goods. It has been the consistent view of the Courts and Tribunal that there should be positive evidence regarding purchase of raw materials, use of electricity, sale of final products to prove clandestine manufacture and removal. The Allahabad High Court has held in **Continental Cement Company Vs U.O.I., 2014 (309) ELT 411 (ALL)** that unless there is clinching evidence of the nature of purchase of raw material, use of electricity, sale of final products, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumption. The Allahabad High court has held that “we are of the opinion that when there is no extra consumption of electricity, purchase of raw materials and transportation payment, then manufacturing of extra goods is not possible.”

6. The learned DR, Shri R.K. Mishra has supported the impugned Order-in-Original. The learned DR has emphasized that the register resumed from the premises of the transporter’s contained the details of actual clearances and thus, the

entries not recorded by the Appellants in their records were the goods removed without invoices and without payment of duty. There is no reason for a transporter to make those entries in his records.

7. Heard both sides, considered the submissions in detail and perused the records. The demand of Central Excise duty has been confirmed and the penalties have been imposed on both the Appellants on the basis of records resumed from the premises of transporter and the statement of the proprietor of the transport firm. The main issue involved in the present matter is whether the charge of clandestine removal can be made on the basis of documents resumed from the premises of a third party without independent corroboration.

8. We observe that neither the factory premises of the Appellants has been searched nor any discrepancy in the stocks of finished goods & raw materials has been found by the Central Excise Officers. No investigation has been conducted by the officers at the Appellant's end, as to whether they have the capacity to produce the alleged quantity of TMT bars, electricity consumption, purchase of raw materials, its transportation and payment to the suppliers. There is no investigation about the buyers of goods involving duty of more than Rs.4.53 Crores. The entire case has been made upon the recovery of some documents from the third party premises. It is well settled law that allegations and findings of clandestine removal are required to be made upon cogent and positive evidence which corroborate unaccounted production and clearance of finished goods. In the present matter, no such evidence is available on record at all, except the third party records which cannot be relied upon as admissible piece of evidence in view of the judgment of

the Apex Court in **CBI Vs V.C. Shukla, 1998 AIR SC 1406**. The Apex Court observed as under:

*“A conspectus of the above decisions makes it evident that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person. Keeping in view the above principles, even if we proceed on the assumption that the entries made in MR 71/91 are correct and the entries in the [other] books and loose sheets (which we have already found to be not admissible in evidence under Section 34) are admissible under Section 9 of the Act to support an inference about the formers’ correctness still those entries would not be sufficient to charge Shri Advani and Shri Shukla with the accusations levelled against them for there is not an iota of independent evidence in support thereof. In that view of the matter we need not discuss, delve into or decide upon the contention raised by Mr. Altaf Ahmed in this regard. Suffice it to say that the statements of the four witnesses, who have admitted receipts of the payments as shown against them in MR 71/91, can at best be proof of reliability of the entries so far they are concerned and not others. In other words, the statements of the above witnesses cannot be independent evidence under Section 34 as against the above two respondents. So far as Shri Advani is concerned Section 34 would not come in aid of the prosecution for another reason also. According to the prosecution case itself his name finds place only in one of the loose sheets (Sheet No. 8) and not in MR 71/91. Resultantly, in view of our earlier discussion, Section 34 cannot at all be pressed into service against him.”*

9.1 Similar view has been taken by the Tribunal in the case of **Rama Shyama Papers Ltd. Vs CCE, Lucknow, 2004 (168) ELT 494 (Tri-Del)** by holding as under in Para 10:

*“10 The confirmation of duty in respect of 149 consignments is also based on the records seized from the premises of M/s. Chitra Traders and not on the basis of any record seized from the premises of the Appellant-company. The Revenue has not been able to adduce any corroborative evidence to show the movement of goods from the premises of the Appellant-company to the premises of M/s. Chitra Traders or the Customers whom the goods were sent directly to as per the direction of Chitra Traders. No inquiry has also been*

*made into these Customers who ultimately received the goods. There is no substance in the reasoning given by the Commissioner in the impugned order to the effect that “as the party did not challenge the fact of their business association with M/s. Chitra Traders, Delhi, the enquiry further down the line was not considered necessary.” The onus of proof that the goods were removed by the Appellants without payment of duty and without entering the same in their records is upon the Revenue which cannot be discharged merely on the strength of the entries made in the records of a third party without linking the removal of goods from the premises of the Appellant-company. The mere fact that the Appellant-company had business relation with Chitra Traders, does not mean that they will be liable to each and every entry made by Chitra Traders in their books of account.”*

9.2 The learned Counsel for the Appellants has rightly submitted that this Tribunal has consistently held that the allegation of clandestine manufacture and removal of finished goods cannot be proved merely on the basis of third party records without independent corroboration. Some of the decisions are as follows:-

- (1) **CCE Vs Renny Steel Castings (P) Ltd.,  
2011 (274) ELT 94 (Tri).**
- (2) **Shirley Dyers Vs CCE, Jalandhar,  
2013 (293) ELT 234 (Tri-Del).**

10. We also agree with the learned Counsel that the impugned Order has been passed in gross violation of the principles of natural justice inasmuch as the cross-examination of Shri Mahipal Yadav, Proprietor of transport firm was not allowed though the statement recorded from him has been relied upon by the learned Adjudicating Authority. The Supreme Court has observed in **Andman Timber Industries Vs C.C.E., Kolkata-II, 2015 (324) ELT 641 (S.C.)** that “According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority, though the statements of those witnesses were made the basis of the impugned Order is a serious flaw which makes the Order nullity inasmuch as it

amounted to violation of principles of natural justice because of which the assessee was adversely affected.”

11. We find that except the recovery of some document from the premises of third party and unsubstantiated statement of proprietor of transport firm, there is factually no other evidence to indicate any clandestine manufacture and removal of the finished goods by the Appellant. Accordingly we set aside the impugned Order and allow both the appeals.

[Order pronounced on 08.01.2019.]

**(ANIL CHOUDHARY)**  
**MEMBER (JUDICIAL)**

**(BIJAY KUMAR)**  
**MEMBER (TECHNICAL)**

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