IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. II

Date of Hearing: 26.09.2018
Date of Decision: 28.02.2019

Appeal No. E/51310, 51323/2016-DB
[Arising out of Order-in-Original No. OIO-RPR-EXCUS-000-COM-004-2016 dated 29/01/2016 passed by Commissioner of Central Excise-RAIPUR]

SHILPHY STEELS PVT LTD
NITIN AGARWAL, DIRECTOR — Appellants

Vs.

C.C.E. & S.T.-RAIPUR — Respondent

Appearance:
Shri Kamaljeet Singh, Advocate for the Appellant
Shri H.C. Saini, DR for the Respondent

CORAM:
Hon’ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

FINAL ORDER NO. 50297-50298/2019

Per Anil Choudhary:

1. These appeals are filed by the appellant company, (SSPL for short) and its director against Order-in-Original dated 29th January, 2016 whereby demand of duty of Rs. 3,78,77,400/- have been confirmed against the company with equal amount of penalty. Further the amount of Rs. 31,09,162/- deposited by the appellant company during investigation has been appropriated. Further penalty is imposed on the appellant director-Nitin Agarwal of Rs. 76 lakhs under Rule 26 of CER 2002, for the alleged clandestine manufacture and removal of excisable goods by the appellant company. The proposed confiscation of goods valued at Rs. 54,94,37,888/- have been dropped, observing that there is no ground to uphold the proposed confiscation of the goods.

2. The evidences relied upon by Revenue in the show cause notice are as follows:-

2.1. Panchnama dated 07.07.2011 drawn at M/s Shilpy Steels Pvt. Ltd. Behind Shivali Udyog, Urla Industrial Area, Sarora, Raipur (C.G.)-493 221 [RUD-1]

2.2. Panchnama dated 07.07.2011 drawn at office of M/s Shilpy Steels Pvt. Ltd. 6 & 7, Jeevan Plaza, Avanti Bai Chowk, Raipur (C.G.)-492 001 [RUD-5]

2.3. Panchnama dated 07.07.2011 drawn at residential premises (Flat No. 501, Ashoka Ratan, Diamond, Shankar Nagar, Raipur) of Shri Nitin Agarwal, Director of M/s SSPL [RUD-6]

2.4. Panchnama dated 07.07.2011 drawn at another residential premise (Flat No. 12/202, Ashoka Ratan, Diamond, Shankar Nagar, Raipur) of Shri Nitin Agarwal, Director of M/s SSPL [RUD-7]

2.5. Panchnama dated 13.07.2011 for cloning of two pen drives seized from the residential premises of Shri Nitin Agarwal, Director [RUD-8]

2.6. Panchnama dated 03.08.2011 for cloning of 01 hard disk and 02 pen drives seized from the city –office premises of M/s SSPL [RUD-10]

2.7. Panchanama dated 04.08.2011 for cloning of 03 hard disk and 01 hard disk of laptop seized from the factory premises of M.s SSPL [RUD-12]

2.8. Panchnama dated 08.08.2011 for cloning of hard disks of laptop seized from the residential premises of Shri Nitin, Agarwal, Director [RUD-14]

2.9. Panchnama dated 18.03.2013 for cloning of hard disks of laptop seized from the residential premises of Shri Nitin Agarwal, Director [RUD-16]

2.10. Panchnama dated 21.03.2011 for cloning of hard disks of laptop seized from the residential premises of Shri Nitin Agarwal, Director [RUD-17]

2.11. MS Excel Workbook-st recovered from pen drive (PNY 8 GB) recovered from the residential premises of Shri Nitin Agarwal [RUD-23]

2.12. Statement dated 07.07.2011, 12.08.2011 & 29.09.2011 of Shri G. Jagan Mohan Rao, Assistant Accountant, M/s SSPL [RUD 3, 25,26 & 27]

2.13. Letter dated 26.07.2011 of M/s SSPL, intimating payment of Rs. 30,00,000 as duties of excise [RUD-18]

2.14. Statements dated 07.07.2011 & 04.08.2011 of Shri M.P. Sharma, Factory Manager of M/s SSPL [RUD-4 & 13]

2.15. Statement dated 07.07.2011 of Shri M.K. Gupta, Cashier of M/s SSPL [RUD-2]

2.16. Statement dated 03.08.2011 of Shri Shyam Kandwal, Manager, City of office of M/s SSPL [RUD-11]

2.17. Pen drive (PNY 8GB) recovered from the residence of Shri Nitin Agarwal [RUD-28]

2.18. Print copies of Balance sheet, Profit & Loss A/cs, Trial Balances, Sales Ledger of Excisable goods & their customers' ledger etc. in five volumes from Tally Ledger A/Cs under company names -1 Shri Raj Ji- (AP-OCT.9) 2 Shri Raj Ji-(Nov 9-Mar, 10) 3 Shri Raj Ji-(AP/SEP.10), 4. Shri Raj Ji- (OCT,10-MAR.11) & 5. Shri Raj Ji- (AP.11) [RUD-29 to 33]

2.19. Profit & Loss A/cs of the FYs: 2009-10 and 2010-11, and a CD containing Sales Register for the FYs: 2009-10 to 2011-12 (upto July, 2012) submitted by M/s SSPL on 26/11/2013 [RUD-40,43 & 42]

2.20. Writing pads, Note pads & files (Record No. 1,2,3,6,8, & 9) recovered from the residence of Shri Nitin Agarwal, Director [RUD-34,35,36,37,38 & 39]

2.21. Any other records, such as Excise Invoice, ER-1/ER-6/FORM-IV RG-1 etc, which are discussed in this notice.

3. The following charges have been made in the show cause notice:-

a. SSPL was engaged in clandestine removal of finished goods, i.e. sponge iron, steel ingots, runners, dolochar & char manufactured, without payment of duty of excise and it was also engaged in short payment of duty excise by undervaluing the excisable goods.

b. All the transactions of the clandestine production activities and the additional amount charged/recovered from the customers were in cash which is not accounted for in the specified books of accounts of the appellant.

c. SSPL purchased excess raw materials, i.e. iron ore, coal, dolomite, etc, for consuming them in its plant to manufacture unaccounted finished excisable goods.

d. The aforementioned charges are made on the basis of entries in private diaries notebook, rough pad, etc, maintained to record clandestine removal of the excisable goods, corroborated by evidence in private financial accounts maintained in tally accounting software, as well as admissions made by director-Nitin Agarwal and the employees of appellant company.

4. The Ld. Counsel for appellants, assails the impugned order on the following grounds and contentions-

4.1. That during the search, the officers found cash amounting to Rs. 4,30,000/- in the office premises of the appellant. The officers were fully satisfied that the said cash was fully accounted for and they did not seize this cash. Thus no unaccounted cash was found during the search of the office premises or the factory premises or the two residential premises of its director, which establishes that the appellant has not manufactured & cleared any goods clandestinely.

4.2. That entire case of the Department is based on the data retrieved from one pen drive only which was recovered during the search from the residence of the director. None of the hard disc of desktop computers or laptops or other pen drives contain any incriminating data. Reconstructed data or data retrieved from computer /laptop is not admissible as evidence under the provisions of Section 36B of the CEA, 1944, as it was not produced by the computer during the period over which it was used regularly to store or process information. The data has been retrieved from the pen drive subsequently after almost after 1 year 9 months from the date of search and not during the course of use of the hard disc, computer or pen drives. A demand of duty on the basis of reconstructed or retrieved data is not sustainable as such data does not satisfy the conditions laid down in Section 36B(2) as held in the case of **Premium Packaging Pvt. Ltd. Vs. CCE, 2005 (184) ELT 165 (CESTAT)**. Hence the demand of duty on the basis of the data retrieved from the pen drive is not sustainable.

4.3. That the person who has maintained the accounts in Tally has not been identified and questioned by the investigating officers. In his statements dated 27.11.2013, Sh. Nitin Agarwal has repeatedly stated that the pen drive was not prepared by him or at his instance, but was prepared by some staff member unauthorisedly. This contention of Sh. Nitin Agarwal has not been rebutted in the show cause notice or the impugned order. Since the pen drive has been prepared unauthorisedly, the data contained therein cannot be said to be authentic and no reliance can be placed on it, to allege clandestine removal of goods.

4.4. That though the tally accounts in the said pen drives do contain some entries of the appellant's transactions however it does not follow that all the entries pertain to the appellant, especially when these entries are not corroborated by any material evidence.

4.5. That no reliance ought to be placed on the documents recovered during the course of search in the residential cum guest house premises of Sh. Nitin Agarwal. It is pertinent to point out that Sh. Agarwal lives in Raipur only for 5-6 days in the month. He otherwise resides with his family in Kanpur. The residential premises in Raipur is looked after by a care taker/ servant and is also used as a guest-house by the appellant company. Various employees of the appellant company have free access to this premises. The alleged incriminating documents were recovered from the sitting room of the said premises to which various employees of the appellant have access. These documents do not contain a true and correct picture of the clearances of the appellant and no reliance can be placed on them to confirm the demand of duty.

4.6. Out of the nine records seized during the search, <u>**only one is in the handwriting of Sh. Nitin Agarwal. However this record has not even been relied upon in the show cause notice**</u> as it was not found to contain anything incriminating.

4.7. That the so called incriminating records are not in the handwriting of Sh. Nitin Agarwal. The person in whose handwriting these records are written has neither been identified nor questioned by the officers. Admittedly these records do not bear the name of the appellant and are not official records of the appellant. There is no justification whatsoever for presuming that these records show transactions of the appellant. The alleged suppliers of raw material and purchasers of the finished goods as per the said records have not been identified or questioned, nor they have admitted to having sold/ purchased the goods from the appellant as per these documents. The transporters have not admitted to having transported these goods to or from the premises of the appellant. None of the goods allegedly cleared without cover of invoices have been seized at any time. The alleged discrepancies in stocks are too minor to support the allegation of clandestine removal. In the absence of corroborative evidence, no reliance can be placed on the alleged incriminating documents and the demand of duty on the basis of these documents is not sustainable.

4.8. That in his statement dated 08.08.2011, Sh. Agarwal has specifically stated that these records have neither been maintained by him nor under his directions and he was not aware who had prepared these documents.

4.9. That the alleged incriminating documents and tally accounts have been prepared by some unidentified employee of the appellant or some other person. These records are not the official records of the appellant. No reliance can be placed on the private records maintained by an employee to confirm the demand of duty against the employer manufacturer especially when the person who has maintained these records has not been identified & questioned. In the absence of any explanation from the person who has allegedly maintained these private records, no reliance can be placed on these records to allege clandestine manufacture and removal of goods by the appellant. Moreover these records are corroborated by material evidence, demand of duty cannot be confirmed only on conjectures and surmises. Suspicion, however strong, is not a substitute for proof. Reliance is placed on-

-Shree Nakoda Ispat Ltd. Vs. CCE, Raipur
2017 (348) ELT 313 (Trib.-Delhi)

-CC Vs. Lakhpatri
2016 (343) ELT 78 (Del.)

-Santogen Textile Mills Ltd. Vs. CCE, Navi Mumbai
2017 (347) ELT 581 (Bom.)

-Shivam Steel Corpn. Vs. CCE
2016 (3390 ELT 310 (Tribunal)

-CCE Vs. Gopi Synthetics Pvt. Ltd.
2014 (302) ELT 435,

-Surya Alloy Indus. Ltd. Vs. UOI
2014 (305) ELT 340 (Cal.),

-Hindustan Machines Vs. CCE
2013 (294) ELT 43 (Tribunal),

-K.V. Textiles Pvt. Ltd. Vs. CCE

2009 (240) ELT 397 (CESTAT)

-CCE Vs. Baroda Rolling Works
2009 (238) ELT 495 (CESTAT)

-Madura Coats Pvt. Ltd. Vs. CCE
2009 (92) RLT 368 (Trib.)

-Kamal Biri Factory Vs. Collector
2003 (161) ELT 1197 (Tribunal)

In the light of these said judgments, the demand of duty against the appellant on the basis of these documents is not sustainable.

4.10. The stock verification was done by eye estimation only as no calculation sheet is available or referred. Thus the demand of duty of Rs. 4,09,162/- on alleged shortages in stock of sponge iron & ingots is not sustainable. The appellant is supported in its contention by, inter alia, the following cases :-

-Shree Nakoda Ispat Ltd. Vs. CCE, Raipur
2017 (348) ELT 313 (Trib-Delhi)

-CCE Vs. Kwality Tube Industries
2009 (240) ELT 20 (Guj.)

-CCE Vs. Kundan Castings Pvt. Ltd.
2008 (227) ELT 465 (Trib.)

-Sri Chakra Cements Ltd. Vs. CCE
2008 (231) ELT 67 (Trib.)

-Bhushan Ltd. Vs. Commr.
2005 (186) ELT 197 (Trib.)

-Shiva Steel Rolling Mills Vs. CCE
2005 (186) ELT 326 (Trib.)

-Moolchand Steels Pvt. Ltd. Vs. CCE
2005 7) ELT 387 (Trib.)

4.11. That the actual stock of sponge iron as per books was 996.477 M.T. and not 1103.716 M.T. as alleged. The alleged shortage in stock of sponge iron was noticed also because the chart prepared for sponge iron in the statement dated 07.07.2011 is wrong or erroneous.

4.12. That in the case of **Roll Tubes Ltd. Vs. CCE** reported in **2013 (294) ELT 458 (CESTAT)**, it has been held that if the stock-taking is not done correctly, benefit of doubt must go to the assessee. In the case of **CCE Vs. Silvertone Papers Ltd. reported in 2013 (287) ELT 478 (CESTAT)** it has been held that mere acceptance of shortages cannot lead to a conclusion about clandestine clearance. In the present case, merely because the shortage in stock has been accepted by the appellant's director Sh. Nitin Agarwal and employee, Sh. M.P. Sharma (Factory Manager) it does not follow that the goods were removed clandestinely or that there was infact a shortage in stocks as weighment of stock was not done.

4.13. That the alleged shortage in stocks is not supported by corroborative evidence of removal of goods without payment of duty from the premises of the appellant. Hence demand of duty on alleged shortages is not sustainable.

4.14. The summons issued to the panch witnesses were returned undelivered while no summons were issued to the investigating officers. In the absence of cross-examination of the panch witnesses and the investigating officers, the appellant’s contention that physical verification was conducted by eye estimation, must be accepted as correct.

4.15. That the ld. Commr. failed to appreciate that the allegation that the appellant has procured unaccounted raw material and used it to manufacture finished goods clandestinely, without payment of central excise duty is erroneous. As per para 14 of the show cause notice, the appellant has cleared the following quantities of finished goods clandestinely :-

Name of Item	Qty (M.T.)	Period
Sponge iron	20516	01.04.09 to 07.07.11
Dolochar	19959	01.04.09 to 07.07.11
Steel Ingots	8951	01.04.2010 to 07.07.2011
Risers & Steel Scrap	73	01.04.2010 to 07.07.2011
Char	19959	01.04.2009 to 07.07.2011

For manufacturing sponge iron, the raw materials used are iron ore, coal & dolomite. Admittedly, no shortage was found in the stock of any of these three raw materials at the time of visit of the officers on 07.07.2011. This itself proves that the appellant has not manufactured sponge iron or other goods clandestinely.

4.16. That the principal raw material for manufacture of sponge iron is iron ore. The mining and procurement/distribution and transportation of iron ore is strictly controlled by the State Government.

It is just not possible to procure unaccounted iron ore to manufacture sponge iron clandestinely. The impugned order is silent on this contention of the appellant.

4.17. That in order to manufacture 6872.48 M.T. of sponge iron and 7461 M.T. of ingots, which is alleged to have been produced clandestinely, the appellant should have procured 25412 M.T. of iron ore without accounting, during the period 01.04.2009 to 07.07.2011.

Iron Ore is transported mostly in railway wagons having capacity of 3500 to 4500 M.T. It is also transported in trucks having capacity of 9 to 16 M.T. However unaccounted iron ore cannot be transported in Railway wagons as the Railways, which is also a Govt. Department would not transport iron ore unless it is accompanied by a 'fit pass' from the mine. If trucks are used for transporting iron ore, then, taking the average capacity of trucks as 13 M.T., approx., 2000 truck loads are needed to procure 25412 M.T. of iron ore.

It is pertinent to note that not even a single truck has been intercepted by the Central Excise Department, the Department of Mines or any other Govt. department, which was found to have been transporting unaccounted iron ore to the premises of the appellant. Moreover, iron ore cannot be procured from any other person clandestinely as that other person can also cannot procure iron ore unauthorisedly, from the mines.

As explained hereinabove, it is just not possible to procure iron ore unaccountedly. Thus the appellant could not have manufactured sponge iron and/or ingots clandestinely. The impugned order is however silent on this contention of the appellant.

4.18. That para 9 of the show cause notice gives a comparision of the purchase of iron ores as per official P&L A/c. and as per private P&L A/c. for the financial years 2009-10 and 2010-2011. As per this chart, the private P&L A/c. for 2009-10 shows procurement of lesser quantity of iron ore in 2009-10 vis-à-vis the official records.

4.19. There are alleged discrepancies in purchase of dolomite and coal also as per the official private P&L A/c. vis-à-vis the P&L A/c. in the tally accounts. It is pertinent to note that without the corresponding procurement of iron ore, the appellant cannot produce more sponge iron. Coal is used only as fuel in the kiln, while dolomite is added to the ore to control the quality of sponge iron by controlling the sulphur content. By using more dolomite or coal, more sponge iron cannot be obtained, unless a corresponding quantity of iron ore is also procured. Thus no adverse inference can be drawn against the appellant on the basis of the alleged purchase figures shown in these records. The impugned order is silent on this contention of the appellant.

4.20. It is further alleged in the show cause notice that the appellant has cleared 19959 M.T. of dolochar and 6849 M.T. of char during the period 01.04.2009 to 07.07.2011. Dolochar and char are obtained as waste/ by-products during the course of manufacture of sponge iron.

The ratio of production of sponge iron to dolochar (and char) to burning loss is 55:40:5. That is to say, for every 55 M.T. of sponge iron manufactured by the appellant, 40 M.T. of dolochar and char are obtained. 5% of the iron ore is lost as burning loss. However, as per para 14 of the show cause notice, the appellant has clandestinely manufactured and cleared 20516 M.T. of sponge iron and 26808 M.T. of dolochar and char (19959 M.T. of dolochar + 6849 M.T. of char). The chart on page 14 of the show cause notice has been prepared on the basis of the tally accounts. The comparison between the quantity of sponge iron and dolochar and char alleged to have been produced clandestinely itself establishes that the appellant has not manufactured and cleared any goods clandestinely.

4.21. That no reliance can be placed on the statements of Sh. Nitin Agarwal and Sh. J.M. Rao, Accountant of the appellant wherein they have allegedly admitted that they have cleared sponge iron, ingots etc. clandestinely without payment of duty of excise. The department has not brought on record any material evidence to support the allegation of clandestine production & removal of goods. The appellant is supported in its contention by the judgment of Hon’ble CESTAT in the case of **Premium Packaging Pvt. Ltd. Vs. CCE, 2005 (184) ELT 165 (CESTAT).**

4.22. That no reliance can be placed on the statement dated 13.07.2011 of Sh. Nitin Agarwal as he has signed the statement dictated and typed by DGCEI officer on computer, only to buy peace with the department and to be able to catch his flight to Kanpur. This statement is neither voluntary nor true. Shri Agarwal also retracted from his statement through the interim defense reply.

4.23. That the amount of Rs. 34,09,162/- was deposited by the appellant during investigation, only to buy peace with the Department and to avoid arrest. Vide letter dated 25.02.2012 the appellant submitted that this amount had been deposited by them under pressure from the Department and requested that this amount be refunded to them.

4.24. That in the case of **Hindustan Machines Vs. CCE reported in 2013 (294) ELT 43 (CESTAT)**, Hon'ble Tribunal has held that the internal records maintained by a worker in private capacity are not sufficient to allege clandestine removal. In the case of **Meenambal Fire Works Vs. CCE, 2002 (49) RLT 832 (CESTAT)**, Hon'ble Tribunal set aside the demand of duty on the basis of private notebook maintained by the accountant, who was not produced for cross-examination and due to lack of corroborative evidence. In the case of **Shree Nakoda Ispat Ltd. Vs. CCE, Raipur 2017 (348) ELT 313 (Trib. –Delhi),** it has been held that demand of duty cannot be confirmed on the basis of documents where the person who has prepared the documents is not known.

The appellant's case is on a better footing than the cases cited hereinabove, as the records contained in the said pen drives are not the internal records of the appellant. The person who has prepared these records has not been identified and questioned and there is no corroborative evidence whatsoever.

4.25. That the statement dated 05.05.2014 of Sh. Nitin Agarwal is neither voluntary nor true. When Sh. Agarwal reached the office of DGCEI on 05.05.2014, he was kept waiting for many hours. Then the officers presented this typed statement to him and asked him to sign it. He was not even allowed to read this statement nor he was given a copy of this statement. Hence no reliance can be placed on the statement dated 05.05.2014 of Sh. Nitin Agarwal, being not voluntary.

5. That it has been held by Hon'ble Delhi High Court in the case of **<u>CCE, Delhi-I Vs. Vishnu & Co. Pvt. Ltd., 2016 (332) ELT 793 (Delhi</u>** that even if a statement is retracted late, then also, it is not a reliable evidence. In the case of **<u>Sh. Nakoda Ispat Ltd. Vs. CCE, Raipur, 2017 (348) ELT 313 (Tribunal)</u>**, the retraction of the statement through the defense reply has been held to be admissible. In the light of the said judgment, no reliance can be placed on the statement of Sh. Nitin Agarwal.

4.27. That the cross-examination of Sh. Rao clearly establishes that

- the statement dated 17.08.2011, of Sh. Rao is neither voluntary nor true.
- that this statement was not written by him but was prepared by the officers and he has only signed it.

- that he was only shown the panchnama of the search carried out in the premises of Sh. Nitin Agarwal on 07.07.2011 but not the documents allegedly recovered during the search.
- that he has not stated that no invoices were issued against the documents alleged to have been recovered from the residence of Sh. Nitin Agarwal.
- that he has not prepared Annexure A & Annexure B enclosed with the statement dated 17.08.2011
- that in respect of goods shown consigned by M/s. Dewatram & Co., Kanpur to M/s. Mamta Steels, Amethi, no invoices were issued by the noticee as these documents do not pertain to their company.
- that physical verification of stock was conducted by eye estimation only and the material was not weighed.
- That the payment of duty by the company on the alleged shortages was not voluntary.

4.28. That the allegation of clandestine removal is not supported by any material evidence like receipt of unaccounted inputs, mode of payment of consideration for unaccounted raw material, consumption of electricity, use of labour, proof of transportation and sale etc. Admittedly, no goods (raw material as well as finished goods) have been seized which were being transported without payment of duty. The department has not been able to identify any such transporters who have allegedly transported goods (raw material as well as finished goods) without invoices, and obtain any confirmation from them. No corroboration has been obtained from the alleged purchasers of finished goods regarding receipt of unaccounted goods or from the suppliers of raw material regarding sale of unaccounted raw material. Though it has been alleged that payment was received in cash, no unaccounted cash has been recovered during the search of the factory or office of the appellant or the residence of its director. No evidence has been led regarding procurement of corresponding large quantity of raw material by the appellant, its transportation or utilization. In the absence of any corroborative evidence, the demand of duty is not sustainable.

4.29. In the case of **Suntrek Aluminium P. Ltd. Vs. CCE 2013 (288) ELT 500 (Guj.)**, Hon'ble Gujarat High Court has held that demand of duty cannot be confirmed on the basis of confessional statement of the Director, which has been retracted, in the absence of corroborative evidence.

4.30. In the case of **Shreeji Aluminium Pvt. Ltd. Vs. CCE reported in 2012 (282) ELT 234 (CESTAT)**, this Tribunal has held that corroborative evidence must be adduced to confirm a demand of duty and the burden is on the revenue to prove clandestine clearance by adducing strong, sufficient and positive evidence. Assumptions & presumptions leading to doubt against manufacturer are not sufficient. An allegation of clandestine removal must be established beyond doubt. This view has also been taken in, inter alia, the following cases :-

-Golden Steel Corporation Ltd. Vs. CCE, Kolkata-II
2017 (347) ELT 570 (Trib-Cal.)

-Kalyan Glare Tiles Vs. CCE
2008 (222) ELT 417 (CESTAT)

-Emm Ess Electricals Vs. CCE
2003 (159) ELT 730 (CESTAT)

-Western Metal Caps Ltd. Vs. CCE
2004 (170) ELT 451 (CESTAT)

-Nu Tech Polymers Ltd. Vs. CCE
2004 (173) ELT 358 (CESTAT)

-CCE Vs. Shri Narottam Udyog Pvt. Ltd.
2003 (158) ELT 40 (CESTAT)

-Rajasthan Petro Synthetics Vs. Commr.
2003 0) ELT 297 (CESTAT)

4.31. That the Department has carried out investigations with four purchasers of sponge iron, whose accounts were found maintained under the heading 'Shri Raj Ji' in the tally accounts in the pen drive recovered from the residence of Sh. Nitin Agarwal. These four purchasers have denied the cash transactions reflected in these accounts. This further supports the appellant's contention that they have not manufactured & cleared any goods clandestinely.

4.32. That the demand of duty on the basis of the transaction value shown in the said tally accounts is not sustainable. As submitted hereinabove, no reliance can be placed on the said tally accounts as they do not reflect the actual transactions of the appellant. The allegation of under valuation is also not supported by any corroborative evidence. The statements dated 13.07.2011 and 08.08.2011 of Sh. Nitin Agarwal, wherein he has allegedly admitted undervaluation are neither voluntary nor true. Hence no reliance can be placed on them to confirm the demand of duty against the appellant.

4.33. That extended period of limitation is not invokable in the facts and circumstances of the present case. The appellant has not manufactured and cleared any goods clandestinely without payment of Central Excise duty. All clearances of the appellant are duly reflected in the accounts of the appellant. The entire case of the department is based only on conjectures and surmises and not on any cogent evidence on record. The demand is therefore not sustainable as it is time-barred.

4.34. That since the demand of duty itself is not sustainable being based only on conjectures & surmises, penalty is also not imposable on the appellant or its director as has been held in, inter alia, the following cases :-

-Mount Methur Pharmaceuticals Ltd. Vs. CCE
2006 (206) ELT 508 (Trib.)

Spar Engg. Vs. CCE
2007 (78) RLT 405 (Trib.)

-Rajasthan Spg. & Wvg. Mills Ltd. Vs. Commr.
2005 (179) ELT 70 (Trib.)

-Blue Star Ltd. Vs. CCE
2004 4) ELT 339 (Trib.)

4.35. The appellant has acted bona fidely and in good faith. The appellant cannot be penalized in the absence of evidence to corroborate the allegation of clandestine manufacture and removal of goods.

5. The Ld. AR for Revenue supports the impugned order. He further states that although the calculation sheet for verification of stock on the date of search is not available, however the appellant have accepted the sheet worked out at the relevant time and have disputed such stock taking subsequently. So far

the data obtained by Revenue from laptop and pen drive seized at the time of search, the same have been done in the forensic lab by expert, after cloning of the laptop/ pen drive. Thus, such data obtained by Revenue from the laptop/ pen drive, admittedly seized from the premises of the appellant, has got evidentiary value. Further reliance placed by Revenue on such data for making out case of clandestine manufacture and removal is sustainable. The Ld. AR further relied on Section 36A of the Act which provides that, where any document is produced by any person or has been seized from the custody or control of any person, under this act or under any other law and such document is produced by prosecution in evidence against him and any other person tried jointly, the court shall, unless the contrary is proved by such person, presume the truth of the contents of such documents and admit such document in evidence, notwithstanding it is not duty stamped.

6. Having considered the rival contentions we find that the case of the Revenue is mainly on the basis of procurement of unaccounted raw materials and its use in the manufacture of unaccounted finished goods, alleged to have been cleared clandestinely. We find that in the search proceedings no unaccounted cash was found. Further we find iron ore is a controlled commodity and no iron ore can be dispatched or received by the appellant assessee, without permit issued by the competent authority of the mines department of the States Government. Normally iron ore is dispatched in wagons from the mines, which is accompanies by 'Fit Pass' or permit issued by the competent authority. We find that no supplier of alleged quantity of iron ore have been identified. Neither there is evidence of any transportation for receipt of unaccounted iron ore. Similarly there is no evidence of receipt of other raw materials like dolomite and coal. We find that the allegations are

mainly based on the unsubstantiated data retrieved from laptop/ pen drive which is not reliable, as the same does not have evidentiary value as provided under Section 36B of the Act, as the condition precedent for placing reliance in respect of data obtained from computer/pen drive, etc have not been established, like whether the paper print out containing data was produced by the computer during the period over which the computer was regularly being used during the relevant period by the person having lawful control over use of the said computer. Further the information contained in the statement reproduced or derived from information supplied to the computer was in the ordinary course of the said activities. We find that no such facts have been established by the Revenue, not even the person have been identified who maintained or entered the data on the computer and/or obtained the copy of any data on pen drive. Further we find that the document seized from the guesthouse cum residential premises of Shri Nitin Agarwal also lack evidentiary value. Said premises have been used by many persons. Further we find that no suppliers of raw material have been identified of the alleged quantity not recorded in the books of accounts. We further find that the Director Mr. Nitin Agarwal and also excise clerk Shri J.M. Rao have categorically denied that any of the records as alleged by the Revenue to be of clandestine activity on the part of the appellants, have been maintained under their instructions or their instance. Further we find that it is evident from the records that stock verification have been done by way of eye estimation on the date of search, as no calculation sheet is admittedly available on record. Further we find that the opening stock taken for stock verification is also erroneous leading to erroneous calculation on the part of the Revenue. Further we find that no unaccounted raw materials were found in the course of search either in the premises of the appellant or in the course of transportation to the factory premises of the appellant. We further find that no reliance can be placed on the statements of the Director Shri N. Aggarwal and the Excise Assistant, Mr. J.M. Rao, as such statements are not primary evidence and the same have been retracted by both of them, either in the course of cross examination or in the reply to the show cause notice. We further find that there is no corroborative evidence of clandestine activity by way of unexplained consumption of electricity, excess utilisation of labour, evidence of clandestine transportation nor there is evidence of any clandestine cash flow found. Thus, we find that the allegations in the show cause notice are presumptive and are not based on the actual state of affairs and /or corroborative evidence. Accordingly, we hold that impugned order is not maintainable.

7. Accordingly we allow appeals and set aside the impugned order. We leave the question of limitation open as we have allowed the appeal on merits.

(0rder pronounced in the open court on 28.02.2019)

(Bijay Kumar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Rekha