CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Excise Appeal No. 51445 of 2018-EX[DB]

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-630-631-17-18 dated 15/02/2018 passed by the COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE(Appeal)]

Ganpati Structures Private Limited ....Appellant
Plot NO. 8, Sector-E, Industrial Area,
Sanwer Road, Indore

Versus

Commissioner of CGST,
Central Excise, Indore ....Respondent
Hqrs., ManikBagh Palace, Indore

And

Excise Appeal No. 51615 of 2018-EX[DB]

[Arising out of Order-in-Appeal No. -IND-EXCUS-000-APP-630-631-17-18 dated 15/02/2018 passed by the COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE(Appeal)]

Ashok Joshi ....Appellant
Plot NO. 8, Sector-E, Industrial Area,
Sanwer Road, Indore

Versus

Commissioner of CGST,
Central Excise, Indore ....Respondent
Hqrs., ManikBagh Palace, Indore

Appearance

Shri R K Varma, Advocate for the appellant

Shri R K Mishra, Authorized Representative for the respondent

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

Date of Hearing: 04.04.2019
Date of Decision: 17.06.2019

PER BIJAY KUMAR

1. These two appeals are filed against the Order-in-Appeal No. 630-631-17-18 dated 15/02/2018 passed by the Commissioner (Appeals) Customs, CGST and Customs and Central Excise, Indore. Vide the impugned order learned Commissioner (Appeals) has confirmed the Order-in-Original No. 86-87/ADC/CEX/IND/2015-16 dated 05.11.2015. By the said Order-in-Original the primary Adjudicating Authority has confirmed the demand against the appellant , namely, M/s Ganpati Structures Private Limited Plot No. 8 Sector E, Industrial Area Sanwer Road, Indore (MP) and also on its Director Shri Ashok Joshi against whom penalty was imposed. The Order-in-Original was in respect of two Show Cause Notices dated 16/07/2010 and 11/02/2004. Aggrieved by the impugned order appellants have preferred these appeal.
2. Brief facts of the case are that the appellant, M/s Ganpati Structure is engaged in production and clearance of steel re-rolling products falling under chapter 72 and 73 of Schedule two Central Excise Tariff Act, 1985. The officers of Central Excise, Indore conducted a search on the appellant's premises on 23/09/2009 and also conducted stock verification of raw material and finished goods and detained finished goods and raw materials worth Rs. 41,52,864/- which were subsequently seized on 20/01/2010. The Show Cause Notice dated 16/07/2010 was issued to the appellant proposing confiscation seized goods on the grounds that the

appellant had exceeded the turnover of Rs. 1.50 Crors in terms of Notification No. 08/2003 dated 01/03/2003. During the search some hand written loose sheets were also resumed, which as per Department reflected the clearance of finished goods from the appellant’s factory during period 14/09/2019 to 29/09/2019. These loose sheets were three sets of hand written pages allegedly showing the clearance of finished goods, receipt of payment on account of sales, miscellaneous income and purchase of raw material. These annexures were tabulated as annexure A, B, C ,D and E as under;

Annexure-‘A’	Value of goods sold Rs. 17,48,531/- (First set of papers)
Annexure-‘B’	Payment Received Rs. 96,35,667/- (Second set of papers)
Annexure-‘Ç’	Goods sold Rs. 66,79,182/- (Third Set of papers)
Annexure-‘D’	Payment received Rs. 12,56,640/- (Third set of papers)
Annexure-‘É’	Value of clearance Rs. 98,09,885/- (Weighment Slips)
	Total Rs. 2,91,29,905/-

3. Besides, some weighment slips(kanta parchi) were also recovered which indicated vehicle number, gross weight, tare weight and net weight of the goods loaded in the vehicle. In the resumed file No. 1, at page 37 and 38, there were date wise entry regarding vehicle number, gross weight, net weight for 21/02/2009, 25/08/2009, 26/08/2009, 27/08/2009 and 28/08/2009. On perusal of

these loose sheets, the officers of the Department concluded that the appellant had cleared these goods without payment of Central Excise duty. Against this background the Show Cause Notices were issued to the appellants which were confirmed by the primary Adjudicating Authority and subsequently upheld in the impugned order.

4. Ld. Advocate, on behalf of the appellant, submits that the redemption fine and penalty is not imposable on the finished goods which were seized on 20/01/2010 on account of the fact that the appellant was availing SSI exemption under Notification No. 08/2003(supra), and therefore, it was not required to maintain any statutory records. However, all the finished goods were entered in their computer record and also subsequent the visit of the excise officer the appellant had applied for the Central Excise Registration, and therefore, the stock lying in the factory could not have been seized by the Departmental Officer. Further also, it was submitted that the stock verification was done on the eye estimation basis without actual weighment thereof. Such type of stock verification on the eye estimation basis has been found to be not sustainable in view of various decisions of Hon'ble Tribunal and other superior courts. Even otherwise, redemption fine of Rs. 8,00,000 which has been imposed is much in excess as the duty involved on seized goods were only to the extent Rs.3,21,510/- only. Also penalty of Rs. 12,00,000/- under Rule 25 of Central

Excise Rules 2002 (hereinafter referred to as 'Rules') is not imposable as the same could not have been more than the amount of duty involved.

(i) Ld. Advocate further submits that the duty amounting to Rs. 2,05,712 for year 2008-09 has been confirmed on the basis of purported clearance of goods on 21/02/2009, valued Rs. 26,66,328/- as per the weighment report. This amount was added to the recorded turnover of the appellant company amounting to Rs. 1,43,30,880/- for the Financial Year 2008-09 making total turnover of Rs. 1,69,97,208/-. To this effect, it is the submission of Ld. Advocate that other than the alleged weighment slips there were absolutely nothing to corroborate the allegation. No statement was recorded from Director of the appellant (the other appellant in these appeals) regarding this clandestine removal alleged by the Department.

(ii) It was further submitted that this weighment slips pertained to other units, who have got weighment done on the weighbridge of the appellant, and therefore, could not be added towards the manufacture and clearance of excisable goods by the appellant. The Department did not take any step to corroborate the allegation about these weighment slips recovered from the weighbridge from any of the transporter, vehicle owners, driver to confirm the same. The appellant further produced certificate from a few transporters, namely,

- M/s Milan Goods Transport Corporation in respect of two consignment of 21.02.2009 related to truck no. MP17-C-5290 and MP09-KD-1713.

- M/s Banganga Transportation in respect of two consignment of 21.02.2009 related to truck no. CPO-7001.

- M/s Mansi Trailor Transport Company in respect of three consignment of 21.02.2009 related to truck no. MP09-KB-6823, MP09-KA-9558 and MP09-KC-2958.

(iii) These transporters had categorically submitted that the consignment which weighed on the weighbridge belonged to other person and not to the appellant. It was also impressed upon by the ld. Advocate that it was for the Department to find out the various transporter truck owner or driver and to ascertain from them as to whether the weighment slips recovered from the weighbridge belonged to the consignment cleared by the appellant or not. Ld. Advocate also submitted that the total quantity as shown in weighment slips could not have been manufactured by the appellant considering the installed capacity of the unit. As far as the demand of duty for year 2009-10 is concerned, the same is not sustainable on account of the fact that the demand were raised solely on the basis of loose paper, and sheets without any independent evidence. The reliance was placed on the decision of this Tribunal in case of **Arya Fibres Private Limited vs. Commissioner of Customs and Excise, Ahmedabad-II reported as 2014 (311) ELT 529 (Tri.-Ahmd),** wherein it is held that clandestine removal is a serious charge which needs to be proved by the Revenue on production of sufficient and tangible evidences. Ld. Advocate placed reliance on the decision of **Varun Enterprises vs. CCE & ST [2019 (TIOL) 58 (Cestat-Del),** wherein the demands were solely confirmed on the basis of diaries and loose papers recovered from the premises of assessee, were held to be unsustainable. The Department also failed to cause inquiry from raw material suppliers, transporter, excess use of electricity etc., to collect independent evidences. The case against the appellant has been made on the basis of assumption and presumption which is not sustainable in view of the decision of **Jayant Extraction Indus Limited. vs ADC., Rajkot[2004(171) ELT 501 (Tri.-Mum).**

(iv) Ld. Advocate also submits that the annexure A, B, C, D and E which were alleged to be that a clandestine clearances actually pertain to the trading and brokerage activity of the firm, therefore, Department was incorrect in considering this at the manufactured goods by the appellant which were allegedly clandestinely cleared as per the Show Cause Notices.

In view of above ld. Advocate submits that the impugned order is not sustainable and liable to be set aside.

5. Ld. Departmental Representative, however, reiterates the impugned order and finding contained therein.
6. We have heard the parties and considered the case records.
7. The issue involved in this case is confirmation of demand against the appellant based on the loose sheets recovered from the appellant's factory as well as on the basis of weighment records of the weighbridge belonging to the appellant. The Department has not conducted any investigation other than recovery of these loose sheets and weighment record, from any of the buyers, suppliers, transporters etc., We are in agreement with the submissions made by the Ld. Advocate that this issue is settled in their favour by the decision of *Arya Fiber(supra)* wherein it is held at para 40 as under;

> "**40.** After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :
>
> (i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;
>
> (ii) Evidence in support thereof should be of :

(a) raw materials, in excess of that contained as per the statutory records;

(b) instances 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 identified parties;

(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers 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) statements of buyers with some details of illicit manufacture and clearance;

(h) proof of actual transportation 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."

8. We also find that no investigation has been conducted by the Department for the forward and backward linkages of clandestine activities alleged to have been committed by the appellant. Same issue came up for consideration before Hon'ble Allahabad High Court in ***Continental Cement Company(supra)*** . The relevant paragraph as reproduced 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.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.

14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so called buyers, namely M/s. Singhal Cement Agency, M/s. Praveen Cement Agency; and M/s. Taj Traders are based on memory alone and their statements were not supported by any documentary evidence/proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts cannot be ruled out.

15. In view of the above, 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. No purchase of raw material out side the books have been proved.

16. In the light of the above discussions and considering the totality of the case, we are satisfied that no case is made out for extra so called clandestine sale of the Portland Cement to the said parties. We are satisfied that the first appellate authority has rightly deleted the addition and cancel the penalties. Hence we hereby set aside the impugned order passed by the Tribunal and restore the order passed by the first appellate authority, along with the reasons mentioned herein.

17. In the result, all the appeals filed by the appellants are hereby allowed."

8. In view of above, we find that that impugned order is not sustainable and, accordingly, liable to be set aside in these appeals. We allow both appeals filed by the appellants with consequential benefit if any.

(Order pronounced on 17.06.2019)

(Bijay Kumar) | **(Anil Choudhary)**
Member (Technical) | **Member (Judicial)**

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