IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA

Date of Hearing: 12.7.2018
Date of Pronouncement: 02.01.2019

Appeal No. E/319 & 320/2008-DB

(Arising out of Order-in-Original No. 03/ Denovo/Commr./2008 dated 31.3.2008 passed by the Commissioner of Central Excise, Patna)

M/s Kamper Concast Ltd. — Appellant
Shri Pawan Kumar Gupta

Vs.

CCE, Patna — Respondent

<u>Appearance</u>

Shri R. Santhanam, Advocate - for the appellant

Shri H.S. Abedin, AR - for the respondent

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No.FO/A/75007-75008/2019

Per Bijay Kumar

The present appeal is filed against the Order-in-Original No. 04/Denovo/Commr./208 dated 31.3.2008 passed by the ld. Commissioner of Central Excise & Service Tax, Panta. This is second round of litigation before this Hon'ble Tribunal. In the previous proceeding, the ld. CESTAT has directed the adjudicating authority to pass appropriate order. The remand order is reproduced as under:

> "1.5 Ìn the aforesaid Order No. S-102-107 & A-165-170/Kol/2004 dated 17.2.04 in the matter of M/s Camco Steels Pvt. Ltd. & Others, the Hon'ble CESTAT, in respect of trading activity, order, in Para-4 and to quote:
>
> *"4. We also find force in the appellant's contentions that it is the entire clearance as reflected in the balance sheet, including the trading items, on which the demand has been confirmed. The evidence produced by the appellants have convinced us that such traded items were reflected in the sales tax returns, which stand duly seized by the proper officers and on which sales tax was paid by the appellants. As such the Commissioner should have looked into this fact and should have confirmed the demand, if any, on the appellant's own manufacture items."*

In view of above direction, the ld. Commissioner has passed the impugned order

2. The facts of the case are that the appellant is engaged in the manufacture and production of MS ingot from its factory besides there is trading activity also which is carried out from its office. The manufacturing activities attracts Central Excise duty and as per the appellant the same has been discharged by them in accordance with law. In respect of trading activity, according to appellant, there can be no liability to Central Excise duty as the appellant is conducting the activities of trading not from their factory but from their office. It is alleged in the show cause notice issued to the appellant that they have manufactured 10162.33 MT of ingots valued at Rs. 10,16,23,300.00 ingots removed them clandestinely without payment of Central Excise duty amounting to Rs. 1,62,59,728/- by

suppressing the production of 106.389 MT of ingots manufactured out of 10612.62 MT of unaccounted sponge iron. The period involved in this case is from 2001-2002. It is against this background, the appellant has preferred the appeal before us, being aggrieved with the impugned order.

3. The ld. Advocate, on behalf of the appellant, submits that while passing the impugned order in remand proceeding, the ld. Adjudicating authority has not considered the facts submitted before him as per the direction of Hon'ble CESTAT. There was a clear direction from Hon'ble CESTAT in earlier proceeding that the plea of trading activity should be considered by the Commissioner while deciding the case afresh. Ld. Advocate further submits that the entire record of trading activity conducted by the appellant was made available to the adjudicating authority. He directed the jurisdictional Central Excise Office of Danapur to verify all the transactions relating to trading activities of the appellant pursuant to letter dated 12.10.2006. The Supdt., Danapur in various correspondent with the applicant asked them to furnish purchase order and other related documents evidencing the trading of goods. The appellant submitted that most of the orders were being received orally or over telephonic conversation. The Supdt. asked for the various ledger and other documents such as RG 23 Part 1 & II which were made available to him. In addition to above, the Supdt., who

was asked to verify the details about trading activity and kept on asking the various documents which was not necessary for the disposal of the adjudication order. Even then the appellant produced whatever documents was available with them. It is the contention of the appellant that verification was to be conducted as per the ld. Adjudicating authority's direction, and also CESTAT directive, the Supdt. wanted to re-investigate the case and proceed on altogether erroneous basis which was not directed either by the Commissioner or by the Hon'ble Tribunal. The Supdt. submitted the verification report to the adjudicating authority and who without relying on the same confirmed the demand against the appellant in the impugned order. The ld. Advocate further states that the impugned order has been passed without following the binding direction of Hon'ble High Court as well as the Tribunal and also the demand is barred by limitation. The respondent has provided various information asked by the department to justify their trading activity. However, while adjudicating the case ld. Adjudicating authority has brushed aside the same without any cogent reasons. It is well settled that trading transaction of purchase and sale of sponge iron as well as waste, scrap of steel by the appellant carried out from its office in Patna and hence there can be no liability of Central Excise duty at all and in absence of manufacture of finished excisable goods from the sponge iron as well as waste and scrap bought and sold in the course of trading. The question of liability to Central Excise duty does not at all arise and impugned order is perverse and unjustified. The ld. Advocate further states that the trading activity is duly incorporated in the profit and loss account and the financial accounts of the appellant and the balance sheet also. The appellant has also filed the income tax and sales tax return for the respective years, which have been duly verified and accepted by the authorities concerned and, therefore, it is not open to the adjudicating authority to disregard the same and to conclude that the goods traded as have been manufactured by the appellant when none of those goods entered in the factory. The appellant has also not availed any Modvat credit on such inputs. The adjudicating authority has not informed by the Suptd. who has not conducted the verification as desired by him in the appropriate manner as per law.

4. The appellant also asked for the cross-examination of the investigating officer and other which has been refused by the adjudicating authority which is in contravention with the Central Excise Rule 9D(i) of the Central Excise Act. It was also submitted by the ld. Advocate that the adjudicating authority has committed the grave error of imposing duty of excise on traded goods which has never been received in the factory nor utilised as input and, therefore, duty demand has been worked out by assuming the traded goods as input received in the factory and the finished goods manufactured therefrom and removed without payment of duty. According to ld. Advocate, such perverse and imaginary action and

orders based on allegations made by the respondent without any evidence whatsoever. It is also submitted by the ld. Adjudicating authority was wrong in confirming the demands of Rs. 1,80,865/- and Rs. 1,12,466/- in respect of alleged shortage/excess of the finished goods and raw material at the time of alleged stock taking on 27.3.2002 which the departmental officers forced the appellant to debit and appellant paid the same under coercion and duress for which there was neither a show cause notice permissible to the issued nor any adjudication to be made in view of the statutory provisions under Section 11A(2B) of the Central Excise Act, 1944. These demands have been confirmed by the Additional Commissioner as adjudicating authority and the same was set aside in appeal. Therefore it was not permissible to include such demand in the impugned order.

5. In view of above the ld. Advocate on behalf of the appellant states that there is no justification on imposition of any penalty and interest thereon. It was also stated that as there was no cause against the appellant imposition of penalty on Shri Pawan Kumar Gupta (Appellant No. 2) is also not justified.

6. The ld. AR supports the impugned order.

7. We have heard the parties and perused the case record.

8. This is a second round of litigation before this Hon'ble Tribunal. In the earlier round, the Hon'ble CESTAT has directed the Commissioner to verify the record of trading activities undertaken by the appellant. All the records were made available to the adjudicating authority regarding the trading of the goods being undertaken by the appellant. However, the ld. Adjudicating authority has got the verification done by the Supdt. which was not correct. The Supdt. in contravention with the direction of Hon'ble Tribunal in earlier round of litigation has started afresh investigation which was not mandated. It is held in the case that the adjudicating authority is bound by the direction of Tribunal in the remand proceeding. The adjudicating authority was not mandated to carry out afresh investigation in the remand proceeding. It is on record that the appellant has submitted the entire record of trading activity made by them during the relevant period and also submitted the respective sales tax and income tax return along with balance sheet. It is apparent from the record that the appellant has indeed indulged in trading activity from their office at Patna. The ld. Adjudicating authority has failed to take cognisance of this corroborative evidence to support the claim by the appellant that they have indulged in the trading activity on which there was no justification of raising the demand, considering that the appellant has indulged in clandestine manufactured goods. It is also on record that the adjudicating

authority has not allowed cross examination of the investigating officer, who has prepared the investigation report against the assessee on the basis of resumed documents from their factory and office premises. The denial of cross-examination is not permissible under Section 9D (i) of the Central Excise Act as held in the following cases :

(i) ***Andaman Timber Industries Vs. CCE, Kolkata-II*** – 2015 (324) ELT 641 (SC);

(ii) ***Jindal Drugs Pvt. Ltd. Vs. Union of India*** – 2016 (340) ELT 67 (P&H);

(iii) ***CCE, Delhi Vs. Kuber Tobacco India Ltd***. – 2016 (338) ELT 113 (Tri.-Del).

We also find that the allegation of clandestine manufacture and clearance of the goods is serious charge as required to be substantiated by the corroborative evidence, which has not been done in this case. The clandestine manufacturing and clearance of the goods is required to be proved by the various other supporting evidence as clandestine manufacture thereof and sale thereof. No such investigation has been conducted by the investigating officer. In absence of such detailed investigation demand is not sustainable. We refer and rely the decision of Hon'ble High Court of Allahabad in the case of ***Continental Cement Company Vs. Union of India*** – 2014 (309) ELT 411 (All.), wherein it has been held 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."

9. As this is second round of litigation before this Tribunal, we are of the view that the proceeding has to come to end at this point. For this view we rely on the decision of Hon'ble Tribunal in the case of ***Anurag Dalmia & Others Vs. CCE, Delhi*** vide Final Order No. 51853-51862/2018 dated 17.5.2018, which is reproduced as under :

"27. No useful purpose will be served after the lapse of more than two decades to ask the authorities to re-examine the issues especially when the matter was remanded earlier. By now some of the witnesses might not be alive and some might not have been traceable. There is no use to keep the issues alive. It may be mentioned that the litigation should come to an end as per the maxim *interest rel publicae ut sit finis litium."*

10. In view of above, we set aside the impugned order and allow the appeals with consequential relief.

(Pronounced in Court on 02.01.2019)

Sd/ Sd/

(P.K. Choudhary
Member (Judicial)

(Bijay Kumar)
Member (Technical)

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