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

Date of Hearing/Order 18.9.2018

Appeal No. E/75820-75821/2016-DB

(Arising out of Order-in-Original No. 66/Commr/DGP/DGP-III/BNK/15-16 dated 16.2.2016 passed by the Commissioner, Central Excise & Service Tax, Burdwan, West Bengal)

M/s Amit Metaliks Ltd. — Appellant
Shri Amit Kumar Singh, Director

Vs.

CCE & ST, Durgapur — Respondent

Appearance

Shri S. Bagaria, Advocate - for the appellant
Shri Sourabh Nanda, Advocate

Shri H.S. Ahedin, AC (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/77191-77192/2018

Per Bijay Kumar :

The appellants have filed the present appeal, being aggrieved by the Order-in-Original No. 66/Commr./DGP/DGP-III/BNK/15-16 dated 16.2.2016. As the appeals arises out of common adjudication order hence being disposed off by this common order.

2. In the impugned order, the ld. Commissioner has confirmed demand of Rs. 4,21,64,032/- under the provisions of Section 11A(4)

erstwhile proviso to Section 11A(1) of the Central Excise Act, 1994 (hereinafter referred to as 'Act') against the Noticee No. 1 along with interest under Section 11AA of the Act, 1944 [(erstwhile), Section 11AB of the Act]. In addition to duty and interest and the penalty of equivalent amount was also confirmed against the Noticee No. 1 in terms of Section 11AC of the Act read with Section 25 of the Central Excise Rules, 2002 (for short, 'Rules'). In addition to above, a personal penalty of Rs. 50 lakhs was also imposed on Noticee No. 2 under Rule 26 (1) of Rules, 2002 for his involvement in clandestine removal of goods for the shortage noticed during stock taking.

3. The fact of the case is that in pursuance to an information collected and developed by the officers of DGCEI, Kolkata that the appellant No. 1 were evading the Central Excise duty by way of wilful suppression of production and removal of finished excisable goods i.e. MS ingots falling under Chapter 72 of the First schedule to Central Excise Tariff Act, 1985, without proper accountal thereof and without payment of applicable Central Excise duty. Simultaneous searches were conducted on 19.2.2010 at the factory premises of the appellant located at Durgapur, West Bengal and office premises of M/s Shiv Shakti Sponge Ltd., Kolkata. The searches were also conducted on the residential premises of Shri Rajendra Kumar Mishra,, General Manager (Finance) and authorised representative located at Durgapur and office premises of M/s Tirupati Transport

Corporation at Howrah. Various records and documents, which appeared to be relevant for the purpose of investigation, were seized under Panchnama prepared at the respective place. On the date of search, i.e. 19.2.2010, the stock of finished goods lying in the factory premises of Noticee No. 1, were subjected to joint physical verification in presence of authorised representative of Noticee No. 1. Accordingly, joint stock taking report was prepared in relation to the finished goods and raw materials, which revealed a shortage of 160.390 MT of MS billet in comparison to that appearing in daily stock account (DSA). The statements of various officials including the Appellant No. 2 were also recorded during the course of investigation. Subsequent to investigation, relying various documents resumed and statements of the person concerned, the subject show cause notice was caused to be issued, which resulted into the passing of the impugned order against the appellants.

4. The ld. Advocate, on behalf of the appellant, submits that the order was passed without proper consideration of various contentions raised in the reply to the show cause notice, which were supported by various case laws was also not considered by the adjudicating authority. The ld. Commissioner as adjudicating authority was pre-determined to confirm the demand as he rejected the prayer of appellant to allow them to cross examine the transporters and employee of M/s Shiv Shakti Sponge Iron Pvt. Ltd.

(M/s SSSIL), who supplied the raw materials to the appellant without any cogent reason. The ld. adjudicating authority also failed to reasons as to why the cross-examination of the employee of M/s SSSIL and transporters were being denied to the appellant. Therefore, the impugned order is not maintainable as is passed in a very cryptic manner without the observance of principles of natural justice. Ld. Advocate relied upon the decision of Hon'ble CESTAT, SZB, Bangalore in the case of ***Southern Plywood Vs. CCE (Appeals) -*** 2009 (243) ELT 693 (Tri.-Bang.) wherein it is held that non-consideration of submission of the parties makes order is unsustainable.. Similar view was expressed by Hon'ble Supreme Court in the case of ***CCE & Customs, Rajkot Vs. Amul Industries Pvt. Ltd.*** – 2010 (260) ELT 499 (SC) and Hon'ble High Court in the case of ***Rostam Parveresh Vs. Union of India*** – 2010 (259) ELT 342.

5. The ld. adjudicating authority has reproduced the statement given by Shri Vivekanand Tiwari (the Partner, Shivam Transport Agency) that they had one worked with company till June, 2008 and after that they did not transport any of finished goods of appellant. The appellant's Advocate submitted that the demand for the clearance and removal has been confirmed for the period May 2008 to Feb. 2010, therefore, reliance on the statement of Shri Tiwari to confirm the demand of clandestine removal of the excisable goods

after June 2008 to Feb. 2008 is not maintainable is liable to be set aside on this ground alone.

5.1 The ld. Adjudicating authority in his order has also reproduced the content of the impugned show cause notice but failed to discuss the contentions made in the reply regarding the allegation of duty involvement on unaccounted sale of finished goods without payment of Central Excise duty. The case related to the allegation of manufacture and clearance of MS billet from the factory to the various parties based on the seized File No. 01/Amit/RKM-RES/DUR/10 to quantify the demand. It is alleged that at page 257, which related to the statement of transportation of finished goods from their factory premises by M/s Shivam Transport Agency resumed document at page 305 and 307 are alleged to be the pages containing the statement of despatch of finished goods from their factory made by M/s Tirupati Transport Corporation. In that connection, the statement of a partner of M/s Shivam Transport namely Mr. Tiwari and also the statement of proprietor of M/s Tirupati Transport, Shri Kalicharan Pande, were also relied upon in the impugned show cause notice. Both Mr. Tiwari and Mr. Pande are shown the shown the relevant pages of seized file No. 01/Amit/RKM-RES/DUR/10, containing the statement of the alleged despatch of the finished goods made by the said transporters respectively. The appellant specifically wanted to cross-examine both Mr. Tiwari and Mr. Pande as their statements have been relied upon in the show cause notice. The Commissioner has not allowed the cross examination or recording the finding for the same as per the provisions of Act. It was, therefore, submitted that in absence of the cross examination of Mr. Tiwari and Mr. Pande is reliance placed on his statement is contrary to the provisions of the Section 9(D) of the Act. Reliance was placed on the following case laws in support of that :

(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).

5.2. Ld. Commissioner in the impugned order also relied upon the statement of Shri Amit Kumar Singh, Noticee No. 2, who has retracted the statement and hence his statement has lost its evidentiary value.

5.3 Shri Rajendra Kumar Mishra, the Authorised Representative and Manager Commercial, response to Question No. 2 accepted the removal of goods from the factory premises of the appellant. It was submitted by the ld. Advocate that in the statement there is no such admission and acceptance by Shri Mishra therefore, the

Commissioner conclusion is not correct and unacceptable. In the statement Shri Mishra has only accepted the alleged shortage of finished goods but not the clandestine removal.

5.4 Ld. Commissioner, while adjudicating, the case has relied upon the case law of ***Albright Steel Industries Vs. CCE, Raipur -*** 2015 (322) ELT 542 (Tri.-Del.). In this case, the Hon'ble Tribunal, while allowing the appeal observed in para 6 which is as under:

> "**6.** In this case allegation of clandestine removal is made against the appellant on the basis of the ledger record of the transporter. In fact when the transporter is transporting the goods, the transporter is required to issue the goods transportation receipt and on the basis of this receipt the ledger account is prepared. Revenue has failed to produce the goods transportation receipt to establish their charge of clandestine removal of the goods by the appellant. In the absence of any corroborative evidence, benefit of doubt goes in favour of the appellant. In these circumstances, I hold that Revenue has failed to prove their case. Therefore, demand confirmed against the appellant is not sustainable. Accordingly, the penalties on both the appellants are not imposable."

In this case, "the allegation of clandestine removal is made against the appellant on the basis of ledger record of transporter. In fact, when the transporter is transporting the goods, he is required to issue the goods transportation receipt on the basis of which the ledger account is prepared. Revenue has failed to produce the goods transport and receipt to establish their charge of clandestine removal of the goods by the appellant. In absence of any corroborative evidence, the benefit of doubt goes in favour of appellant. In the circumstances, I hold that the Revenue has failed to prove their case. Therefore, the demand confirmed against the appellant is not sustainable. Accordingly, penalty of both the appellants are not imposable. The commissioner has not followed this decision.

5.5 The Commissioner has also not relied upon the case law of ***Shri Ram Rubber Products Vs. CCE*** – 2010 (251) ELT 123 (Tri.Kol.), wherein it has been held in para 6 as follows:

> "6. I find that in this case, the finished goods were found short in the factory at the time of visit of the Revenue Officials and the appellant failed to explain the shortage rather than admitted the shortage. The private records which were recovered from the factory premises were having datewise details of the clearances made, invoice/bill numbers and the amounts which were received from their customers. The appellant relied upon the decision in the case of *Prempreet Textile Industries Ltd*. (supra), wherein the Tribunal after taking into consideration the retraction made by the authorized person of the manufacturer and the inadequacy of the evidence, set aside the demand. In the case of *Sri Jayajothi & Co. Ltd.* (supra), the demand was set aside on the ground that the impugned Order was non-speaking and the evidence produced by the manufacturer was not taken into consideration. In the present case, the facts are different from the above-cited decisions, as the shortage in this case, was found at the time of visit of the Revenue Officials and that had been admitted by the proprietor of the appellant firm, who agreed to pay the duty also. The private records were systematically maintained in this case in regard to the datewise clearances of the goods, names of the customers, invoice/bill numbers and also the amounts received from their customers. The statements made by the Proprietor were not also retracted. Therefore, the ratio of the decisions relied upon by the appellant is not applicable to the facts of the present case. In the case of *M.R. Tobacco P. Ltd.* (supra) relied upon by the Revenue, the Hon'ble

> Delhi High Court upheld the charge of clandestine removal where loose sheets were maintained in a systematic and datewise manner. In view of the above discussions, I find no infirmity in the impugned Order in respect of the demand confirmed and the penalty imposed by the lower authority. However, the demand confirmed is Rs. 2,38,647.00 whereas the penalty imposed is Rs. 2,41,571.00 under Section 11AC of the Central Excise Act. Therefore, the penalty is reduced to Rs. 2,38,647.00 (Rupees two lakhs thirty-eight thousand six hundred and forty-seven). The impugned Order is modified to that extent only. The appeal is otherwise dismissed."

5.6 In the present case therefore, the facts are different from the above cited decision as the shortage in this case was found at the time of visit of Revenue officer and had been admitted by the proprietor of the appellant firm who agree to pay the duty also. The private records were systematically maintained in this case in regard to date wise clearance of the goods, name of the customer, invoice bill number and also amounts received from the customer. The statement made by the proprietor were not also retracted. Therefore, the ratio of the decision relied upon by the appellant is not applicable to the fact of the present case.

6. It was also submitted that in case of ***M/s MR Tobacco Pvt. Ltd*** (supra) relied upon by the Revenue, the Hon'ble High Court upheld the charge of clandestine removal where loose sheets were systematic and date wise manner. In view of the same discussion, no infirmity in the impugned order in respect of demand confirmed and penalty imposed by the lower authority was approved. I find that no

infirmity in the impugned order in respect of demand confirmed and penalty imposed by the lower authority. The appellant is of the view that the aforementioned case laws cited by the adjudicating authority is not applicable in their case and stands distinguished in their case inasmuch as the shortage has been explained with case law which has not been discussed by the ld. Adjudicating authority and the demand was raised not only the shortage quantity but also clearance found in other document resulting to double demand.

7. The Commissioner in his order has relied upon the case law of ***Amba Rerolling Mills Pvt. Ltd. Vs. CCE, JSR -*** 2012 (284) ELT 438 (Tri.-Kolkata.) which related to stay with observation of acceptance of private record. As per the Advocate, this is clearly distinguishable.

8. In the adjudication order, the Commissioner has recorded his finding of removal of sponge iron by M/s SSSIL and resulted manufacture of MS billet and removal thereof without payment of duty. It can be seen from the impugned order that the adjudicating authority has merely reproduced the allegation levelled in the show cause notice and did not discuss the contention of the appellant. In this case, demand has been confirmed on the basis of presumption of manufacture of MS billets on the basis of calculation of the receipt of sponge iron against the confirmed demand on the shortage quantity.

The appellant also requested that in many cases there appears to be a demand without the full proof of the clandestine manufacture and clearance of the goods.

9. The ld. AR on behalf of Revenue supports the impugned order and states that this is a case of clandestine manufacture and clearance of the goods and on account of shortage noticed in the factory of the appellant.

10. We have gone through the rival contention and submissions made in the appeal record.

11. We find that Revenue has made the case of clandestine removal of the manufactured goods and subsequent raising of demand on such huge quantity of without properly corroborating evidences on record. After going through the impugned order, we find that the entire show cause notice is based on the stock taking report and the various statements recorded from the Authorised Representative, Transporter and Director of the appellant company. It is seen that the Authorised Representative has accepted the shortage of the goods found in the factory but not the clandestine removal of goods without payment of duty. His statement is thus not conclusive to prove clandestine removal. In the show cause notice

as well as in the impugned order, there is no concrete and tangible evidence in support of such a huge quantity of finished goods presume to have been cleared without payment of duty from the appellant factory during the relevant period (May 15, 2008 to Feb, 18, 2010). For receiving such a huge quantity of raw material and for sending out such a huge quantity of finished goods and raw materials, number of transporters are required to be engaged. There is no evidence regarding any movement of goods by trucks or any other means to and from the factory of the appellant. No adequate enquiry or investigation from the transporter was carried out by the department. It is also on record that the department has got the complete address of most of the buyer of the appellant who are well known established concerns. However, there was no investigation regarding receipt of the said quantity which were alleged to be cleared by the appellant.

12. No evidence was brought during the investigation regarding any evidence of receipt of money by the appellant as there was no seizure of cash at all. From the investigation, it is clear that in the present case, no evidence has been gathered by the Revenue about :

(i) About clearance or sale or transportation of any extra quantity;

(ii) About receipt of price for extra quantity;

(iii) About any buyer having received any extra quantity;

(iv) No extra quantity of finished goods or raw material was found at the factory or other places.

Therefore, we find that allegation of clandestine removal of finished goods and the raw material are based purely on the assumption and presumption and surmises and conjecture. No corroborative evidence was adduced by the Revenue in support of alleged clandestine removal of the goods. It is well settled that the charge of clandestine removal is a serious charge and the demand cannot be made on the basis of mere surmises and conjectures and assumption and presumption. Non-accountal of the receipt of raw material or clandestine removal of the goods cannot be on the basis of presumption as has been held in the case of ***Continental Cement Company Vs. Union of India*** – 2014 (309) ELT 411 (All.).

13. We further find that in the alleged clearance of 19352.552 of final product is based upon the show cause notice issued of SSSIL alleging the manufacture and clearance of 18501.04 MT of sponge iron to the appellant. We find that the reliance placed on the another show cause notice without further corroboration is of no use in the present case. Even it is on the record that the document on which the clandestine removal and manufacture is fastened on the appellant has been recovered from the guest house of the employee

of M/s SSSIL this at the best as 3rd party evidence and the reliance on which cannot be without the further corroboration as has been held in the case of ***Rhino Rubbers Pvt. Ltd. Vs. CCE, Bangalore*** - 1996 (85) ELT 260, Rama ***Shyama Papers Ltd. Vs. CCE*** – 2004 (168) ELT 494 (Tri. – Del.) and ***Bhandary Industrial Metals Pvt. Ltd. Vs. CCE, Goa -*** 2009 (245) ELT. 613 (Tri.-Mumbai). It is on record that the ld. adjudicating authority has denied the cross-examination asked by the appellant of the following persons:

(i) Mr. Sujit Kumar (Commercial Manager) of SSSIL.

(ii) Mr. Rajendra Kumar Mishra (GM (F&A) of SSSIL

(iii) Mr. Amit Kumar Singh (MD) of the Noticee No. 1 & of SSSIL)

(iv) Mr. Amit Kumar Agarwal, Proprietor of M/s Anil Kumar Agarwal (Transporter).

14. We find that their statement has been relied upon by the adjudicating authority while confirming the demand. The admissibility of the evidence without following the procedure established under Section 9(D)(i) of the Act, is not admissible as a evidence in the investigation proceeding as mentioned in para 4.2 of order. We also find that in this case, raw material for the manufacture of the ingot by the appellant has come from the State of Orissa. No evidence on transport whatsoever has been gathered by

the Revenue about the transport of the goods from the one state to another state which is well documented at the check post of two states.

15. In view of above, we find that the impugned order is not sustainable and liable to be set aside. Accordingly, we set aside the impugned order and allow the appeals with consequential benefit.

(Pronounced in Court)

Sd/ Sd/

(P.K. Choudhary) (Bijay Kumar)
Member (Judicial) Member (Technical)

RM