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

Date of Hearing & Decision: 19/09/2018

Appeal No. E/342, 343, 344 & 345/2007-DB
(Arising out of Order-in-Original No.17/MP/Commr./2007 dated 28.2.2007 passed by the Commissioner of Customs (Port. Customs House, Kolkata)

Miki Wire Works Pvt. Ltd..
Prabhat Poddar
Mahesh Podder
Sunil Kumar Mathur. **Applicant (s)/Appellant (s)**

vs.

CCE, Ranchi. **Respondent (s)**

Appearance:

Shri Dr. Samir chakraborty, Sr. Advocate, G.K. Mundhra,CA- for the appellant(s)

Shri D. Aaldar,, AC(AR) for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Final Order No. FO/A/77193-77196/2018

Per Shri Bijay Kumar

1. Being aggrieved with the impugned order the appellant has filed the present appeal.

2. The fact of the case if that the appellant is engaged in the manufacture of steel wire classifiable under CET S.H. No. 7217.90 and 7312.10 respectively. The appellant is duly registered for the manufacture of the said goods. By the impugned order the Commissioner, as adjudicating authority, has

confirmed the duty demand of Rs. 81,23,530 against the appellant under the provisions of Section 11 A of the Central Excise Act, 1944 (hereinafter referred to as Áct') and also imposed equal penalty on the appellant under Section 11AC of the Act. The demand has been made on the basis of allegation that during the relevant period from (25/3/2003 to 28/05/2003) the appellant has clandestinely cleared 1,60,420 MT of excisable finished goods without payment of duty the allegation was made on the basis of comparison of entries in 229 Weighment slip contained in the three weighment slips of M/s Om Dharam Kanta having mark "MW" with the daily stock account RG-1 of the appellant. In the RG-1 only 51 weighment slips were found to be entered , and therefore, it was alleged that the entries which were not found in the RG -1 Register, the appellant has clearly finished excisable goods in clandestine manner without payment of duty.

3. Ld. Sr. Advocate on behalf of the appellant submits that the Commissioner erred in holding that there was a clandestine removal of 1,692.402 MT of the manufactured products without payment of duty. The finding in the impugned order is based on the presumption and assumption and is contrary to the evidence on record. It is submitted that by the Ld. Sr. Advocate in this case not a single incidence of clandestine removal which was undertaking by the appellant. The Commissioner had himself directed the verification of the details furnished by the appellant and the same was

carried out of the range authorities. It was, therefore, imperative for the Commissioner to obtain such report and consider the verification report before passing the impugned order. This has not been done by the Adjudicating Authority.

4. The Verification report clearly states 191 entries mentioned in annexure-B was duly verified by the range authority with reference to RG-1 Registration and other records maintained by the appellant. In report dated 20/8/2007, Range Superintendent, submitted that only with respect to three entries these were discrepancies and the same were duly explained by the appellant and its letter dated 1/3/2007. It was further submitted by the Ld. Advocate that the Commissioner has erred in not examining/ considering the details furnished by the appellant regarding the weighment slips which related to the removal of finished excisable goods by the group companies of the appellant, namely, M/s MVS Wires and M/s Vika Manufacturing Company Pvt. Ltd. on the ground that the owner of the weighbridge denied that the goods belong in to M/s MVS Wire and M/s Vika Manufacturing Company. Ld. Sr. Advocate submits that the statement of owner, namely, Mr. Om Prakash Choudhary is wrong and incorrect on face of it. The Commissioner was wrong in accepting the alleged statement of Mr. Om Prakash Choudhary, further the Commissioner was also not justified in not accepting the evident produced by the appellant in respect of 280 weighment slips on the ground that the appellant has not in

corroborated with the removal of the goods on payment of duty the weighment slips in their defence. It was also submitted on behalf of the appellant that in the impugned order, the Commissioner has not disputed the correctness of any of the details in the aforesaid statement at Annexure B-1 filed by the appellant. Further, the Commissioner has not disputed the authenticity and correctness of the excise invoice, job work, challan , purchase invoice and other document filed him. The Commissioner as a Adjudicating Authority, has also not disputed the correctness of the invoices of M/s MVS Wire and M/s Vika Manufacture Company, which were also filed by the appellant before him. In the circumstances there was no reason or justification for not accepting the claim of appellant. The impugned order was passed without considering the explanation rendered by the appellant regarding entries of 144 weighment slips which related to the finished excisable goods and cleared by the appellant and is found to be contained in the RG-1 Register the total of weight of such good were 13510.8 MT. However, in spite of submission all these evidences and invoices mentioned on the verification report by the range authority, confirmed the demand wrongly. With only 51 per weighment slips were found to be contained in the RG-1 Registered covering a quantity of 45.6 MT only that the Ld. Adjudicating Authority has also considered the weighment slips in respect of incoming of consignment including furnished oil as relating to the clearance of finished excisable goods found with necessary document to that effect were filed by the appellant and the same were verified by the range superintendent also.

5. The Ld. Sr. Advocate further submits that it is well settled that the Department can make the charge of clandestine removal only on the basis of sufficient and tangible evidences. In the present case, there is no evidence at all of any clandestine removal. The demand has been confirmed merely on the basis of surmises, conjecture and inference wrongly drawn. There is no evidence of purchase of any raw-material required for manufacture of such goods. The appellant states that Cenvat Credit was available on the inputs of the appellant from details of the purchase and consumption of the raw material during Financial year 2003-04, duly filed by the appellant; it is clearly evident that there was no excess consumption of raw material to produce unaccounted goods and clandestine removal thereof.

6. It was submitted that Ld. Advocate that weighbridge of M/s Om Dharma Kanta is a public commercial weighbridge. A large number of users get their consignment weighted at the said weighbridge. Merely, many of the appellant incoming and outgoing consignments were also weigh on the said weighbridge, it does not mean that copies all the weighment slips in question were in respect of excisable goods cleared by the appellant. Such a presumption is completely wrong, untenable and contrary to the fact on

record. Further, in the said weighment slips neither the name of consigner nor the name of consignee is mentioned. Such weighment slips also do not contained the goods were, and therefore, there is absolutely no basis that in every case weighment slips related to the appellant. The appellant also submitted the details and freight paid in each and every case of the clearance by the appellant to the transporter. The entry thereof is found in daily stock account register or the job work register. The appellant has specifically replied to the Commissioner in the Show Cause Notice that along with the evidence regarding the bill raised by the transporter for freight charges. As regards the adjudication in the impugned order that weighment slips books were recovered from the gate of the registered premises of the appellant. It was submitted that the appellant did not use any of the such weighment slips. In this case, no search was carried out under Rule 22 of the 2002 Rules on the appellant. There is no provision in this rule, which empowers the officer to make any search or make any recovery in question recovery of the documents of the Central Excise Officer from the gate or any part of the appellant registered premises did not arise at all. Also there is no allegation in the Show Cause Notice that three weighment slips books in question, were made available by the appellant to the Central Excise Officer. In explanation has been given in the Show Cause Notice/ impugned order as to how these weighment slips were recovered by the Central Excise Officer without following the due process of law. The name of the person from whom such weighment slips were recovered have never been disclosed. There is nothing on record to show that the Central Excise Authority has recorded the statement of the person from whom the weighment slips have been obtained. The Commissioner further erred in holding that the listed documents were presented by the person of the appellant which is contrary to the allegation in the Show Cause Notices that weighment slips in question were recovered from the gate of the appellant. The weighment slips has not been authenticated by the Excise Department by examining the person who has prepared or signed in the purported weighment slips. In the situation no reliance could be placed on the said authenticated weighment slips.

7. Ld. Advocate submits that the entire case of the Department is based on the alleged entry in the weighment slip book. Since the alleged recovery of the weighment slips itself is not legal and contrary to the provisions of law, no reliance can be placed on them. Regarding he alleged statement of the Om Prakash Choudhary, the appellant submission is that the said statement was taken without knowledge of the appellant and the appellant was not given opportunity to cross examine him. In view thereof, no reliance could be placed by the Adjudicating Authority on the statement of shri Om Prakash Choudhary. Shri Om Prakash Choudhary, in his statement has clearly admitted that weighment slips with "MW" mark belong to Om Dharam Kanta and weighment slips with "MW" Mark is received to the parties not making cash payment including but appellant. As Om Prakash

Choudhary has never accepted that weighment slips with "MW" mark was issued only to Miki Wire Works Pvt. Ltd. in spite of specific query in this regard. The Commissioner also erred in holding that weighment slips were carrying the signature of the employee of the appellant in his reply the appellant has pointed out the weighment slips has been signed by the client of weighbridge. Further on some of the weighment slips, which related to the appellant there may be signature, initial, of the appellant's staff in addition to signature of weighbridge staff. Such signatures were taken in weighment slip have been taken place in their presence. Further, the Commissioner has appreciated that all these cases, where is weighment slips bearing the signature of appellant staff, the same was co-related by its various outgoing/incoming consignment. The Commissioner in the impugned order has not given any order accepting such evidence. Also appellant relied upon in case of ***Brims Products vs. CCE*** [2001 (130) ELT 719 (Tri-Del.)]

8. Further without prejudice Ld. Advocate submits that during the relevant period there was no duty liability on the wire drawn from the wire rods. The determination of the name of the goods and their tariff classification by the Commissioner was absolutely essential before holding that the appellant is liable for the payment of duty. The appellant submitted that prior to insertion of the Section note 10 in Section 15 of the Central Excise Tariff with effect from 9/7/2004, no duty was leviable on the non alloy

steel wires as process wire was held as not manner to manufacture the Hon'ble Supreme Court in case of ***CCE vs. M/s Technoweld Industries*** [2003 (155) ELT 2003. In this connection, Ld. Advocate on behalf of the appellant also refer to the CBEC Circular No. 720/36/2003/CX dated 29/05/2003. In fact the Commissioner has issued the Show Cause Notice dated 5/4/2004 to the appellant on the ground that during period 27/3/2003 to 9/7/2004, no excise duty was chargeable on non alloy steel wires manufactured by the appellant and the appellant had wrongly cleared the said wires of payment of Excise duty during said period. In spite of raising this issue the Ld. Sr. Commissioner has not given any finding to that effect in the impugned order, it was further submitted that there is no liability of duty on entire quantity on 1692.402 MT of the alleged clandestinely cleared by the appellant following the Supreme Court decision in case of ***Technoweld Industries*** (supra) and board circular dated 29/5/2003. Ld Advocate also submits that the Show Cause Notice in the instant case was also barred by limitation the document was received on 29/05/2003, whereas the Show Cause Notice has been issued on 24/08/2005 that is after more than 2 years. In the last, it was submitted there is no case of imposition of any penalty. Ld. Advocate submitted the Commissioner erred in imposing the penalty on Managing Director, Authorised Signatory and proprietor of Santosh roadways under Section 26 of 2002. Accordingly it was prayed that the impugned order is not sustainable and required to be set aside in appeal.

9. Ld. Advocate relied upon the following laws regarding the clandestine removal of the goods indicated that the charges cannot be based on the presumption and assumption without any tangible evidence of removal;

(i) ***Durga Trading Company vs. CCE*** [2002 (148) ELT (Tri-Del.)]

(ii) ***Doaba Alloys Casting Pvt. Ltd. vs CCE*** [2003 (159) ELT 681 (Tri.-Del.)]

(iii) ***United Metals & Steels Pvt Ltd. vs CCE*** [2003 (161) ELT 685 (Tri.-Kolkata)]

(iv) ***Sober Plastic Pvt Ltd. vs. CCE*** [2002 (139) ELT 562 (Tri.-Del.)]

(v) ***Brims Products vs. CCE*** [2001 (130) ELT 719 (Tri.-Kolkata)]

(vi) ***C.C.E. vs. Harcharan & Brothers*** [2004 (168) ELT 454 (Tri.-Del.)]

(vii) ***Mediways Pharmaceuticals Pvt. Ltd. vs. CCE*** [2007 (215) ELT 541 (Tri.- Del.)]

(viii) ***HMT Machine Tools Divisions vs. CCE*** [2007 (210) ELT 266 (Tri.-Bang.)]

(ix) ***Lakshman Exports Ltd. vs CCE*** [2002 (143) ELT 21 (SC)]

(x) ***CCE vs. Technoweld Industries*** [2003 (155) ELT 209(SC)]

10. Further, it was stated that the issue raised before the Commissioner appeal in case of the demand which was confirmed by the Ld. Joint Commissioner has also not been considered by the Commissioner while deciding the impugned case. The reliance was placed on the following decisions;

(I) ***HMT Machine Tools Division vs. CCE*** [2007 (210) ELT 266 (Tri-Bang.)]

(II) ***Lakshman Exports Ltd. vs. CCE*** [2002 (143) ELT 21 (SC)]

11. Further the Advocate also states that the cross examination has required by the appellant was not permitted by the Ld. Adjudicating Authority in violation of principle of natural justices and also submitted the provision

contained in Section 9D(1) of the Central Excise Act, 1944. Further, no cross examination or raw material supplier was also permitted which is also in violation of the provisions of the Section 9 D (1) of the Act and for which the reliance was placed in case of ***CCE vs. Technoweld Industries*** [2003 (155) ELT 209 (SC)]**.** Ld Advocate also stated that the process of drawing of wire from rods does not amount to manufacture which has been classified vide CBEC Circular No. 720 /36/2003-CX dated 29.05.2003. In view of above the entire demand is not sustainable.

12. Ld. AR on behalf of the Revenue has supported the impugned order.

13. Heard the parties and perused the appeal records.

14. The issue involved in this case is as to whether the appellant is indulged into clandestine removal of the goods as alleged in the Show Cause Notice and upheld in the impugned order merely on the basis of weighment slips received from the weighbridge. The recovery of 3 registers which is weighment register from the weighbridge indicated mark “MW” as per Department was the record of the clandestine removal made by the appellant. It is on record the recovery of the weighment registers were not made under Panchnama and the reliance of same cannot be placed for alleging the clandestine removal against the appellant. It is also held by the Adjudicating Authority these weighment slips were recovered from gate

office of the appellant which has been denied by the appellant. In absence of the assumption of the said document without proper panchnama reliance cannot be placed on said record. Further we find that the appellant has categorically desired to have the cross examination of raw-material supplier and the incharge of the weighbridge, which had been denied by the Adjudicating Authority. This denial of the cross examination the amount of violation of the principle of natural justice it has been held in the following case of ***Lakshman Exports Ltd. vs. CCE*** [2002 (143) ELT 21 (SC)]. We also find that verification was conducted by the Range Superintendent as per the order of Adjudicating Authority. The verification submitted that after the perusal and inspection of the various statutory records being maintained by the appellant. It was found that only in three cases the records of removal of the goods has found to have been not matching value in weighment slips vis-a-vis duly stock register (RG-1). These three discrepancies were also properly explained by the appellant subsequently, which were also not considered by the Adjudicating Authority while confirming the demand against the appellant in the impugned order. We also find that reliance on the evidence of the third party cannot be placed without proper corroboration thereof through independent investigation as has been held in the following judgments of Hon'ble this Tribunal;

(i) ***Rhino Rubbers Pvt Ltd. vs. CCE, Banglore***-[1996 (85) ELT 260]

(ii) ***Shyama Papers Ltd. vs CCE***-[2004 (168) ELT 494 (Tri-Del.)]

(iii) ***Bhandary Industries Metals Pvt. Ltd. vs. CCE, Goa*** [2009(245) ELT 613(Tri-Mumbai)]

15. In view of above, we are of the opinion that no case has been made against the appellant for want of (i) proper investigation (ii) denial of cross examination asked by the appellant as per section 9D (1) of the Central Excise Act (iii) reliance on the third party evidence without any corroboration with additional evidence (iv) non-reliance of on the investigation report submitted by the Range Superintendent by the order of Adjudicating Authority.

16. There are large number of decisions of this Hon'ble Tribunal/ High courts/ Apex Court on this aspect. For the brevity of this order, we do not reiterate the same which has already been relied upon by the Ld. Sr. Advocate referred above and also in this order.

17. At this juncture, we find that Ld. Adjudicating Authority has not applied his mind, while deciding the case due to lack of his knowledge of Central Excise Act, law, and procedure or with proper deligence to frustrate this investigation of revenue with reasons best known to him.

18. Accordingly, we set aside the impugned order and allow the appeal with consequential benefit if any.

(Operative part of the order pronounced in open court)

Sd/ Sd/

(P.K.Choudhary)
MEMBER(JUDICIAL)

(Bijay Kumar)
MEMBER(TECHNICAL)