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

Appeal Nos. E/459-464/2009

Arising out of Order-in-Original No. 61/Commr./Bol/2009 dated 15.05.2009 passed by the Commissioner of Central Excise, Bolpur..

1. M/s Bravo Sponge Iron (P) Ltd.
2. Shri Ashok Kr. Agarwal
3. Shri Ramesh Agarwal
4. Shri Trilak Chand Jain
5. Shri Sudeep Chateerjee
6. Shri Mukesh Sharma

…Appellant (s)

Vs.

Commissioner of Central Excise, Bolpur.

…Respondent (s)

Appearance:
Shri Anjan Dasgupta, Advocate for the Appellant (s)
Shri H. S. Abedin, A.C. (AR) for the Respondent(s)

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: - 12.07.2018

Date of Pronouncement: - 02/01/2019

ORDER No…FO/A/75030-75035/2018

Per Bench:

The facts of the case are that the appellant is engaged in the manufacture of Sponge Iron classifiable under Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985 in its factory at Mahuda, P.S. Para, P.O. Rukni, Dist. Purulia, West Bengal. Officers of Anti Evasion Unit of Bolpur Central Excise

Commissionerate visited and searched the factory premises of the appellant on 11.06.2007 as also the residential premises of one Shri Devki Nandan Sureka, Authorised Signatory of M/s. Purulia Metal Casting Pvt. Ltd., one of the prime recipient of the appellant’s finished products. A Stock Verification Report (as at Page 41 of Paper Book) was prepared on eye estimation showing shortage of 158.800 MT of Sponge Iron. Central Excise Duty evasion on the above shortage is ascertained to the tune of Rs.2,09,362/-. On the basis of records seized from the premises of the third party viz., Shri Devki Nandan Sureka, further evasion of Central Excise duty of Rs.86,15,364/- has been estimated for the period 1st April, 2006 to 11th June, 2007 (as at pages 33 to 37 of the Paper Book). The Adjudicating Authority confirmed the demand of Rs.88,24,726/- alongwith interest and imposed equal penalty under Rules 25(I) (a) (b) & (d) of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act. Penalties were also imposed upon the director, Factory Manager, Authorized Signatory, Commercial Manager & Accountant of the appellant company.

2. The Ld. Advocate appearing on behalf of the appellants submitted that the above demand has been raised on the basis of alleged documents and statements of different persons. As regards the statement dated 26.06.2007 of Sri Sudip Chatterjee, an employee of the appellant company, which formed the basis of

alleged clandestine removal, the Ld. Advocate submitted that the same was obtained against threat, duress and physical torture, facts which were sworn in an Affidavit before the Notary Public on the very next day i.e. on 27.06.2007, within 24 hours. The above Affidavit was forwarded to the Commissioner of Central Excise, Bolpur. The above fact is also evident from Para 3.4 of the impugned Adjudication order which was considered by the Tribunal while disposing the Stay Petition by order dated 21.10.2011, wherein it was observed that this ground alone is enough to waive the requirement of pre-deposit and ordered stay accordingly. In view of above, it was submitted that the statement of Sri Sudip Chatterjee, retracted subsequently cannot be relied at all. In support of his submissions, the Ld. Advocate relied upon the following decisions :-

(i) Vinod Solanki Vs Union of India reported in 2009 (233) ELT 157 (S.C.).

(ii) Commissioner of Central Excise, Surat-II Vs. Sarvesh Polyester (P) Ltd. reported in 2009 (233) ELT. 391 (Tri.-Ahmd.).

3. The Ld. Advocate submitted that statements were obtained from one Shambhunath Tiwari, Owner of vehicle No. WB 37A 9872 on 21.11.2007, including the computerised statement regarding movement of various vehicles, from one Smt. Sumilata Mallick / Shri Prabhat Mallick and from the Driver Shri Dipu Rawat to establish the charge of clandestine removal but they were not

allowed to be cross examined although the Appellant had prayed for the same in their Written Submission dated 23.04.2009. It was submitted that the adjudication order is liable to be set aside for denial of natural justice in view of the following decisions:-

(i) Harrison Steel Pvt. Ltd. Vs. Union of India, reported in 2018 (360) ELT.A 126 (S.C.)

(ii) Skyrise Overseas Pvt. Ltd. Vs. Commissioner of Customs (Port) reported in 2017 (383) ELT 421 (Cal).

(iii) Bhupinder Steel Pvt. Ltd. Vs. Commissioner, reported in 2018 (360) ELT A 205 (CESTAT-Chandigarh).

(iv) Rajasthan Explosive & Chemicals Ltd. Vs. Commissioner of Central Excise, Jaipur-I reported in 2017 (357) ELT. 269 (Tri.-Del.).

In respect of the allegation of illicit production of Sponge Iron on the basis of electricity consumption, it is submitted that the above allegation is only a presumptive one inasmuch as during the years 2005 and 2006, work for installation of second and third kiln was under process/operation as also installation of ESP (i.e., Pollution Control Device) resulting in huge electricity consumption bill.

4. The Ld. D. R. re-iterates the findings of the impugned order.

5. We have carefully considered the submissions from both sides and perused the records.

6. The allegation of duty evasion against the appellant company and duty demand against them is based on the documents called "weighment slips" recovered from the residential premises of Shri Devki Nandan Sureka.

7. Significant portion of the demand stands confirmed on the basis of records recovered from the premises of third party, Shri Devki Nandan Sureka, Authorised Signatory of M/s Purulia Metal Casting Pvt. Ltd., one of the main buyers.

8. The appellant have also raised the ground of serious breach of principles of natural justice. They have claimed that the cross-examination of Shri Shambhu Nath Tiwari, Smt. Sumilata Mallick, Shri Prabhat Mallick and Dipu Rawat were sought by them but the adjudicating authority did not make them available for cross-examination. Accordingly, their submission is that the statements cannot be used as evidence against them. It is well-settled law that cross-examination has to be allowed normally before using such statements for confirmation of demand. If the witnesses do not turn up for cross-examination, it is then open to the adjudicating authority to proceed with the adjudication without relying on those statements.

9. As discussed in the above paragraphs, the learned Commissioner has proceeded to confirm the demand on the basis of documents seized from third party, etc. The appellant has

successfully rebutted these evidences relied upon by the Commissioner. We also find that no investigation has been undertaken by the Revenue towards procurement of additional raw materials clandestinely. No other corroborative documents have been produced. Investigations against the consignees have also not been done before raising demand on the allegation of clandestine clearance. The onus is definitely on the Department to establish manufacture and clearance of such goods and also the receipt of payments. In the absence of such investigation and evidence, we are unable to sustain the demand for duty. Once the demand for duty payable is not sustained, there is no justification to impose penalties on the appellant company as well as on the connected persons.

10. In view of the above, the impugned order is set aside and appeals are allowed.

(Pronounced in the open court on...............................)

(Bijay Kumar)
Member (Technical)

(P. K. Choudhary)
Member (Technical)

Tushar Kr.