IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Ex.Appeal Nos.75414,75415/18 & CO-75592/18

Arising out of Order-in-Appeal Nos.261-262/HWH/CE/2017-18 dated 31.10.2017 passed by Commr. (Appeals) of CGST & Excise, Kolkata

CGST & Excise, Howrah

…APPELLANT(S)

VERSUS

M/s Jaypee Alloy & Castings Pvt. Ltd.
Shri Shekhar Agarwal

RESPONDENT (S)

APPEARANCE

Shri D. Haldar, Asstt.Commr.(A.R.) for the Revenue
Shri A. K. Das, Adv. for the Respondent (s)

CORAM:

SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

DATE OF HEARING /PRONOUNCEMENT : 31.07. 2018

ORDER NO……FO/A/77227-77228/2018

Per Shri P. K. Choudhary :

These appeals have been filed by the Revenue against Orders-in-Appeal Nos.261-262/HWH/CE/2017-18 dated 31.10.2017.

2. Briefly stated the facts of the case are that respondent assessee is a manufacturer of steel ingots. They received ingots from one supplier, namely, M/s Shree Ganesh Forging Company involving Central Excise duty of Rs.24,57,861/-, which was taken as credit by the respondent assessee. Show-cause notice was issued alleging that the respondent has taken credit by producing fraudulent paper transactions without physically receiving the corresponding goods.

The Adjudicating authority confirmed the demand along with interest and imposed equal amount of penalty each on the appellant company and its Director, Shri Sekhar Agarwal and also on M/s Shree Ganesh Forging Company. Both the respondents herein filed the appeals before the lower appellate authority and the ld.Commissioner (Appeals) allowed their appeals. Being aggrieved, Revenue has filed these appeals against the impugned order. Respondent assessee has also filed Cross Objection.

3. The ld.D.R. appearing on behalf of the appellant Revenue, reiterated the grounds of appeal and submitted that the Commissioner (Appeals) had not considered the statements and declarations of owners of vehicles, which have been claimed to have been utilized in the transportation of input goods from the premises of M/s Shree Ganesh Forging Company to the factory premises of M/s Jaypee Alloy & Castings Pvt. Ltd..

4. The ld.Counsel appearing on behalf of the respondent assessee, submitted that the confirmation of demand in the adjudication order was on the basis of some discrepancies noticed in the vehicle in the excise records/invoices and statements of owner/transporter. He further submits that the cross examination was not allowed in spite of repeated request. In support of his contention, he relied upon the following decisions of the Tribunal :

(i) Dhakad Metal Corporation Vs. CCEx. & S.Tax, Daman : 2015 (330) ELT 561 (Tri.-Ahmd.) ;

(ii) Classic Strips Ltd. Vs. CCEx., Thane II : 2016 (339) ELT 144 (Tri.-Mumbai).

5. Heard both sides and perused the appeal records.

6. I find that no evidence whatsoever has been produced by the Revenue to substantiate the fact that the respondent assessee had procured the impugned goods from elsewhere after getting possession of the relevant Central Excise Invoices issued in their favour from M/s Shree Ganesh Forging Company. Further, nothing has been brought on record to show any manner in which the assessee had accounted for the quantum of raw materials for finished goods in their stock if the impugned goods/inputs had not been received by them during the material period, as alleged by the Department. In the absence of any credible corroborative evidence, the allegation of non-receipt of inputs/goods by the assessee is not maintainable. I also observe that it is not in dispute that the goods on which the assessee had to avail cenvat credit had not suffered duty, when the same were cleared by M/s Shree Ganesh Forging Company. As such, credit cannot be denied merely on the ground of suspicion being not bagged by credible corroborative evidence. I find that the Tribunal in the case of Dhakad Metal Corporation (supra) has held as under :

> "***6.*** *Heard both sides and perused the case records. The issue involved in the present appeals is whether appellant M/s. Dhakad Metal Corporation is eligible to credit on the basis of documents which are claimed to have been received along with inputs issued by the registered dealer when original manufacturer M/s. Prasun Ferro Alloys & Metal Casting Pvt.*

Limited had no facility for manufacturing the goods on which ultimately credit was taken. There is no evidence on record that appellant M/s. Dhakad Metal Corporation did not receive the inputs along with cenvatable invoices issued by M/s. Bhavna Metal Company. It is also not on record whether M/s. Dhakad Metal Corporation was aware that the inputs received had been shown manufactured by M/s. Prasun Ferro Alloys & Metal Casting Pvt. Limited which had no facility for manufacturing of such inputs. It is beyond comprehension that a man will get invoices without inputs and separately acquire inputs clandestinely from other sources to manufacture his goods. There is no whisper about M/s. Dhakad Metal Corporation to be indulging in clandestine removal of finished goods in these proceedings. It is now well settled legal position that a case cannot be established on the basis of few confessional statements without other corroborative evidences like shortage of raw materials, cash transactions, alternative procurement of raw materials. Appellant requested for cross-examination of the persons whose statements are relied upon but the same was not extended. It is now well settled law that cross-examination of the persons whose witness are relied upon by the Revenue should be extended to the appellant and in the absence of such cross-examination extended, the statements of such persons cannot be relied upon as evidence. It is also observed that Revenue has not contested with any documentary evidence to show that M/s. Dhakad Metal had knowledge that the inputs received alongwith invoices, at the time of taking credit, was from M/s. Prasun Ferro Alloys & Metal Casting Pvt. Limited who had no facility for manufacturing such inputs. In the above factual matrix, appellant M/s. Dhakad Metal Corporation cannot be held to have any mala fide intention to take wrong credit and extended period of demand cannot be invoked in the present case against them. In this case, the demand is for the period 2005-06 whereas the *show cause notice was issued on 20-2-2009. As the extended period is not invokable, therefore, the demand is also time barred in addition to credit being admissible on merits. Accordingly appeal filed by M/s. Dhakad Metal Corporation is required to be allowed."*

7. Similarly, in the case of Classic Strips Ltd. (supra), the Tribunal has held thus :

"4. *The ld. DR. has reiterated the impugned order. After hearing and perusal of the records, we find that for the following reasons we need to waive the pre-deposit and after waiver allow the appeals at the stay stage itself :-*

(a) The Commissioner has failed to carry out the direction of the Tribunal as contained in the order dated 24-6-2004.

(b) The Commissioner has failed to consider the documentary evidence relied on by the appellants.

(c) The Commissioner has only chosen to follow the previous order without considering the direction of the Tribunal as mentioned in the said order.

(d) The Commissioner has sought to counter the documentary evidence submitted by the appellants by way of delivery challans mentioning the vehicle nos. of the transporters who have claimed that they have never gone out of Biwandi and which clearly prove that deliveries have been made outside Bhiwandi by these very vehicles all along.

(e) Had the investigation been done in the proper perspective and unbiased manner the appellant could not have noted that each of the delivery challans produced by the appellants also bears the corresponding Central Excise Invoice no., which is a

cenvatable/modvatable duty paying document and would surely have all particulars.

(f) The respondent has not considered any of the bona fide facts that the stock of inputs and finished goods of the appellants was perfectly tallying with the statutory records as recorded in the Department's own panchnama dated 1-9-1999 during the surprise visit, the availability of material issue slips showing the issue for production and that cheque payments had been made for each of the consignments, while unshaken reliance is being placed on the transporters-statements, which the appellants have during investigation stage itself complained to the Commissioner as being recorded by using questionable means, even though the statements have been proved to be false as aforesaid through undisputable evidence, which has not been negated by the respondent himself. Besides, the non-maintenance of any records by the transporters is also apparently not an issue of concern to the respondent while the perfectly tallying stocks and absence of any statutory lapse or shortcoming on part of the appellants is of no consequence to the respondent.

(g) It is clear from the Para 114 of the impugned order that there was contradictions in the statement of transporters and as such the statement could not have been relied on in the impugned show cause notice and ultimately on the basis of the present impugned order. Without upholding the relevant documentary evidence it was not competent for the Commissioner to have chosen not to make proper enquires and ascertain the truth. The oral statement cannot be relied on the face of the documentary evidence. The documentary evidence excludes the oral evidence and the documentary evidence is the primary evidence whereas the statements are secondary evidence. No where the secondary evidence could be preferred

over the documentary evidence. The failure of the Commissioner in this regard is a serious legal lacune in the impugned order and the impugned order deserves to be set aside on this ground alone. The ld. Counsel for the appellants relied on the case of Gurpreet Rubber Industries v. CCE reported in 1996 (82) E.L.T. 347 where in it has been held "Demand cannot be sustained only on basis of a private diary without considering production capacity, raw material purchased, labour employed, power consumed, etc. At the most it may raise a doubt but that cannot take place of proof. There is a long distance between 'may be true' and 'must be true' and the whole distance must be covered by legally reliable and un-matchable evidence." In another decision reported in Kashmir Vanaspati (P) Ltd. v. CCE - 1989 (39) E.L.T. 655 (CEGAT) it has been held that the "Demand based on note book maintained by labourers containing un-authenticated entries cannot be sustained, unless the same is supported by other evidence, such as raw material consumed, goods actually manufactured, packed, etc."

(h) The Commissioner has not denied the fact that the statement of the transporters have been relied on over the documentary evidence produced by the appellant.

(i) The whole case of the Department is based on assumption and presumption, conjunctures and surmises and no positive evidence has been brought on record by the Commissioner to substantiate the allegation made against the appellant. The direction by the Tribunal as contained in the remand order has been totally ignored by the Commissioner and the Commissioner has merely followed the order of his predecessor. This itself is sufficient to set aside the impugned order. Since there is no willful mis-statement or suppression on the part of the appellant the question of invoking longer period does not arise and the demand is, therefore, time barred.

(j) Since the demand itself is not sustainable, the question of penalty does not arise.

8. In view of the above discussions and the aforesaid decisions, I do not find any reason to interfere with the impugned order and the same is sustained. The appeals filed by the Department are dismissed. Cross objection also gets disposed off.

(Operative part of the Order was pronounced in Court)

Sd/

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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