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

Appeal Nos.E/220, 221, 222/2009

(Arising out of Order-in-Original No.04/Commr/2009 dated 27.01.2009 passed by the Commissioner, Central Excise, Jamshedpur)

M/s. Shyamlal Iron & Steel Co.
Sri Brajesh Chandra. Asthana
Sri Binod Kr. Jaiswal

…APPELLANT(S)

VERSUS

Commissioner of Central Excise, JSR

…RESPONDENT (S)

APPEARANCE

Shri Bipin Garg, Advocate and Ms. Rinki Arora, Advocate for the Appellant.
Shri H.S.Abedin, AC(AR) for the Respondent.

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing : 13.11.2018

Date of Pronouncement : 07.01.2019

ORDER NO.FO/A/77306-77308/2018

Per Bench :

These three appeals have been filed by M/s Shyam Lal Iron & Steel Company (Unit-II), Shri Binod Kumar Jaiswal and Shri Brajesh Chandra Asthana against Order-in-Original dated 27.01.2009 under which the learned Commissioner has confirmed the demand of Central Excise duty amounting to Rs.54,46,406/- and imposed penalty of equivalent amount on Company [Appellant No.1] and penalty of Rs.5,00,000/- each on other two Appellants. Since all the three appeals arise out of a common order, these are being disposed of by this Order.

2. Briefly stated the facts are that the officers of the Directorate General of Central Excise Intelligence searched the factory premises of Unit-1 and Unit-II of the Appellant No. 1, the factory premises of M/s Jagannath Cement Works Pvt. Ltd. [hereinafter referred to as JCWPL] and the office premises of both Appellant No.1 and JCWPL on 07.07.2006. The officers found negligible shortage in the stock of finished goods and some excess in the stock of Melting Scrap. Some documents were recovered from the possession of the labours engaged by the Contractor and living within the premises of Appellant No. 1. A pocket diary was also recovered from the room of a labour in the factory premises of JCWPL. The statements of one of the partner of Appellant No. 1, Binod Kumar Jaiswal, Brajesh Chandra Asthana and some labours were recorded by the DGCEI Officers. Thereafter, a show cause notice dated 01.10.2007 has been issued to all the three Appellants, which was adjudicated by the learned Commissioner, wherein he has confirmed the demand of Central Excise duty and imposed penalties on all the three Appellants on the grounds that the Appellant No.1 was indulged in evasion of Central Excise duty by way of willful suppression and mis-statement as excess stock of raw material was found in the factory premises; a few entries in the documents resumed from the workers matched with the entries in the records of the Appellant No. 1; no documentary evidence has been produced by the Appellant No.1 to show that the entries in the resumed documents were not meant for them. Three cheques amounting to Rs.20,00,000/- issued by Appellant No.1 for adjustment of duty shows

admittance of removing excisable goods clandestinely. The learned Commissioner has also observed that other 2 Appellants were Authorized Signatories of Appellant No.1 and had colluded with Appellant No.1 for the evasion of duty and are, therefore, liable to be penalized under Rule 26 of the Central Excise Rules.

4.1 Shri Bipin Garg, learned Advocate for all the three Appellants, mentioned that the Appellant No. 1 is having two units. Unit-1 is engaged in decoding coiled sheet, cutting and slitting of sheet and Unit-II manufactures Steel Ingots. The learned Advocate submitted that on the basis of following documents, recovered from the workers, the impugned Order has been passed.

Document		**Amount of Duty (Rs.)**
(i)	01/DGCEI/JRU/JCPL/W/06	25,01,876/-
(ii)	36/DGCEI/JRU/SISCO/06	12,50,141/-
(iii)	34/DGCEI/JRU/SISCO/06	1,31,556/-
(iv)	38/DGCEI/JRU/SISCO/06	15,62,833/-

4.2 The learned Advocate submitted that the impugned Order has been passed in gross violation of the principles of natural justice as the cross-examination of the persons from whose possession the impugned documents were recovered and the persons whose statements have been heavily relied upon in the impugned Order has been denied by the learned Commissioner. It is settled law that the Adjudicating Authority has to allow cross-examination of the witnesses. Reliance has been placed on the judgment in Andman Timber Industries Vs C.C.E., Kolkata-II, 2015 (324) ELT 641 (S.C.) wherein the Supreme Court has held that "according to us, not allowing the assessee to cross-examine the witnesses by the

Adjudicating Authority though the statements of those witnesses were made the basis of the impugned Order is a serious flaw which makes the Order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.”

4.3 The learned Advocate submitted that the learned Commissioner has accepted the correctness of entries made in documents without allowing the cross-examination of those persons. Therefore, no case of clandestine removal of excisable goods can be made against the Appellants on the basis of uncrossed statements of the witness and un-verified documents.

4.4 The learned Advocate has also placed reliance on the judgment in Jindal Drugs Pvt. Ltd. Vs U.O.I. 2016 (340) ELT 67 (P&H) wherein the Punjab and Haryana High Court has held that the procedure prescribed in Section 9D(1) of the Central Excise Act has to be scrupulously followed and if makers of statement is not examined in chief before the adjudicating authority, such statement has to be eschewed from evidence and should not be relied on as evidence in adjudication. The learned Advocate contended that in the present matter, provisions of Rule 9D were not complied with and therefore none of the statements recorded during investigation under Section 14 of the Act can be relied on as evidence.

5.1 The learned Advocate submitted that duty amounting to Rs.25,01,876/- has been confirmed on the basis of one pocket diary recovered from the room of one Ranjeet Singh working as labour in JCWPL. The said diary has not been recovered from the factory premises of the Appellant as it has been recovered from the premises of a third party. Above all, said Ranjeet Singh was not working in the Appellant’s factory during the relevant period i.e. May, 2005 to July, 2006. The learned Advocate emphasized that when Ranjeet Singh was not working in May, 2005 in the factory of the Appellant, it was impossible for the plant incharge to have directed him to make entries in his diary for 29.05.2005. Above all, there is no statement of the said plant incharge on record to corroborate the statement of Ranjeet Singh.

5.2 The learned Advocate contended that it is settled law that the document recovered from the premises of third party cannot be relied upon to establish an allegation of clandestine removal. Reliance has been placed on the decisions in Kuber Tobacco Products Pvt. Ltd. Vs CCE, 2013 (290) ELT 545 (Tri); Rama Shyama Papers Ltd. Vs CCE, 2004 (168) ELT 494 (Tri) etc.

5.3 He further contended that entries made in a private diary cannot be made basis for clandestine manufacture and removal without independent corroboration. The Hon'ble Calcutta High Court has held in CCE, Vs Lords Chemicals Ltd., 2010 (258) ELT 48 (CAL) that the entries recorded in the private note book maintained by the labour contractor should not be taken as the clearance figure of finished products from the factory. The High Court has observed that "It is settled law that such presumption is not permissible" and the presumption "was misplaced in the absence of any corroborating, reliable and independent evidence."

6.1 Similarly, learned Advocate submitted, the demand of Rs.12,50,141/- is based upon loose sheets which were recovered from a bag kept in the quarter of one Narayan Yadav, working as a labour in Unit-1. It is worth emphasizing that no statement of said Narayan Yadav was recorded regarding the documents. A statement of one Ayub Sheikh, Foreman in Unit-1 was recorded who has merely stated that the documents were recovered from a bag kept in the room of Narayan Yadav. Ayub Sheikh has not stated anything about the documents in his statement dated 07.07.2006. Further Binod Kumar Jaiswal, in his statement, has denied to know the said Narayan Yadav and has not admitted that all the document belong to Appellant No.1. The learned Advocate also emphasized that though the documents contained name of the party, no enquiry has been made from them. Thus, there is no basis to come to the conclusion that these documents belonged to Appellant No. 1. From the mere fact that some documents tallied with the purchases made by Appellant No.1, it cannot be concluded that all entries in documents pertained to the Appellant No.1. It is settled law that, the charge of clandestine removal is a very serious one and is required to be proved by bringing tangible and cogent evidence on record.

6.2 The learned Advocate submitted that only on the basis of such documents, charge of clandestine removal is not sustainable in law.

7. A demand of Rs.15,62,833/- has been confirmed on the basis of loose sheets resumed from the room of one Sushant Bera, labour. No enquiry from said Sushant Bera about the document has been made as there is no statement on record. It has been presumed by the Department without any basis that Pages 6 & 9 were sale data of Appellant No.1 merely because some entries tallied with their records. It is settled law that the show cause notice cannot be issued on assumptions and presumptions. No reliance can be placed on such loose sheets without bringing on record the tangible evidence.

8. A demand of Rs.1,31,556/- has been confirmed on the basis of alleged parallel invoices recovered from the room of Sushant Bera. The demand has been confirmed as the hand writing on these invoices is said to have matched with the hand writing of the person who had prepared the invoices of Appellant No.1 and JCWPL. The learned Advocate contended that the documents had not been examined by a hand writing expert nor the statement of the person who had prepared the invoices has been recorded. The learned Advocate also emphasized the fact that no investigation has been done from the consignees as well as transporters mentioned in those invoices. He, therefore, submitted that no demand of duty can be made on the basis of such documents which have not been corroborated by independent evidence.

9. The learned Advocate also mentioned that two loose sheets marked as 37/DGCEI/JRU/SISCO/06 were recovered from the bag of one Moti Chand, labour who had stated in his statement dated 07.07.2006 that the said documents were written by one Amir Chand and he did not know anything about the documents. No statement of said Amir Chand has been recorded nor any enquiry has been made from the driver/owner of the trucks mentioned in the documents.

10. Finally the learned Advocate submitted that the department has not conducted any enquiry from the transporter of raw material/finished goods and consignees. Further for manufacturing the alleged quantities of steel ingots, substantial units of electricity, employment of labour are required and there is no iota of evidence to substantiate any clandestine manufacture and removal of excisable goods. The learned Advocate reiterated that merely because some entries in the documents so

recovered tallied with the entries made in Appellant's records, no inference can be drawn without any evidence that the remaining entries pertained to Appellant No.1. Reliance in this regard has been placed on the decision in Oudh Sugar Mills Ltd. Vs U.O.I., 1978 (2) ELT J172 (S.C.). He also relied upon the judgment in State of Kerala Vs M.S. Mathew, 1978 (42) STC-348 (SC) wherein the Supreme Court has held that strong suspicion, strange coincidence and grave doubts cannot take place of legal proof. To establish charges it is essential for the prosecutor to establish that the books of accounts relate to the business transaction carried out by the party and none else. The learned Advocate prayed for setting aside of the impugned Order.

11. The learned A.R. for the Department reiterated the findings contained in the impugned Order and emphasized the facts that the Appellant No.1 has admitted the clearance of steel ingots clandestinely as they had given three cheques for Rs.20 Lakhs under their letter dated 18.07.2006; there was excess stock of melting scrap and some of the entries in the documents so recovered tallied with the records maintained by the Appellant No.1 which clearly goes to show that the documents contained transaction undertaken by the Appellant No.1.

12. Heard both sides and perused the appeal records.

13. We find that the entire case has been made against the Appellants on the basis of documents and statement of witnesses. Though the Appellants had requested for the cross examination of the witnesses whose statements have been relied upon, the learned Commissioner has declined the same without assigning any reason. It has been held by Supreme Court, High Courts and this Tribunal in a number of cases that

when Revenue places heavy reliance on certain statements of the witnesses recorded during the course of investigation the Noticees are well within their right to seek cross-examination. In fact using a statement, the deponent of which has not been cross-examined, amounts to using evidence which the Appellant/Noticee has no opportunity to question. Denial of cross-examination results in gross violation of principles of natural justice and not allowing fair hearing to the Noticee. The Hon'ble Supreme Court has held in Andaman Timber Industries case, (supra), not allowing the cross-examination of witnesses, though their statements were made the basis of the impugned Order is a serious flaw which makes the order nullity.

14. Further, the provisions of Section 9D of the Central Excise Act are very specific which have not been complied with in the present matter. Section 9D clearly mandates that a statement shall be relevant only if the person concerned is examined as a witness and the Adjudicating Authority is of the opinion that the statement should be admitted in evidence. No doubt there are certain exceptions. But it is not the case of the Revenue that any of those exception is applicable in the present matter. Since the learned Commissioner has not followed the mandate contained in Section 9(D), as held by the Hon'ble Punjab & Haryana High Court in Jindal Drugs Pvt. Ltd. Case, (supra) "it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE on the said statement, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof."

15. We find substantial force in the contention of the learned Advocate that the documents on the basis of which the demand of duty has been confirmed were not recovered from the office and factory of the Appellants but from the possession or rooms of the labour. We also observe that only statement of one labour, namely, Ranjeet Singh was recorded by the officers about his pocket diary and none of the other labours were questioned by the officers about the documents. Further, during the material period, said Ranjeet Singh was not working as labour in the Appellant' Unit. The Revenue has not adduced on record any independent evidence to corroborate the contents of those documents. Without any independent corroboration it cannot be presumed that the entries contained in those documents pertain to the Appellant No.1. The tallying of some entries in those documents with the records of the Appellant may raise suspicion but cannot be used to establish malafide. The onus to prove clandestine manufacture and clearance of excisable goods is on the Revenue by adducing cogent and tangible evidence which is lacking in the present matter. Clandestine removal of goods is a serious charge and cannot be leveled on the basis of presumption, assumptions and surmises. The Hon'ble Calcutta High Court has dismissed the appeal filed by Revenue in Lords Chemicals Ltd., (supra), holding that the presumption that the entries in the private note book maintained by the labour contractor should be taken as the clearance figures of the finished products is not permissible and show cause notice cannot be issued on the basis of such presumption in the absence of any corroborating, reliable and independent evidence.

16. It is settled law by the decision of the Courts and this Tribunal that the charge of clandestine manufacture and removal cannot be leveled on the basis of documents recovered from the premises of a third party. The Appellants have placed reliance on a number of decisions in this regard such as Rhino Rubbers Pvt. Ltd. Vs CCE, 1995 (85) ELT 260; Tijiya Steel Pvt. Ltd. Vs CCE, Haldia, 2005 (185) ELT 425 (Tri-Kolkata); Sharma Chemicals Vs CCE Calcutta-II, 2001 (130) ELT 271 (Tri-Kolkata); CCE, Calcutta-II Vs Tube Bend (Cal) Pvt. Ltd., 2001 (136) ELT 839 (Tri-Cal) and Gurpreet Rubber Industries Vs CCE, 1996 (82) ELT 347.

17. A reference is made to the decision in Sharma Chemicals Vs Commissioner of C.Ex. Calcutta-II 2001(130) ELT 271 (Tri Kolkata) wherein the Tribunal observed that the note book entries of production and removal of products recovered from a person whose name was appearing in the list of the workers in statutory records cannot be of any relevancy to establish the charge of clandestine manufacture and removal. Such a charge cannot be sustained on presumption that the persons entrusted with such jobs are not usually shown as employees, The entries in private note book of record of production at the most may raise a doubt but cannot be a proof of the charge in the absence of other corroborative evidence like installed capacity of factory, raw materials utilization, labour employed, power consumed, goods actually manufactured and packed etc. recipients of allegedly clandestinely removed goods. No authorized person of the company admitted to unaccounted production and clearance removal. There was no difference in stock found by the officers on the date of visit.

18. We do not find any force in the argument of the learned AR for the Revenue that the three cheques given by the Appellants towards duty amounts to admission of removing the goods without payment of duty. The learned Advocate has controverted the said argument by submitting that Binod Kumar Jaiswal was threatened to give the letter dated 18.07.2006 with three cheques. We are of the view that mere giving of cheques during the course of investigation would not amount to admission of charge of clandestine removal in absence of corroborative evidence about procurement of raw material/physical manufacture, use of electricity, transport of finished goods and statement of buyers, etc.

18. In view of the foregoing, we hold that Revenue has not established the charge of clandestine manufacture and removal of finished goods by the Appellants No.1. Consequently we set-aside the impugned Order and allow all the three appeals.

(Pronounced in the open court on …07.01.2019…)

(V. Padmanabhan)
MEMBER (TECHNICAL)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

ss