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

**<u>Appeal No. E/75520/2018</u>**

(Arising out of Order-in-Appeal No. 254/HWH/CE/2017-18 dated 31.10.2017 passed by the Commissioner of CGST & Central Excise (Appeals-II), Kolkata.)

Commissioner of CGST & CX, Howrah

Appellant (s)

**Vs.**

M/s. Dekon India Respondent (s)

<u>Appearance:</u>
Shri S. S. Chattopadhyay, Suptd. (A. R.) for the Revenue
Shri N. K. Choudhary, Advocate for the Respondent

**CORAM:**
**HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)**
Date of Hearing: 06/02/2019
Order No. FO/75608/2019

**<u>PER SHRI P. K. CHOUDHARY</u>**

The facts of the case in brief are that the Respondent-assessee is engaged in the manufacture of Air Tube, Briquetting Machine, Reduction Gear for stand, Cold Bar Shear, Railway Wagon Components parts, parts of structures, Towers etc. classifiable under Chapter 84 of the First Schedule to the Central Excise Tariff Act, 1985. A Show Cause Notice dated 28/08/2015 was issued for contravention of Rule 26 (2) of Central Excise Rules, 2002. It was also alleged in the Show Cause Notice that the Respondent-assessee facilitated their Customs/Clients to avail wrongful Cenvat Credit by issuing 22 invoices during February 2002, without actual delivery of the goods. The Adjudicating Authority imposed penalty of Rs.20,80,600/- under Rule 26 (2).

On appeal, the Ld. Commissioner (Appeals) set aside the penalty. Hence, Department is in appeal before the Tribunal.

2. The Ld. DR appearing on behalf of the Department reiterates the grounds of appeal and submits that buyers of the goods i.e. M/s. Jayaswal Neco Industries Ltd. reversed the amount of Cenvat Credit taken in respect of the impugned goods and subsequently, also paid interest and such action establishes that they have admitted the fact of availing in-

admissible Cenvat Credit that was on to them by the Respondent assessee.

As regards the prayer of cross objection being not entertained by the Adjudicating Authority, it is his submission that it was not pressed upon at the time of personal hearing and none of the statements recorded, were subsequently retracted.

3. The Ld. Advocate appearing on behalf of the Respondent-assessee submitted that the impugned goods were manufactured and cleared on payment of duty to M/s. Jayaswal Neco Industries Ltd. It is his submission that payment was received against the supply of goods and entire transactions were recorded in the Statutory Registers maintained. All the Statutory records were duly submitted and assessments were finalized for the period 2011-12.

The Ld. Advocate also submits that the buyers of the goods have no where stated that the goods in question were not received by them.

4. The present appeal has been filed by Revenue on being aggrieved by the Order-in-Appeal dated 31.10.2017 passed by the Ld. Commissioner (Appeals), Kolkata, whereby he has set aside the penalty of Rs. 20,80,600/- imposed under Rule 26(2) of the Central Excise Rules, 2002 ('Rules') vide the Order-in-Original dated 29.09.2016 passed by the Ld. Addl. Commissioner, Central Excise, Kolkata.

The respondent assessee had issued 22 nos. of central excise invoices during the period February 2012 for consignment of goods to one, M/s. Jaiswal Neco Industries Ltd, Raipur (in short, 'JNIL'). It is the case of the Revenue that the Respondent assessee had issued mere paper invoices to the said JNIL without actually supplying the goods to enable wrong availment of CENVAT credit in contravention of the provisions of the Central Excise Act, 1944 and the Rules made there under. The said consignee, JNIL also being a central excise assessee who availed the credit on the strength of central excise invoices issued by the respondent assessee has reversed the credit with applicable interest.

5. Officers of Anti-Evasion unit of Central Excise Department visited the factory premises of the appellant on 05.09.2012 and obtained statement of Sri Ratan Das, authorized representative of the respondent assessee, who deposed that he was not aware whether the impugned goods were actually manufactured in the factory of the respondent and

submitted that he only maintained Central Excise Registers namely, RG-23A Part-I and Part – II, DSA and prepares ER-1 and ER-7 returns. On the same date, i.e., 05.09.2012, another team of Anti-Evasion unit visited the office premises of M/s K R Das & Co., Chartered Accountants, where they interrogated one of the Partners namely, Mr. Gaurab Das, who deposed that their firm were auditing the records of the respondents during the past periods but did not undertake the audit for FY 2011-12 as their limit for undertaking number of audits were exhausted in the said FY. The said Partner supplied signed audited financial statements for the FY 2006-07 to 08-09 and unsigned copies for the subsequent period 2009-10 and 10-11. Further, on the same date, i.e., 05.09.2012, one more team of Anti Evasion unit visited the office premises of transporters, M/s Srishti Carriers. The proprietor of said transporting agency, Mr. S K Agarwal in his statement stated that the consignment notes were issued to the appellant without actually undertaking the transportation and the payment received through cheques were returned back to the appellant and they actually received an amount of Rs. 500/- per consignment. Statement of Mr. Vikash Nagalia of the respondent was also obtained who deposed that goods were duly supplied by them through the transporters M/s Srishti Carriers, under the cover of proper central excise invoices. He inter-alia deposed that several inputs were purchased by them on payment of duty which were used in manufacture of final products for supply to JNPL as well as other parties and that payments have duly been received through proper banking channels. He submitted that the charge of department was completely baseless and devoid of any merit. Statement of vehicle owner was also obtained who deposed that his vehicle was not used in transportation of goods to JNPL, Raipur.

6. In the course of adjudication proceedings, the respondent specifically prayed for cross examination of the witness whose statements were recorded and relied in the impugned SCN dated 28.08.2015. They inter-alia submitted that the statement of transporting agency that amount paid by cheque to them were paid back for a commission of Rs 500/- per consignment has no evidentiary value in absence of any proof or evidence. They also submitted that the mere fact that the consignee, JNPL, has reversed the credit to avoid litigation cannot be understood to mean that the have accepted the guilt. The submissions made by the

respondent before the Original authority did not find favour and accordingly the penalty as proposed in the SCN under Rule 26(2) of the Rules was confirmed without granting the opportunity of cross examination of the persons whose statements have been relied in the proceedings.

7. The Ld. Commissioner (Appeals), vide his detailed Order-in-Appeal dated 31.10.2017 observed that the Department, without affording the facility of cross examination to the assessee, could not establish that there was a flow back of money from the transporting agency whose bald statements have been merely relied upon to build up the case against the respondent assessee. He also observed that it was also not clear as to who prepared the transporting documents and neither any question was raised by the investigating officers in this regard much less that any statement of drivers of the vehicles were obtained. Moreover, it was also not understood why the statement of proprietor of transporting agency was obtained on 05.09.2012 with regard to Certificate dated 23.04.2012 containing details of consignment, after a period of about four and half months. In some cases, the statement of vehicle owners were obtained after a period of three years for which there could not be any convincing reason. The Ld. Commissioner (Appeals) specifically observed that the representative of JNPL, Sri Tushar M. Barway, Head (Commercial), nowhere in his statement stated that their Company has not received the goods in question. It was also observed that no Show Cause Notice appeared to have been issued to the said JNPL, the consignee of goods as disputed by the department in the instant proceedings so as to appropriate the credit amount reversed by JNPL towards duty demand alongwith interest. Having not issued SCN to the said JNPL, no case could be built against the appellant particularly when the guilt has not been accepted by the party receiving the goods. The Ld. Commissioner (Appeals) has arrived at a categorical conclusion that there is no proposal for declaring the impugned invoices as unauthorised documents inasmuch as no allegation has been made for violation of the provisions of Rule 4, 6, 8, 10, 11 and 12 of the said Rules. He also relied on the rulings in the case of CCE Pune vs. Pioneer Industries 2014 (306) ELT 671 (Tri-Mum) and Motabhai Iron & Steel Industries vs. CCE, Ahmedabad 2014 (302) ELT 69 (Tri-Ahm).

8. The Ld. Departmental Representative submitted that the impugned Order-in-Appeal is not correct inasmuch as the Ld. Commissioner (Appeals) failed to appreciate that there was no actual transportation of goods since the goods could not be manufactured by the respondent and that the proprietor of transporting agency categorically admitted that he received an amount of Rs. 500/- per consignment to issue transporting documents to enable wrong availment of credit to the consignee. Relying on the grounds taken in appeal, he emphasised that since credit amount was reversed by JNPL alongwith interest, the same clearly establishes the fact that no goods were supplied by the respondent assessee. He prayed that that the Original Order be restored by allowing the appeal of the Department.

9. On the other hand, the Ld. Advocate appearing for the assessee respondent submitted a written note containing detailed arguments to plead his case. He stated that there was no evidence of flow back of money from the transporting agency as rightly observed by the Ld. Commissioner (Appeals) in his order. Neither there is any dispute that the appellant got consideration through banking channels for supply of goods to said JNPL (consignee) through Diefy Infrastructures Limited, Raipur, who is actually the buyer of goods on whose instructions goods have been consigned to JNPL. The names of the both the parties, namely JNPL as 'consignee' and Diefy Infrastructures Limited as 'buyer' are duly appearing on the 22 nos. invoices issued by the respondent. Neither JNPL nor Diefy Infrastructures Limited have been made party in the SCN. He emphasised on the point of cross examination which was duly prayed by the assessee in the adjudication proceedings and no heed was paid by the original authority to consider their request. He relied on several case decisions, particularly to the Apex Court decision in Andaman Timber Industries vs. CCE Kolkata 2015 (324) ELT 641 (SC) wherein it has been held that denial of cross examination is a serious flaw by the adjudicating authority and same would amount to violation of natural justice. The Hon'ble Punjab & Haryana High Court in Jindal Drugs Pvt Ltd. vs. UOI 2016 (340) ELT 67 (P&H) observed that statement recorded during investigation cannot be relied on straight way by adjudicating officer without cross examination. He also submitted that this Tribunal in Indian Oil Corporation Ltd vs. CCE Mumbai 2011 (274) ELT 561 (Tri-Mum) has held that settlement of a case

is not an admission of a guilt and likewise, the reversal of credit by JNPL in the instant case cannot prejudice the case of the respondent assessee herein. He accordingly prayed that the appeal filed by Revenue has no merits and the same be rejected being devoid of any merit. He also relied on the following case decisions :

- CCE vs. Decent Dyeing Co. 1990 (45) ELT 201 (SC)
- Motabhai Iron & Steel vs. CCE Ahmedabad 2014 (302) ELT 69 (Tri-Mum) as affirmed by Gujarat High Court 2015 (316) ELT 374 (Guj)
- CCE Pune vs. Pioneer Industries 2014 (306) ELT 671 (Tri-Mum)
- Monarch Metals Pvt Ltd vs. CCE Ahmedabad 2010 (261) ELT 508 (Tri-Ahm)
- Gontermann Pipers (India) Limited vs. CCE Kolkata Final Order no. 77772-77773/2017 dated 8/11/2017.

10. Heard both sides and perused the appeal records and the invoices issued by the respondent assessee which is the subject matter of dispute. I find that the entire case has been built against the assessee mainly based on the statements made by the proprietor of transporting agency and the owner of vehicles. Before I deal with the facts on record, it is important to peruse the legal provision contained in Section 9D of the Act which prescribes a specific procedure to be followed before the statement can be admitted in evidence. The relevant provisions are reproduced below:

> *"9D. Relevancy of statements under certain circumstances.*
>
> *(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
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> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*
>
> *(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*

*(2) The provision of sub-section (1) shall, so far as may be,□ apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."*

11. The Hon'ble Punjab and Haryana High Court in Jindal Dugs Pvt Ltd (Supra) has very well explained the above legal provisions by observing that if none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz. (i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and (ii) the adjudicating authority has thereafter to form the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. The High Court has also observed that it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1).

12. In the instant case, no attempt whatsoever has been made to consider the request of the cross examination and the statements have been relied against the assessee. It is a settled law that statements obtained behind back of the assessee cannot be entered into evidence without affording the opportunity to cross examine the statements of persons sought to be relied be Revenue. In my view, the case of Revenue suffers from a serious legal infirmity and does not meet the test of law as laid down by the Courts time and again. Moreover, I also find that the other parties namely, JNPL (consignee) and Diefy Infrastructures Limited, Raipur, being the actual buyer of the goods, on whose instructions goods have been consigned to JNPL, have no where been implicated in the entire proceedings so as to prove that there was any connivance between the parties including. the respondent assessee herein. It cannot be the case of

the Revenue that the respondent assessee was only responsible for issue of paper invoices without involving the person who actually received the so called paper invoice i.e. JNPL and the person placing orders for supply of goods in question i.e. Diefy Infrastructures. Nowhere in the facts of the case, there is any murmur about the fact or confession much less any allegation in the SCN that the respondent assessee returned back money realised through banking channels. A mere bald statement of Proprietor of transporting agency having accepted return back of money has no factual or legal basis and cannot be entered into evidence since no opportunity of cross examination was ever afforded. No attempt has been made to implicate the said transporting agency who tendered itself to involve in wrongful issue of transport documents, when adequate provisions exist in Rules to penalise such action. Likewise, no penal action has been taken against the other parties, i.e. consignee and buyer of goods in question. It is a settled legal position that when no enquiry has been made by the department at the end of other party (supplier or recipient), the charge of mis-declaration or connivance cannot be leveled against the assessee as has been held in catena of decisions of this Tribunal in Dharmesh Castings Pvt Ltd. vs. CCE Chandigarh 2015 (320) ELT 2450 (Tri-Del), Shree Ambica Trading Company vs. CCE, Thane 2015 (317) ELT 170 (Tri-Mum), Surya Alloys Industries Pvt Ltd. CCE, Raipur 2008 (227) ELT 617 (Tri-Del), CCE Ludhiana vs. Pawan Ispat Udyog 2007 (213) ELT 134 (Tri-Del).

13. I also find force in the submission of the Ld. Advocate for the respondent-assessee that the case of department that the statement made by the Proprietor of transporting agency having received the commission of Rs.500/- per consignment for returning back the money paid by appellant by cheque towards freight amount is completely flawed. In similar situation, this Tribunal in the case of Gontermann Peipers (India) Ltd (supra), clearly discarded the said confession by the other party in absence of any evidence of flow back of money considering the statement to be a bald statement having no evidentiary value when cross examination was not provided. In any case, the reversal of credit by the receiving party i.e. JNPL cannot prejudice the case of respondent assessee in absence of any evidence of admission of not having received the goods supplied under the cover of invoices in dispute.

14. In view of the above factual matrix and in view of the precedent legal judicial pronouncements and relevant statutory provisions referred above, the case of Revenue is devoid of any merit. I do find any reason to interfere with the impugned Order-in-Appeal passed by Ld. Commissioner (Appeals). Hence, the appeal is rejected.

(Dictated and pronounced in the open court.)

**Sd/-**
**(P.K. Choudhary)**
**Member (Judicial)**

Pooja