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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.77245 of 2019

(Arising out of Order-in-Appeal No.138-140/BOL-CE/2019-20 dated 11.07.2019 passed by Commissioner of CGST & Central Excise, Siliguri Appeal Commissionerate, Siliguri.)

M/s. Jai Balaji Industries Limited (Unit-III)
(BEPIP Plot, Rajbandh, Banskopa, Durgapur-713212.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bolpur Commissionerate

.....Respondent
(Nanoor Chandidas Road, Sian, Bolpur, Birbhum, West Bengal-731204.)

WITH

Excise Appeal No.77246 of 2019

(Arising out of Order-in-Appeal No.138-140/BOL-CE/2019-20 dated 11.07.2019 passed by Commissioner of CGST & Central Excise, Siliguri Appeal Commissionerate, Siliguri.)

Shri Sankasan Mohpatra, General Manager (Taxation) of M/s. Jai Balaji Industries Limited (Unit-III)
(BEPIP Plot, Rajbandh, Banskopa, Durgapur-713212.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bolpur Commissionerate

.....Respondent

(Nanoor Chandidas Road, Sian, Bolpur, Birbhum, West Bengal-731204.)

AND

Excise Appeal No.77247 of 2019

(Arising out of Order-in-Appeal No.138-140/BOL-CE/2019-20 dated 11.07.2019 passed by Commissioner of CGST & Central Excise, Siliguri Appeal Commissionerate, Siliguri.)

Shri Aditya Jajodia, Director of
M/s. Jai Balaji Industries Limited (Unit-III)
(BEPIP Plot, Rajbandh, Banskopa, Durgapur-713212.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bolpur Commissionerate

.....Respondent
(Nanoor Chandidas Road, Sian, Bolpur, Birbhum, West Bengal-731204.)

APPEARANCE

Shri A.K.Prasad, Advocate & Shri S.Mohapatra, General Manager(Taxation) for the Appellant (s)

Shri A.Roy, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75631-75633/2020

DATE OF HEARING : 14 October 2020
DATE OF DECISION : 19 November 2020

P.K.CHOUDHARY :

Brief facts of the case are that the Appellants are alleged to have availed Cenvat Credit of Rs.1,28,39,142/- in respect of 11460.460 MT of LAM (Low Ash Metallurgical) COKE, an input, for the year 2011-12 and 2012-13 on the basis of 5 fake invoices issued by a Central Excise Registered dealer, M/s Dankuni Steel Ltd, 58/1B, Gaushala Road, Liluah, Howrah-711204, West Bengal, without supply of goods. This allegation is based on the investigations done by the department from the Municipal Corporation as well as the Postal Department that no such godown / premises in the name of M/s Dankuni Steel Ltd existed at the declared address.

2. It is also the case of the department that the Appellants availed input service tax credit of Rs.1,30,534/- covering 5 invoices, on loading/unloading/transportation charges (GTA services) paid to a transporter, M/s Silverstone Infra Projects Pvt. Ltd, in respect of the above goods, for the same period, without any actual transportation taking place.

3. During the course of investigations, the department recorded the statement of Shri Sankarshan Mohapatra, General Manager (Taxation) of the Appellants, on 07.02.2017. Shri Mohapatra confirmed receipt of 11460.450 MTs of LAM coke from M/s Dankuni Steel Ltd during the years 2011-12 and 2012-13, under 5 (five) invoices, and that Cenvat credit had been availed and utilized in respect of the duty paid on the said LAM coke. He confirmed that the LAM coke had come by rail up to the siding located within their factory premises and thereafter they were transported by trucks belonging to their transporter, M/s Silverstone Infra Projects Pvt. Ltd, to the actual place of storage. Shri Mohaptatra also intimated that these consignments were accompanied by Railway Receipts (RR's) as well as duty paying documents of the registered dealer, on the basis of which they had taken Cenvat credit. He also clarified that they had also made full payment to the supplier/dealer towards the purchases through proper banking channels and to the transporter against the transportation.

4. During the investigations the department also recorded the statement of Shri Sanjay Banthia, authorized signatory of a third party, M/s Concast Bengal Industries Ltd, on 8.11.2016 wherein he, inter alia, accepted availment of Cenvat credit on fictitious invoices generated by M/s Dankuni Steel Ltd, without any accompanying goods.

5. The department also recorded the statement of Shri Madhusudan Saha, Director of M/s Silverstone Infra Projects Pvt. Ltd., on 22.3.2017, wherein he confirmed that his company had transported LAM Coke from the railway siding to the raw material storage place in the factory of Appellants. He also confirmed having billed the Appellants for the services and having received the payments along with service tax.

6. Based on the investigations the then Durgapur Commissionerate, issued show cause notice dated 7.4.2017 proposing to disallow / recover Cenvat Credit amounting to Rs.1,28,39,142**/-** in respect of inputs and Rs.1,30,534**/-** in respect of input services, along with interest. Penal provisions were invoked against the appellants, Shri Mohapatra , GM(Taxation) Shri Aditya Jajodia, CMD, as well as two other, Shri Sanjay Surekha and Shri Madhusudan Saha.

7. The adjudicating authority, vide his Order-in-Original No 40/JC/BOL/17-18 dated 26.03.2018 confirmed the full amount along with interest and imposed equivalent penalty on the appellant company. He also imposed a penalty of Rs 10,00,000/- on Shri Aditya Jajodia and Rs 5,00,000/- on Shri Sankarshan Mohapatra (the other 2 appellants).

8. This Order dated 26.03.2018 was challenged by the appellants before Commissioner (Appeals), who, vide his Order-in-Appeal No 138-140/BOL-CE/2019-20 dated 11.07.2019**,** dismissed the appeals. Against this Order all the three appellants are now before us.

9. Shri A. K. Prasad, the learned Advocate has made the following submissions on behalf of the appellants :-

9.1 None of the grounds raised in the appeal before the Commissioner (Appeals) have been discussed or rebutted by the Commissioner (Appeals). Hence, it is not a speaking order.

9.2 No panchnama was drawn by the departmental officers of having carried out any physical verification of the godown/premises of the registered dealer at the declared address.

9.3 The letter dated 20.9.2013 of the Municipal Commissioner merely states that there was no "holding" in the name of M/s Dankuni Steels Ltd. M/s Dankuni Steels Ltd. had never claimed to be the "holders" (owners) of the said godown /premises. Shri Sanjay Surekha, Managing Director of M/s Dankuni Steels Ltd, had clarified that they were the tenants of M/s S.G. Strips and that the ownership of the property was with one, M/s Calcutta Punj Co-operative Society. The department made no efforts either to contact the owners of the property or the landlord to verify the contentions of M/s Dankuni Steels Ltd. Shri Sanjay Surekha had also clarified in his statement that they did possess a trade licence from the Municipal Corporation in the name of their head office which was at 8, Bentinck Street, Kolkata. The certificate of the Municipal Commissioner nowhere stated that a company by the name of M/s Dankuni Steels Ltd. did not exist at the address reflected in the invoices.

9.4 As regards the letter dated 18.10.2013 of the Postal authorities, it was submitted that though the last invoice during the disputed period is of April 2012 , the letter of the postal authorities is of October, 2013, which is one and a half years later. It is quite possible that the trader could have either shifted his operations to another place or would have closed down his business from that address. In his statement dated 11.7.2014, Shri Sanjay Surekha, MD of Dankuni Steels Ltd, had contested the report dated 18.10.2013 of the postal authorities and had requested the department to verify the premises by deputing someone to the said premises, but this was not done.

9.5 Merely because a dealer was not found at the address mentioned in the invoice, Cenvat Credit could not be denied. Following decisions may be referred to :

i) Commissioner Central Excise Bangalore-1 vs Bhuwalika Steel Industries Ltd. 2012 (277) ELT 153 (Kar).

ii) Commissioner of Central Excise Ludhiana vs Dhawan Steel Industries 2015(324) ELT 169 (Tri.-Del)

iii) Surya Steel Industries Ltd. vs. Commissioner of Central Excise Chandigarh-I 2017 (346) ELT 128 (Tri-Chan)

9.6 The existence of the trading company, M/s Dankuni Steels Ltd, could not be denied as they were very much operating at their Bentinck Street address and had proper VAT Registration. In fact, all the 5 disputed invoices mention the address of 8, Bentinck Street, also.

9.7 The cross-examination of Shri Sanjay Surekha, M.D of Dankuni Steels Ltd as well as of Shri Sanjay Banthia authorized signatory of M/s Concast Bengal Industries Ltd was denied by the adjudicating authority only on the ground that the request for cross examination was made late i.e. after seven months of the issue of the show cause notice. As per the following judgments cross-examination was a valuable right and that if a witness was not made available for cross-examination, his statement could not be relied upon. Further, as per section 9D of the Central Excise Act,1944, a statement could be admitted as evidence only after the adjudicating authority examines the witness.

i) Super Smelters Limited Vs. Commissioner of Customs, Central Excise and Service Tax, Durgapur- 2020 (371) ELT 751 (Tri-Kol).

ii) Swadeshi Polytex Ltd. vs Collector of Central Excise, Meerut – 2000 (122) ELT641 (SC),

iii) Lakshman Exports Ltd., v/s Collector of Central Excise - 2002(143) ELT 21 (SC),

iv) J & K Cigarettes Ltd., v/s Collector of Central Excise - 2009 (242) ELT 189 (Delhi),

v) Flevel International v/s Commissioner of Central Excise – 2016 (632) ELT 416 (Del),

vi) Genesis Associates Pvt Ltd and others vs CC, Delhi-Final Order No A/53409-53411/2016-SM[BR] dated 6.9.2016 of CESTAT, Delhi.(copy enclosed)

vii) CCE Delhi vs Balajee Perfumes-2017 (358) E.L.T. 87 (Del.)

viii) Kirit Shrimankar v. Commissioner of CGST & Central Excise [2018 (362) E.L.T. 385 (M.P.)];

ix) Ankit Kapoor v. Commissioner of Customs (Port), Kolkata [2018 (362) E.L.T. 401 (Cal.);

x) Nirmal Seeds Pvt. Ltd. v. Union of India [2017 (350) E.L.T. 486 (Bom.)];

xi) K. Srinivasulu v. Commissioner of Customs, Chennai-III [2017 (345) E.L.T. 477 (Mad.)];

xii) HIM Logistics Pvt. Ltd. v. Principal Commissioner of Customs [2016 (336) E.L.T. 15 (Del.)];

xiii) G-Tech Industries Vs. Union of India, reported at 2016 (339) ELT (P & H)

xiv) HI Tech Abrasives Ltd. Vs. Commissioner of Central Excise & Customs, Raipur, reported at 2018 (362) ELT 961 (Chhattisgarh)

xv) Commissioner of Central Excise, Delhi-1 Vs. Kuber Tobacco India Ltd, reported at 2016 (338) ELT 113 (Tri-Del.).

9.8 If one company admits to having received only invoices from a registered trader without accompanying goods, it does not automatically mean that the same modus-operandi was adopted by all buyers of raw materials from the same supplier. [(1966) 17 STC

465- State of Kerala vs C. Velukutty]. Evidence is required to be produced in each case.

9.9 There is no evidence to show that the dealers' register, in Form RG-23D, was ever scrutinized by the department to ascertain the backward link with the inputs received by the dealer, M/s Dankuni Steels Ltd. Each disputed invoice mentions the specific sl no of the RG-23D register maintained by M/s Dankuni Steels Ltd.

9.10 The appellants had provided the following documents to the investigating officers much before the issue of the instant show cause notice, vide letter dated 12th June, 2015 . These documents were enough to establish genuineness of the purchase of LAM Coke from M/s Dankuni Steels Ltd. These documents were neither considered by the adjudicating authority nor the appellate authority.

i) Copy of the Tax Invoice cum Excise Invoice

ii) Copy of the Road Challan

iii) Copy of Way Bill issued under the West Bengal Value Added Tax Rules,2005, in Form 50A

iv) Annexure to Way Bill in Form 50A issued by Directorate of Commercial Taxes, West Bengal

v) Copy of Railway Receipt (R/R) issued by Railway Authorities

vi) Bills for Unloading/Loading/Transporting in the appellants Railway Siding against each R/R

vii) Copy of Ledger of M/s Dankuni Steels Limited

viii) Copy of Bank Statement earmarking the payment given to M/s Dankuni Steels Ltd., against the purchase of LAM Coke during the relevant period.

ix) Copy of Stock Ledger, product wise (RG 23A Part-1, Register) showing transactions of M/s. Dankuni Steels Ltd.

x) Copy of Cenvat Input Register, product/item wise (RG 23A Part-II, Register) showing transaction of M/s Dankuni Steels Ltd.

9.11 Whenever a dealer is registered by the Central Excise Department, the department is required to verify the premises of the registered dealer within 5 days, as per para 5.7 of the Supplementary Instructions 2012-13**,** relating to Central Excise [Also refer para 5.6 of Board's Circular No 662/53/2002-CX, dated 17-9-2002]. It is on record that M/s Dankuni Steel Ltd were issuing invoices to others till the year 2015-16. It is impossible to believe that a registered dealer's premises remained unverified by departmental officers for nearly 5 years.

9.12 As per 3rd proviso to Rule 11(2) of the Central Excise Rule 2002, it is not necessary for a registered dealer to actually physically receive the goods in a godown to sell / transfer the said goods to a buyer, accompanied by dealer's cenvatable invoices. Prior to this also Board's instructions permitted movement of Modvatable/Cenvatable goods directly from the supplier/manufacturer to the buyer. There are a number of judgments also in support of this.

9.13 The existence of the company itself (though at their registered address at Bentick Street, Kolkata) has not been denied by the department. In that case cenvat credit cannot be denied if these goods were actually received in the factory of the Appellants and utilized in the manufacture of duty paid finished goods.

9.14 The department did not conduct any stock taking of LAM Coke at the factory premises of the Appellants to verify as to whether the stocks were consistent with the quantity claimed to have been received by Appellants . If only invoices had been issued by Dankuni Steel Ltd, without accompanying goods, stock taking would have revealed a shortage of 11460.460 MTs of LAM Coke. There is no evidence of this.

9.15 The department also did not carry out any analysis / study as to whether the quantity of finished goods (Pig Iron/Hot Metal) produced by the Appellants, during the relevant period, was consistent with the claim of the Appellants regarding receipt of the above quantity of raw materials, i.e. LAM Coke.

9.16 If, as alleged by the department, only invoices had been received by Appellants without accompanying LAM Coke, the payments made to M/s Dankuni Steels Ltd, amounting to nearly Rs 26.24 crores (@ Rs 22900/- per MT) would have been returned back to Appellants either in cash or in kind. There is no evidence regarding this.

9.17 The Appellants had produced the railway receipts (RR's) under cover of which LAM Coke had been received up to the railway siding in their factory premises. Railway receipts are documents provided by a Government authority (i.e. Railways) which cannot be tampered with as it is backed with a large number of contemporaneous records / registers. The department made no effort to verify the genuineness of the railway receipts nor did they make any effort to trace backwards the movement of the goods by Railways. Copies of dealer's invoices and corresponding RR's were all provided to the department.

9.18 The appellants have consistently said that the 11460.460 MT of LAM Coke supplied by M/s Dankuni Steels Pvt Ltd under the dealer's invoices were duly received in their factory and used in the production of their finished goods. These were all reflected in the statutory records like RG-23A Parts I and II. The appellants had procured the inputs as well as services from entities duly registered by the department and had also paid the amounts through proper banking channels.

9.19 The 5 disputed invoices of the dealer carries the Central Excise Registration Number which the department has not disputed as being correct. There is nothing in the show cause notice to indicate that any action was taken by the department to either suspend or cancel the said registration.

9.20 In similar circumstances CESTAT, Kolkata, has allowed the appeals in the following two cases of the present appellants themselves :-

(i) Final Order No 77032/2019 dated 25.10.2019 in Appeal No E/258/2010-DB passed relying on the decision of the Allahabad High Court in the case of Commissioner v. Juhi Alloys Ltd. — 2014 (302) E.L.T. 487 (All.)

(ii) Final Order No 75111/2020 dated 15.01.2020 in Appeal No 224 of 2010.

9.21 The demand is time barred since the invoices are dated March to July 2012 whereas the SCN has been issued on 07.04.2017, and there is no evidence of any fraud, collusion, willful misstatement or suppression of facts by the appellants.

9.22. In view of the above, the department has not been able to make out a case for denial of Cenvat Credit of Rs. 1,28,39,142/- in respect of inputs.

9.23 The inputs which came to the railway siding in the appellants factory premises were further transported within the factory premises to the storage area by trucks belonging to M/s Silverstone Infra Projects Pvt. Ltd. The Service Tax of Rs.1,30,534/- paid to the transporter and borne by the appellants is clearly available as Cenvat Credits to the appellants.

10. The learned Authorized Representative reiterated the findings of the Appellate order and submitted that the appellants had knowingly availed credit on the basis of fake invoices. He urged that the appeals be rejected.

11. Heard both sides through video conferencing and perused the appeal records.

12. We find that the main basis of denying the Cenvat credit to the appellants are the two letters received by the department, one from

the Municipal Commissioner and the other from the Postal authorities. The letter from the Municipal Commissioner reads as under :

> *"In response to your letter dated 22.08.2013 this is to inform you that as per current A/R- 2003-04, there is no existence of such type of holding as 58/1B, Gousala Road(N.S.Road), Liluah, in the name of M/s Dankuni Steels Ltd.*
>
> *Necessary action may kindly be taken from your end."*

It may be seen that it is based on some A/R of 2003-04. By no stretch of imagination can a database of 2003-04 determine whether a registered dealer exists at an address in the year 2011 and 2012.

13. As regards the letter from the Postal authorities the same cannot also be considered as conclusive proof of existence, or otherwise, of any postal address as, admittedly, the enquiries were conducted nearly one and a half years after the issue of the invoice by the dealer.

14. The best evidence would have been for departmental officers to physically visit the place and draw a panchnama after making enquiries from the locality. No such documentary evidence is there on record.

15. The department has not denied that the dealer, M/s Dankuni Steel Ltd was registered with the jurisdictional Central Excise formation. As per extant departmental instructions the premises were required to be physically inspected within 5 days of granting registration. It has to be presumed that these instructions were duly followed. In that case it has to be assumed that during the relevant period the dealer was operating from the registered premises.

16. The dealer has clarified that their head office was at Bentinck Street and this was duly indicated in all the disputed invoices. The department has not denied the existence of the dealer at the Bentinck Street address.

17. Hence, the material available on record can at most arouse suspicion, but suspicion, however strong, cannot replace

proof/evidence. [Anjlus Dung Dung v. State of Jharkhand reported in (2005) 9 SCC 765].

18. The department has made no enquiries to ascertain whether the disputed quantity of LAM Coke had been received in the appellants' factory or not. A proper stock-taking would have revealed the true picture. But no such evidence is there. Hence, it has to be accepted that the disputed quantity of LAM Coke was actually received in the factory.

19. The department did not also make any enquiry to determine whether the quantity of finished goods manufactured by the appellants was consistent with the consumption of the disputed quantity of inputs.

20. In the absence of the above it has to be presumed that the disputed quantity of LAM Coke was duly received in the appellants' factory and used in the manufacture of finished goods.

21. The appellants had provided the Railway Receipts (RR's) under cover of which the inputs had come. The disputed invoices have cross-references of the corresponding RR's. The department made no efforts to verify the genuineness of the RR's.

22. Hence, it cannot be said that the invoices received in the appellants' factory were not accompanied by duty paid goods.

23. In any case, it is now established law that the mere non-existence of a dealer at the registered premises will not disentitle the recipient from availing cenvat credit. The case of Commissioner Central Excise Bangalore-1 vs Bhuwalika Steel Industries Ltd. 2012 (277) ELT 153 (Kar) may be referred to in this regard. Relevant extracts from the judgment are reproduced below:-

"3........

> *The material on record clearly discloses that the dealer who has issued the invoice has shifted the premises and that the premises from where the invoices were issued are the premises where the dealer did not have any office or business activity going on. However, there is no denial of the fact*

that the inputs which were produced by the appellant is duty paid and they were received and consumed by the assessee in the factory premises. The assessee was required to give all the particulars of the goods procured by them and the details of the duty paying document. The invoice produced by the assessee contains all the necessary particulars. The authority has not recorded any finding that there is no such dealer in existence or that no inputs were supplied by him or that any duty was paid on such inputs. There is also no finding that the inputs were not received in the factory premises or it was not used in the manufacturing process. In the absence of any such finding and all those facts having been established the Tribunal held that the benefit of Cenvat credit cannot be denied to the dealer who has paid the duty. In that view of the matter, we do not see any justification to interfere with the well considered passed by the Tribunal. Thus the substantial questions of law is answered in favour of the assessee and against the revenue."

24. We also note that in respect of the same appellants, a Bench of this Court in Final Order No 77032/2019 dated 25.10.2019 in Appeal No E/258/2010-DB **[**2019-TIOL-3842-CESTAT-KOL] relyin**g** on the decision of the Allahabad High Court in the case of Commissioner v. Juhi Alloys Ltd. [2014 (302) E.L.T. 487 (All.)],has held as under :-

6. We find that the Department did not submit anything to controvert the contention of the appellant that they availed cenvat credit on the basis of invoices issued by the manufacturer having Central Excise Registration. They have paid the amount by Account Payee Cheques and the machines are in existence in the factory of the appellant. The Tribunal in the case of Sunvik Steels Ltd. (cited supra) has allowed the appeal of the assessee in respect of goods supplied by the same supplier. We also find that this issue was also before the Hon'ble High Court of Allahabad for consideration in the case of CCEx., Cus. & Service Tax Vs. Juhi Alloys Ltd. : 2014 (302) ELT 487 (All.), wherein the Hon'ble High Court held as under :

25. It is also established law now that duty paid goods can be consigned directly to a buyer by the manufacturer/supplier without the goods first going to the dealer's premises. [Air Pac Filters & Systems Pvt. Ltd Vs Commissioner Of C. Ex., Mumbai-I reported in 2015 (329) E.L.T. 437 (Tri. - Mumbai), Aristo Exports Vs Commissioner of Central Excise, Daman reported in 2013 (296) E.L.T. 542 (Tri. - Ahmd.), etc].

26. Once it is held that the disputed quantity of goods have been duly received in the appellants factory, the cenvat credit on input service of transportation cannot also be denied.

27. In view of the above discussions, the department has not been able to make out a case for denial of Cenvat Credit.

28. Accordingly, all the three appeals are allowed.

(Order pronounced in the open court on 19 November 2020.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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