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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76130 of 2018

(Arising out of Order-in-Original No.31/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 28.12.2017 passed by Commissioner of Central Tax, CGST & C.Ex., Howrah CGST Commissionerate.)

M/s. Ashirwad Foundries Private Limited
(46, 47, 48, 'E' Road, Dasnagar,
Howrah-711105, West Bengal.)

...Appellant

VERSUS

Commissioner of CGST & Central Excise,
Howrah Commissionerate

.....Respondent

(Custom House, 15/1, Strand Road, Kolkata-700001.)

WITH

Excise Appeal No.76131 of 2018

(Arising out of Order-in-Original No.31/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 28.12.2017 passed by Commissioner of Central Tax, CGST & C.Ex., Howrah CGST Commissionerate.)

Shri Shankar Lal Agarwal, Director
M/s. Ashirwad Foundries Private Limited
(46, 47, 48, 'E' Road, Dasnagar,
Howrah-711105, West Bengal.)

...Appellant

VERSUS

Commissioner of CGST & Central Excise,
Howrah Commissionerate

.....Respondent

(Custom House, 15/1, Strand Road, Kolkata-700001.)

<u>APPEARANCE</u>

Shri Jitin Singhal, Advocate for the Appellant (s)
Shri Joideep Chakraborty, 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. 75663-75664/2020

DATE OF HEARING : 14 October 2020
DATE OF DECISION : 16 December 2020

P.K.CHOUDHARY :

The appellants have filed the present appeals against Order-in-Original No.31/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 28.12.2017 passed by Commissioner of Central Tax, CGST & C.Ex., Howrah CGST Commissionerate.

Excise Appeal No.76130 of 2018

2. Briefly stated, the facts of the case are that the appellant company is engaged in the manufacture of CI castings classifiable under chapter 73 of the First Schedule to the Central Excise Tariff Act, 1985. Major raw materials for manufacture of CI castings are Pig Iron, Hard Coke and Lime Stone. A search was conducted by the officers of Anti-Evasion Unit at the factory premises of the appellant company on 05.08.2015. It was found that purchases have been made directly or through dealer namely M/s.Hari Om Udyog and M/s.Maa Parwati Engineering & Casting against manufacturers' invoices of M/s.A.S. Infratel Pvt.Ltd., M/s.Ganesh Udyog, M/s.Ganpati Enterprises and M/s.OHM Metals and Engineering Corporation. Statements of the Manager of the appellant company Shri Krishna Murari Upadhyay, Shri Ashoke Kanti Kar and the Director Shri Shankar Lal Agarwal were recorded on various dates. Thereafter the documents were scrutinized and the department made investigation with respect to transportation of goods at the database VAHAN (hhtps://vahan.nic.in), wherein following details were found:-

(a) 8 vehicles with respect to 24 invoices were found non-existent in the database.

(b) In respect of 234 consignments of Pig Iron, the owners of 9 vehicles denied transportation by written communications.

(c) In respect of 4 vehicles involving 7 invoices, they were found to be ‘Light Goods Vehicle’ on the VAHAN database.

(d) Similarly in respect of 4 vehicles involving 13 invoices, they were found to be ‘Tractor and Trailer’ in VAHAN database.

(e) 5 vehicles involving 7 invoices were found to be ‘3 wheeler, two wheeler, Bus and Moped’ in VAHAN database.

(f) Some letters issued to the transporters as per the addresses available in VAHAN database were returned as insufficient address.

Based on the above observations, the department was of the view that the transactions in respect of the above consignments were either fake or fictitious.

3. Further statement of Shri Ajay Sharma, Proprietor of M/s.Jai Mata Enterprises, Jamshedpur, Shri Ajay Kumar Sharma, Proprietor of M/s.Hari Om Steel, Jamshedpur and Shri Dharmavir Kumar, Director of M/s.A.S.Infratel Pvt.Ltd. were recorded by the officers of DGCEI, Jamshedpur wherein it was stated that there was no production in these firms.

4. Based on the above investigation, a show cause notice dated 18.05.2017 was issued alleging wrong availment of Cenvat Credit and for recovery of the same along with interest and for imposition of penalty. The adjudicating authority vide the impugned order confirmed the demand of Cenvat Credit totaling to Rs.5,57,78,466/- along with interest and imposed a penalty of equal amount under Rule 15(2) of Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise

Act, 1944 and Rule 25 of the Central Excise Rules, 2002 read with section 174(2) of Central Goods and Services Tax Act, 2017 and a penalty of Rs.2.00 Crores was imposed on the Director Shri Shankar Lal Agarwal. Hence the present appeals before the Tribunal.

5. The learned Counsel appearing on behalf of the appellants submitted that during the financial year 2013-14 and 2014-15, the appellant company availed Cenvat Credit on 24,775 MT of raw materials and manufactured 22401 MT of finished products and removed 20,728 MT (18,689 MT cleared on payment of Central Excise duty of Rs.8.94 Crores and 2,039 MT of goods were exported under bond). It has been alleged in the show cause notice that out of total quantity of 24,775 MT, the appellant company availed illegal Cenvat Credit on 14,992 MT without receiving any goods i.e. appellant received 9,782 MT raw materials only. The learned Counsel submitted that if the case of the department is accepted, then it is not possible for the appellant to manufacture 22,401 MT of finished goods from 9,782 MT of raw materials. It is his submission that this point was categorically placed before the learned Commissioner, however, no findings have been given by him in this regard. It is also submitted that it is not the case of the department that the appellant company had arranged such quantum of inputs from alternate sources and also no evidence have been brought on record to support this assumption. The above facts clearly shows that the appellant has duly received all goods and rightfully taken Cenvat credit on the same, which have been duly manufactured and removed on payment of duty [which has been accepted by the department] or exported, as the case may be. In support of his submissions, the learned Counsel relied upon the decision of the Tribunal in the case of Modern Ex-Serviceman Engg. Co.P.Ltd. vs. CCE, Panchkula [2014 (304) ELT 298 (Tri.-Del.)].

6. It was submitted that, during the course of visit by the officers of the Central Excise at the premises of the appellant, neither incriminating documents were recovered nor any shortage/excess of raw materials/finished goods were found, which clearly shows that the appellant were duly following the provisions of the Central Excise Act, 1944 and rules made thereunder. If the appellant is taking the credit on fake invoices, then some incriminating documents or shortages/excess were bound to be recovered or found, however, in the present case, nothing was recovered or found, which clearly shows that the allegations of the department is not sustainable in the eyes of law.

7. It was submitted that the statement recorded under Section 14 of the Act cannot be relied upon as evidence unless the provisions of Section 9D of the Act has been followed. The statements of Sh. Krishna Murari Upadhyay (05.08.2015), Sh. Ashoke Kanti Kar (05.08.2015), Sh. Shankar Lal Agarwal (07.08.2015 & 13.08.2015), Sh. Ajay Kumar Sharma, Prop. of Jai Mata Di Enterprises (07.07.2014), Sh. Ajay Kumar Sharma. Prop. of M/s Hari Om Steel (15.07.2014) and Sh. Dharmavir Kumar, Director of M/s A.S. Infratel Pvt. Ltd. (19.09.2014) were recorded under the provisions of Section 14 of the Act, however, the learned Adjudicating Authority has not followed the provisions of Section 9D of the Act, therefore, the said statements cannot be relied as an evidence and have to be eschewed from evidence. The appellant would like to rely upon the judgement of Hi-Tech Abrasives Ltd. Vs. CCE&C, Raipur, 2018 (362) ELT 961 (Chhattisgarh), wherein the Hon'ble High Court of Chhattisgarh, in similar issue, held that statements recorded under Section 14 of the Act cannot be relied upon as evidence without following the rigor of Section 9D of the Act. It has been further held that the provisions of Section 9D is mandatory in nature. It was also submitted that, similar

view has been taken by the Hon'ble High Courts and the Larger Bench of the Tribunal also as mentioned below:-

i. G-Tech Industries Vs UOI, 2016 (339) ELT 209 (P&H).

ii. Final Order No. 62244-62245 of 2018 dated 23.04.18 in the case of Bhupinder Steel Pvt. Ltd. Vs. CCE, Delhi-IV, in Appeal No. E/2328/09 and E/2617/09 passed by Larger Bench of this Hon'ble Tribunal.

iii. CCE, Delhi-I Vs. Kuber Tobacco India Ltd, 2016 (338) ELT 113 (Tri-Del.)

iv. MSP Sponge Iron Ltd Vs Commissioner of CGST, Central Excise, 2020-TIOL-523-CESTAT-KOL

It was submitted that, in view of the settled law and facts of the present case, the aforementioned statements, cannot be relied upon as evidence and have to be eschewed from evidence.

8. It was submitted that, even otherwise, in their statements Sh. Krishna Murari Upadhyay (05.08.2015), Sh. Ashoke Kanti Kar (05.08.2015), Sh. Shankar Lal Agarwal (07.08.2015 & 13.08.2015), have clearly stated that they have received the goods under the cover of invoices and rightly taken the Cenvat credit. It was further submitted that, the allegations of the department that, Sh. Shankar Lal Agarwal has admitted everything in his statement, is wrong appreciation of the said statement and cannot be relied upon. The learned Advocate further submitted that statements of Sh. Ajay Kumar Sharma, Prop. of Jai Mata Di Enterprises (07.07.2014), Sh. Ajay Kumar Sharma. Prop. of M/s Hari Om Steel (15.07.2014) and Sh. Dharmavir Kumar, Director of M/s A.S. Infratel Pvt. Ltd. (19.09.2014) have been recorded by the officers of DGCEI, Jamshedpur and the statements of these persons have not been recorded by officers investigating the case of the appellant. It is submitted that no cross-

examination has been allowed by the learned Commissioner, therefore, cannot be relied upon as evidence in view of the judgment of Hon'ble Supreme Court of India in the case of Andaman Timber Industries Vs CCE, Kolkata-II, 2015 (324) ELT 641 (SC).

He further submitted that the department has neither confronted the statements of dealers nor investigation conducted at the end of the transporters to Sh. Shankar Lal Agarwal nor the employees of the appellant, inasmuch as they have not put any part of the investigation to the director and employees of the appellant.

9. It was submitted that, the investigation conducted by the department at the end of the transporter by searching the vehicles from the site 'www.vahan.nic.in' is an evidence which cannot be relied upon inasmuch as by the said evidence, the department is fastening the liability against the appellant, especially when the department could have investigated from the concerned State RTO in order to get the details of the truck owners. This exercise has not been done in the present case, thus, the said evidence cannot be relied upon in order to deny the lawful credit availed by the appellant.

10. It was submitted that, the department has denied the credit on 912 consignments, out of which the department has allegedly found discrepancy in 285 consignments based on the website www.vahan.nic.in. 234 consignments (involving 9 vehicles) out of the above 285 consignments, on inquiry, the owners of 9 vehicles denied transportation by sending their letters (Annexure L-1 to L-9) to the department. It is very strange to note that, all these 9 letters sent by the vehicle owners are stereotyped and similarly worded, which clearly shows that these have been dictated by the department and cannot be relied upon. These letters relied upon by the department has no evidentiary value. It is further submitted that, no formal statement had been recorded by the department under Section 14 of the Central

Excise Act. The appellant also requested for the cross-examination of these persons, however the same has been denied by the learned commissioner. It is well settled law that, statement has to be eschewed from evidence, if cross-examination is not allowed.

11. It was further submitted that, with respect to 24 consignments, the VAHAN database shows 'no vehicles found', however, on perusal of the said page, it has been written that,

> "... if the vehicle details are not found then it is possible that...
>
> - Wrongly entered combination of parameters;
> - Vehicle details are not digitized by Registering Authority;
> - Due to Network failure the data may not reach on National Register"

It was submitted that, when there is even one possibility that, Vehicle details are not digitized by Registering Authority, then it was necessary for the department to investigate via proper channel i.e. by summoning the officers of the RTO with relevant records or taking records from RTO, which has not been done in the present case. The aforesaid evidences cannot be relied upon as evidence. With respect to the other 27 invoices, wherein department found Light Good vehicles, it is submitted that they should have also investigated from the concerned RTO, which has not been done in the present case.

12. It was further submitted that, the allegation of the department with respect to remaining invoices, further letters were issued to remaining transporters as per addresses mentioned in VAHAN database, however the same were retuned as 'insufficient address'. No evidence whatsoever has been relied upon by the department to show whether any letters are sent and moreover, the said allegation of the department proves that the data present on VAHAN website is not reliable and had to be verified from concerned RTO. It was further

submitted that, the department is not disputing that these transporters were truck owners. Denial of Cenvat credit mechanically is not sustainable in the eyes of law.

13. It was further submitted that the department is alleging the non-existence of premises of manufacturer/dealers, relying solely upon the alert circulars issued by the different commissionarêtes. It was submitted that, in the present case, the department has neither relied upon nor stated in the SCN about the Panchnama drawn at the concerned premises. If the said evidences have not been relied upon, then there is no material for the appellant to controvert the same, which is in clear violation of the principle of natural justice. It was further submitted that, it is well settled law that, merely on the basis of alert circulars, it cannot be said that particular premises are non-existent. That, there is no dispute that, these manufacturer had issued the invoices and paid the Central Excise duty to the exchequer, on which Cenvat credit has been taken by the appellant, thus causing no loss to exchequer, therefore, the Cenvat credit has been rightly availed by the appellant. It was further submitted that, when the department is accepting the duty then it cannot be said that they are non-existent.

14. It was submitted that, the appellant has taken all reasonable steps as mentioned in Rule 9 of the Cenvat Credit Rules, therefore, the denial of Cenvat credit is wrong and liable to be set aside. The appellant assessee produced duty paid invoices under cover of which goods received in the factory, showing names of manufacturer and supplier thereon and weighment slips produced evidencing receipt of goods and further all payments have been made through the banking channels and the goods received have been duly entered into the RG-23 register. The appellant has also paid the Service Tax under RCM on freight expenses incurred by them for transportation of raw materials

under the category of GTA and ST-3 returns were also filed. It was further submitted there is neither allegations nor evidence for flow back of money. This clearly shows that, the appellant has taken all reasonable precautions as prescribed in the Cenvat Credit Rules. There is no ground to doubt that these raw materials have been used in the manufacture of finished goods and further removed on payment of duty.

15. It was submitted that, the department has not investigated at the end of the broker also, inasmuch they have also not discharged the burden of proof. It is further submitted that the department is duty bound to investigate and bring on record cogent and positive evidence, which is absent in the present case.

16. The appellant placed reliance on the following judgements to support its case:-

(i) CCE, Kanpur Vs Juhi Alloys, 2013 (296) ELT 533 (Tri-Del.)

(ii) CCE, Kanpur Vs Juhi Alloys, 2014 (302) ELT 487 (All.)

(iii) Nidhi Metal Auto Component P. Ltd. Vs CCE, Delhi-IV, 2016 (343) ELT 576 (Tri-Del.)

(iv) Ashok Sharma & Ors. Vs CCE, Raipur, 2019-TIOL-3405-CESTAT-DEL

(v) CCE Vs Tata Motors Ltd, 2013 (294) ELT 394 (Jhar.)

17. It was further submitted that, merely deposit of money at the time of investigation would not amount to acceptance of any allegations as mentioned in the SCN. It is well settled law that, payment of money at the time of investigation would be treated as a deposit under protest. The appellant would like to place reliance on the following judgements to support its contention:-

i. Bayshore Glass Trading Pvt. Ltd. Vs CC, Kolkata, 2002 (148) ELT 1243 (Tri-Kol.)

ii. CCE, Lucknow Vs Eveready Industries India Ltd., 2017 (357) ELT 11 (All.)

iii. CC, New Delhi Vs Ganesh Trading Co., 2013 (297) ELT 547 (Tri)

18. It was submitted that, if the denial of Cenvat credit is not sustainable, then the interest and penalty are liable to be set aside on this ground alone. The penalty imposed on the Director of the appellant is also liable to be set aside.

19. The learned Authorised Representative appearing on behalf of the respondent, reiterated the findings of the impugned order and submitted that the impugned order passed by the learned Commissioner is a well-reasoned order and requires no interference.

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

21. We find that during the course of search at the factory premises of the appellant neither incriminating documents were recovered nor any shortage/excess of raw materials/finished goods were found by the officers of the anti-evasion. The employees of the appellant in their statements have clearly stated that they have physically received the goods and utilized in the manufacture of their final products.

22. We find that the statement recorded under Section 14 of the Central Excise Act, 1944 cannot be relied upon as evidence unless the provisions of Section 9D of the Central Excise Act, 1944 has been followed as has been held by the judgement passed by the Hon’ble High Court of Chhattisgarh in the case of Hi-Tech Abrasives Ltd. Vs.

CCE&C, Raipur, (supra), which is binding on the Tribunal, in view of the principle of judicial discipline. The Hon'ble High Court held as under:-

> ***"9.5*** *Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating*

officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana.

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Accordingly, on the first and second question of law, we hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 9D of the Act. The two questions of law accordingly, stand answered in that manner"

We further find that the Hon'ble High Court of Punjab and Haryana in the case of G-Tech Industries Vs UOI (supra) and the Larger Bench of this Hon'ble Tribunal in the case of Bhupinder Steel Pvt. Ltd. Vs. CCE, Delhi-IV (supra) has taken the similar view.

In view of the above binding judgements, we find that the adjudicating authority is required to first conduct examination-in-chief of the witnesses whose statement is relied upon by the department and then to form an opinion whether the statements of the witness is admissible in evidence with respect to the facts and circumstances of the case and then only the witness shall be offered for cross-examination. We find that in the present case, since no examination-in-chief has been conducted by the learned adjudicating authority, therefore the statements of witnesses are inadmissible in evidence and are eschewed from evidence by following the judgements as mentioned above.

23. As far as investigation conducted by the department at the end of the transporters, we find that the details of the vehicles have been searched by visiting the website 'www.vahan.nic.in', wherein the 9 vehicle owners have denied the transportation of goods. The learned Counsel for the appellant has argued that, the department has not recorded the statements of these truck owners, however they have received the letter from them which are stereotyped and similarly worded, therefore, no reliance can be placed on them especially when no cross-examination has been allowed by the learned Adjudicating Authority. We agree with the submission of the appellant that these letters written by the truck owners cannot be relied upon inasmuch these are similarly worded which creates doubt with respect to authenticity of these letters. We further find that the cross-examination of these truck owners have also been denied by the learned Adjudicating Authority. The Hon'ble Apex Court in the case of Andaman Timber Industries Vs CCE, Kolkata-II (supra) has held that if cross-examination is not allowed, then the said evidence cannot be relied upon. By following the aforesaid judgement, we find that the said letters cannot be relied upon as evidence. We further find that with respect to certain vehicles which were not found, the said page relied upon by the department clearly shows that one of the possibilities of vehicle not found is, 'vehicles details not digitized by registering authorities', this clearly shows that the department has not made the investigation properly and they should have enquired from the concerned RTO with respect to vehicles. Similarly, with respect to other infirmities like light goods vehicles or insufficient address, the department should have investigated from the concerned RTO to verify the credentials. We also note that, the department has not confronted the aforementioned evidences to the appellant, which further creates doubt about the said half-baked investigation conducted by the department. We therefore find that the investigation conducted at the

end of transporter is not reliable piece of evidence and cannot be used against the appellant as discussed above.

24. We find that the appellant has taken all reasonable steps as mentioned in Rule 9 of the Cenvat Credit Rules. The appellant has produced duty paid invoices under cover of which goods were received in the factory, showing names of manufacturer and supplier thereon and produced weighment slips evidencing receipt of goods. The payments have been made through the banking channels and the goods received have been duly entered into the RG-23 register. The appellant has also paid the Service Tax under Reverse Charge Mechanism on freight expenses incurred by them for transportation of raw materials under the category of GTA and ST-3 returns were also filed. That these raw materials have been used in the manufacture of finished goods and further removed on payment of duty. We further find that there is no evidence adduced by the department to show any flow back of money in the show cause notice. We find that the department is not disputing the fact that these dealers raised invoices giving all particulars required to be given under the provisions of Cenvat Credit Rules in respect of materials supplied to the appellant. We further find that there is no evidence in the show cause notice that goods are not duty paid.

25. The learned Counsel for the appellant brought to our notice and submitted that, during the disputed year i.e. F.Y. 2013-14 and 2014-15, if the case of the department is accepted, then it is not possible to manufacture 20728 MT of finished goods from 9782 MT of raw material, without showing any evidence of alternate source of procurement of raw material. We agree with the said submission of the appellant, there is no evidence in the show cause notice that the appellant has procured the raw material from some other alternate source. We further find that the appellant has paid Central Excise duty of Rs.8.94 crores approximately on its finished goods and certain

goods have also been exported. We find that this clearly shows that the appellant has physically received the goods and utilized in the manufacture of its finished goods.

26. We find that the appellant have discharged its onus as required under Rule 9 of CCR, 2004 and as explained by the Hon'ble High Court of Allahabad in the case of Commissioner of Central Excise and Service Tax Vs Juhi Alloys Limited (supra).

27. It is important to note that the department has neither confronted the statements of dealers nor investigation conducted at the end of the transporters to Shri Shankar Lal Agarwal nor the employees of the appellant, which further weakens the case of the department inasmuch as that they have not put any part of the investigation to the Director and employees of the appellant.

28. The investigation conducted by the department at the end of the transporter by searching the vehicles from the site 'www.vahan.nic.in' is an evidence which cannot be relied upon inasmuch as by the said evidence, the department is fastening the liability against the appellant, especially when the department could have investigated from the concerned State RTO in order to get the details of the truck owners. This exercise has not been done in the present case, thus, the said evidence cannot be relied upon in order to deny the lawful credit availed by the appellant.

29. The department has denied the credit on 912 consignments, out of which the department has allegedly found discrepancy in 285 consignments based on the website www.vahan.nic.in. 234 consignments (involving 9 vehicles) out of the above 285 consignments, on enquiry, the owners of 9 vehicles denied transportation by sending their letters (Annexure L-1 to L-9) to the department. It is very strange to note that, all these 9 letters sent by

the vehicle owners are stereotyped and similarly worded, and cannot be relied upon. These letters relied upon by the department has no evidentiary value. It is further submitted that, no formal statement had been recorded by the department. The appellant also requested for the cross-examination of these persons, however the same has been denied by the learned Commissioner. It is well settled law that, statement has to be eschewed from evidence, if cross-examination is not allowed.

30. It is further submitted that, with respect to 24 consignments, the VAHAN database shows 'no vehicles found', however, on perusal of the said page, it has been written that,

> "………if the vehicle details are not found then it is possible that……………
>
> - Wrongly entered combination of parameters;
> - Vehicle details are not digitized by Registering Authority;
> - Due to Network failure the data may not reach on National Register"

When there is even one possibility that, Vehicle details are not digitized by Registering Authority, then it was necessary for the department to investigate via proper channel i.e. by summoning the officers of the RTO with relevant records or taking records from RTO, which has not been done in the present case. The aforesaid evidences cannot be relied upon as evidence. With respect to the other 27 invoices, wherein department found Light Good vehicles, then they should have also investigated from the concerned RTO, which has not been done in the present case.

31. The allegation of the department with respect to remaining invoices, further letters were issued to remaining transporters as per addresses mentioned in VAHAN database, however the same were returned as 'insufficient address'. No evidence whatsoever has been

relied upon by the department to show whether any letters are sent and moreover, the said allegations of the department proves that the data present on VAHAN website is not reliable and had to be verified from concerned RTO. The department is not disputing that these transporters were truck owners. Denial of Cenvat credit mechanically is not sustainable in the eyes of law.

32. The department is alleging the non-existence of premises of manufacturer/dealers, relying solely upon the alert circulars issued by the different Commissionerates. In the present case, the department has neither relied upon nor stated in the SCN about the Panchnama drawn at the concerned premises. If the said evidences have not been relied upon, then there is no material for the appellant to controvert the same, which is in clear violation of the principle of natural justice. It is well settled law that, merely on the basis of alert circulars, it cannot be said that particular premises are non-existent. There is no dispute that, these manufacturer had issued the invoices and paid the Central Excise duty to the exchequer, on which Cenvat credit has been taken by the appellant, thus causing no loss to the exchequer, therefore, the Cenvat credit has been rightly availed by the appellant. When the department is accepting the duty then it cannot be said that they are non-existent.

33. The appellant has taken all reasonable steps as mentioned in Rule 9 of the Cenvat Credit Rules, therefore, the denial of Cenvat credit is wrong and liable to be set aside. The appellant assessee produced duty paid invoices under cover of which goods were received in the factory, showing names of manufacturer and supplier thereon and weighment slips produced evidencing receipt of goods and further all payments have been made through the banking channels and the goods received have been duly entered into the RG-23 register. The appellant has also paid the Service Tax under RCM on freight expenses incurred by them for transportation of raw materials under the category of GTA and ST-3

returns were also filed. We find that there is neither allegations nor evidence for flow back of money. This clearly shows that, the appellant has taken all reasonable precautions as prescribed in the Cenvat Credit Rules. There is no ground to doubt that these raw materials have been used in the manufacture of finished goods and further removed on payment of duty.

34. The department has not investigated at the end of the broker also, inasmuch as they have also not discharged the burden of proof. The department is duty bound to investigate and bring on record cogent and positive evidence, which is absent in the present case.

35. The appellant relied upon the following judgements to support their case:-

(i) CCE, Kanpur Vs. Juhi Alloys
[2013 (296) ELT 533 (Tri-Del.)]
(ii) CCE, Kanpur Vs. Juhi Alloys
[2014 (302) ELT 487 (All.)]
(iii) Nidhi Metal Auto Component Pv.Ltd. Vs. CCE, Delhi-IV
[2016 (343) ELT 576 (Tri-Del.)]
(iv) Ashok Sharma & Ors. Vs. CCE, Raipur
[2019-TIOL-3405-CESTAT-DEL]
(v) CCE Vs. Tata Motors Ltd.
[2013 (294) ELT 394 (Jhar.)]

36. It is further submitted that, merely deposit of money at the time of investigation would not amount to acceptance of any allegations as mentioned in the SCN. It is well settled law that, payment of money at the time of investigation would be treated as a deposit under protest. The appellant relied upon the following judgements to support their contention:-

(i) Bayshore Glass Trading Pvt.Ltd. Vs. CC, Kolkata
[2002 (148) ELT 1243 (Tri.-Kol.)]
(ii) CCE, Lucknow Vs. Eveready Industries India Ltd.
[2017 (357) ELT 11(All.)]
(iii) CC, New Delhi Vs. Ganesh Trading Co.
[2013 (297) ELT 547 (Tri)]

37. In view of the above, the impugned order cannot be sustained and is accordingly set aside. The appeal filed by the appellant is allowed with consequential relief as per law.

38. We further note that, since we have allowed the appeal of the appellant-company on merits of the case with consequential relief, then penalty on Sh. Shankar Lal Agarwal (Director of the company) cannot be sustained.

(Order pronounced in the open court on 16 December 2020.)

SD/

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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