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

Excise Appeal No.78555 of 2018

(Arising out of Order-in-Original No.06/MP/Commr/2018 dated 19.06.2018 passed by Commissioner of CGST & Excise, Patna II)

M/s Garg Rerollers Pvt. Ltd.
B/35-38,Industrial Area, Hajipur, Dist.-Vaishali (Bihar)-844101

Appellant

VERSUS

Commissioner of CGST & Excise, Patna
C.R.Building (Annexe), B.C.Patel Path, Patna-800001

Respondent

WITH

Excise Appeal No.78556 of 2018

(Arising out of Order-in-Original No.06/MP/Commr/2018 dated 19.06.2018 passed by Commissioner of CGST & Excise, Patna II)

Shri Sudhir Kumar Garg, Director of M/s Garg Rerollers Pvt. Ltd.
B/35-38,Industrial Area, Hajipur, Dist.-Vaishali (Bihar)-844101

Appellant

VERSUS

Commissioner of CGST & Excise, Patna
C.R.Building (Annexe), B.C.Patel Path, Patna-800001

Respondent

Appearance:
S/Shri Hariom Tiwari & Amit Awasthi, both Advocates for the Appellant
Shri K.Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI RAJU, TECHNICAL MEMBER

FINAL ORDER NO.75862-75863/2021

DATE OF E-HEARING : 25.08.2021
DATE OF PRONOUNCEMENT : 21 DECEMBER 2021

Per P.K.Choudhary :

1. Appellant No.1, M/s Garg Rerollers Pvt. Ltd. and the Appellant No. 2, Shri Sudhir Kumar Garg, the then Director of M/s Garg Rerollers Pvt. Ltd. have filed appeals against the order in original number 06/M.P./Comm./2018 dated 19.06.2018 issued vide C. No. V(15)06-Adjn/2016/2046 dated 20.06.2018 passed by the Commissioner, CGST and Central Excise, Patna- II Commissionerate, Patna.

2. Briefly stated, the facts of the case are that on the basis of specific information received and developed by the Officers of DGCEI, regional unit, Jamshedpur, the Officers conducted search at the factory of the Appellant No.1 at B/35-38, Industrial Area, Hajipur, Distt: Vaishali – 844 101 (Bihar) and also at the premises situated at 212 Second floor, Ashiana Tower, Exhibition Road, Patna.(Which is being referred to as the '*secret office*' of the Appellant no.1). Apart from these two places, the residence of the Appellant No. 2, Shri Sudhir Kumar Garg director of M/s Garg Rerollers Pvt. Ltd. was also searched. All these three searches were conducted simultaneously on 24.07.2013. During search of the above mentioned three premises on 24.07.2013, the Officers recovered and seized loose handwritten sheets of paper, Loose slips, Spiral pocket notebooks/notepads, *Kaacha Register,* Petty cash sheet/Private cash registers etc. On the day of search i.e on 24.07.2013, statement of Sri Vijay Kumar Sinha and Sri Prabhat Kumar Singh, both employees of the said Garg Rerollers Pvt. Ltd. and of Shri Sudhir Kumar Garg, Director of the company were recorded. A further statement of Shri Sudhir Kumar Garg was also recorded on 29.07.2015. After examining the said private records recovered and seized from the said three premises, a Show Cause cum demand notice was issued to both the appellants vide DGCEI F. No. 123/KZU/KOL/JRU/Gr-F/15/6497 dated 15.12.2017. By the said show cause notice, the appellant No. 1 M/s Garg Rerollers Pvt. Ltd was asked to show cause as to why an amount of Rupees 3,92,46,461 as detailed in annexure Q should not be demanded and recovered from them by invoking the extended period of limitation

under sub section (4) of section 11A of the Central Excise Act, 1944 and Rs. 25 lakhs deposited during investigation as detailed in Para 3.2.3 of the show cause notice, should not be appropriated against the duty demanded along with interest in terms of section 11AA of the Central Excise Act 1944. The Appellant No.1 was also asked as to why penalty should not be imposed on them under section 11AC(1)(c) of Central Excise Act 1944 read with rule 25 of the Central Excise Rules 2002 for wilful misstatement, suppression of facts and contravention of the statutory provisions with intent to evade payment of Central Excise duty. Shri Sudhir Kumar Garg being the noticee No.2 (Appellant No.2 herein) was also called upon to show cause separately as to why penalty should not be imposed upon him under Rule 26 of the Central Excise Rules, 2002.

3. That the Appellant No.1 is engaged in the manufacture of MS bars and rods, MS angles, MS flats, MS rolls and rolling waste classifiable under chapter 72 of Central Excise Tariff Act, at their factory situated at B/35-38, Industrial Area, Hajipur, Distt: Vaishali – 844 101 (Bihar).

4. The learned Commissioner CGST and Central Excise, Patna II. being the Adjudicating Authority passed the impugned order by which he confirmed the demand of Central Excise duty of Rs. 3,92,46,461 under section 11A of Central Excise Act 1944 on the Appellant No.1. He also ordered for appropriation of Rs 25 lakhs which was deposited by the appellant No.1 during the enquiry. He also confirmed the demand of interest under section 11AB of the Central Excise Act and imposed a penalty of Rs. 3,92,46,461 under section 11AC of the Central Excise Act 1944 on the Appellant No.1. A further penalty of Rs. 1 (one) Crore has been imposed upon the appellant No. 2 under Rule 26 of Central Excise Rules 2002. Hence, the present appeals before the Tribunal.

5. We have heard the learned Advocate appearing for Appellant No. 1 and No.2 and the learned DR on behalf of the Respondent through video conferencing and perused the appeal records and the various paper books filed by the Appellant Company. We have also examined the written Submissions filed by the Appellants and by the Revenue.

6. We find that the demand has been raised for alleged clandestine removal of the finished excisable goods from the factory of the Appellant No.1 for the period 18.12.2011 to 31.08.2012 and from 01.10.2012 to 23.07.2013. Physical stock verification was done at the factory of the Appellant No.1 on the day of search i.e on 24.07.2013. From the records we also find that during the relevant period the Appellant No. 1, as per the allegations in the show cause notice and the confirmation thereof by the learned adjudicating authority, removed 9,924.836 MT of Finished excisable goods i.e MS bars and rods, MS angles, MS flats, MS rolls and 354.665 MT of rolling waste clandestinely by way of wilful misstatement and suppression of facts and on such grounds the demand of duty of Rs. 3,92,46,461 has been confirmed by the Impugned order.

7. From the show cause notice and the impugned order dated 19.06.2018, we observe that the entire plank of the case rests on the private loose documents/ Papers which were recovered and seized during searches on 24.07.2013 and the statements of Sri Vijay Kumar Sinha, Sri Prabhat Kumar Singh (both being employees of Appellant no.1) and Shri Sudhir Kumar Garg Appellant no. 2. It is an admitted position that the premises of Alok Raj Associates located at 212, Ashiana Tower, Exibition Road, Patna which is being referred to by the department as the 'secret office' of Appellant no.1, belongs to Shri Alok Chaudhary. Private documents were recovered and seized from this premises, but no statement of Shri Alok Chaudhary was recorded either on 24.07.2013 or at any point of time subsequent to the search. The Department simply relied upon the Panchnama drawn, which was only record of the proceedings and the Appellants have challenged, all the respective Draws of Proceedings, on the ground of maintainability. There is nothing on record to suggest or indicate that attempts were made to record the statement of the said Shri Alok Chaudhary who was available.

8. It is brought to our notice that the investigation did not travel beyond searches and recording of statements and examination of the private documents/papers which are all unsigned and nowhere contains the name of the Appellant Company. The department has defended their position by relying upon the statements and examination of the private documents/papers.

9. From the discussion on seized documents in paragraph 4.1.1, 4.1.2, 4.2.1, 4.2.2, 4.3.1, of the show cause notice, it is observed that certain figures, amounts, vehicle numbers, names of some companies/ persons appear on the photocopies of seized private documents. It is also observed that from all these handwritten pages, it is impossible to form any concrete idea about the alleged clandestine removals with description of finished excisable goods.

10. Although these documents contain verifiable clues, no attempts appear to have been made to make inquiries with the persons whose names appear on them. No inquiries appear to have been made with regards to the vehicle numbers featuring on them. No transporter was called to affirm the quantity and the description of the goods transported by the vehicle numbers found mentioned on those private documents. In fact, an in-depth investigation with regard to the private documents was required as constituting sufficient evidences to lend support to the claim of the department that there were clandestine removals of finished excisable goods and also to substantiate with the help of those evidence the statements of Shri Garg and others. The appellants requested for cross-examination of all those persons whose statements were recorded as well as the Panchas, which were relied upon by the Revenue. However, none of them could be presented by the Revenue for cross examination by the appellants. In this respect we find that the learned Adjudicating authority has held that if sufficient corroborative evidences exist, then cross examination of the deponent of the statements is not necessary and he placed his reliance on the judgement of the Hon'ble High Court of Bombay in the case of **Sharad Ramdas Sangle [2017(347)ELT 413 (Bom.)]** wherein it was, *inter alia*, held that –

> "*It is seen from the records that the entries made in the private accounts where corroborated by Shri Ramdas ShivramSangle, Director of the appellant firm and Shri Sharad Ramdas Sangle, Proprietor of M/s Ambica Scrap Merchant through whom clandestinely remove goods were sold, wherein they had admitted that the entries recorded are true and correct and pertain to the unaccounted production, purchase of raw materials without accounting and sale of finished goods in cash without payment of duty. Further, from the records it is seen that about 16 buyers (referred to in para 11.13 of the impugned order), who purchased the finished goods from the appellants without payment of duty have also confirmed that they had received these goods without the cover of proper excise documentation and without payment of duty. Similarly, two scrap suppliers, Mr. Yunus Ahmed Shaikh and Mr. Shaikh Mushtaq Gulab have also admitted that they supply the MS scrap which is the raw material for the manufacture of these goods without the cover of documents and they have received considerations for sale of such scrap in cash*."

From this case it is seen that investigation had travelled beyond recording of statements and the documents under seizure. In this referred case we find that there is corroboration in the form of statements of other relevant persons who are recipients and suppliers. But this kind of corroboration, we are constrained to hold, is completely absent here. Therefore according to us, the learned adjudicating authority holding that cross examination was not necessary is not correct.

11. Shri Vijay Kumar Sinha, an employee of the Appellant No.1 joined the company only a few days before the day of search. He was also not the author of the seized private documents. Likewise, Shri Prabhat Kumar Singh another employee of appellant no. 1 was also not the author of the said seized documents. It is the submission of

the appellants that Shri Sudhir Kumar Garg merely described the nature of entries in the seized private document shown to him and given his subjective personal opinion in response to questions which were put to him. It is on record that both the appellants have in there replies to the SCN strongly contested the presumptive inferences which were drawn from the private records by the department. The appellants also opposed the allegations, made against them on the basis of such inferences. The appellants had relied upon the judgement dated 04.10.2010, passed by the Hon'ble High Court of Delhi in the case of Commissioner of Income Tax vs M/s Dhingra Metal Works, in para 15 of which it has been held that

> *"In any event, It is settled law that though an admission is extremely important peace of evidence, it cannot be said to be conclusive and it is open to the person who has made the admission to show that it is incorrect."*

Further reliance has been made by the appellant on the Final Order numbers 1419-1421/2012-SM(BR)(BP), dated 04.10.2012 passed by the Tribunal in the case of Vikram Cement(P) Ltd. Vs Commissioner of Central Excise Kanpur 2012 (286) E.L.T. 615 (Tri. – Del.). Upheld by Hon'ble High Court of Judicature at Allahabad in the said case it has been inter alia held that:

> *"8. As regards clandestine removal, Revenue's case is based upon recovery of some loose sheets during the course of search of the Factory. I have seen the said loose papers which are relied upon documents in the show cause notice. On going through the said loose documents, I find that there is no indication to show that the same belong to cement. Revenue has taken into consideration the statement of director, which is to the effect that number of bags, figures reflected in the said loose paper. Relate to the cement which stand cleared by them clandestinely.*
>
> *9. The issue required to be decided is as to whether the said statement alone can be made the basis for arriving at the finding of clandestine removal. What is evidentiary value of the said statement in the absence of other corroborative evidence on*

record. The Hon'ble Delhi High court in a recent judgement in the case of Commissioner of Income Tax verses Dhingra Metal Works has considered the evidentiary value of the statement of director given at the time of search of the factory, sought to be relied upon by the revenue. While examining the evidentiary value of the said statement in the absence of any other evidence, the Hon'ble High Court observed that it is settled law though the admission is extremely important piece of admission it can not be said to be conclusive, and it is open to the person who has made the admission to show that this is incorrect… Clandestine removal cannot be presumed nearly because there was shortage of stock or on the recovery of some loose papers.

10. As such I am of the view that the statement, which was recorded on the date of visit of the officers cannot, when standing alone, take the place of evidence…

11. Apart from the above, I note that the truck numbers as also complete name of the purchases was duly mentioned in the said loose papers. For the reason best known to the revenue, they have made no efforts to go to the transporters, truck drivers etc. and to the buyers to arrive at the truth. In majority decision in the case of Tejal dyestuff Industries as reported in 2007 (216) E.L.T.310 (Tri). Tribunal held that the revenue can not make it case on the basis of statement alone in the absence of any independent evidence to corroborate. The said decision was confirmed by the honorable high court of Gujrat as reported in 2009 (234) E.L.T. 242 (Guj), when the appeal filed by their revenue was dismissed. Further, Tribunal in the case of CCE v. LuxmiEngineeirng as reported in 2001 (134) E.L.T. 811 (Tri-Del.), has held that there being no corroborating evidence in the form of receipt of raw materials or sale of final products to each buyer, the allegation of clandestine removal cannot be upheld. The said decision was upheld by Hon'ble High court of Punjab and Haryana as reported in 2010 (254) E.L.T. 205 (P&H), laying down that even if some records recovered during raid and *corroborated by some supportable evidence for attempt of clandestine production and removal, it is necessary two have some positive evidence of clandestine production and removal.*

12. Learned AR has not been able to explain the half-hearted exhibition of the revenue to establish their case on the basis on statements alone and without undertaking further investigation.

13. Plethora of judgements have held that it is for the Revenue to establish the case of clandestine removal by production of concretes and tangible evidence. I find that apart from loose paper, which in the face of it cannot be related to the appellants business accounts and the sole statement of the director, there is no other evidence to reflect upon the clandestine activities of the appellants. The appellants have also taken stand that it is beyond their capacity to manufacture more than 1000 MT tons per month and as such the revenues allegations that they cleared more quantity in the month of February 2004 must be taken with the pinch of salt.

In the view of the forgoing discussion, I set aside the confirmation of demand against the appellant and in position of penalties upon them."

The Appellant submitted their defence contentions in reply to the allegations in Show cause notice in Paragraph 5.0 of their written submissions filed before this bench.

12. We find that the above-mentioned Judgements and orders squarely cover the case of the appellants herein. We observe that no positive independent tangible evidence have been produced by the Revenue to substantiate the statements recorded during investigation and the entries made in the private documents which are undoubtedly unsigned, bearing no indication in any form that they relate to the appellant No.1. Revenue's contentions that reliance has been correctly placed on the statements and on the loose private documents/papers

does not cut the ice, in the light of the above mentioned decision of the High Court and the Tribunal.

13. Going by the statements, it is found that the name of Shri Umesh Kumar has surfaced, to be the person behind writings on the loose private documents/papers under seizure. It is not the case that the said person Shri Umesh Kumar was not available for recording his statement. But no attempts appear to have been made to record the statement of the said Shri Umesh Kumar. No investigation has been directed to find out the author of the unsigned handwritten loose private documents/papers under seizure. It is not explained us to why the Revenue had not gone full throttle in their investigation to collect independent corroborative tangible evidences in their endeavour to support the statements as well as the loose unsigned handwritten private documents/papers. As we find, specific description of the finished excisable goods alleged to have been clandestinely removed are also not found mentioned on the unsigned handwritten loose private records/documents, and as a result of which the amount of duty alleged to have been evaded and confirmed by the impugned order appears to be vague, in the realm of conjecture.

14. We find that the summons was issued for the first time on 31.01.2018 to said Shri Alok Chaudhary proprietor of M/s Alok Raj Associates Patna, whose premises was searched on 24.07.2013 by the Officers, which goes to establish that summon was issued to him after about 4 and a half years of search of his premises and that too when his cross examination was sought. Shri Alok Chaudhary filed an Affidavit dated 31.01.2018 which it is found, goes to support the contention and arguments made by the appellants regarding the illegality of the search and the panchnama proceedings. The appellants have made elaborate submissions on the illegality of search and panchnama proceedings. Although there is merit in their submissions but at the same time, we cannot brush aside the fact of seizures of private loose documents/papers.

15. The Appellants strongly relied upon the Judgement of Hon'ble Delhi High Court in Flevel International v/s CCE reported in 2016(332) ELT416 (DEL) which has relied upon the landmark decision of the Tribunal in the case of Arya Fibres Pvt Ltd. V/s CCE reported in 2014 (311) ELT 529(T). The Legal position has been summarized as under –

"(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;

(ii) Evidence in support thereof should be of :

(a) raw materials, in excess of that contained as per the statutory records;

(b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;

(c) discovery of such finished goods outside the factory;

(d) instances of sale of such goods to identified parties;

(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) statements of buyers with some details of illicit manufacture and clearance;

(h) proof of actual transportation of goods, cleared without payment of duty;

(i) links between the documents recovered during the search and activities being carried on in the factory of production; etc."

16. Taking into consideration the allegation regarding suppression of production and clandestine removal of 10279.501 MT of finished excisable goods are true, then it is obvious that for manufacture of aforesaid quantity of finished excisable goods, the appellant would have required to procure and consume commensurate quantity of raw-materials viz. Coal; -MS Ingots; -MS Rolls, Electricity, Man Power. There is also no positive, factually and legally sustainable evidence of

purchase of MS Ingots/MS Rolls and other raw materials in excess of those accounted for in the regular/statutory books of accounts. The appellants have taken us through the documents on record proving that No enquires whatsoever have been conducted with any of the supplies of the raw-materials who are alleged to have sold such raw-materials to the Appellant, Nor is there any evidence of excess consumption of electricity and coal used in rolling mill and reheating furnace mandatorily required for manufacture of rerolled products. The following decisions squarely cover the facts of the present case : –

i) Mohan Steel v/s. CCE, Kanpur
- 2004 (177) ELT 668 (Tri. – Del.)

(ii) Auto Gallan Industries (P) Ltd. v/s. CCE, Rohtak
- 2015 (317) ELT 139 (Tri. – Del.)

(iii) Amba Cement & Chemicals v/s. Collector
- 2000 (115) ELT 502 (Tri.)

(iv) Balashri Metals Pvt. Ltd. v/s. UOI
- 2017 (345) ELT 147 (Jhar H.C.)

(v) Triveni Rubber & Plastics v/s. CCE
- 1994 (73) ELT 7 (SC)

(vi) Galaxy Indo Fab v/s. CCE, Lucknow
- 2010 (258) ELT 254 (Tri. – Del.)

(vii) CCE, Chandigarh v/s. Dashmesh Castings (P) Ltd.
- 2010 (257) ELT 225 (P & H)

17. Taking a composite view of all the evidence on record including the case laws referred to and relied upon by the appellants as well as the Revenue, and on a careful evaluation of the submissions and arguments put forth by both the sides, we feel inclined to hold that the Revenue has failed to discharge the burden to prove the case of clandestine removals of finished excisable goods by the appellants

beyond doubt by collecting and producing independent corroborative tangible evidences to sustain their claim/findings.

18. In view of the above observations, we set aside the impugned order and allow both the appeals with consequential relief to the Appellants.

(Pronounced in the open court on **21.12.2021**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(Raju)
Member (Technical)

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