

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76522 of 2014

(Arising out of Order-in-Original No.22/MP/Ayukta/2014 dated 24.07.2014 passed by Commissioner of Central Excise & Service Tax, Patna.)

Commissioner of Central Excise, Patna

(C.R. Building, Bir Chand Patel Path, Patna-800001, Bihar.)

...Appellant

VERSUS

M/s. Dadiji Steel Limited

(Exhibition Road, Patna, Bihar.)

.....Respondent

APPEARANCE

Shri K.Chowdhury, Authorized Representative for the Revenue
Shri Ankit Kanodia, Advocate for the Respondent

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

FINAL ORDER NO. 75868/2023

DATE OF HEARING : 27 June 2023
DATE OF DECISION : 28 June 2023

Per : P.K. CHOUDHARY :

The present appeal has been filed by the department against the Order-in-Original No. 22/MP/Ayukta/2014 dated 24/07/2014 passed by the Commissioner of Central Excise, Patna Commissionerate by which the demand of Excise duty amounting to Rs. 13,35,39,859/- was dropped by the Ld. Adjudicating authority. The brief facts of the case are that an intelligence was developed by the officers of the DGCEI (Hqrs.) that one M/s. Kamdhenu Ispat Limited, Bhiwandi, Alwar, Rajasthan ('M/s. KIL') of which the Respondent herein is one of the franchisees for manufacture of "Kamdhenu" brand of the iron and steel products, searches were conducted in the premises of M/s. KIL on 12.11.2008, which resulted in recovery of various incriminating

records showing evasion of service tax and excise duty. Based on the above investigation at the premises of M/s KIL, searches were conducted by the Anti Evasion wing of the Central Excise Department on 15.02.2013 at the Respondent's premises and statements were also recorded by the visiting team of officers of various executives and directors of the Respondent. After the investigation, it was alleged by the department since a demand has been raised and confirmed by the department on M/s. KIL for evasion of service tax on royalty received from various franchisees, including the Respondent for the period April 2008 to August 2008, it is inevitable that the Respondent has also clandestinely manufactured and sold goods to M/s. KIL without accounting for the same and accordingly a Show cause cum demand notice dated 08.04.2013 (hereinafter referred to as 'SCN') was issued to the Respondent alleging evasion of excise duty of an amount of Rs. 13,35,39,859/- along with interest and equivalent penalty under section 11AC of the Central Excise Act, 1944 as per calculation annexed to the said SCN along with proposal to impose personal penalty under Rule 26 of the Central Excise Rules, 2002 on Mr. Ramesh Chandra Gupta, Managing Director, Shri Prasant Joshi, Senior Manager and Shri Shashi Bhushan Singh, Accountant of the Respondent.

2. The said SCN was adjudicated by the Ld. Adjudicating authority and after perusal of the entire records, the Order-in-Original No. 22/M.P./Ayukta/2014 dated 24/07/2014 was passed by the Ld. Commissioner, Central Excise and Service Tax, Patna Commissionerate by which the Ld. Adjudicating Authority dropped the entire demand as proposed in the SCN by passing an order on all the allegations raised in the SCN and thus exonerated the Respondents and its directors and authorized representatives from all demand of duty, interest and penalty. Being aggrieved by the above order dated 24.07.2014, the department is in appeal before us.

3. The Ld. DR appearing for the revenue department contended that the order of the adjudicating authority is not tenable for reasons stated in the grounds of appeal and thus the order should be reversed.

4. The Ld. Advocate appearing for the respondent argued that the order passed by the Ld. Adjudicating authority is a reasoned and speaking order and thus it calls for no interference. He further submitted that the demand has been raised on the assumption that the Respondent would have clandestinely manufactured and removed the goods on the basis of service tax demand on royalty received by KIL from various parties. He further submitted that the allegation of clandestine manufacture and removal of goods on the ground that the report of the GEDQ based on which the present SCN has been issued is itself in dispute as the Tribunal vide order dated 02.04.2018 had remanded the matter to the adjudicating authority as the data from the seized Laptops & other devices were possibly manipulated in the office of the investigating agency i.e. DGECI, the investigating agency and thus the officials of GEQD had to be examined. He further stated that the entire demand is based on investigation of KIL which itself is in dispute and thus no demand can be confirmed against the Respondent and the adjudicating authority has rightly dropped the entire demand. He relied on the judgment of the Tribunal as affirmed by the Hon'ble High Court in the case of *ASHUTOSH METAL INDUSTRIES Versus COMMISSIONER OF C. EX. & S.T., DELHI 2018 (15) G.S.T.L. 384 (Tri. - Del.)* and *2019 (366) E.L.T. 1019 (Del.)* in his support.

5. Further, the Respondents also contended that is a settled proposition under the excise laws that clandestine removal cannot be provided based on assumptions and presumptions. In this regard, the Respondent relied upon the following judicial pronouncements:

- A. Ambica Iron & Steel Private Limited Vs. Commissioner of Central Excise, Customs & Service Tax, Rourkela, MANU/CK/0059/2021 – CESTAT, Kolkata
- B. Garg Rerollers Pvt. Ltd. and Ors. Vs. Commissioner of CGST & Excise, Patna, MANU/CK/0061/2021– CESTAT, Kolkata
- C. Mohan Steel vs. CCE, Kanpur - MANU/CE/0751/2004 : 2004 (177) ELT 668 (Tri. - Del.)
- D. Auto Gallan Industries (P) Ltd. vs. CCE, Rohtak - MANU/CE/0666/2014 : 2015 (317) ELT 139 (Tri. - Del.)
- E. Amba Cement & Chemicals vs. Collector - MANU/CE/0804/1999 : 2000 (115) ELT 502 (Tri.)
- F. Balashri Metals Pvt. Ltd. vs. UOI - 2017 (345) ELT 147 (Jhar H.C.) (v)
- G. Triveni Rubber & Plastics vs. CCE - MANU/SC/0309/1994 : 1994 (73) ELT 7 (SC)
- H. Galaxy Indo Fab vs. CCE, Lucknow - MANU/CE/0357/2010 : 2010 (258) ELT 254 (Tri. - Del.)
- I. CCE, Chandigarh vs. Dashmesh Castings (P) Ltd. - MANU/PH/2014/2010 : 2010 (257) ELT 225 (P & H)
- J. Flevel International vs. CCE reported in MANU/DE/2747/2015 : 2016 (332) ELT 416 (DEL)

6. Heard both sides and perused the appeal records.

7. The present appeal by the revenue is on the ground that the Ld. Adjudicating authority erred in accepting the contention of the Respondent that the data retrieved by GEQD is not admissible as evidence against the Respondent as the condition laid down by sub-

section (2) of section 36B of the Central Excise Act, 1944 was not fulfilled as also the fraudulent character of the Respondent even when there was a shortage of 20.798 MT of MS Ingot found during physical verification on 15.02.2013.

8. We find that the report of GEQD itself has been disputed on allegations of manipulation as per the order of the Tribunal dated 02/04/2018 (*supra*). The Tribunal had remarked as below:

"The veracity of retrieved data as contained in profit and loss accounts cannot be relied upon as the Laptop/Computer/CPU has been accessed after sealing of the same. Further, the validity of retrieved data is doubtful, as the file based upon which demand has been raised was created on 12.11.2008 at 20:45:13 hrs and entries were modified on 13.11.2008 at 1:11:45 and last accessed on 13.11.2008 at 1:41:09 hrs i.e. after the time the seized Laptops/Computers were claimed to be resealed and lying unattended in the possession of DGCEI."

Thus, in the present case the departments case doesn't have any merits as the report itself being in dispute, no reliance can be made on the same to confirm the demand on the Respondent herein.

9. We further note that the Ld. Adjudicating authority on the issue of admissibility of the report under section 36B of the central Excise act, 1944 had discussed as below in the OIO:

"From the above, it is manifest that Section 36B of the Act stipulates that a statement contained in a document and included in a printed material produced by a computer (computer printout) shall be deemed to be a document for the purpose of the Act and Rules made thereunder and shall be admissible in any proceedings thereunder, if the conditions mentioned in sub-section (2) and the other provisions contained in this Section are satisfied in relation to the statement and the computer in question. Further Section 36B(2)(a) of the Act provides the conditions with respect to the computer printouts that the computer printout containing the statement has to be produced by the computer during the period over which the computer was used

regularly to store pr process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer. As the noticee no.- 1 and their officials had no lawful and/or administrative control over the use of the computers, pen drives and laptops etc. recovered from the premises at J- 1200 and other premises of KIL during search made on 12.11.2008 by the officers of DGCEI, the conditions provided under Section 36B(2)(a) of the Act are not fulfilled.

64.....Earlier on this issue Show Cause Notices were issued to various assesseees of this Commissionerate namely M/s KamperConcast Limited, M/s. JagdambaIspat (P) Limited and M/s.Venky Steels (P) Limited which were decided in their favour by the then Commissioner of Central Excise & Service Tax, Patna vide his order-in-original nos. 03-06/MP/Commr./2011 dt.08.03.2011, 07-10/MP/Commr./2011 dt.09.03.2011 and 12-14/MP/Commr./2011 dt.14.03.2011, respectively. In the case of M/s KamperConcast Limited, during the material period, the consumption of electricity for the manufacture of one MT of MS Ingot was 2307.79 units. In this case, the then Commissioner, Central Excise & Service Tax, Patna in his Order-in Original no.03-06/MP/Commr./2011 dt.08.03.2011 held as under65. Thereafter the then Commissioner, Central Excise & Service Tax, Patna has placed his reliance on the decision of the Hon'ble CESTAT in the case of R.A.CastingPvt Ltd. reported in (2005) 237 ELT 674 and U.P.Alloys (P) Limited reported at 198/2009-SM(BR) dated 20.02.2009 and dropped the demand by holding that demand is based upon resumption and assumption hence, not maintainable. As these orders stand accepted by the Department therefore, the issue has attained finality. Moreover, it is well settled law that for the corroboration of clandestine manufacture and sale of iron & steel products, the excess consumption of electricity vis-a-vis the reference level cannot be considered as concrete and forceful evidence in absence of other valid, verifiable and cohesive evidence. "

10. We find that no attempt has been made by the revenue to counter such findings of the adjudicating authority and thus we are to accept the view taken by the Ld. Adjudicating authority.

11. Further, the deficient quantity of 20.798 MT of MS Ingot cannot be considered as concrete Circumstantial evidence in regard to allegation of huge evasion of Central Excise duty by resorting to clandestine manufacture and sale of 35948.0799 MT of MS Bars & Rods by the Respondent. It is a settled proposition that demand cannot be raised on assumptions and presumptions in cases of clandestine removal.

12. In view of the above discussions, we do not find any infirmities in the impugned order and hence the same is sustained. Accordingly, the appeal is dismissed.

(Order pronounced in the open court on 28 June 2023.)

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

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)