IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

(1) Excise Appeal No.634 of 2012
(On behalf of Appellant)

(Arising out of Order-in-Original No.21-24/Commr/Bol/12 dated 22.05.2012 passed by Commissioner of Central Excise, Bolpur)

M/s Sen Ferro Alloys Private Limited
Vill-Dejudi, P.O.-Unra Jambedia, P.S.-Barjora, Dist.-Bankura, Pin-722202

Appellant

VERSUS

Commissioner of CGST & Excise,Bolpur
Nanoor Chandidas Road, Bolpur,SIAN, Dist.-Birbhum, Pin-731204

Respondent

WITH

(2) Excise Appeal No.635 of 2012
(On behalf of Appellant)

(Arising out of Order-in-Original No.21-24/Commr/Bol/12 dated 22.05.2012 passed by Commissioner of Central Excise, Bolpur)

Shri Bijoy Kumar Bhalotia, Director of M/s Sen Ferro Alloys Private Limited
Vill.-Dejudi, P.O.-Unra Jambedia, P.S.-Barjora, Dist.-Bankura, Pin-722202

Appellant

VERSUS

Commissioner of CGST & Excise,Bolpur
Nanoor Chandidas Road, Bolpur,SIAN, Dist.-Birbhum, Pin-731204

Respondent

AND

(3) Excise Appeal No.636 of 2012 (Shri Swapan Kumar Sen)
(4) Excise Appeal No.637 of 2012 (Shri Partha Banerjee)

APPERANCE :

Shri N.K.Chowdhury, Advocate for the Appellant
Shri S.Mukhopadhyay, Authorised Representative for the Respondent

***Excsie* Appeal No.634,635,636 & 637/12**

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO……76205-76208/2023

DATE OF HEARING : 03 .07.2023

DATE OF PRONOUNCEMENT : **27 JULY 2023**

Per Ashok Jindal :

The appellants are in appeal against the impugned order demanding duty along with interest and imposing penalties alleging that the appellants are involved in the activity of clandestine removal of goods.

2. The facts of the case are that on 12.05.2010, a search was conducted in the factory as well as the office premises of the appellant and the office premises of one M/s Sen Brothers Enterprises. During visit, some private as well as statutory records were recovered and seized. During search, allegedly a chit showing clearance of the goods of Sponge Iron during the period from January, 2009 to December 2009 was recovered from one Shri Partha Banerjee, General Manager of the Appellant Company. From the Chit, it was inferred that a quantity of 2017.625 MT of Sponge Iron clearing without payment of duty of Rs.19,85,355/-. Stock verification was also done for raw material and it was found that there is shortage of 7664.786 MT of Iron Ore. Statement of Shri Partha Banerjee, General Manager of the Appellant Company was recorded and agreed with the said clearance of 2017.625 MT of Sponge Iron. During search of the Office premises of M/s Sen Brothers Enterprises, some private documents were recovered and

seized. Statement of Shri Sisir Mondal, Employee of M/s Sen Brothers Enterprises was recorded and he stated that the documents seized were related to the appellant and were prepared for keeping records.

2.1 On 08.07.2010, the statement of Shri Swapan Kumar Sen, employee of M/s Sen Brothers Enterprises and Ex-Director of the appellant, was recorded.

2.2 On 11.10.2010, the statement of Shri Bijoy Kumar Bhalotia, Director of the Appellant Company was also recorded, who expressed his inability to answers the questions without consulting the verification of records.

2.3 From the records recovered from the premises of M/s Sen Brothers Enterprises, it was allegedly found that the appellant has maintained records of clearance for a particular period giving details of the Party's name, dates, vehicle numbers, reflecting clearance of the goods. It was further alleged that there were records showing maintenance of receipts and payments and income and expenditure for some payments. The Officers of the Department prepared a statement showing consumption of electricity for manufacture of sponge iron. The iron ore received were ascertained from the Railway Authorities.

2.4 On the basis of the above investigation, a show-cause notice was issued to the appellant on 06.05.2011 alleging clandestine clearance of 2017.625 MT of Sponge Iron on the basis of Chit records from Shri Partha Banerjee and clearance of 27653.657 MT of Sponge Iron on the basis of documents recovered from the premises of M/s Sen Brothers Enterprises and proposed for recovery of demand of duty amounting to

Rs.6,28,08,613/-. The appellant contested the show-cause notice and the adjudicating authority after considering the reply filed by the appellants, confirmed the demand as proposed in the show-cause notice against the appellant and imposed penalties on the appellants.

3.5 Aggrieved from the said order, the appellants are before us.

3. The ld.Counsel appearing on behalf of the appellants, submits that the show-cause notice was pre-judged and Recovery of chit and clearance of the goods mentioned therein has not been established. He also submits that the alleged shortage of raw-material is on the basis of eye estimation and without considering of submissions has not been successfully established by the Ld. Adjudicating Authority. He also submits that the procurement of raw-material ascertained from the Railway Authorities were properly accounted for and the consumption of electricity was properly explained and was not proportionately high in respect of the production made. He contends that the major demand is based on the entries in the private record recovered from the third party premised cannot be maintainable in law in view of the fact that authenticity of those documents could not be proved by adducing evidence. He further submits that there is no corroborative evidence in respect of manufacture of goods, transportation of the goods, identification of buyers, flow of funds and procurement of huge quantity of raw-materials required etc. and the statements were retracted by Shri Partha Banerjee, General Manager of the appellant, even if there is admission that would require corroboration in case of clandestine removal since oral evidence is not be sufficient. Finally, he submits that

the Adjudicating Authority did no advert on the decisions cited by the appellant which makes the Order non-speaking and the Adjudicating Authority did not supply the records as stated in the reply to the show-cause notice and no entries in the statutory records tallies with the entries in the private records.

3.1 To support his contentions, he relies on the following decisions :

1. Star Alloys & Chemicals Pvt. Ltd. : 2019 (21) GSTL 174 (Tri. – Del.)
2. Raipur Forgings Pvt. Ltd. : 2016 (336) ELT 297 (Tri. – Del.)
3. Triveni Engineering & Industries Ltd. : 2016 (334) ELT 594 (All.)
4. T.G.L. Poshok Corporation : 2002 (140) ELT 187 (Tri. – Chennai)
5. Continental Cement Co. : 2014 (309) ELT 411 (All.)
6. A.R. Shanmugasundaram : 2016 (333) ELT 158 (Tri. – Chennai)
7. Gopi Synthetics Pvt. Ltd. : 2014 (302) ELT 435 (Tri. – Ahmd.)
8. Super Smelters Ltd. : 2020 (371) ELT 751 (Tri. –Kol.)
9. Jai Balaji Industries Ltd. : 2021 (378) ELT 674 (Tri. – Kolkata)
10. Nidhi Auto Pvt. Ltd. : 2020 (33) GSTL 419 (Tri. –All.)
11. Nestle India Ltd. : 2009 (235) ELT 577 (S.C.)
12. Globe Rexine Pvt. Ltd. : 2006 (203) ELT 532 (Tri. – Chennai)
13. Gurmeet Singh : 2014 (312) ELT 689 (Tri. – Del.)
14. Madurai Metal Industries : 1991 (52) ELT 495 (Mad.)
15. Siemens Ltd. : 2007 (207) ELT 168 (SC).

4. On the other hand, the ld.A.R. for the Revenue reiterated the findings of the impugned order and submitted that the demand of Rs.19,85,355/- has been confirmed on the basis of Chit records from Shri Partha Banerjee, Manager of the Appellant Company and from the records maintained by the appellants in the possession of M/s Sen Brothers Enterprises as Shri Sisir Mondal was the Ex-Authorised Signatory of the Appellant Company and Shri Swapan Kumar Sen was also the Ex-Director in the Appellant's Firm.

5. Heard the parties and considered the submissions.

6. On the basis of records placed before us and the arguments advanced before us, the demand has been raised alleging clandestine removal of goods from the following records :

(a) A Chit recovered from Shri Partha Banerjee, General Manager of the Appellant Company during the course of search ;

(b) On the basis of private records recovered from the premises of one M/s Sen Brothers Enterprises wherein the Ex-Authorised Signatory of the Appellant Company and the Ex-Director of the Appellant Firm, were the employees.

7. We have gone through the Chit recovered during the course of investigation. The said Chit is extracted below :

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ANNEXURE - 'A'   ANNEXURE- D2

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Sponge Iron Sales.

	(L)	(F)	Total
June'09	98.23	65.18	163.410
July'09	378.22	240.36	618.580
Aug'09	409.32	374.495	783.815
Sept'09	512.76	135.560	648.320
Oct'09	337.26	159.900	497.160
Nov'09	471.88	164.370	636.250
Dec'09	534.93	668.650	1203.580
			4551.115

Partha Banerjee
12/05/10

Seen
Partha Banerjee
12/05/10

ATTESTED
05/05/11
Superintendent (AE)
Central Excise, Bolpur

On going through the said Chit, we find that if the said Chit has been recovered during the investigation from Shri Partha Banerjee, there is no authentication of the said Chit as neither it bears any signature of punchas nor any name of the officer who has seized the above said documents. Therefore, the said Chit is deemed to be a fictitious one as Shri Partha Banerjee has joined the services with the appellant in the month of August, 2009 whereas this Chit is bearing entries from June, 2009 to December, 2009 and it is also fact on record that he was not allowed to make any statement in his own handwriting, therefore the allegation that the Chit shows clandestine clearance of goods is not established as per the said Chit.

8. In that circumstances, we hold that the demand on the basis of Chit is not sustainable.

9. In respect of remaining demand, we find that during the course of investigation, it was alleged that there was a shortage of 7664.786 MT of Iron Ore, but the appellant contended that no weighment was made and verification was done only on eye estimation basis. Although, the appellant was having their own weighing machine but one Shri Nader Chandra Roy looking after Central Excise matters was asked to prepare weighment slip showing 133.05 MT and arrived at shortage of the aforesaid quantity. The said weighment was shown as weighment of Iron Ore, but the statement was recorded of Shri N.C.Roy, who in his Affidavit, stated that no weighment was made. The appellant has also given a letter dated 07.05.2010 showing sale of sponge iron of 2912.580 MT before visit of the Officers of the Department, which was not considered. By another letter, the Director of the appellant explained the details of the goods in the factory and the manner of

stock verification on the basis of eye estimation was pointed out, but there is no rebuttal from the Department to that effect.

10. We find that the goods were received from Railway Authorities, which has been properly accounted for by the appellant. We further take note of the fact that it is alleged that the appellant has removed 27653.657 MT of sponge iron on the basis of the loose slips recovered from the premises of M/s Sen Brothers Enterprises.

11. We have gone through the said documents, but the Revenue has failed to establish that who is the author of the said documents and entries therein. Only the Author of the documents can say about the contents of the documents. Those documents were not recovered from the premises of the appellant. The documents recovered from the premises of the third party cannot be the basis to allege the clandestine removal of the goods.

12. We further take note of the fact that it is to be established that how much the raw materials have been used and from where it has been procured and how much man power is required and how much man power was engaged where the said raw materials and finished goods were stored and how much electricity is required for manufacturing of such huge quantity of finished goods and how much is the consumption of the electricity by the appellant. Is there any illicit mode of manufacturing of such huge quantity of goods, whether the machinery installed have the capacity to manufacture of such huge quantity of goods cleared clandestinely along with the goods cleared on

the basis of duty paying document who were the buyers of such huge quantity of goods ? What is the mode of payment ?

13. The Revenue has not come up with any conclusive evidence to establish the clandestine clearance of goods in question as discussed above.

14. We further take note of the fact that during the course of cross-examination, Shri Sisir Kumar Mondal, stated that he has no personal knowledge about the documents and Shri Swapan Kumar Sen has categorically stated that the records do not belong to the appellant. Under these circumstances, the question arises that the records recovered from M/s Sen Brothers Enterprises can be said that documents pertains to the Appellant's firm.

15. We further take note of the fact that the ld.Counsel has relied on the various decisions of this Tribunal. In the case of Star Alloys & Chemicals Pvt. Ltd. (supra), this Tribunal held that the clandestine removal cannot be upheld on the basis of documents recovered from the third party premises or shortages detected at the time of visit without any other documents cannot be the reasons for inferring clandestine removal.

16. In the case of Raipur Forgings Private Limited (supra), this Tribunal held that the admission by the Director of firm gives strong indication of clandestine activity but the same would not be conclusive evidence without any corroboration.

17. Further, in the case of Triveni Engineering & Industries Limited (Supra), this Tribunal held that to allege clandestine removal of goods,

there should be clinching evidence in the nature of purchase of raw materials and removal of final product and there should be an investigation to that effect..

18. Further, in the case of A.R.Shanmugasundaram (supra), the Tribunal held that it is settled law that the charge of clandestine removal is not sustainable merely on the basis of statement and private records unless corroborated with other evidences.

19. Further, in the case of Gopi Synthetics Private Limited (supra), this Tribunal held that onus to prove clandestine removal of goods and the same is required to prove by sufficient evidences and cannot be decided on the basis of some documents, which is the only piece of evidence, which may at best create a suspicion but not full proof of evidence.

20. We further take note of the fact that in the case of Super Smelters Limited (supra), this Tribunal held that the charges of clandestine removal of goods cannot be upheld merely on assumption and presumption but ought to be proved with positive evidence such as, purchase of excess of raw-materials, consumption of excess electricity, employment of extra labour and transportation of clandestinely removed goods.

21. Further, in the case of Jai Balaji Industries Limited (supra) again this Tribunal held that clinching evidence is required of purchase of raw material, sale of final product, clandestine removal, transportation, payment, realization of sale proceeds, identification of buyer are

required and demand cannot be confirmed on presumption and assumption basis.

22. We find that in the case of Nidhi Auto Private Limited (supra), this Tribunal held that if the Author of Diary is not identified and his statement is not recorded, such Diary is not admissible as an evidence.

23. On the basis of the above discussion and the considerations of the case laws, we find that in this case, the demand has been raised on the basis of documents recovered from the third party premises whose Author is not known and from the person to whom the documents have been recovered have retracted the statements in cross-examination as stated, these documents do not belong to the appellant . Moreover, there is nothing on record for procurement of excess raw materials, electricity consumption, transportation of goods of such huge quantity of goods from whom the goods were sold out.

24. In that circumstances, we hold that the allegation of clandestine removal of goods is not sustainable against the appellants. Therefore, no demand is sustainable. Accordingly, the said demand confirmed against the appellant is set aside.

25. We further take note of the fact that as the demand against M/s Sen Ferro Alloys Private Limited is not sustainable, penalties on the appellants are not sustainable.

26. In view of the above, we set aside the impugned order and the demand of duty and imposition of penalties on the appellants are set aside.

27. In the result, the appeals are allowed with consequential relief, if any.

(Pronounced in the open court on **27.07.2023**)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)

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