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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 75921 of 2024

(Arising out of Order-in-Appeal No. 81-82/HWH/CE/2023-24 dated 11.10.2023 passed by the Commissioner of Central Excise, Kolkata Appeals-II Bamboo Villa, 3rd Floor, 169, A. J. C. Bose Road, Kolkata-700 014)

Commissioner of CGST & Central Excise,Howrah : Appellant
Commissionerate, M.S. Building,
15/1, Strand Road, Kolkata-700001.

VERSUS

M/s. J. S. Pigments Pvt. Ltd. : Respondent
Vill. & P.O. Jarura, P.S. Polba,
Delhi Road, Hooghly-712138

APPEARANCE:

Shri, Authorized Representative for the Appellant

Shri I. Banerjee,
MS. Ankita Nitna, Advocate for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75916/2024

DATE OF HEARING / DECISION: 29.08.2024

Order: [PER SHRI ASHOK JINDAL]

The Revenue is in appeal against the impugned order.

2. The facts of the case are as under: -

4.0 Brief fact of the case:-

4.1 The brief facts of the case as revealed from the SCN-1 are that on the basis of an intelligence, a team of Central Excise Officers of Kolkata IV Commissionerate on 12.09.2016 conducted simultaneous search in the factory premises of the appellant at Vill. & P.O. Jarura, P.S.-Polba, Delhi Road, Hooghly. Pin 712138 and Office *premises at P-199 B, CIT Road. Scheme VI(M). Kolkata-700054.*

4.2 *During the search operation at the factory premises it was noticed that the appellant used to manufacture lead ingot, lead alloys etc. from e-waste (ie, various types of old batteries, old and used CPU's etc.) by melting, purification and flotation process through furnaces. The appellant used to purchase their principle raw materials i.e. old und used batteries, C.P.U's etc. from different Govt, and non-Govt. organization like BSNL, Eastern Railway, Metro Railway, Vodafone, Eureka Forbes and others.*

4.3. *On the basis of preliminary examination of the records of the appellant, during the visit, it was found that the appellant had crossed the SSI exemption limit of sale amounting to Rs.1.50 Cr., during the financial year 2014-15, and the appellant have not taken registration from the Central Excise Department and could not explain the reasons for non-payment of Central Excise duty. During the search, joint stock verification of Lead Ingot, being their finished goods, was conducted in presence of Sri Vijay Shaw (Director of the appellant) and it was found that 423 Pcs, weighing 10,575 Kgs, of Lead Ingot lying in their finished stock on 12/09/2016 and the said goods were detained for investigation purpose. Subsequently, the sald lead Ingot was salzed on 06/12/2016 by the departmental officer in presence of two Independent witnesses and Sri Vijay Shaw of the appellant. Sample of the said seized lead ingot has been drawn after observing proper procedure in presence of Sri Vijay Shaw, Director, with his declaration on drawal of sample which was tasted at Chemical Laboratory of Custom House. According to the said test report the sample is in the form of greyish cut/broken heavy dense metallic piece. It is essentially composed of Lead together with small amount of tin, iron and copper and Lead Content is 97.8% by wt.*

4.4. *In this regard, Shri Vijay Shaw, Director of the appellant in his statement recorded under Section 14 of CEA on 12.9.2016, stated that the said lead Ingots is their manufactured finished goods and the same have been manufactured in their factory premises at Village & P.O. Jarura, P.S.-Polba, Hooghly-712138. A Statement dated 12.09.2016 of Sri Pankaj Jaiswal another Director of the appellant was recorded.*

4.5. *On scrutiny of seized documents le purchase ledger, copy of VAT Challans and sale Invoices for the year 2014-15 and 2015-16 from the factory and office premises of the appellant, it revealed that the appellant have purchased huge quantity of e- waste and manufactured a large quantity of Lead ingot at their factory and cleared clandestinely without taling Central Excise registration to evade huge amount of Central Excise duty. The finished product Le. 423 pcs of lead ingot lying at the godown of the appellant and the same were detained on 12/09/2016 by issuing Suparadnama' in the name of Shri Vijay Shaw as custodian and subsequently seized on 06/12/2016 on reasonable belief to protect Govt. revenue. It is also evident that the appellant suppressed their turnover to avail the benefit of SSI Exemption under Notification No. 08/2003-CE dated 01/03/2003 as amended. In other words, the appellant wanted to keep themselves within SSI exemption limit to evade Excise duty to mislead the whole investigation.*

4.6. *On the basis of above statement dated 12.09.2016 of Shri Vijay Shaw as recorded under Section 14 of Central Excise Act, 1944, the documents/ records including goods no seized under Section-110 of the Customs Act, 1962 read with Section 12 of Central Excise Act, 1944, the SCN-1 alleged that the appellant manufactured and cleared huge quantity of lead ingot from the P.Y. 2014-15 and 2016-17, without paying any Central Excise duty from their factory surreptitiously without taking Central Excise Registration under Rule 9 of the Central Excise Rules. Thus, the said goods of 423 Pcs. of Lead Ingot were seized which were lying in their godown for removal clandestinely. The said officers also seized carbon coples of few VAT Challans from the factory premises.*

4.7. *In view of the above facts, in the SCN 1, the appellant was called upon to show cause, as to why excisable goods namely Lead Ingot quantified as 423 Pcs X 25 Kg. i.e. 10575 Kgs, valued at Rs. 14,85,788/- @140.50 per Kg as per Tax invoice No.58/16-17 dt. 06/08/2016 under seizure shall not be confiscated and imposition of penalty under 25(1)(a)(b)(c) & (d) of the CER.*

4.8 *The facts of the case as revealed from the SCN-2 are that the goods Lead Ingot, Lead Alloy etc. manufactured by the appellant are classifiable under Tariff Heading Nos. Ch. 78019900 & 78019910 of the First Schedule to the Central Excise Tariff Act, 1985 (as amended). Thus, the* *said goods manufactured by the appellant are excisable and dutiable goods as notified under the Firat Schedule to the Central Excise Tariff Act, 1985, as amended rendering the appellant liable to observe the Central Excise formalities as prescribed under the CEA and rules thereunder.*

4.9 On the basis of statement of Sri Vijay Shaw, Director of the appellant, it was alleged in the SCN-2 that the appellant have started their manufacturing activity in the said factory since February, 2014 and manufactured Lead ingot, lead alloys etc. from e-waste and sold their finished goods to the various parties viz. M/s. Raj Finoxide, M/s. Associated Pigments, M/s Castrol Metal etc.

4.10. In the SCN 2, it was alleged that the appellant had manufactured and cleared the goods over and above the amount specified in exemption limit of the Notification /2003-CE dated 01/03/2003, as amended and did not register themselves with the Central Excise Department under Section 6 of the Central Excise Act, 1944 read with Rule 9 of the Central Excise Rules. On verification of seized documents and recorda (viz. VAT invoice, 3CD returns etc.) it is found that the appellant manufactured and cleared the following quantity of Lead Ingot/Lead Alloy, its value for the financial year 2014-15, 2015-16 & 2016-17 are given below:-

Year	Goods	Quantity (in Kgs)	Value (Rs)	Duty involved (in Rs)
2014-15	Lead Ingots/Lead Alloy	236.387	31592738	3949092
2015-16	-do-	468.282	54570833	6821354
2016-17	-do-	466.646 ** (including quantity of 258.981 MT cleared under carbon copy of VAT challan)	62860591	7857574

This quantity excludes 423 Pes of Lead ingot (seized goods weighing 10.5 M.T., demand notice in respect of the said quantity has already been issued in SCN-1 as stated above.

4.11 In the SCN-2, it was also alleged that the appellant cleared their manufactured goods to *different buyers without Central Excise invoice but only under cover of VAT invoice. It was also alleged that the appellant had not taken Central Excise registration willfully by suppressing their manufacturing activity and clearance, to de-fraud the Government by evading payment of Central Excise duty and is, thus, liable to pay appropriate Central excise duty in terms of Rule 8 of Central Excise Rules on their sale value amounting to Rs. 14,90,24,162/- for the financial years 2014-15 то 2016-17.*

4.12 In the SCN-2, it was also alleged that during the search operation at the factory and office premises some incriminating records and documents like carbon copy of VAT challan, hand written exercise book etc, were recovered and seized. On examination, it appeared that VAT challan (carbon copy) of 258.98 M.T. 90 recovered were used for removal of their finished goods i.e. Lead Ingot etc. to different buyers and the sald carbon copies of VAT Challan meant for purported sale to the different parties.

4.13 The SCN-2 further alleged on the basis of carbon copies of the VAT Challans, that the appellant manufactured and cleared 258.481 M.T. of Lead ingot valued at Rs. 3,63,16,581/- to their buyers viz. Kamala Metachem, Raj Metal Industries, Associated Pigments Pvt. Ltd. etc. for the period from 1st April 2016 to 12.09.2016. The representative of the said appellant and vehicle owners (or their representative) who transported the goods from the factory of M/s. J.S. Pigments to the said buyers have given statement voluntary against summons proceedings under Section 14 of Central Excise Act, 1944.

4.14 It appears from the SCN-2 that the carbon copies of VAT challans were found in respect of nine (9) customers. The Enquiry Officer recorded the statement of some of the customers as under :-

A. Statement dated 10.11.2016 of Shri Soumyadeep Paul, CEO of M/s. Kamala Metachem.

B. In response to Summons dated 05.10.2016 a statement of Shri Manoj Kumar Srivastava, Accountant, Authorised Representative of M/s Raj Metal Industries was recorded.

C. In response of Summons dated 15.11.2017 statement of Shri Radha

Krishna Pandey of M/s. Associated Pigments Private Limited was recorded.

D. *A Statement dated 03.02.2017 of Shri Deepak Kumar Singh, Authorised Representatives of M/s. M. B. Carrier was recorded.*

E. *A letter was received on 20.02.2017 of Sanjay Kumar Shaw, owner of vehicle whereby he stated that he is unable to attend before the Enquiry Officer, confirmed that both of his vehicles were given to hire to the appellant.*

F. *A statement dated 19.01.2017 of Shri Rajiv Banerjee, Accountant of the appellant company was recorded.*

G. *Further a Statement dated 10.04.2017 of Shri Pankaj Jaiswal, and a Statement dated 21.02.2017, of Sri Vijay Shaw both the Directors of the appellant company were recorded in respect of trading business apart from manufacturing as claimed by the appellant.*

All the above Statements are related to recovery of Carbon copies of VAT challans in respect of alleged manufacture and clearance of 258.481. M.T. Lead Ingots.

4.15 *SCN-2 alleged that the appellant was the manufacturer of Lead ingot, refined Lead Ingot etc. Both the Directors admitted manufacturing activity at their factory. One of the director used the word 'stock loan' on procurement trading material to mislead the investigation process to defraud the Govt. revenue. At last, the appellant had tried to mislead the investigation process by submitting a letter dated 17/05/2017 for keeping themselves within SSI exemption limit in an improper way. In the sald letter, they had shown that Lead ingot was received from different entities on loan basis but they failed to submit any document for the said loan. Even the office seized large No of documents/registers including incriminating documents from the factory as well as office premises of the appellant, but documents/invoices pertinent to stock loan of Lead Ingot was not found in the said seized documents and such loan account was an after-thought and scripted to defraud Govt. revenue.*

4.16 *SCN-2 demanded Central Excise duty of Rs. 1,86,28,020.00 on clearance of 1171.315 M.T.*

> *during the period 2014-15 to 2016-17, which was not paid by the appellant by way of suppression of the material facts of the manufacturing and selling of said excisable goods willfully with an intent to evade payment of duty and therefore, it has been contended that such amount of duty was recoverable from the appellant in terms of Section 11A(4) of the CEA, along with appropriate interest in terms of Section 11AA of CEA and for such act of omission and commission, the appellant had rendered themselves liable for penalty in terms of Section 11AC of the Central Excise Act, 1944.*

3. The said order was challenged before the Ld. Commissioner (Appeals) who after considering the submissions made by the respondent herein, dropped the proceedings initiated against the respondent.

3.1. Against the said order, the Revenue is before us.

4. The Ld. Authorized Representative of the Revenue submits that in this case, an investigation was conducted and it was found that the respondent was engaged in the manufacturing of Lead Ingots / Lead Alloy from e-waste, and the respondent were not paying excise duty on their product. It is stated that the activity undertaken by the respondent amounted to 'manufacture' of excisable goods and, therefore they are liable to pay duty. It is his contention that this aspect has not been examined by the ld. Commissioner (Appeals) and therefore, the impugned order is liable to be set aside.

5. On the other hand, the Ld. Counsel appearing on behalf of the respondent submitted that it is not disputed that the respondent is a manufacturer of Lead Alloy/Lead Ingot and liable to pay duty thereon, but whole of their turnover is well within the

threshold limit in terms of Notification No. 08/2003-C.E. dated 01.03.2003.

5.1. It is his further submission that in the Show Cause Notice, it has been alleged that the respondent had cleared goods without payment of excise duty, clandestinely; the Ld. Commissioner (Appeals) in the impugned order has however held that the respondent has not cleared any goods clandestinely, but the same were cleared under the cover of VAT invoices/challans, which were reflected in their books of accounts; therefore it was held by way of the impugned order that the allegation of clandestine removal of goods cannot be sustained. It is pointed out by the Ld. Counsel for the respondent that the said part of the order has been accepted by the appellant/Revenue and in these circumstances, the appeal filed by the Revenue deserves no merit and is required to be dismissed.

6. Heard the parties and considered their submissions.

7. We find that in this case, in the impugned order, the Ld. Commissioner (Appeals) has examined the issue as to whether the process undertaken by the respondent tantamounts to manufacture to attract the levy of central excise duty or not. The said issue has been examined by the Ld. Commissioner (Appeals) in the impugned order holding that the respondent is a manufacturer of excisable goods i.e., Lead Ingots.

7.1. We further take note of the fact that the main allegation levelled against the respondent is that they have cleared the goods clandestinely. The said issue has also been examined by the Ld.

Commissioner (Appeals) in the impugned order and it was observed as under: -

> *8.3 I find that on 12.09.2016 the Central Excise Officers of Kolkata-IV Commissionerate conducted simultaneous search operation of the factory premises and the office premises of the appellant company. During the search operation the said Officers seized several records and documents and detained the finished stock lying in the factory on 12.09.2016. They have also recorded the statements of both the Directors Sri Vijay Shaw and Sri Pankaj Jaiswal on 12.09.2016. Subsequently, the said finished goods were seized on 06.12.2016. After examining the records and documents the Central Excise officers were of the view that the appellant wrongly availed the SSI exemption Notification No. 8/2013-CE dated 01.03.2003 as amended and the said exemption notification has granted exemption from duty to specified goods up to the value of clearance of Ra. 1.50 Crores in any financial year. It was alleged that during the material period (i.e. 2014-15 to 2016-17) the appellant exceeded the exemption limit and failed to pay the duty thereon. Further on 21.02.2017 and 10.04.2017 the Central Excise Officers recorded the statements of Shri Vijay Shaw, and Shri Pankaj Jaiswal of the appellant company and made query on clearance of goods beyond the exemption limit. Shri Vijay Shaw in his statement stated that the appellant had been manufacturing Lead Ingot as well as undertaking the trading business. In reply to question, Shri Vijay Shaw explained that the trading materials were procured through Stock Loan. But Shri Pankaj Jaiswal another Director of the appellant stated that they are doing trading activities in addition to manufacture of the said goods. In order to avoid the confusion, the appellant vide letter dated 17.05.2017 informed the Superintendent of Central Excise Anti Evasion, Kolkata - IV Commissionerate with a statement of details of procurement of trading goods.*
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> *8.4 It appears that during the search operation on 12.09.2016 the Central Excise Officers recovered few Carbon copies of VAT challans from the premises of the appellant, showing clearance of 258.481 MT of Lead Ingot. The appellant claimed that there was no clearance of the said quantity from the factory. The Central Excise Officers found that the said VAT challans are related to 9 parties. Out of that, the Central Excise Officers*

recorded the statements of three parties namely- M/s. Kamala Metachem on 10.11.2016, M/s. Raj Metal Industries on 25.10.2016 and M/s. Associated Pigments summoned on 15.11.2016. Further, statements of one vehicle owner Shri Deepak Kumar Singh of M. B. Carrier and M/s. A. K Goods Carrier were recorded on 03.02.2017. After recovery of the said carbon copy of the VAT challans and the statements of three parties, the Central Excise Officers recorded the statement of Shri Vijay Shaw on 21.02.2017 and the statement of Shri Pankaj Jaiswal on 10.04.2017- both Directors of the appellant company.

8.5 In this context, the appellant referred statement of Shri Radha Krishna Pandey of M/s. Associated. Pigments Pvt Limited, wherein in response to Question no. 11 regarding the carbon copy of VAT challans, Shri Pandey categorically stated that the goods as mentioned in the said carbon copy of VAT challan were not delivered. to their factory. Further, Shri Soumyodeep Paul, CEO of M/a. Kamala Metachem in his statement dated 10.11.2016 in reply to specific Question No. 8 stated that they have not received any goods on the basis of carbon copy of VAT challans. It is seen that the Adjudicating authority had not taken into consideration of the said statements and/or may have escaped from his notice in the said Adjudication Order. On perusal of the Statement and cross examination of Shri Dipak Kumar Singh, A.R. of vehicle owners, they had given contradictory statement and in the cross examination there was no confirmation that the goods were delivered on the basis of those particular carbon copies of the VAT Challan. So, there is no material evidence available on record that the goods were cleared on the basis of the said carbon copies of the VAT challans and therefore, the demand of duty on 258.481 M.T on the basis of the copies of the VAT challans cannot be sustained.

8.6 Regarding the clearance of the balance quantity of 922.834 M.T. i.e.1171.315-258.481) the appellant stated that the quantity of 169.4 MT was manufactured and cleared on the basis of VAT Challan. The clearance of balance quantity were trading materials. It is seen that Shri Vijay Shaw stated in his statement that they were also engaged in trading business and the goods were procured on Stock Loan basis. On the other hand, Shri Pankaj Jaiswal, other Director of the appellant, only admitted the trading business but no proper reply was given on procurement of the trading goods. Shri Pankaj Jaiswal stated that *they will inform the details of procurement of materials. In this background the appellant by letter dated 17.05.2017 enclosed the statement of details of procurement of the trading materials.*

8.7. It is seen from the SCN-2 that no enquiry was conducted by the Central Excise Offices on the basis of statement enclosed with letter dated 17.05.2017. In the SCN-2 it was alleged that nothing was reflected in the books of accounts and registers of the appellant and evidence of such loan and theory of loan account was just after thought and scripted to defraud the Government Revenue. The Adjudicating authority also accepted the observation of Enquiry Officer in Show Cause cum Demand Notice and stated that submission of letter dated 17.05.2017 giving the name of some companies but not producing any documentary evidence in support of this claim is nothing but after thought.

8.8. I find from the statements that Shri Vijay Shaw used the word "Stock Loan" in his statement. Shri Pankaj Jaiswal in his statement did not utter anything regarding procurement of trading goods or stock loan issue. It is observed by the Adjudicating authority that the Directors should submit the same from the very beginning of the investigation with proper records and supporting documents and non-production of documents showed their guilty mind to suppress the manufacturing activities in their factory and to suppress the factory production figure, keeping the same within the limit of Rs. 1.5 Crore to avail exemption notification with intent to evade payment of duty in the guise of change i.e. trading /stock loan.

8.9. I find that the investigation / search operation was conducted on 12.09.2016. The Central Excise Officers recorded two statements on 21.02.2017 of Shri Vijay Shaw and Shri Pankaj Jaiswal on 10.04.2017. There is no dispute on the fact that the appellant cleared the entire quantity accompanied with VAT challan/bills and duly recorded in their Accounts and Balance Sheet. Thus, there is no clearance of goods in a clandestine manner. In the instant case, the dispute relates to procurement of the trading goods. One of the Directors stated that the trading materials were procured on the basis of stock loan. The other Director stated that the goods were procured in the normal course of trading. The appellant after about a month of the statement of Shri Pankaj Jaiswal by letter dated

17.05.2017 had given the details of the procurement of trading materials and also stated that for various reasons like non-settlement of accounts to their satisfaction, last moment cancellation of orders, non-availability of transport etc. no goods were sent under the aforesaid challans and accordingly no invoice were issued against any of those challans, which was a verifiable fact.

8.10. I find that relating to 'Stock Loan (Lead Ingot), the appellant have submitted date wise/party wise statement for the period from 2013-14 to 2016-17 along with representative sample copies of some Challans.

8.11. I find at para 8.14 of "Discussion and Findings" of the Adjudication Order is as follows:-

"In this regard, I find that in the statement of Shri Vijay Shaw, Director of Noticee-1, recorded on 21.02.2017,…. then, he was asked (Q. No. 5)- "What do you mean by stock loan?" He replied that they got different stock loan from different party and concern. Then he was asked (Q. No. 6)- "Could you produce any document of the said stock loan?' He replied that "Presently, I could not produce the same. If, I got I will produce in due course. In the next question (Q. No. 7) he was asked - What purpose you are doing stock loan? Please state name and address of the party you are taking stock loan?" In reply, he stated that "I will provide the same within 10 days. But he has not submitted the same within 10 days. In this regard, I fully agree to the contention of the SCN made in Para 2.19 of the SCN-2, wherein it was contended that though they have admitted the manufacturing activity in their factory, Shri Shaw, Director, used the work "Stock loan" with the intent to maintain their production figure within the threshold exemption of Rs. 1.5 Crore in each year. Being a director of the company he uttered the words but could not explain anything in this regard. Before and after this nobody on behalf of the company did point out this thing ore the investigating authority SCN stated that they submitted a letter dated 17.05.2017 giving the name of some companies but they have not produced any documentary evidence in support of this claim. From the above discussion, it appears that taking of this plea is nothing but after thought on behalf of the said director."

8.12 Also, on perusal of the statement enclosed with the letter of 17.05.2017 I find that the appellant had given the details of the name of the parties, *challan no. & date, vehicle no. and the quantity for the entire period. It is noticed that the Inquiry Officer had not made any enquiry about the authenticity of any of the challans as mentioned in the statements. It is seen that no letter was issued to the appellant by the Enquiry Officer for any clarification in respect of the said statement. The Adjudicating authority had not taken into consideration of the statements of procurement of the trading goods submitted vide their letter dated 17.05.2017 on the ground that the Directors have not placed these facts during the recording of their statements. It is well settled that evidence would prevail over and above the statements. The statement of procurement of trading goods submitted during the course of investigation cannot be brushed aside without any verification. The veracity of the statement of the procurement of trading goods would reveal the vehicle number which could be verified through the Motor Vehicle department. Further, the name of the supplier of the trading materials were mentioned in the said statements but not a single supplier of trading materials were examined. The entire demand was raised only on the basis of the statement of one Director, who stated "Stock Loan and totally ignored the relevant evidences placed by the appellant without any verification.*

8.13 Also, I find that the appellant submitted 5 (five) Nos. of agreements relating to "stock loan" to the investigating authority. From the copies of the agreements signed between the appellant and other parties, I find that the appellant in course of their business activities, recovered different metals from e-waste like old and used batteries, CPU etc. but deals solely in lead. They exchange the metals other than lead with their counterparts in lieu of lead ingot. There is no monetary consideration in such dealings and they keep account of the transactions of the quantity of metals given out in exchange of the lead they received over a period of five years and make a settlement of any differences in transactions at the end of such periods. I find that this aspect was neither examined nor verified by the department before passing the adjudication order.

8.14. It is noted that the Central Excise Officers while demanding duty on the basis of Carbon copies of the VAT challans of 258.481 M.T. had made an enquiry by recording the statement of the parties as well as the vehicle owners regarding the clearance of the goods as stated above and the *demand of duty on 258.481 M.T. is not sustainable. But after receipt of the Statement of procurement of the trading materials by letter dated 17.05.2017 where the name of the parties, vehicle nos, challan nos had been clearly mentioned, even then the Central Excise Officers had not made any enquiry thereon. It is not clear that when the Central Excise Officers shad made enquiry in respect of 258.481 M.T. of materials on the basis of carbon copy of the VAT Challan why the said Officers had not made any enquiry in respect of procurement of the trading materials on the basis of the "Statement" annexed with the letter dated 17.05.2017. It is merely mentioned in the SCN-2 as 'afterthought' without any verification. It is not the case that the appellant had not given any evidence regarding the procurement of trading materials prior to letter dated 17.05.2017. Therefore, the letter dated 17.05.2017 of the Statement of procurement of trading goods cannot be brushed aside as afterthought.*

8.15 It is noted that the Central Excise duty is levied on goods and the assessee is required to establish that the goods are actually received on the basis of evidence. If the goods were not procured by the appellant, the production of accounts have no relevance. The Enquiry Officers, as well as the Adjudicating authority had totally overlooked the verification of the receipt of the trading materials as submitted by the appellant by letter dated 17.05,2017. In this context, the appellant contended that the the documents relating to trading were available in the office premises of the appellant but the same were not seized as expressly those documents were not relevant/necessary for the purpose of the investigation. It is stated that in course of the search in the office premises, though these and other documents e.g., ROC documents, Audit Report, PCB records, Agreements with parties, Trade License related documents, Delivery Orders, Acceptance Letters, Service Tax Records etc. were there, the officers did not seize the same as expressly those documents were not relevant / necessary for the purpose of their Investigation;"

8.16. I find that the Adjudicating authority accepted the clearance of the Lead Ingot on the basis of VAT challan containing the description of the goods, quantity of the goods which was produced by the appellarit. On the other hand while the appellant produced the Statement of procurement of the trading materials on the basis *of challan containing description of the goods, quantity of the goods, parties name and the vehicle number, the Inquiry officers as well as the Adjudicating authority declared them as afterthought. The evidence of the statement of procurement of the trading goods on the basis of challans containing the description of the goods, quantity of the goods and the vehicles numbers cannot be brushed aside without any enquiry.*

8.17. It may be noted that the SCN is a knowledge of fact, which is the outcome of the enquiry. By issuance of the Show Cause Notice, it is communicated based on the evidences and materials to the assessee to enable him to reply thereon. It is a duty to place all the materials of enquiry in the notice for the purpose of adjudication by the adjudicating authority. I find that in the present case, the enquiry officer without undertaking any enquiry in respect of procurement of the trading goods had contended the same documents as afterthought and stepped into the shoes of the adjudicating authority. The Enquiry Officer should have conducted proper enquiry before coming to the conclusion.

8.18. The appellant submitted a Certificate of a Chartered Engineer and Valuer regarding the procurement of trading goods who certified that the statements of the quantity of the Lead Ingots procured and sold are correct. The statement enclosed with the Certificate are corroborating with the statements as submitted by the appellant by letter dated 17.05.2017 during the course of investigation which was totally ignored by the Inquiry Officer as afterthought. No attempt was made to verify the authenticity of the statements submitted by the appellant during the investigation which is supported by the Certificate of Chartered. Engineer and Valuer. Hence, the demand of duty and imposition of penalty on the balance quantity of material cannot be sustained.

8.19. The Adjudicating authority observed that the petitioner had not maintained proper records in respect of trading materials. The appellant submitted that there was no requirement of maintenance of records by the SSI Unit and referred the decision of the Hon'ble Tribunal in the case of Dayal Industries Vs Commissioner of Central Excise, Delhi-11, 2006 (199) ELT 237 (Tri-Del). In that case the appellant is a small scale unit. It has been held as under

> *3. The submission of the learned Counsel is that in the absence of any statutory obligation maintain account of production, there cannot be violation of Rule 25 of the Central Excise Rules in as much as that rule relates to violation of provision of the statute.*
>
> *4. There is merit in the appellant's contention. Since the appellant was not under any statutory obligation to keep account of production, Rule 25 could not be invoked against it. Penalty imposed is set aside and the appeal is allowed. The seized goods shall be returned to the appellant*

8.20. In the case of Booster Industries Vs. Commissioner of Central Excise, Delhi-Il, 2008 (221) ELT 418 (Tri-Del) it has been held that -

> *2. The contention of the appellant is that their unit was non-declaring unit and they were not required to maintain any statutory record. As their unit is a small scale unit, they were not required to maintain any statutory record, therefore, the goods which were found in factory, cannot be confiscated on the ground that these are not accounted in the records. The appellant relied upon the decision of the Tribunal in the case of Dayal Industries v. CCE, Delhi-II reported in 2006 (199) E.L.T. 237 to submit that the Tribunal set aside the confiscation of the goods on the ground that small scale units are not under obligation to maintain the production account*
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> *3. As the issue is already settled by the Tribunal the case of Dayal Industries (supra) in favour of the assessee, therefore, the impugned order is set aside and the appeal is allowed.*

8.21. To sum up, in the instant case there is no dispute that the appellant cleared the goods under the cover of VAT invoices/challan which was reflected in the books of accounts. The allegation of clandestine removal of goods cannot be sustained. The allegation of manufacturing of the trading materials as claimed by the department is without any supporting documents and therefore the demand of duty along with interest and penalty cannot be sustained and it is liable to be set aside.

> *8.22 The appellant submitted that the removal of trading goods are under the cover of VAT/invoice challan which is evident from the calculation sheet enclosed to the Show Cause Notice. Thus, there is no suppression of facts. The demand of Central Excise was confirmed under Section 11A (10) of the Central Excise Act, 1944. Sub Section (4) of Section 11A provides that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act made thereunder with intent to evade payment of duty, by any person chargeable with the duty the Central Excise Officers shall, within five years from the relevant date serve notice on such person. In the present case, it has been alleged that there was clandestine manufacture and clearance of the finished goods by the appellant. On perusal of the records I find that there is no suppression of facts in respect of clearance of goods as the goods were cleared under the cover of VAT invoices/challan. The dispute relates to eligibility of the benefit of SSI exemption Notification. The appellant claimed that a portion of the goods were trading materials. On the other hand, the SCN-2 proposed that the goods were manufactured by the appellant. The appellant placed the evidence in support of their contention of procurement of trading materials. The department did not produce any material in respect of manufacture of the goods and proceeded on the basis of assumption and presumption and alleged that the Statement for procurement of materials by letter dated 17.05.2017 placed by the appellant are afterthought. There is no doubt that the goods were cleared under the cover of the VAT Invoice/challan which was duly recorded in the statutory records, the allegation of suppression of facts with intent to evade payment of duty cannot be sustainable. Hence, the demand of duty is barred by extended period or limitation.*

7.2. The ld. Commissioner (Appeals) in the impugned order has clearly held that the respondent has cleared the goods under the cover of VAT invoices/challans which were duly reflected in their books of accounts and therefore, the allegation of the clandestine removal against the respondent does not arise. We observe that this finding of the Ld.

Commissioner (Appeals) has not been challenged by the Revenue, in appeal. The Revenue is only alleging that the Ld. Commissioner (Appeals) has not examined the processes undertaken by the respondent by way of converting e-waste into Lead Ingots which are manufactured and are dutiable. We find that the Ld. Commissioner (Appeals) has passed the impugned order on merits and insofar as the charge of clandestine removal of goods, the same cannot be sustained as excitability of goods has no relevance to this case.

8. As the Ld. Commissioner (Appeals) has passed a reasoned order in respect of clandestine removal and the same has been accepted by the Revenue, therefore, from the total clearance of goods, if the alleged clandestine clearance is reduced, the turnover of the respondent shall come down to SSI exemption in terms of the Notification No. 8/2003 CX, dated 01.03.2003, therefore, no duty is payable by the respondent.

9. In these circumstances, the Revenue's appeal deserves no merit and accordingly, the same is dismissed.

(Operative part of the order was pronounced in open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

rkp