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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.264 of 2009

(Arising out of Order-in-Original No.11/Commissioner/09 dated 11.02.2009 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

M/s. Bihar Raffia Industries Limited
(A6(Part)/A8(Part), Phase-V,
Adityapur Industrial Area,
Gamharia, Jamshedpur-832108.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur
.....Respondent
(143, New Baradwari, Sakchi, Jamshedpur-831001.)

WITH

Excise Appeal No.265 of 2009

(Arising out of Order-in-Original No.11/Commissioner/09 dated 11.02.2009 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

Shri Trilok Chand Agarwal, Director of
M/s. Bihar Raffia Industries Limited
(A6(Part)/A8(Part), Phase-V,
Adityapur Industrial Area,
Gamharia, Jamshedpur-832108.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur
.....Respondent
(143, New Baradwari, Sakchi, Jamshedpur-831001.)

AND

Excise Appeal No.266 of 2009

(Arising out of Order-in-Original No.11/Commissioner/09 dated 11.02.2009 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

Shri Suresh Kumar Agarwal, Director of
M/s. Bihar Raffia Industries Limited
(A6(Part)/A8(Part), Phase-V,
Adityapur Industrial Area,
Gamharia, Jamshedpur-832108.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur
.....Respondent
(143, New Baradwari, Sakchi, Jamshedpur-831001.)

APPEARANCE

Shri B.N.Chattopadhyay, Consultant for the Appellant (s)
Shri D.Halder, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 77034-77036/2019

DATE OF HEARING : 5 August 2019
DATE OF DECISION : 23 December 2019

BIJAY KUMAR :

All these appeals are filed against Order-in-Original dated 11.02.2009 passed by the Commissioner of Central Excise, Jamshedpur vide which a demand of Rs.12,46,746/- (Rupees Twelve Lakhs Forty Six Thousand Seven Hundred and Forty Six only) has been confirmed on the clandestine removal of the goods by M/s.Bihar Raffia Industrial Ltd.(BRIL). Similarly Cenvat credit of Rs.36,08,787/-(Rupees Thirty Six Lakhs Eight Hundred Seven Hundred and Eighty Seven only) has been disallowed and proposed to be recovered. The demands and Cenvat credit were proposed to be recovered along with interest and penalty of Rs.60,98,791/-(Rupees Sixty Lakhs Ninety Eight Thousnad Seven Hundred Ninety One only) was imposed on appellant M/s.Bihar Raffia Industries Limited (BRIL) and also penalty of Rs.20.00 Lakhs on it under the various provisions of Central Excise Act, 1944 and Rules made thereunder. A penalty of Rs.10.00 Lakhs was imposed on Shri Trilok Chand Agarwal, Director of BRIL and Shri Suresh Kumar Agarwal, also Director of appellant No.1 under the provisions of Rule 26 of the Central Excise Rules, 2002.

2. Being aggrieved by the impugned order, the appellants have filed separate appeals. However, the appeals are being disposed of by this common order as it emanates from the same impugned order.

3. The facts of the case are that appellant company is engaged in manufacture of Poly Proplene Woven Sacks classifiable under Tariff Heading 3923.2390 of the First schedule to the Central Excise Tariff Act (CETA), 1985. For the manufacture of PP Woven Sacks, the Poly Proplene granules and Master Batch are required as the inputs. The officers of Central Excise visited the factory of the appellant (BRIL) on 15.09.2006 and examined their books of accounts maintained by them in respect of raw material and finished goods. The verification resulted into shortage of PP granules to the extent of 308.8 MT valued at Rs.2,56,92,160/- involving inadmissible Cenvat Credit of Rs.35,33,907/- (BED) and Rs.70,608/- (Education Cess). The physical stock of Master Batch was also found to be short by 0.250 MT valued at Rs.25,705/-. A stock of finished goods manufactured by the appellant was also found to be short by 9,79,500 pieces of sacks along with shortage in rejected wastage/scrap to the extent of 43.247 MT valued at Rs.1,86,410/- along with the shortage of rejected odd size bag of 4.300 MT, which was valued at Rs.4,98,515/-. The departmental officer also found that the Daily Stock Account (RG-1) and Raw Material Account (Form-IV) was maintained only up to 31.08.2006. During the enquiry various documents relating to production, clearance, raw material etc. were resumed for verification from main appellant (BRIL) through their Authorized Representative Shri Suman Kumar, who in his statement dated 15.09.2006 agreed with the stock position arrived by the Central Excise officer. The departmental officer also found that the main appellant collected VAT @ 4% from the buyer which they were availing exemption under the provisions of VAT Rule and failed to include that amount in the assessable value of the goods for payment of Central Excise duty.

4. During the course of enquiry, statements of following persons were recorded under section 14 of the Central Excise Act, 1944 :-

(i) Authorized signatory of main appellant Shri Suman Kumar and Shri Suresh Kumar Agarwal, Director.

(ii) Suppler of PP granules to the main appellant namely M/s.Haldia Petro Chemical Limited, M/s. IPL and M/s.Reliance Industries and Master Batch from M/s.K.K.Polymer and M/s.Swastik Polymer.

(iii) Transporter namely Shri R.K.Mishra, Partner of Rush Cargo Movers, Jamshedpur.

(iv) A statement of Shri Dilip Kumar Agarwal, authorized signatory of M/s.Johari Lal Agarwal Sales Private Limited, Mango, Jamshedpur (JASPL for short).

5. After the examination of these persons and perusal of VAT record, and other incriminating document the department issued a show cause notice dated 21.08.2007 on the appellants, which culminated into the impugned order.

6. Learned Counsel on behalf of the appellants submits that no verification of stock was conducted by the officer during their visit on 15.09.2006. The stock verification report as annexure ‘C’ to the show cause notice represented to the stock of HDPE Sacks/PP Woven Sacks and PP granules and Master Batch in the factory of the main appellant. The stock verification report does not contain signature of Central Excise officer who has conducted the verification. The report was prepared by Shri Manoj Pandey, the worker of appellant factory as per the instruction of the visiting Central Excise officer which was signed by Shri Suman Kumar, Central Excise clerk and therefore in absence of signature by the Central Excise officer, the stock verification report is not reliable. In fact the Central Excise officers themselves never have verified any stock of the material lying in the factory including the finished goods, raw material and Master Batch. The verification report, which is prepared at the instance of departmental officer, by the

employee of the main appellant cannot be stated to be stock verification report by the Central Excise officers. Reliance was placed on the decision of Tribunal in the case of D.M. Gears Pvt.Ltd. v. Commissioner of Central Excise, Dlehi-I [2002 (141) ELT 514 (Tri.-Del.) and Satpushp Steels (P) Ltd. v. Commissioner of Central Excise, Jaipur [2006 (196) ELT 105 (Tri.-Del.)]. These facts were already made before the adjudicating authority. However, the same was not taken into consideration while passing the impugned order.

7. Learned Consultant further submits that the reliance was placed on the statement of Shri R.K.Mishra, partner of M/s.Rush Cargo Movers, the transporter of the appellant company. The appellant wanted to cross-examine Shri R.K.Mishra, however, the learned adjudicating authority has not permitted the cross-examination of Shri Mishra without assigning any reason in the order. Reliance was placed on the decision of M/s.Gonterman Peipers (India) Limited v. Commissioner of Central Excise, Kolkata-VII (Final Order No.77772-77773/2007 DATED 08.11.2012. It was also submitted that the learned adjudicating authority has not examined the persons whose statements were relied upon in passing the impugned order contrary to the statutory provisions of section 9D of Central Excise Act, 1944. In absence of such examination and cross-examination, the statement on which Revenue seeks to rely have to be excluded from the evidence adduced by the department. Similarly, the statement of Shri R.K.Mishra is also not to be relied upon for want of compliance of provisions of section 9D(1) of the Central Excise Act.

8. Regarding inclusion of sales tax in the assessable value during the period April 2006 to December 2006, it is the submission of learned Advocate that main appellant has availed the incentive of deferred payment of VAT/Sales Tax for setting up the industry in the remote area as per sales tax incentive scheme of the Government. It is further submitted that the sale tax was paid to the sale tax authority during the period 20.07.2013 to 20.08.2016 amounting to Rs.76,17,998/-.

Learned Advocate concedes to the fact that this payment details were not furnished before learned adjudicating authority, however, same being the admitted fact can be raised before this Tribunal as on the ground that the Tribunal is last fact finding authority in the process of adjudication of the cases. Accordingly it was prayed that the impugned order is not sustainable and required to be set aside in the appeal.

9. For the other appeals, it was submitted that the main appeal itself is contested on merit, there is no question of imposition of penalty on any other appellants, who were directors of the company.

10. Learned Authorized Representative appearing on behalf of the department however, supports the impugned order on the various grounds contained in the impugned order which included the shortages of both raw material and finished goods.

11. We have heard the rival submissions and also perused the records.

12. The issue involved in the present appeal is regarding the duty liability and denial of Cenvat credit on the stock of shortage noticed on account of raw material during the visit of Central Excise officers. Also, regarding the non-inclusion of sales tax collected under deferment scheme in the assessable value of excisable goods under section 4 of the Central Excise Act. As far as the second issue is concerned it has been brought to our notice that the same has been paid to the sales tax department after the scheme of deferment was over and thus there is no question of inclusion of the sale component of deferred payment of sales tax in the assessable value of the goods. This issue has been clarified by the CBEC Circular No.378/II/98-CX dated 12.03.1998 wherein it has been clarified that in respect of deferred payment of sales tax for a particular period and the grant of incentive equivalent to sales tax payable by the unit. Thus the sale tax paid has been clarified to be excluded from the assessable value of the goods. Reliance was also placed on the decision of Tribunal in the case of Super Syncotex (India) Ltd. v. Commissioner of Central Excise, Jaipur reported as 2003

(160) E.L.T. 859, which was affirmed by the Hon'ble Supreme Court reported as 2014 (301) ELT 273 (SC).

13. Regarding the second issue, we find that the stock verification report was not conducted by the visiting officer, but simply the statement was asked to be prepared by one of the employee of the appellant namely, Shri Suman Kumar Mishra, Excise Clerk along with Shri Manoj Kumar Pandey and Shri Uday Kumar, all employee of the main appellant (BRIL). As the stock verification report was not done on the physical weighment basis and even not verified by the Central Excise officer as is evident from the stock verification report, its evidentiary value looses its significance, especially in view of the fact that the RG-1 Register and Form-IV Register were incomplete after 31.08.2006. Similarly we place our reliance in holding so on the decision of the Tribunal in the case of D.M. Gears Pvt.Ltd. (supra), wherein Para 5.4 is held as under:-

> ***"5.4.****Even the adjudicating authority's finding of commonalities in respect of factory premises etc., does not appear to be well-founded. After noting that the premises of DMG and CAE were separated by a wire-mesh, the Commissioner recorded a finding to the effect that the two units had common office, common stores and common testing laboratory. He did not say which was on whose side of the wire-mesh, nor did the photographs (which he accepted as evidence in the case) indicate existence of any openings in the mesh for ingress and egress of workers. As regards management, it is an admitted position that the directors of one unit were not on the board of directors of the other. The Commissioner, however, found that both the units were under the overall control of one Rajiv Gambhir and that the units belonged to the Gambhir family. This finding is not supported by any cogent evidence. Even Shri Rajiv Gambhir did not depose (in his statement recorded by C.E. officers) that he was in overall control or that the directors of the two units were all his family members. The finding of common labour has been drawn from statements of some of the employees/workers, notwithstanding the fact (acknowledged by the Commissioner) that some of those statements had not been signed by any C.E. officer. In*

this connection, we have considered the case law which was cited by ld. Consultant in support of his argument that the unsigned statement were not reliable. In the cited case of State v. Yakub Ahmed [2000 (125) E.L.T. 113 (Bom.)], it was held by the High Court that statements not recorded by gazetted officer of Customs under Section 108 of the Customs Act were not admissible in evidence. We note that, by and large, the provisions of Section 108 ibid are pari materia to those of Section 14 of the Central Excise Act under which the above statements were recorded. The only difference between the two provisions appears to be that, while under Section 108 of the Customs Act 'any gazetted officer of Customs' shall have power to take evidence from any person, 'any Central Excise officer duly empowered by the Central Government in this behalf' shall have similar power under Section 14 of the Central Excise Act. The Central Government has empowered all officers not below a specified rank for purposes of Section 14 of the Central Excise Act. It would follow from these provisions that any statement of any person recorded under Section 108 of the Customs Act should be signed by any gazetted officer of Customs and any statement of any person recorded under Section 14 of the Customs Act should be signed by an officer of Central Excise empowered by the Central Government. In other words a statement recorded under Section 108 of the Customs Act and signed by a non-gazetted officer of Customs will not be admissible as evidence for the relevant purpose under that Act. Similarly, a statement recorded under Section 14 of the Central Excise Act and signed by an officer of Central Excise not empowered for the purpose will also not be admissible as evidence. It would follow as a corollary that, if any statement of any person recorded under Section 108 of the Customs Act or under Section 14 of the Central Excise Act does not bear the signature of any departmental officer and does not disclose the identity of the officer who recorded the statement, it will not be admissible in evidence. The ruling of the High Court in the cited case is on this point. Therefore, the reliance placed by the adjudicating authority on those statements of workers which did not bear the signature, and did not disclose the

> *identity of the Central Excise Officer who recorded such statements cannot be sustained."*

Similarly findings has been recorded by this Tribunal in the case of Satpushp Steels (P) Ltd. (supra) regarding shortage of raw material without physical weighment is not sustainable. The Paragraph 8 of the order which is relevant is reproduced as under:-

> ***"8.****In respect of the goods found short in the factory on the Panchnama, it is clear that the shortage was recorded on the average basis. The Revenue relied upon the decision in the case of Majestic Auto Ltd. (supra). I find that the facts of that case are different where the appellant was manufacturer of two wheelers and those were accounted in the presence of the assessee. In such a situation, the correctness of that accounting method was found to be good in absence of any challenge at the time of verification. In the present case certain weighment has been arrived on average basis, therefore, the shortage arrived at without physical weighment and only on average basis is not sustainable. In view of the above decision the impugned order is set aside and the appeal is allowed."*

14. We also find that the appellant has taken Cenvat Credit on the basis of prescribed document as per Cenvat Credit Rules and therefore the impugned order is not correct in denying the same for which we place our reliance in the decision of Hon'ble Allahabad High Court reported as 2014 (302) E.L.T. 487 (All.) which upheld the order passed by the Tribunal in the case of Commissioner of Customs & Central Excise, Kanpur v. Juhi Alloys Ltd. [2013 (296) E.L.T. 533 (Tri.-Del.)].

15. Regarding the reliance placed on the various statements of the different persons, which were recorded during the course of investigation, we find that the Commissioner has not examined the maker of the statements and not permitted the cross-examination of those persons by the main appellant in spite of being specifically requested for. This is in clear violation of statutory provisions as contained in section 9D of Central Excise Act. This issue has been

decided in many cases including that of M/s.Andamann Timber Industries vs. Commissioner of Central Excise, Kolkata-II [2015 (324) E.L.T. 641 (S.C.)]. Accordingly these statements are required to be eschewed as a piece of evidence. If that being so, the clandestine removal of the goods as alleged in the impugned order is not sustainable. We also find that lot of reliance has been placed on the record of transporter M/s.Rush Cargo Movers. However, this is third party evidence, which cannot be relied without corroborative evidence as held in the case of M/s.Rudra Ventures (P) Ltd. v. Commissioner of Central Excise, Ludhiana [2016 (344) E.L.T. 472 (Tri.-Chan.)].

16. In view of the above discussion, we are of the considered opinion that the impugned order is not sustainable and required to be set aside. As appeal against main appellant has been allowed, there is no question of imposition of any penalty on the other appellants. Accordingly, those are also being set aside. Accordingly all the appeals are allowed.

(Order pronounced in the open court on 23 December 2019.)

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

SD/

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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