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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75817 of 2019

(Arising out of Order-in-Appeal No.500/RAN/2018 dated 14.11.2018 passed by Commissioner(Appeals), Central Goods & Services Tax & Central Excise, Ranchi.)

M/s. Madhura Ingots & Steel Company Private Limited
(Argada Road, Binjhar, P.O.Marar-829117, Dist.Ramgarh, Jharkhand.)
...Appellant

VERSUS

Commissioner of CGST & CX, Ranchi Commissionerate
.....Respondent
(5A, Main Road, Ranchi, Jharkhand.)

WITH

Excise Appeal No.75818 of 2019

(Arising out of Order-in-Appeal No.501-502/RAN/2018 dated 14.11.2018 passed by Commissioner(Appeals), Central Goods & Services Tax & Central Excise, Ranchi.)

M/s. Madhura Ingots & Steel Company Private Limited
(Argada Road, Binjhar, P.O.Marar-829117, Dist.Ramgarh, Jharkhand.)
...Appellant

VERSUS

Commissioner of CGST & CX, Ranchi Commissionerate
.....Respondent
(5A, Main Road, Ranchi, Jharkhand.)

AND

Excise Appeal No.75487 of 2019

(Arising out of Order-in-Appeal No.501-502/RAN/2018 dated 14.11.2018 passed by Commissioner(Appeals), Central Goods & Services Tax & Central Excise, Ranchi.)

Shri Deepak Kumar Jain, Director
M/s. Madhura Ingots & Steel Company Private Limited
(Argada Road, Binjhar, P.O.Marar-829117, Dist.Ramgarh, Jharkhand.)
...Appellant

VERSUS

Commissioner of CGST & CX, Ranchi Commissionerate
.....Respondent
(5A, Main Road, Ranchi, Jharkhand.)

APPEARANCE
Shri Sekhar Sharad, Chartered Accountant for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75390-75392/2021

DATE OF HEARING : 25 February 2021
DATE OF DECISION : 15 July 2021

P.K.CHOUDHARY :

The present appeals have been filed by the assessee, M/s. Madhura Ingots and Steel Co. Pvt. Ltd ('Company') and its Director, Sri Deepak Kumar Jain against the Order-in-Appeal bearing No. 501 & 502 dated 14.11.2018 passed by the learned Commissioner (Appeals), Ranchi, upholding Central Excise duty demand pertaining to the period 2012-13 to 2013-14. Appeal has also been filed by the aforesaid Company against the separate Order-in-Appeal bearing No. 500 dated 14.11.2018 upholding Central Excise duty demand pertaining to the period 2014-15 on same counts. All the three appeals involving common issues pertaining to eligibility of CENVAT credit are taken for disposal by this common order. The duty demand have been raised in the original adjudication orders, as also upheld by the aforesaid appellate orders impugned herein, on the ground that the appellant company has availed CENVAT credit on the strength of fake invoices without actually receiving the goods in violation of the CENVAT Credit Rules, 2004.

2. The appellant company is engaged in the manufacture of M.S. Ingots on which Central Excise duty is being paid. Show Cause Notice (SCN) dated 06.06.2016 was issued by the Addl. Commissioner, Central Excise, Ranchi, for the period 2012-13 to 2013-14 for proposing denial of CENVAT credit in respect of seven invoices issued by the Central Excise registered dealers as mentioned therein on the ground that those dealers never supplied the goods as mentioned in the invoices. On the basis of letter dated 14.08.2015 issued by the

DGCEI, Jamshedpur, addressed to the Ranchi Commissionerate, it was alleged in the SCN that the manufacturers as mentioned in the Excise invoices issued by the said dealers never sold goods to the said dealers and that the said dealers were issuing bogus invoices. Statement deposed by the manufacturers and dealers before the DGCEI, Jamshedpur, were also relied in the SCN to allege that credit was availed by the appellant on the basis of bogus invoices without any involvement of goods. Similar Show Cause Notice (SCN) dated 08.02.2016 was issued pertaining to the period 2014-15 to deny credit availed on the strength of the excise invoices issued by the Excise registered dealers.

2.1 In the course of adjudication, the appellant disputed the duty demand on various counts and also prayed for allowing cross-examination of the persons whose statements were relied against the appellants in both the notices. Both the notices were separately adjudicated vide Order-in-Original dated 27.09.2017 and Order-in-Original dated 15.09.2017 whereby the demand proposed in the notices were confirmed alongwith interest and equivalent penalty imposed. Penalty has also been imposed on Shri Deepak Kumar Jain, Director.

2.2 The request for cross-examination was turned down with the observation that ample opportunities were given by the Department to those persons whose statements have been relied, but however, those persons failed to turn up before the Adjudicating authority. It has also been observed in the adjudication order that it could not be ruled out that the appellant had an understanding with those persons for not appearing for cross-examination and had they actually supplied the goods, they would have appeared for cross-examination and supported the appellant. Identical observations have been made by the Adjudicating authority in both the aforesaid original demand orders.

2.3 In the first appeal, the learned Commissioner (Appeals), Ranchi, relied on the provisions of Section 9D of the Central Excise Act, 1944, which deals with the “Relevancy of the Statements under certain circumstances” to hold that the cross-examination of the persons named in the proceedings could not be obtained without an amount of delay or expense and therefore, the request made by the appellants for cross-examination in the instant case has rightly been denied. He also observed that since the authors of the statements stated the truth in accordance with the provisions of Section 14 of the Central Excise Act, the said statements remained valid. Further, he observed that proceedings under the aforesaid Section 14 is deemed to be judicial proceedings within the meaning of Section 193 and Section 228 of the Indian Penal Code as mentioned therein.

3. Shri Shekhar Sharad, learned Chartered Accountant, appeared for the appellant and Shri A. Roy, learned Authorized Representative appeared for the Revenue.

4. The learned Chartered Accountant for the appellant, *inter-alia*, submitted that the instant demand has been raised merely on the basis of the statements of the persons whose cross-examination have not been allowed to test the correctness and authenticity of the allegations and hence the same will prejudice the interest of the appellants. The observations made by the authorities that the appellant deliberately kept away the persons from causing appearance whose cross-examination was requested is a bald allegation and without any basis in the absence of any evidence. He relied on several decisions including the following decisions, in support of his contention to submit that statements made by the person cannot be entered into evidence where the cross-examination of the statements of said persons are sought to be relied against the assessee :-

- **CCE vs. Parmarth Iron Pvt. Ltd 2010 (260) ELT 514 (Allahabad)**
- **G-Tech Industries vs. UOI 2016 (339) ELT 209 (P&H)**
- **Nidhi Auto Pvt Ltd vs. CCE 2020 (33) GSTL 419 (Tri-All)**

Apart from the above submissions, the appellant also submitted that they have duly received the goods which have been used in the manufacturing process and necessary accounts and statutory records under Central Excise have been duly maintained. He also submitted that payment has been duly made through banking channels and there is no evidence that the payment has been received back so as to dispute the authenticity of the transaction. He stated that the said submissions were also made in the course of adjudication which have not been refuted by the authorities. He also submitted that since the CENVAT credit has been lawfully availed, there is no reason to impose any penalty on the Company as well as the Director.

5. The learned Authorized Representative, appearing for the Revenue, justified the findings made in the impugned orders and stated that there is no case for the appellant to seek any relief inasmuch as the credit has been illegally availed without receipt of excisable goods as would be evident from the proceedings initiated by the DGCEI, Jamshedpur against the concerned manufacturers and the dealers on whose invoices the CENVAT credit have been illegally claimed by the appellant. He accordingly prayed that all the appeals be rejected being devoid of any merit.

6. Heard both sides through video conferencing and perused the appeal records and the written submissions filed by the learned Chartered Accountant for the appellant.

7. I find that the entire proceedings have been initiated on the basis of statements made by the manufacturers and the Excise dealers which have been solely relied to conclude that the appellant has not received the goods. The appellants in the course of adjudication have been consistently demanding cross-examination of the witnesses whose statements have been heavily relied upon by the Department. The appellants have pleaded that the goods on which credit have been availed were duly received by them and duly accounted for in the

statutory records and that payments have been made through banking challans.

7.1 It is the case of the appellant that CENVAT credit has been unjustifiably denied to them by the jurisdictional Central Excise authorities at Ranchi merely on the basis of the communication made by the DGCEI, Jamshedpur, enclosing the statements made by the persons whose cross-examination have not been allowed. No other evidence is available on record but the statements which too have not been allowed to be examined. The status of the proceedings against the said persons, if at all taken by the Department, have not been informed and neither the said persons have been implicated as co-noticee in the present proceedings. In the absence of prosecution of said persons, the appellants cannot be deprived in any manner.

7.2 On perusal of para 3.25 of the adjudication order dated 15.09.2017, I find that the request for cross-examination of the persons whose statements have been relied upon has been turned down on the ground that despite several opportunities given by the Department, those persons failed to turn up before the authorities. Identical observation has been made in para 3.12 of the other adjudication order dated 15.09.2017. In this regard, I find that the reasons assigned by the authorities below to reject cross-examination is clearly unsustainable in legal parlance for the obvious reason that no adverse inference can be drawn against assessee whose statements are to be relied by the Revenue without ascertaining the veracity in the absence of cross-examination. In an almost identical situation, this Tribunal in the case of **Arsh Castings Pvt Ltd vs. CCE, Chandigarh 1996 (81) ELT 276 (Tri)** has observed that:-

> ***8.*** *Considered. It is not in dispute that the entire case of the Department regarding the gate passes in question being fictitious hinges on the evidence of the Partner/Director of the concerned firm of Alang (Rajkot), who according to the gate passes resumed in the instant case were consignors. From the Final Order (as extracted*

above) No. A/245/92-NRB, dated 25-5-1992 passed by the Tribunal, it is clear that, earlier the case was remanded to the adjudicating authority for affording an opportunity to the appellants to cross-examine the concerned persons whose statements were relied upon in the Show Cause Notice. We find from the impugned Order that still the opportunity to cross- examine the witnesses whose statements were relied upon in the Show Cause Notice was not given to the appellants. The adjudicating authority, that is to say, the Additional Collector of Central Excise, Chandigarh, has recorded his finding in paragraph 4 of the impugned order-in-original as follows :

> *"4. <u>Personal hearing along with cross-examination of the witness, whose statements were relied upon in the Show Cause Notice, was fixed for 27-10-1992, 9-11-1992, 12-12-1992, 23-1-1992, 10-2-1992, 30-3-1993 which was finally held on 17-5-1993. None of the witnesses turned up for cross-examination, except for written statements tendered by two of the witnesses one partner of Ganpat Rai Jai Gopal and other AB Gujrati, Partner of Madhaw Industrial Corporation.</u>"*

9. *From the above findings of the adjudicating authority, it is obvious that the opportunity was not given to the appellants to cross-examine third parties on whose statement reliance was placed by the Department and, in fact, on whose statements the present demand has been confirmed.* ***It is an elementary principle of natural justice and fair play that a person who is sought to be proceeded against and penalised in adjudication on the basis of third party statements should be afforded effective opportunity to challenge the correctness of the same as per law by cross-examination, if he so desires.<u>If witness do not turn up for cross-examination, it is open to the adjudicating authority to proceed with the adjudication without relying on these statements against the person so charged.</u> Failure of a witness to appear for cross-examinationwill not be a ground to penalise the appellants in law when the appellant is entitled to an opportunity of cross-examination of third party on whose statements reliance is placed.*** *In case of L. Chandrasekhar v.*

Collector of Customs, supra, decided by the Tribunal applies on all fours to the present case. For ready reference, the relevant portion may be reproduced herein with advantage :

> *"5. On going through the records, I find that the factual submission set out above and made by the learned Counsel are correct. The Tribunal initially remanded the case for giving the appellant an opportunity of cross-examination of third parties on whose statements reliance had been placed against the appellant. In the impugned order, after remand, the learned Adjudicating Authority in this context has observed as under :*
>
> > *"S/Sri Sundarraj, Velusamy, Manuel Coreira, Sethu and Kalyani who were called upon forcross-examination did not turn up. The Advocates insisted on their cross-examination but it appeared that they are keeping away from their proceedings and as such the process could not be completed. Moreover, the case could not be kept in abeyance indefinitely merely on the non-availability of persons required for cross-examination."*
> >
> > *The Adjudicating authority again in the finding column in the impugned order has observed as under :*
> >
> > *"The opportunity by cross-examination of the witnesses also was given.But the persons summoned to appear forcross-examination before me did not turn up. It was explained to Counsel L.Chandrasekaran that the persons summoned for cross-examination appeared to keep away from their proceedings and as such the adjudication process will not be completed."*
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> *6. ...."*

10. *Besides, the case of Pahar Chand & Sons v. The State of Punjab, (1972) 30 STC 211, decided by the Division Bench of the Punjab & Haryana High Court (cited by the appellants in the memo of appeals) also applies on all fours to the present case. In that case also, the*

Sales Tax Assessing Authorities under the Sales Tax Act were treating the sales recorded in the books of accounts as fictitious and the assessing authorities relied upon the testimony of the witnesses without giving opportunity of cross-examination to the assessee therein. Setting aside the assessment, the Court observed ***(1) that "if the assessing authority was relying on the testimony of a witnesses, the assessee should have been afforded an opportunity to cross-examine. It was not open to the assessing authority to get over this hurdle on the plea that the witness had not been produced by the assessee****; and (2) that the assessing authority acted on material which was not legal, to come to the conclusion that the sales were fictitious. [Head Note (2) & (3)]. The same view was taken by the Division Bench of the Mysore High Court in the case of NeminathAppayya v. Jamboorao, AIR 1966 Mysore 154, wherein it was held that the evidence of the witness must be excluded from consideration when there is a failure to give opportunity to cross-examine the witness.*

11. In view of the above, the statement of the witnesses on whom the Department is relying upon has to be disregarded. If that be so, nothing remains on record to prove that the gate passes so resumed were fictitious."

7.3 I further find that the Tribunal in the case of **Nidhi Auto (Supra),** while relying on the ratio laid down by the Hon'ble High Court in the case of Parmarth Iron Pvt Ltd. has held that when the Revenue does not allow cross-examination of any prosecution witness then Revenue cannot rely on the statement given by such prosecution witness for confirmation of demand. The relevant portion of the decision of the Tribunal is extracted below:-

"6. Having considered the submissions from both the sides and on perusal of record, we note that the Original Adjudicating Authority has basically relied on few statements recorded and two ledgers maintained by the appellant M/s. Nidhi Auto and one diary recovered from the residence of partner of M/s. Ruby Steels and transport details for five months provided by Shri Arun Jain and he has accepted all the

evidences relied upon for issue of show cause notice without examining the contentions of the appellants which were submitted before him before passing the impugned Order-in-Original. ***We note that it was held by Hon'ble Allahabad High Court in the case of Commissioner of Central Excise v. Parmarth Iron Pvt. Ltd. (supra) that if Revenue does not allow cross-examination of any prosecution witness then Revenue cannot rely on the statement given by such prosecution witness for confirmation of demand.*** *In the present case cross-examination of none of the prosecution witnesses were allowed. Therefore, following the ruling by Hon'ble Allahabad High Court, we hold that none of the statements were admissible evidence in the present case. We, further, note that it is settled law that if the author of a diary is not identified and his statement is not recorded then such diary is not admissible evidence. In the present case, we find that the author of the diary recovered at the residence of the partner of M/s. Ruby Steels was not identified and his statement was not recorded and therefore, the diary recovered was not admissible evidence. Further, we also note that it was alleged that M/s. Nidhi Auto was maintaining parallel ledgers whereas we find that M/s. Nidhi Auto was maintaining two ledgers which was in the regular course of business and that the goods entered were tallying with the total quantity received by them in both the ledgers put together. Further, Revenue could not exhibit any discrepancy of total inputs reflected in two ledgers put together with entries of inputs in RG-23 records. Further, we note that Revenue has not investigated as to if 9112.500 MT of quantity of inputs shown in the books of account of M/s. Ruby Steels were not delivered to M/s. Nidhi Auto and only invoices were given then where did such huge quantity of inputs gone and to whom and who was the transporter. Further, Revenue also did not investigate as to if 9112.500 MT of inputs were not received by M/s. Nidhi Auto then from where M/s. Nidhi Auto has procured inputs for manufacture of goods which were cleared on payment of duty. We, therefore, do not find the impugned order to be sustainable.*

7.*We, therefore, set aside the entire impugned order and allow all the appeals. All the appellants shall be entitled to consequential relief, as per law."*

In view of the above discussions, the impugned orders cannot be sustained and hence, the same are set aside. All the Appeals are allowed with consequential relief, if any.

(Order pronounced in the open court on 15 July 2021.)

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

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