5CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 661 of 2012

(Arising out of Order-in-Appeal No. Th-I/RKS/16-18/2012 dated 31.01.2012 passed by the Commissioner of Central Excise (Appeals), Thane-I)

Hasmukh Dahyabhai Patel .... Appellant
194, Shakti Compound, College Road,
Dhamankar Naka, Bhiwandi,
Thane - 421 302,

Versus

Commissioner of Central Excise, Thane-I .... Respondent
Meher Building, Bombay Garage,
Dadiseth Lane, Chowpathy,
Mumbai – 400 007.

WITH

Excise Appeal No. 698 of 2012

(Arising out of Order-in-Appeal No. Th-I/RKS/16-18/2012 dated 31.01.2012 passed by the Commissioner of Central Excise (Appeals), Thane-I)

Balasaheb Laxman Patil .... Appellant
A/301, Oxford Greenwood
Complex, Godbundar Road,
Thane-West

Versus

Commissioner of Central Excise, Thane-I .... Respondent
Meher Building, Bombay Garage,
Dadiseth Lane, Chowpathy,
Mumbai – 400 007.

Appearance:

Shri H.G. Dharmadhikari a/w D. Bhalerao & V.D. Javalgatti, Advocates for the Appellants

Shri Amrendra Kumar Jha, DC, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86260-86261/2022

Date of Hearing: 28.11.2022
Date of Decision: 28.11.2022

Per: Dr. Suvendu Kumar Pati

Confirmation of duty demand, interest and equal penalty on shortages of goods by the Commissioner (Appeals), Thane-I on the ground of clandestine removal upon physical inspection of the goods made in the manufacturing unit of the Appellant alongwith penalty at the reduced rate under Rule 26 of Central Excise Rules, 2002 on the Excise-in-Charge of the Appellant firm is assailed in these appeals.

2. Facts of the case, in brief, is that on the basis of intelligence information Respondent-Department conducted raid on the Appellant's firm and seized certain incriminating documents, stock register and physical stock of processed and unprocessed fabrics which did not tally. Shortages of fabrics were worked out and Appellant was put to show-cause to pay duty on the differential quantity of fabrics on the allegation that those were clandestinely removed. Upon receipt of reply to the show-cause notice, adjudication process was undertaken that confirmed duty demand along with interest and penalty on the Appellant firm and penalties on proprietor of the firm M/s Shree Khodiyar Devi Krupa Textile Processors Shri Hasmukh D Patel and Shri Balasaheb Laxman Patil, Excise-in-Charge of M/s Shree Khodiyar Devi Krupa Textile Processors. In appeals preferred before the Commissioner (Appeals) by the Appellants, duty

demand of Rs.24,34,342/- along with interest as well as equal amount of penalty against the firm were confirmed. Penalty imposed on proprietor of the firm Shri Hasmukh D Patel, was set aside and penalty imposed on Shri Balasaheb Laxman Patil, Excise-in-charge of the Appellant firm was reduced from Rs. 6,50,00/- to Rs. 2,00,000/- under Rule 26 of the Central Excise Rules, 2002. Now, Appellant firm is before us through its proprietor H. D. Patel challenging the legality of the impugned order but wrong nomenclature is put in the appeal memo as its appeal is filed by H D Patel. The order of the Commissioner (Appeals) to the extent of his confirmation of duty and penalty is assailed in these appeals.

3. During the course of arguments, learned Counsel Shri H.G. Dharmadhikari for the Appellant firm submitted that it is a settled principle of law and has found acceptance by various decisions of the Tribunal as well as Hon'ble High Court that *mere mathematical calculation indicating shortages of raw material would not lead to inference of clandestine removal in absence of any proof of physical removal and tangible corroborative evidence of removal*. To support his contentions, he placed his reliance on the following judgments: -

(a) CCE Vs. Anand Founders & Engineers – 2016 (331) ELT 340 (P&H).

(b) Shivalaya Ispat & Power Pvt. Ltd. Vs. CCE – 2017 (357) ELT 742 (Tri-Del).

(c) Super Iron & Steel Pvt. Ltd. Vs. CCE – 2021 (378) ELT 180 (Tri-Del).

(d) Star Alloys & Chemicals Pvt. Ltd. Vs. CCE – 2019 (21) GSTL 174 (Tri-Del)

(e) *Ranasaria Polypack PVt. Ltd. Vs. CCE – 2009 (247) ELT 700 (Tri-Ahmd).*

3.1 His further contention is that duty is supposed to be on manufacture and the charge is on removal of goods but without any evidence of removal and basing on some stock position and other accounting documents imposition and confirmation of duty is unsustainable in law and facts. He placed his reliance on the judgment of *Nitin Spinners Ltd. Vs. CCE – 2016 (337) ELT 473 (Tri-Del)* and *CCE Vs. Sadashiv Metallics Ltd. – 2006 (193) ELT 199 (Tri-Del)* to support his stand.

3.2 Further argument of the learned Counsel is that even the relevant Valuation Rules for the period of 2004 was not followed in the Order-in-Original and average amount of Rs.22/- per L. Mtr. has been worked out despite the facts that clearance of goods to the buyers is varying between Rs.15 to 20. On imposition of penalty on the employee-in-charge of excise matter and firm as well, while pleading that it would amount to double punishment, he argued that such confirmation of demand being unsustainable having its base on the recorded statements of some staff member recorded under Section 14 of the Central Excise Act, 1944, the same statement cannot be considered as evidence without examining the author as per provisions of Section 9D of the Central Excise Act, 1944 to which effect also he relied on the decision of *Jindal Drugs Pvt. Ltd. Vs. CCE – 2016 (340) ELT 67 (P&H)* and *Shree Rohit SVN FAB (P) Ltd. Vs. CCE,* *Jaipur-II – 2018 (363) ELT 564 (Tri-Del)* and prayed for setting aside the order passed by the Commissioner (Appeals).

4. In response to such submissions the learned AR Shri Amrendra Kumar Jha for the respondent Department, while supporting the reason and reasonability of the order passed by the Commissioner (Appeals), has argued that none of the witnesses had retracted from their statements recorded under Section 14 of the Central Excise Act, 1944, for which the statements recorded during investigation and produced at the time of hearing has to be accepted as evidence in this proceedings basing on which learned Commissioner (Appeals) had confirmed the Order-in-Original that needs no interference by the Tribunal.

5. We have heard submissions from both sides and perused the case records. Judicial decision is consistent on the issue of un-sustainability of demand on alleged clandestine removal in the absence of physical tangible corroborative evidence of such removal. It is also submitted that admission of the witnesses needs no further corroboration, but it is equally important to examine the relevancy of statements recorded in certain circumstances as per provisions contained under Section 9D of the Central Excise Act, 1944, but in the instant case, the same appears to have not been complied with as none of the witnesses were examined during the adjudication proceedings and no opportunity of cross examination was granted to the Appellants, who were affected by such decision for which, we

find force in the submissions of the learned Counsel for the Appellants that in view of the judgment cited above for completion of examination of witnesses under Section 9D of the Central Excise Act, 1944 and in absence of essential ingredients and concrete proof of removal of goods from factory as well as in the absence of essential ingredients that would attract penalty under Rule 26, as has been held in the judgment of *CCE Vs. Resham Petrotech Ltd. – 2010 (258) ELT 50 (Guj)* and *Maidar Barrels Pvt. Ltd. Vs. CCE – 2014 (312) ELT 742 (Tri-Mum),* we set aside the order of the duty demand with interest and penalty. Hence, the order.

6. The appeals are allowed and the order passed by the Commissioner of Central Excise (Appeals), Thane-I in Order-in-Appeal No. Th-I/RKS/16-18/2012 dated 31.01.2012 is set aside to that extent of confirmation of demand and penalty on at the reduced rate.

(Operative portion of the order pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Saniv Srivastava)
Member (Technical)

Sinha