CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
REGIONAL BENCH, COURT NO. 4

EXCISE APPEAL NO. 88155 OF 2013

DINESH HARICHAND SHAH
Presscopper House,
C-212/213, MIDC,
TTC,Turbhe,
Navi Mumbai- 400 703.
Appellant

Vs.

COMMISSIONER CGST AND CENTRAL EXCISE, BELAPUR
CGO Complex,
CBD Belapur,
Navi Mumbai- 400 614.
Respondent

(Arising out of Order-In-Appeal No. BC/47-48/BEL/2013-14 Dated 30.04.2013 passed by The Commissioner (Appeals) of CE, Mumbai-III.)

EXCISE APPEAL NO. 86435 OF 2022

ARDH METALS AND ALLOYS PVT. LTD.
Presscopper House,
C-212/213, MIDC,
TTC,Turbhe,
Navi Mumbai- 400 703.
Appellant

Vs.

COMMISSIONER CGST AND CENTRAL EXCISE, BELAPUR
CGO Complex,
CBD Belapur,
Navi Mumbai- 400 614.
Respondent

(Arising out of Order-In-Appeal No. DL/CE/289/RGD-APP/2021-22 Dated 28.02.2022 passed by Commissioner of Central Tax (Appeals), Raigad.)

Appearance:
Shri Mayur Shroff, Advocate for the Appellant.

Shri Xavier P.M. Mascarenhas, Superintendent, Authorized Representative for the Respondent.

CORAM:
HON'BLE MR. ANIL.G.SHAKKARWAR, MEMBER (TECHNICAL)

Date of Hearing: 21.02.2024
Date of Decision: 21.02.2024

FINAL ORDER – 85253-85254/2024.

PER : MR. ANIL.G.SHAKKARWAR

Above stated two appeals are taken up together for decision since they were dealt with in common Order-In-Appeal dated 30.04.2013. The appeal in respect of M/s. Ardh Metals and Alloys Pvt Ltd. arising out of the said Order-In-Appeal dated 30.04.2013 had travelled to this Tribunal and same was decided through final order No. A/87523/17/SMB dated 26.05.2017 and through the said order the matter was remanded to the Original Authority with directions. Subsequent to the said remand, Order-In-Orginal dated 30.04.2021 was passed which was challenged before the Learned Commissioner (Appeals) who decided the appeal through the order dated 28.02.2022 which is challenged before this Tribunal by M/s. Ardh Metals and Alloys Pvt Ltd. The other appeal filed by Shri Dinesh Harichand Shah who is director of M/s. Ardh Metals and Alloys Pvt Ltd. is against personal penalty imposed on him which survived through Order-In-Appeal dated 30.04.2013.

2. Brief facts of the case are that M/s. Ardh Metals and Alloys Pvt Ltd. were manufacturer of products of ferrous and non-ferrous metals. They purchased on high sea sale basis remelted copper wires, paid custom duty on the same and availed CENVAT credit of Rs. 34,60,720/- of additional duty of customs paid on said imported remelted copper wires as CENVAT credit during the period from July, 2005 to February, 2006. The said high sea sale purchases were made from two importers namely M/s. Dinesh International and M/s. Vipin Enterprises.

3. Revenue carried out certain investigation against the said two importers and on the basis of various statements recorded, issued a show cause notice dated 05.08.2010 to M/s. Ardh Metals and Alloys Pvt Ltd. making allegations that the imported remelted copper wires were never received in their factory and without receipt of inputs, appellants have availed CENVAT credit of Rs. 34,60,720/- and, therefore, through the said show cause notice they proposed to recover the same. The Appellant contested the show cause notice stating that Shri Dinesh Harichand Shah,

stated through his statement dated 02.08.2010 that the appellant received inputs in their factory, they were entered in the statutory records and were used for manufacture of final products on which duty was paid. Through the said show cause notice, there was proposal to impose penalty on Shri Dinesh Harichand Shah. The Original Authority issued an order dated 13.03.2012 confirming the demand and imposing penalty on the other appellant. The said order was appealed against before the learned Commissioner (Appeals) who upheld the said order through Order-In-Appeal dated 30.04.2013.

4. Two appeals arose out of Order-In-Appeal dated 30.04.2013. One filed by M/s. Ardh Metals and Alloys Pvt Ltd. and other filed by Shri Dinesh Harichand Shah. The appeal filed by Dinesh Harichand Shah is under consideration presently. The appeal filed by M/s. Ardh Metals and Alloys Pvt Ltd. was considered by this Tribunal and final order was passed bearing no. A/87253/2017/SMB dated 26.05.2017. It was held in the said final order as reproduced below:

"5. I find that there is no confessionary statement of the appellant whereas they have been always maintaining their stand that the goods were received by them which is used in the manufacture of final product and final product cleared on payment of duty. There is no dispute about payment on high sea purchases made by the appellant to the seller of the goods. The customs duty also paid by the appellant and cleared the goods from the customs. The entire case was made against appellant on the basis of various statements recorded from third persons i.e. seller, transporter, broker etc. If this is so, then it is necessary to allow cross examination of these witnesses to the appellant. As per section 9(D) of Central Excise Act, 1944 it is provided that even if assessee does not ask for cross examination it is obligatory on the part of the adjudicating authority to cross examination the witnesses whose statements being relied upon that means for relying on any statements it is necessary that the adjudicating authority first cross examine the persons

whose statements are being relied upon for deciding the case, therefore I am of the clear view that taking into consideration overall circumstances of the present case it is necessary to allow cross examination of the witnesses as requested for by the appellant. I therefore remand the matter to the Original adjudicating authority with direction to first conduct cross examination of the witnesses in the presence of the appellant/ their representative thereafter an opportunity be given to the appellant for making their additional defence if any required and then pass a fresh order by giving proper reasoning. Appeal is allowed by way of remand to the Original adjudicating authority in the above terms."

5. In implementation of the said final order, original authority has put in efforts to call the witnesses for cross examination. It was tried that cross examination would be conducted on 25.02.2021, 07.04.2021 and 16.04.2021. However, no witnesses appeared for cross examination. Therefore, Original Authority passed Order-In-Original dated 30.04.2021. In para 32 of the said Order-In-Original, Original authority has stated that in spite of giving three opportunities for cross examination, none of the witnesses appeared. In spite of Revenue not able to cause to produce prosecution witnesses for cross examination which was the specific direction of this Tribunal, the Original authority confirmed the demand and imposed penalty. The said order was challenged before the learned Commissioner (Appeals). He upheld the said order through his impugned Order-In-Appeal dated 28.02.2022. Aggrieved by the said order, appellant is before this Tribunal.

6. Heard the learned counsel for the Appellant. The Learned counsel for the appellant has submitted that entire show cause notice dated 05.08.2010 was based on various statements recorded. He has submitted that statement of Shri Dinesh Harichand Shah, director of M/s. Ardh Metals and Alloys Pvt Ltd. and other appellants was recorded on 02.08.2010 through which Shri

Dinesh Harichand Shah had deposed that all the raw materials were received in their factory and they were entered in the statutory record and the said inputs were used in the manufacturing of the final products and final products were cleared on payment duty and they have availed the referred CENVAT credit in accordance with the law. Learned Counsel for the Appellant has submitted that it was responsibility of the Revenue to produce prosecution witnesses for cross examination to carry out the direction of this Tribunal, and that Revenue has failed to produce prosecution witnesses for cross examination. Therefore, the Order-In-Original dated 30.04.2021 affirmed by Order-In-Appeal dated 28.02.2022, is passed in violation of the direction of this Tribunal and therefore is not sustainable. He has further submitted that since the confirmation of demand against the M/s. Ardh Metals and Alloys Pvt Ltd. are not sustainable, imposition of question of penalty on Shri Dinesh Harichand Shah does not arise.

7. Heard the Learned Authorized Representative. The Learned Authorized Representative has submitted that Revenue has tried its best to produce the prosecution witnesses for cross examination. However, because of the passage of the time they could not be located. He has also stated that the report of the Transport Commissioner, Gujarat states that the vehicles which were stated to have transported the inputs, had not crossed the Gujarat border.

8. I have carefully gone through the record of the case and submissions made. I find that this Tribunal through its final order dated 26.05.2017 had given specific instructions to conduct cross examination of prosecution witnesses and then to pass fresh orders. The order dated 30.04.2021 is passed without having conducted the cross examination of the witnesses whose statements were relied upon in the show cause notice. Further, Shri Dinesh Harichand Shah, director of the company through his statement dated 02.08.2010 has stated that all the inputs were received in the factory,

they were used in the manufacturing of the final products and final products were cleared on payment of duty. If it was the case of the Revenue that inputs were not received by the appellant. Then Revenue should have investigated as to from where the inputs were received for the manufacture of final products because Revenue accepted the duty paid by the appellant on the final products.

9. The contention of the learned Authorized Representative is that Transport Commissioner's report may be taken into consideration cannot be accepted because even Transport Commissioner's staff was not put to cross examination to make the said report as an admissible evidence.

10. In view of my above observations, I set aside the Order-In-Appeal dated 30.04.2013 in so far as the same is in respect of Shri Dinesh harichand shah and I set aside impugned Order-In-Appeal dated 28.02.2022 in respect of M/s. Ardh Metals and Alloys Pvt Ltd. In above terms, Both the appeals are allowed.

(Dictated and pronounced in open court.)

(ANIL.G.SHAKKARWAR)
MEMBER (TECHNICAL)

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