CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 89420 OF 2014

[Arising out of Order-in-Original No. 43/CEX/COMMR/2014 dated 15th July 2014 passed by the Commissioner of Central Excise & Customs, Aurangabad.]

Pawankumar F Gupta
M/s. Parvati Steel Re-Rolling Mills Pvt Ltd
B-21, Bhagnari CHS, Duccan Causeway Road
Sion East, Mumbai - 400022 … ***Appellant***

versus

Commissioner of Central Excise, Customs & Service Tax
Town Centre, N-5 CIDCO, Aurangabad - 431003 ***…Respondent***

WITH

EXCISE APPEAL NO: 89421 OF 2014

[Arising out of Order-in-Original No. 43/CEX/COMMR/2014 dated 15th July 2014 passed by the Commissioner of Central Excise & Customs, Aurangabad.]

Parvati Steel Re-Rolling Mills Pvt Ltd
Plot No. A-29B, Additional MIDC Area, Jalna - 431203 … ***Appellant***

versus

Commissioner of Central Excise, Customs & Service Tax
Town Centre, N-5 CIDCO, Aurangabad - 431003 ***…Respondent***

AND

EXCISE APPEAL NO: 89422 OF 2014

[Arising out of Order-in-Original No. 43/CEX/COMMR/2014 dated 15th July 2014 passed by the Commissioner of Central Excise & Customs, Aurangabad.]

Ravi S Gupta
M/s Parvati Steel Re-Rolling Mills Pvt Ltd
B-21, Bhagnari CHS, Duccan Causeway Road
Sion East, Mumbai - 400022 … ***Appellant***

versus

Commissioner of Central Excise, Customs & Service Tax
Town Centre, N-5 CIDCO, Aurangabad - 431003 ***…Respondent***

APPEARANCE:

Shri Jatin Singhal, Advocate and Shri D R Gadekar, Consultant for the appellant

Shri Amrendra Kumar Jha, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: __85295-85297/2024

DATE OF HEARING:	14/09/2023
DATE OF DECISION:	12/03/2024

PER: C J MATHEW

The three appellants, M/s Parvati Steel Re-rolling Mills Pvt Ltd, Shri Ravi S Gupta and Shri Pawankumar F Gupta, are before us challenging order[1] of Commissioner of Central Excise and Service Tax, Aurangabad which, with the finding of clandestine removal of 'mild steel (MS) bars' between 1st April 2008 and 23rd March 2011, had charged the assessee with duty of ₹ 3,35,86,883 under section

[1] [order-in-original no. 43/CEX/Comm/2014 dated 15th July 2014]

11A of Central Excise Act, 1944, besides interest as applicable under section 11AB of Central Excise Act, 1944, and imposed penalty of like amount under section 11AC of Central Excise Act, 1944 as well as penalty of ₹ 10,00,000 each imposed on the two individuals.

2. From the contentions made on behalf of the appellants, it would appear that the findings are in dispute solely on the ground of denial of cross examination of witnesses considered to be material to the finding and, in the absence thereof, by attribution of lack of credibility to the inferences drawn from 'computer printout' of ledger recovered from M/s Shri Osiya Traders together with statement of its proprietor who was also a noticee in the proceedings.

3. It is further submitted by Learned Counsel for the appellants that inadmissibility of documents retrieved from computer without authentication has been settled by the Hon'ble High Court of Orissa in *Commissioner of Central Excise and Customs, Bhubaneswar-II v. Shivam Steel & Others [2022 (12) TMI 908-Orissa High Court]* and that the decision of the Hon'ble Supreme Court in *Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II [2015 (324) ELT 641 (SC)]* calls for discarding of statements that had not been tested for veracity in terms of section 9 D of Central Excise Act, 1944.

4. Learned the Authorized Representative pointed out that the statements of customers and transporters, backed by computer records

of the intermediary, have established beyond doubt that assessee had been indulging in clandestine clearance. It is further pointed out that the decision of the Hon'ble Supreme Court in *Collector of Customs, Madras v. D Bhoormull [1983 (13) ELT 1546 (SC)]* and of the Tribunal in *Gulabchand Silk Mills (P) Ltd v. Commissioner of Central Excise, Hyderabad [2005 (184) ELT 263 (Tri-Bang)]* had been relied upon in the impugned order.

5. We find from the records that the confirmation of demand on goods allegedly cleared clandestinely has been based on certain records recovered from other parties and sought to be backed by statements of customers and transporters. No evidence as forthcoming of any other material records of physical clearance or of any recovery of sale proceeds. It is clear from

> *'17.2 The assessee in their submission has stated that this case is based on statements, drafted by the officers of DGCEI and recorded under pressure /threat, and hence not valid evidences. However, I find that no evidences brought out by the assessee that the aforesaid statements were recorded under pressure or threat On the other hand , the fact of recovery of computer printouts of party-wise purchase ledger of M/s. SOT during search of the premises of M/s. SOT could not be denied by the assessee. In fact the correctness of the said data is established beyond doubt. I find that the charge of pressure / threat has been made only in reply to SCN and not at the time of statements made or immediately afterwards. Further, and such a serious allegation has been made without any supportive evidence to*

substantiate the same. It is also relevant to note that the persons whose statements were recorded have neither complained of any pressure/threat, any time earlier, when the investigation of the case was going on nor now and they have never retracted their deposition/ statements made by them till date. …………………… I further find that this case is not based only on oral statements but the documentary evidences recovered from the premises of M/s SOT and these statements are nothing but the confirmation of the information/ data appearing in the seized documents. The deponents have explained the entries appearing in seized records and based on. such entries they had duly admitted the facts. I also find that the statements recorded under Section 14 of the Central Excise Act, 1944 are valid evidences as held by and the Hon'ble Supreme Court in the case of Surjeet Singh Chabra reported as [1997(89) ELT 646(SC)] as these confessional statements are borne out of hard evidences and recorded before revenue officers. Therefore, the statements recorded in this case, based on hard documentary evidences, are valid evidences and can't be invalidated by legal arguments.

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17.4 ……………. I also find that the customers in their statements had clearly admitted to have received both types of finished goods from the assessee, i.e. with payment of duty as also without payment of duty and that the payments in respect of goods received without payment of duty had been made in cash. The transporters in their statements had admitted to have transported both types of goods from the factory of the assessee to various customers.

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> *17.6 …………………. These evidences/ facts clearly establish clandestine clearances by the assessee. I find that the Hon'ble Supreme Court in the case of M/s. D. Bhoormal reported as [1983(013) ELT 1546 (SC)] has held that "the prosecution or the deptt is not required to prove its case with mathematical precision………… The law does not require the prosecution to prove the impossible. All that is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in the issue. "'*

that this is so.

6. It is also clear from

> *'16.2 Thereafter, personal hearing was again fixed on 1.7.2014, wherein Shri D.R. Gadekar, Consultant appeared and he filed a written submission dated 01.07.2014 and reiterated the submissions made therein and again requested to allow cross examination of the witnesses, which was not acceded to.'*

that request for cross-examination had been declined without assigning any reasons or even considering the mandate of section 9D of Central Excise Act, 1944. In *re Andaman Timber Industries*, it was held that

> *'6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of*

natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier

> *occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) ELT A33 (SC)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.'*

rendering the action of the adjudicating authority to be questionable insofar as the findings are concerned.

7. The sole evidence is records of other parties and linking of the appellant with those has been attempted through statements that were not tested in cross-examination despite requests from the appellant. No corroborative evidence of any kind appears to have been brought forth either. With almost a decade having been elapsed after the proceedings, it would be impossible to establish relevancy of the documents in terms of section 9D of Central Excise Act, 1944 leaving the conclusions therefrom to be inadmissible.

8. In these circumstances, there is no merit in the conclusion of the adjudicating authority. Appeals are allowed by setting aside the impugned order.

(Order pronounced in the open court on 12/03/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*