

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH

Excise Appeal No. 88418 of 2014

(Arising out of Order-in-Original No. 42/CEX/COMMR/2014 dated 09.07.2014 passed by the Commissioner of Customs, Central Excise & Service Tax, Aurangabad.)

**M/s. Khatushyamji Re-Rolling
(Nanded) Pvt. Ltd.**

.....Appellant

**D-121, MIDC, Dhanegaon,
Nanded, Maharashtra – 431 603**

VERSUS

Commissioner of Central Excise and Service Tax, Aurangabad

.....Respondent

**Town Centre N-5, CIDCO,
Aurangabad – 431 003**

WITH

Excise Appeal No. 88416 of 2014

(Arising out of Order-in-Original No. 42/CEX/COMMR/2014 dated 09.07.2014 passed by the Commissioner of Customs, Central Excise & Service Tax, Aurangabad.)

Raman Gupta

.....Appellant

**M/s. Khatushyamji Re-Rolling
(Nanded) Pvt. Ltd.
D-121, MIDC, Dhanegaon,
Nanded, Maharashtra – 431 603**

VERSUS

Commissioner of Central Excise and Service Tax, Aurangabad

.....Respondent

**Town Centre N-5, CIDCO,
Aurangabad – 431 003**

AND

Excise Appeal No. 88417 of 2014

(Arising out of Order-in-Original No. 42/CEX/COMMR/2014 dated 09.07.2014 passed by the Commissioner of Customs, Central Excise & Service Tax, Aurangabad.)

Samir Bhagat

.....Appellant

**M/s. Khatushyamji Re-Rolling
(Nanded) Pvt. Ltd.
D-121, MIDC, Dhanegaon,
Nanded, Maharashtra – 431 603**

VERSUS

Commissioner of Central Excise and Service Tax, AurangabadRespondent
Town Centre N-5, CIDCO,
Aurangabad – 431 003

APPEARANCE:

Shri Pramod Kumar Rai, Advocate for the Appellants
Shri Xavier P.M. Mascarenhas, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NOS. 85380-85382/2024

Date of Hearing: 15.02.2024
Date of Decision: 05.04.2024

PER: DR. SUVENDU KUMAR PATI

Demand of Central Excise duty of Rs.8,83,30,407/- on the Appellant Company M/s. Khatushyamji Re-Rolling (Nanded) Pvt. Ltd. alongwith interest and equal penalty on the basis of retrieval of data printouts allegedly made from the computer of a third party and its confirmation under various Sections of the Central Excise Act by the Commissioner of Customs, Central Excise & Service Tax, Aurangabad vide above referred order is assailed by the Appellant Company. Imposition of penalty of Rs.2,00,000/- each on Raman Gupta, Ex-Director of the Appellant Company and Samir Bhagat, present Director of the Appellant Company under Rule, 26 of the Central Excise Rules, 2002 is also assailed by them in the other two appeals.

2. Facts of the case, in brief, is that Appellant M/s. Khatushyamji Re-Rolling (Nanded) Pvt. Ltd. was a manufacturer of M.S. Bars having excise registration for the same. It had also manufactured CTD/TMT Bars as a franchisee of M/s. Kamdhenu Ispat Ltd., Bhiwadi, Rajasthan (Franchisor) using its brand name "Kamdhenu". ADG (DGCEI), New Delhi, on receipt of specific intelligence about evasion of Central Excise duty by way of suppression of production and clandestine clearance of goods, conducted raid in the factory of M/s. Kamdhenu Ispat Ltd. and during investigation recovered relevant data from its computers concerning Appellant's transaction, obtained its printout which were duly certified by Forensic Division, GEQD (Director of Forensic Science, Government of India) and forwarded the same to the Commissionerate at Aurangabad *vide* covering letter dated 30.03.2012, under whose jurisdiction Appellant's manufacturing unit was situated. Accordingly, show-cause notice was issued to the Appellant proposing duty, demand etc., as referred above and the matter was adjudicated upon. Demand, interest and penalty, including penalties on the other two Appellants were confirmed by the Adjudicating Authority and hence the appeal.

3. During course of hearing of the appeal, learned Counsel for the Appellant Mr. Pramod Kumar Rai submitted that solely on the basis of computer printouts, without following the requirement of Section 36B of Central Excise Act 1944, demand was raised by computing minimum amount of royalty @4,00,000/- per month paid for lesser production after making a presumptive production calculation by dividing Rs.200/- as per M. Tonne royalty meant for each TMT Bar

manufactured with "Kamdhenu" logo and the difference of presumptive calculation *vis. a. vis.* production report, as per return submitted by the Appellant, has been treated as clandestine removal. In placing reliance on the case laws of *Anvar P.V. Vs. P.K. Basheer* reported in (2014) 10 SCC 473 and the latest one passed in the case of *Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Ors* reported in AIR 2020 SC 4908 on the evidenciary value of electronic evidence, he further submitted that Hon'ble Supreme Court is consistent in its finding that without meeting the requirement of mandatory certification, as required under Section 65B of the Indian Evidence Act, 1872 which is *pari Materia* to Section 36B of the Central Excise Act, 1944, those printout/documents can't be admitted as secondary piece of electronic evidence. In support of his stand, he has also referred to several decisions of the Tribunal passed in the case of *Attitude Alloys (P) Ltd. Vs. Commissioner of Central Excise, Bhubaneswar -II CESTAT Kolkata* vide Order dated 16.10.2023, *S.N. Agrotech Vs. Commissioner of Customs* reported in 2018 (361) ELT 761 (Tribunal Delhi), *Super Fashion Fasteners Pvt. Ltd. Vs. Principal Commissioner of Central Excise, Meerut-I* reported in 2018 (363) ELT 952 (Tribunal Allahabad), *Super Smelters Ltd. Vs. Commissioner of Customs, Central Excise & Service Tax, Durgapur* reported in 2020 (371) ELT 951 (Tribunal Calcutta/Kolkata), *J.P. Iscon Pvt. Ltd. Vs. Commissioner of Central Excise, Ahmedabad-I* reported in 2022 (63) GSTL 64 (Tribunal Ahmedabad). He strongly pleaded that those printouts were taken from a third place and not from the premises of M/s. Kamdhenu Ispat Ltd. and there was

categorical denial of the Director of M/s. Kamdhenu Ispat Ltd. that the said premises was not owned by "Kamdhenu" and, therefore, the printout containing money transactions or clearance of excisable goods being not acceptable piece of evidence, the demand can be treated as purely based on imagination and presumption as no cogent evidence regarding etc. raw material procurement, sale, transport etc. were established against the Appellant to substantiate the clandestine clearance, the same would be of presumptive value only, that would not receive concurrence of the Court of law. On this point also, he relied upon the following judgments –

- a) *Oudh Sugar Mills Ltd. Vs. Union of India* – [1978 (2) ELT (J172) (SC)]
- b) *J.A. Naidu Vs. State of Maharashtra* – [1983 (13) ELT 1611 (SC)]
- c) *K. Rajagopalan Vs. CCE, Madurai* – [2002 (142) ELT 128]
- d) *Ghodavat Pan Masala Products Ltd. & Ors. Vs. CCE, Pune* – [2004 (175) ELT 182]
- e) *Parshuram Cement Ltd. VS. CCE, Lucknow, CCE, Madurai* – [2003 (160) ELT 213]
- f) *Mukesh Dye Works Vs. CCE, Mumbai-VI* – [2006 (196) ELT 237]
- g) *Padmanabh Dyeing & Finishing Work Vs. Collector of C. Ex., Vadodara* – [1997 (90) ELT 343]
- h) *Amar Ispat (P) Ltd. Vs. CCE, Thane-I* – [2009 (235) ELT 487 (Tri.-Mumbai)]
- i) *Sothorn Ispat Ltd. Vs. CCE, Calicut* [248 ELT 270]
- j) *CCE, Chandigarh Vs. Nachiketa Paper Ltd.* - [2008 -225-ELT-194 (P & H)]
- k) *Commissioner Vs. Nissan Thermoware Pvt. Ltd.* - [2011 (266) ELT 45 (Guj)]
- l) *Prabhu Lala Ram Ratan Das (P) Ltd. Vs. CCE, Kanpur* – [2011 (271) ELT 420]
- m) *Chetak Mfg. Co. Vs. CCE, Vapi* – [2012 (278) ELT 355]

His further submissions was that without reference to actual involvement and nature of illegality done by the Director Samir

Bhagat, penalty was imposed on him that is also required to be set aside.

4. In response to such submissions, learned Authorised Representative for the Respondent-Department Mr. Xavier P.M. Mascarenhas argued in support of the reasoning and rationality of the order passed by the Commissioner and took us to para 12 of the show-cause notice to substantiate that there was shortage of 157MT M.S. billets in the factory premises of the Appellant that refutes the plea of innocence of the Appellant. He further submitted that learned Counsel for the Appellant has not brought any fact on record to show how the conditions of Section 36B(2) are not fulfilled and the onus lies on the Appellants to establish that the provisions were violated, which is apparently found missing in the defence plea. Placing reliance on the judgement of this Tribunal passed in the case of *M/s. Advance Impex Pvt. Ltd. Vs. Commissioner of Customs, Central Excise & Service Tax, Hapur Commissionerate - [2019 -TIOL-1249-CESTAT-ALL]*, in which allegation of clandestine removal on the basis of royalty paid to the same "Kamdhenu" trade mark was held to have been substantiated for which the demand was confirmed by Tribunal in its Bench at Allahabad, he further submitted that intention to evade duties is always secret for which documentary evidence will not be available but if the record indicates *prima facie* case and assessee is not able to give plausible explanation then allegation is proved and in this connection he has placed his reliance in the case law of *Lawn Textile Mills Pvt. Ltd. Vs. CESTAT Chennai - [2018 (362) ELT 559 (Mad.)* passed by the Hon'ble Madras High

Court and he requests no interference of the Tribunal in the order passed by the Commissioner.

5. We have gone through the case records, written note and submissions, relied upon case laws and relevant provision of law concerning admissibility of electronic evidence in the instant case. The contention of the Appellant is that it was agreed between Appellant and the owner of the brand M/s Kamdhenu Ispat that for TMT bars manufactured with its logo, royalty of Rs.200 per metric tonne or Rs.4,00,000/- per month, whichever was higher was to be paid and the Show-cause was issued on the basis of Royalty invoices available at page 154-159, annexed to the Show-cause but the argument led by Learned Counsel for the Appellant that the print-out allegedly showing royalty received was entered at the maximum fixed i.e. Rs.4,00,000/- that was divided by royalty of Rs.200/- to arrive at the production figure, is not the allegation in the Show-cause or available in the findings of the Commissioner in the Adjudication order. On the other hand, Learned Commissioner has extracted the table from April 2008 to September 2008 month-wise directly from the Show-cause that was generated from the computer print-out to establish the quantity of production and the quantity suppressed by Appellant in which royalty amount varied between Rs.6,60,200/- and Rs.9,42,800/- per month and therefore, the contentions of the Appellant that presumptive production calculations by dividing Rs.4,00,000/- with Rs.200 up to March 2009 and thereafter Rs.5,00,000/- by Rs.200/- is not based on any fact available on record.

6. Now going to the admissibility of electronic evidence, we are agreeable with the submissions of Learned Counsel for the Appellant that Section 36B of the Central Excise Act 1944, introduced way back in 1988 is *pari Materia* to newly introduced Section 65B of the Indian Evidence Act in 2000AD but going by the Provision of Section 65B it is very much clear that requirement of a certificate as contemplated in Sub-Section 4 relates to a statement of evidence purported to have been signed by a person operating the relevant computer device or is responsible in his official capacity for its management and then only the said statement (print-out) is to be taken in evidence without production of the original and once this condition is fulfilled, there is no requirement of any further proof as indicated in Sub-Clauses 1 of Section 65B and in the instant case, it relates to Section 36(4) and Section 36(1) of the Central Excise Act respectively. The case record is silent about availability of such certificate nor Appellant has ever sought for such certificate from the person who operated the computer or was responsible for its operation and management but Appellant has indicated in his submissions made before the Commissioner that those 94 pages of print-outs, attached to the Show-cause were not certified by the forensic expert nor report from the forensic expert explaining the outcome of forensic investigation has been appended to the Show-cause and the Learned Commissioner has refuted the said defence plea by saying in para 16.3 of his order that print-outs retrieved from the computer of the franchiser Kamdhenu Ispat were duly certified by GEQD (Director of forensic sciences, Government of India) and

each page thereof was endorsed with the seal of the Forensic Department, the photocopy of which was given to the Appellant, as relied upon documents. This being the facts on record now it is to be seen as to what extent those documents are to be accepted/ admitted as evidence in the Tribunal, where strict rule of evidence is not followed, though its breaches are impermissible.

7. Section 65B of the Evidence Act has been scrutinised time and again by the Hon'ble Supreme Court in sensitive cases including that of State (NCT of Delhi) Vs. Navjot Sandhu (Afzal Guru Case) popularly known as Parliament attack case as reported in 2005 (11) SCC 600. It was held in the said case that there is no bar in adducing those documents as secondary evidence under Section 63 and 65 of the Indian Evidence Act but subsequent to the same, it was overruled in Anvar P.V. Vs. P.K. Basheer judgment cited Supra and in the recently pronounced judgment in the case of Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Ors reported in AIR 2020 SC 4908, decided on 14.07.2020, all previous judgments on the issue were discussed and ultimate finding was rendered with a direction to have a re-look as Section 65B of the Indian Evidence Act introduced 20 years ago by the Act 21 of 2000 that has created a huge Judicial Turmoil. Be that as it may, the said judgment till changes are brought into Section 65B, would rule the field in view of operation of Section 141 of the Constitution of India. In their order Hon'ble Supreme Court has differentiated Section 65 into 3 parts namely Existence, Condition and Content of the document and given a finding in Para 19 of the order that existence would go to

admissibility of the document while under Section 65A content of electronic records would be required to be proved as per Provision of Section 65B. Without going to further details and having regard to the fact that Section 65B (1) opens with a *non-obstante* clause, has clearly indicated that with compliance of Section 65B and availability of required certificate under Sub-Section 4, no further proof is required for the purpose of admissibility of electronic record by way of corroboration or of production of original record. However, relaxation was granted to the Court to exercise discretion in relation to civil cases in accordance with Law, requirement of justice and on facts of each case (para 50 of the said judgment). We are, therefore, of the considered view that without any reference to the existence of such certificate being obtained from the persons handling the computer or managing the same those printouts can be taken as corroborative piece of evidence, if the allegations are otherwise substantiated.

8. In the submissions made before the Adjudicating Authority, Appellant-Company had not defended itself against any of the allegations concerning manufacture of the quantity shown in the Show-cause notice as found from the computer print-out nor about the amount paid by them as royalty on every month i.e. referred in the table copied into the Show-cause. On the other hand, it has stated that authentic copy of forensic certificate was not provided to them and even their own letter dated 24.09.2012 copy that was taken as relied upon document at Serial No. 6 of the Show-cause notice was not also given to them, which it would have in its own

possession (being the sender). It has also not stated anything about the copies of six bills raised by M/s Kamdhenu Ispat Ltd. on the Appellant from April 2008 to September 2008 on account of royalty, as could be seen from Annexure-I. In such circumstances, Appellant's condition would fall under Section 106 of the Indian Evidence Act and burden of proving the fact especially within Appellant's knowledge would shift to it and the illustration given under Section 106 of the said act would clearly bring out the rationality of holding such an opinion. Para B of the said illustration to Section 106 reads,

"A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

8.1 Similar views are also expressed by the Hon'ble Supreme Court on 06.10.2023 in Criminal appeal No. 2430/2014 in the case of Balvir Singh Vs. State of Uttarakhand, that being on Section 106 of the Indian Evidence Act, is also applicable to Taxation Statutes. It was held in the said judgment:

"Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused."

9. Therefore, when Appellant is charged with production of specific quantity and payment of royalty against the said quantity, the burden of proof shifts to it under Section 106 of the Indian Evidence Act and in such circumstances of the case when Hon'ble Supreme Court in the judgment noted in Order-in-Original in the

case of M/s D. Bhoormal reported in 1983 (013) ELT 1546 (SC) has clearly stated that law does not requires the prosecution to proof the impossible but it is required to establish such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue (similar wording can be noticed in Section 3 of the Indian Evidence Act) and the judgment of Madras High Court relied upon by the Authorised Representative in the case of Lawn Textile Mills Pvt. Ltd. cited Supra also had hinted at Section 106 of the Indian Evidence Act in an indirect way, as could be noticed from the submissions of Learned Authorised Representative noted above, we are of the firm opinion that the Revenue has clearly established a case of clandestine removal against the Appellant and following decision of this Tribunal at Allahabad passed in the same M/s. Kamdhenu Ispat Ltd. matter in respect of another Franchise named Advance Impex Pvt. Ltd., we confirm the liability in the nature of duty, interest and penalty on the Appellant Company, as being confirmed by the learned Commissioner. However, having regard to the fact that personal involvement of the present as well as previous Director is not made out from the materials available on the record and the present Director is In-charge of the company, which is having another Excise registration number, against whom no proceeding for the shortage of raw material discovered in 2011 has been initiated and there is specific observation by the Commissioner that the previous Director was responsible only for day to day activity of the Appellant Company, we are not agreeable to the

findings in confirming penalty on both Samir Bhagat and Raman Gupta. Hence the order.

THE ORDER

10. The appeal of Appellant Company bearing Excise Appeal No. 88418 of 2014 is dismissed and the order passed by the Commissioner of Customs, Central Excise & Service Tax, Aurangabad *vide* Order-in-Original No. 42/CEX/COMMR/2014 dated 09.07.2014 to the extent of confirming duty, interest and penalty on the Company is hereby confirmed. Appeals of both Samir Bhagat and Raman Gupta are allowed and the order passed by the Commissioner of Customs, Central Excise & Service Tax, Aurangabad *vide* above noted order to the extent of imposing penalty of ₹2,00,000/- on each of them is hereby set aside. Impugned order is accordingly modified in the above terms.

(Order pronounced in the open court on 05.04.2024)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)