(2021) 08 CESTAT CK 0013

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 51045, 51044 Of 2019

M/s. Fortune Metaliks Ltd. And Anr. — APPELLANT

Vs

Commissioner Of Central Excise And Service Tax, Raipur (C.G.) — RESPONDENT

Date of Decision : 06-08-2021

Acts Referred:
Cenvat Credit Rules, 2004 — Rule 2, 4, 9, 9(3)
Central Excise Act, 1944 — Section 9D, 14

Citation : (2021) 08 CESTAT CK 0013

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Advocate : Bipin Garg, Yashvir Singh

Final Decision : Allowed

Judgement

1. This order disposes of two appeals having common issue involved arising out of same order.

2. In these appeals the Order-in-Appeal No. 380-381-18-19 dated 26.09.2018 has been assailed. The facts in brief for the adjudication of impugned

appeal are as follows:-

M/s. Fortune Metaliks Ltd. (FML hereinafter) is engaged in manufacture of MS Ingot/ MS Billet and Rolled Iron & Steel Products and is the holder

of Central Excise Registration. Shri B.D. Bansal, Shri Deepak Bansal, Shri Ashwani Goyal, Shri Saurabh Bansal and Shri R.N. Singla are the

directors of M/s. FML. Department got a specific information about M/s. High Tides Infra Projects Pvt. Ltd. Dhanbagh, M/s. Jetking Trading and

Agencies Pvt. Ltd., Bhanpuri, Raipur, M/s. RMS Steel & Company, Vill. Tenduwa, Raipur, M/s. Subh Multi Trade Co., MG Road Raipur etc. to be not in existence but were found to have taken and utilized huge amount of cenvat credit without manufacturing any goods during the year 2012-13 7

2013-14. During investigation about the aforesaid information, Department observed that some non-existing firms of Dhanbagh acting a manufacturer,

some first stage dealers and some second stage dealers of Chattisgarh had created a fraudulent Cenvat Credit passing chain to facilitate availment of

Cenvat Credit without actual manufacture and supply of duty paid goods to some manufacturers of Chattisgarh. M/s. FML, the appellant was

observed to be included among these firms. On the basis of the evidences gathered by enquiry and investigations conducted by the DGCI and by

Central Excise Officers of Dhanbagh as well as of Raipur, Department alleged that during the period 2013-14 the appellant, one of the manufacturer,

had availed improper Cenvat Credit amounting to Rs.21,46,418/-on the strength of fake invoices issued by registered dealers as named above i.e. M/s.

High Tides Infra Products Pvt. Ltd. etc. Based on said observations that a show cause notice bearing No.1301 dated 20th January, 2017 was served

upon the appellants and the Cenvat Credit of the aforesaid amount proposed to be disallowed to the appellant. Interest was proposed to be recovered

and appropriate penalties were proposed to be imposed. The said proposal was confirmed vide Order-in-Original No.02/Adj./2018 dated 18.04.2018.

The appeal thereof was rejected vide the Order under challenge. Still being aggrieved the appellant is before this Tribunal.

3. I have heard Shri Bipin Garg, learned Counsel for the appellant and Shri Yashvir Singh, learned Authorized Representative for the Department.

4. It is submitted on behalf of the appellant that the order is liable to be set aside on the grounds of violations of principles of natural justice as no

proper opportunity was given to the appellant to defend their case. Rather, their request for cross-examining the witnesses was rejected without any

cogent reason. The documents recovered from their premises have not been relied upon. Statements of third parties have wrongly been relied upon by

the Adjudicating Authorities below. Since they were not allowed to be cross-examined by the appellant, their statements have wrongly been read

against the appellants. Compliance of the provisions of section 9D of Central Excise Act 1944 is impressed upon as mandatory. Decision of

M/s.Ambika International vs. Union of India reported as 2016 TIOL 1238 (High Court of Punjab & Haryana) has been impressed upon. It is submitted that none of the submissions of the appellants have been considered by the Adjudicating Authority below. Learned Counsel has further

impressed upon that the order against the appellant has been passed mainly on the ground that the manufacturer of scrap and even the dealers were

found to be bogus and non-existent. The entire documents as that of invoices with the appellant showing the supply of the raw-material to the

appellant have totally been ignored. The payment of the amount shown in those invoices was also duly been made by the appellant has also been

ignored. Hence, any evidence recovered from the fake manufacturers / dealers or any statement of the proprietors of such firms cannot be read

against the appellant. The order under challenge is, accordingly, prayed to be set aside and appeal is prayed to be allowed.

5. While rebutting these submissions learned D.R. has laid emphasis upon para 11 of the order under challenge where there is a categorical finding

that appellant has availed irregular & improper Cenvat Credit amounting to Rs.21,46,418/- during the disputed period i.e.2013-14, on contravention of

provisions of Rule 2, 4, 9 of Cenvat Credit Rules. Suppression of facts has also been specifically alleged against the appellant. Learned D.R. has

further impressed upon that the mastermind behind the modus-operandi of availing illegal Cenvat Credit Shri Pradeep Aggarwal has also been

penalized who has not come forward to file the appeal which again is sufficient to hold that there was a nexus among various manufacturers, dealers,

raw-material suppliers and the transporters as mentioned in the Show Cause Notice to cause heavy loss to the Exchequer by availing wrong Cenvat

Credit on bogus invoices issued by non-existent firms. With these submissions, appeal in hand is prayed to be dismissed.

6. After hearing the parties and perusing the record, I observe the hold as follows:-

The basic information as was received by the Department was against M/s. High Tides Infra Pvt. Ltd. Various other co-noticees have been served

with the Show Cause Notice based upon the statements recorded during investigation. The most relied statement is that of Pradeep Aggarwal,

Proprietor of M/s. Subh Multi Trade Co. Pvt. Ltd. as was initially recorded on 01.10.2015 and subsequently on 19.02.2016 which was recorded before

DGCI. The data as was received from his premises vide Panchnama dated 09.05.2015 has also been heavily relied upon by the Department. In addition to the reliance upon various other statements, statements of Shri Pankaj Aggarwal, Proprietor of M/s. Gajmukta Logistic have also been

heavily impressed upon to have sufficient incrimination against the appellant. The admitted fact still remains is that these statements and the data

amounts to a third party evidence. Another fact admittedly is that the appellant craved for leave to cross-examine these witnesses but the request was

turned down on the ground that the statements of the witnesses were voluntary and have not been retracted. I am of the opinion that the reason for

denying cross-examination is not justified. Cross-examination is a most relevant tool of justice delivery system so as to undo the bias, if any. It is

otherwise a statutory mandate flowing from Section 9D of Central Excise Act, 1944. The section reads as follows:-

(1) A statement made and signed by a person before any Central Excise Officer of a Gazette rank during the course of any inquiry or

proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the

facts which it contains, -

Section 9D. Relevancy of statements under certain circumstances. â?

(1) A statement made and signed by a person before any Central Excise Officer of a Gazette rank during the course of any inquiry or

proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the

facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the

adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the

Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having

regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding

before a Court, as they apply in relation to a proceeding before a Court.

7. Hon'ble High Court of Punjab & Haryana in the case of M/s. Ambika International (supra) and also in the case of G-tech Industries vs. Union of

India reported as 2016 (339) E.L.T 209 (P & H) has held that unless a person is examined in terms of section 9D and unless the affected parties is

given an opportunity to cross-examine him, no reliance can be placed on any statement recorded under Section 14 of Central Excise Act. In that case

also the entire demand was based on third party investigation and statement given by the third party. No single document was found issued by the

appellant nor there was a confessional statement of the appellant. In the present case, the Adjudicating Authority is thus, opined to have relied upon

third party evidence only. It is also apparent that even the order of rejecting the request of cross-examination was no properly communicated to the

appellant.

Since the sole challenge to the order is its reliance upon third party evidence, it is necessary to check the evidentiary value of the third party

evidence. The relevant case law in the case of Bajrangbali Ingots & Steel Pvt. Ltd. & Suresh Agarwal vs. CCE, Raipur in Appeal No.

E/52062 & 52066/2018 heard on 16.11.2018, which is held as follows:-

â??9. The law i.e. as to whether the third party records can be adopted as an evidence for arriving at the findings of clandestine removal,

in the absence of any corroborative evidence, is well established. Reference can be made to Honâ??ble Allahabad High Court decision in

the case of Continental Cement Company Vs. Union of India â?" 2014 (309) ELT 411 (All.) as also Tribunalâ??s decision in the case of

Raipur Forging Pvt. Ltd. Vs. CCE, Raipur-I â?" 2016 (335) ELT 297 (Tri.-Del.), CCE & ST, Raipur Vs. P.D. Industries Pvt. Ltd. â?" 2016

(340) ELT 249 (Tri.-Del.) and CCE & ST, Ludhiana Vs. Anand Founders & Engineers â?" 2016 (331) ELT 340 (P&H). It stand held in all

these judgements that the findings of clandestine removal cannot be upheld based upon the third party documents, unless there is clinching

evidence of clandestine manufacture and removal of the goods.â??

It is well settled law that there has to be some concrete evidence which would show clandestine manufacture of goods, as was reiterated by

Tribunal, Delhi in the case of Commissioner of Central Excise & Service Tax, Raipur vs. P.D. Industries Pvt. Ltd. reported as 2016 (340)

ELT 249 (Tri.-Del.). Earlier also in the case of Continental Cement Company vs. Union of India reported in 2014 (309) ELT 411 (All.),

Honâ??ble High Court of Allahabad has held:-

â??12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products,

clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions.

Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of

sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not

investigated the following aspects :

(i) To find out the excess production details.

(ii) To find out whether the excess raw materials have been purchased.

(iii) To find out the dispatch particulars from the regular transporters.

(iv) To find out the realization of sale proceeds.

(v) To find out finished product receipt details from regular dealers/buyers.

(vi) To find out the excess power consumptions.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was

conducted by the Department.â??

7. I further observed that the document recovered from the appellant premises shows that the appellant had maintained a record about the invoices

received from various companies whereupon the appellant has availed the Cenvat Credit. Merely because the company issuing invoice was found

non-existent, the appellant could not be denied the availment of Cenvat Credit thereupon unless and until his involvement in terms of his knowledge

about such non-existence and about the invoice to be bogus is not proved on record. Otherwise also there is no denial that the appellant has cleared his

final product on payment of duty. In such circumstances and that the invoices were containing all the particulars as are required un Rule 9 of Cenvat

Credit Rules and that the appellant was also making the record of all those details. The allegations based on the statements given by other

manufacturers, first or second stage dealers or even by the transporters cannot be read against the appellant. I draw my support from the decision of

Hon'ble High Court of Allahabad in the case of Commissioner of Central Excise, Customs and Service Tax vs. Juhi Alloys Ltd. reported as 2014

(302) ELT 487 (All.) where it was held that though the invoice of manufacturer issued in the name of registered dealers was found fake, though the

manufacturer of import was not found existing but it would be impractical to require the assessee to go behind the records maintained by the first

stage dealer. Once assessee is found to have acted with all reasonable diligence in its dealings within the meaning of Rule 9 (3) of Cenvat Credit

Rules, 2004 will amount to casting an impossible or impractical burden on the assessee and same would be contrary to the rules. Tribunal, Chennai

also in the case of Adhi Alloys Pvt. Ltd. vs. CCE, Ludhiyana reported as 2017 (346) ELT 113 has held that demand on the grounds of invoices being

issued by non-existent dealer without delivering goods, in absence of any corroborative evidence to show that assessee has not received goods, cannot

be confirmed and Cenvat Credit cannot be denied to such assessee. I further observed that despite the investigation in the present case began with the

information against M/s. High Tides Infra Project Pvt. Ltd. But no penalty has been imposed on said M/s. High Tide Infra Project.

8. Imposition of penalty of Rs.5 Lakhs on Shri Pradeep Kumar Aggarwal whose statement has mainly been relied upon by the Department and that

he has not challenged the said imposition cannot be a ground to confirm the disallowance of Cenvat Credit to the appellant. Final Order No.50426-

50430/ 2019 dated 27.03.2019 in the case of Ashok Sharma etc vs. CCE, Raipur has also been brought to my notice. The companies involved herein

i.e. High Tides Infra Project Pvt. Ltd., RMS Steel Tech Pvt. Ltd., Jetking Trading and Agencies, Singh Materials & Infratech etc. were the

companies in the said decision wherein it has been held that when sufficient document is produced by the appellant to prove the physical entry of

inputs in the assessees premises alongwith the ledger account and RG-23 A Register maintained by the assessee alongwith the invoices. the burden is

upon the Revenue to prove that it was merely a paper transaction and goods were not received by assessee appellant. It was held by this Tribunal in

the said final Order that Revenue has failed to produce such a record. Percontra, there is apparent compliance of Rule 9 CCR 2004 on part of the appellant. The allegations based on the fact that manufacturers as that of M/s.High Tides Infra Project Pvt. Ltd are found non-existent have been set

aside. Similar are the facts for the present appeal. Hence, I have no reason to differ from the above findings.

9. In view of entire above discussion, the order under challenge is held to be passed in violation of statutory principles as that of principles of natural

justice. The order is also held to be absolutely presumptive having been passed without appreciation of evidence produced by the appellant, but by

relying upon the third party evidence. The same is, accordingly, hereby set aside. Consequent thereto the appeal stands allowed.

[Order pronounced in the open Court on 06/08/2021]

