

(2021) 03 CESTAT CK 0040

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 51053 Of 2019

M/s.Recon Steel And Power Private Ltd.

APPELLANT

Vs

Principal Commissioner Central Tax, Central Excise And
Customs

RESPONDENT

Date of Decision : 23-03-2021

Acts Referred:

Central Excise Act, 1944 — Section 36B

Indian Evidence Act, 1872 — Section 65B(2), 65B(4)

Citation : (2021) 03 CESTAT CK 0040

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Advocate : P.Juneja

Final Decision : Allowed

Judgement

1. None appeared for the appellant. However there is a written request on record praying for the decision on merits. Learned D.R. has submitted that there is no infirmity in Order of Adjudicating Authority below. The demand has rightly been confirmed. Appeal is prayed to be dismissed.

2. After hearing learned D.R. the record of present appeal including written submission of appellants is perused. For the disposal of appeal on merits the relevant factual matrix in brief are as follows:-

2.1 A show cause notice bearing No.4162 dated 06.05.2016 was served upon as many as 30 Noticees wherein M/s. Hari Om Ingots and Power Limited (hereinafter called as M/s. HIPL) was noticee No.1 and three of his Directors, Shri Sandeep Agarwal, Shri Santosh Aggarwal and Shri Bhagwan Das Agarwal as Noticee No.2, 3 & 4 respectively. Noticee No.5 to 27 were the manufacturers / suppliers of raw-material to M/s. Hari Om Ingots and Power Ltd. Noticee No. 28 - 30 were the dealers of iron and steel products and were the major buyers of such products of M/s. HIPL. The present appellant is Noticee No.20 in the said appeal.

3. M/s. HIPL, on the basis of some information was alleged to have been indulged in unaccounted procurement of raw-material, suppression of production and clandestine removal of the excisable goods. Accordingly, its premises were searched on 7th August, 2012. A Panchnama dated 07.08.2012 was prepared after physical stock verification of raw-materials and finished goods in the premises of M/s. HIPL. Certain documents were procured from the factory premises and certain other documents from a car parked inside the said factory premises. The car was owned by Shri Om Prakash Sahoo, Accountant of M/s. HIPL. On the basis of the said stock verification report and the incriminating documents recovered that the noticees were alleged to have been involved in the clandestine removals of the finished goods and there was a duty demand proposed vide the impugned show cause notice against Noticees No.1-5 alongwith interest and penalties. Proportionate penalties were also proposed against the suppliers of the rawmaterial to M/s. HIPL (Noticee No.5-27), including the present appellant. These raw-material suppliers including the appellant were also alleged to have resorted to wilful and intentional evasion of Central Excise duty to facilitate the buyer i.e. M/s. HIPL.

3.1 The quantum of clandestine removal by Noticees No.5 to 27 was summarised in the table at page No.97 of the impugned show cause notice and the amount of Central Excise duty indicated against their names and the said amount was proposed to be recovered from them alongwith the interest and the proportionate penalty. Accordingly, from the appellant /Noticee No.20 the duty of Rs.12,12,037/- was demanded alongwith the interest and proportionate penalty. The proposal of the said show cause notice was confirmed vide the order under challenge i.e. Order-in-Original No 17185 dated 10.12.2018. Being aggrieved thereof, appellant is before this Tribunal.

4. There is a written synopsis on record as was filed on 24 September, 2019 wherein it is mentioned that Department has produced no evidence to prove that the appellant was involved in clandestine removal or that the appellant has received any consideration other than the consideration against the supply made after payment of excise duty. The whole case against the appellant was based on loose handwritten sheets only without any corroborative evidence. Those hand written sheets were the loose documents recovered from the premises of M/s. Hari Om Ingots and Power Ltd. the main noticee and also from his Car of their Accountant which was parked in the factory premises of Noticee No.1 at the time of the search. It is mentioned in the said synopsis that those documents cannot be read against the appellant.

5. Ld. D.R. while rebutting the synopsis of the appellant has submitted that present is the case of evasion of huge amount of duty. Department has collected entire relevant evidence and it is after appreciation of that evidence only that the impugned demand has been confirmed. Hence, there seems no infirmity nor any illegality in the impugned order. Appeal is prayed to be dismissed.

6. After hearing and perusing the record, I am of the opinion that it is the

acknowledged fact that the appeal of M/s. Hari Om Ingots and Power Ltd. stands already adjudicated by the present Tribunal vide the Final Order No.51109-51125 of 2019 dated 22.08.2019. The copy of those decisions has been annexed by the appellant alongwith his synopsis. I do not find any reason to differ from those findings. The relevant para thereof is reproduced below:-

"26. Relying on these judgments, we hold that the charges of clandestine removal of the goods cannot be upheld merely on assumptions and presumptions, but has to be proved with positive evidence such as purchase of excess raw materials, consumption of excess electricity, employment of extra labour, seizure of cash, transportation of clandestinely removed goods etc. It has also been held that onus of proof of bringing clinching evidence is on the Revenue. It has been held that the clandestine manufacturing and removal of excisable goods is to be proved by tangible, direct affirmative and incontrovertible evidence relating to receipts of raw materials inside the factory premises, and non-accountal thereof in the statutory records, utilization of such raw materials for clandestinely manufacture of finished goods. manufactured of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, amount received by the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal. All these material evidence are missing in the present case and the evidences brought into the record by the department are incomplete, inconsistent and not a reliable piece of evidence to prove charges of clandestine removal.

6.1 Otherwise also perusal of Panchnama dated 7 August, 2012 clarifies that Tally Data of 2009-10 to 2011-12 and ERP Data of sale and purchase was burned into two writable CDs of which one was given to the main appellant and other copy was retained by the officers for further investigation. I have also seen Annexure-A to the panchnama dated 07.08.2012, which contains the details of documents resumed but there is no mention of any CD(s) where the data was burnt. I agree with the contention of the learned Advocate that at the time of the burning of CD(s), a certificate should have been obtained as per the provision of Section 36-B. The panchnama dated 19.02.2016 not only speaks of 2 CD(s) but also that computer data was retrieved after a gap of 4 years which itself creates a suspicion. Further also no certificate from the competent authority was obtained by the officers even at this point of time. The Hon'ble Apex Court in case of M/s. Anwar P.V. Vs. P.K. Basheer reported at 2017 (352) E.L.T. 416 has clearly laid down that the computer printout can be admitted in evidence only if the same are produced in accordance with the provisions of Section 65B(2) of the Evidence Act. A certificate is also required to accompany the said of computer printouts as prescribed under Section 65B(4) of Evidence Act. It has been clearly laid down in para 15 of this judgement that all the safeguards as prescribed in Section 65B(2) & (4), of the Act be met with to ensure the source and authenticity, pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tempering, alteration, transposition,

excision etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. We may add here that the provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act, 1944 of the Act are pari materia. It is evident from the panchanama, record of cross-examination that the investigating officer had failed to follow the safeguard as mandated under Section 36B CEA, 1944. Further the burning process of data into CD and their subsequent retrieval was not made in presence of any computer expert and, therefore, in light of the judgement of the Apex Court the said data cannot be relied upon to prove the charges of clandestine removal against the appellant. Similar findings were made by the Gujrat High Court and the Tribunal in following cases:-

(i) AMBICA ORGANICS VS. C.C.EX. SURAT 2016(334) E.L.T. 97 (Trib) which has been upheld by the Gujrat High Court as reported in 2016 (334) E.L.T. A-67

(ii) PREMIER INSTRUMENTS & CONTROLS LTD. Vs. COMMISSIONER OF CENTRAL EXCISE, COIMBATORE 2005 (183) E.L.T. 65 (Trib)

(iii) JAYSHREE VYPASA LTD. VS. C.C.EX, RAJKOTE 2015 (327) E.L.T. 380 (Trib)

(iv) AGARVANSI ALUMINIUM LTD. VS. C.C.EX. 2014 (299) E.L.T. 83 (Trib)

7. It is also apparent that the shortage was detected on the basis of eye estimation and on average weight basis without any physical weighment, demand cannot be confirmed on the said basis. Above all present is the case of third party evidence.

8. 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:-

"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 Hon'ble Allahabad High Court decision in the case of Continental Cement Company Vs. Union of India - 2014 (309) ELT 411 (All.) as also Tribunal's decision in the case of Raipur Forging Pvt. Ltd. Vs. CCE, Raipur-I - 2016 (335) ELT 297 (Tri.-Del.), CCE & ST, Raipur Vs. P.D. Industries Pvt. Ltd. - 2016 (340) ELT 249 (Tri.-Del.) and CCE & ST, Ludhiana Vs. Anand Founders & Engineers - 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."

9. In view of entire above discussion, the order under challenge is not sustainable, accordingly, is hereby ordered to be set aside. As a consequence thereto appeal stands allowed.

[Dictated and pronounced in the open Court]