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IN THE HIGH COURT OF DELHI AT NEW DELHI**Judgment reserved on: 06 September 2024****Judgment pronounced on: 05 December 2024**

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CEAC 6/2019

COMMISSIONER OF CENTRAL TAX,

GST DELHI EAST

..... Appellant

Through: Mr. Jatin Kumar Gaur, Advocate
for Mr. Harpreet Singh, SSC.

versus

A S P METAL INDUSTRIES

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE YASHWANT VARMA****HON'BLE MR. JUSTICE RAVINDER DUDEJA****J U D G M E N T****RAVINDER DUDEJA, J.**

1. The present appeal has been filed under Section 35G of the Central Excise Act, 1944 ['Act'] against the final order No. A/ 53739-53740/2017 dated 08.06.2017 passed by the Customs Excise and Service Tax Appellate Tribunal ['CESTAT'].

BACKGROUND

2. The respondent-assessee is engaged in the manufacture of copper ingots, and is registered with the Central Excise Department. The unit of the appellant-assessee was searched by the officers of Directorate General of Central Excise Intelligence ['DGCEI'] on 21.09.2005. The residential premises of Shri Rajendra Prasad Gupta, father of Shri Vinod Gupta, who is the sole proprietor of the assessee, was also searched. During the course of search of residential premises of Shri



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Rajendra Prasad Gupta, Indian currency amounting to Rs. 6,20,000/- was recovered and the same was seized by the officers of Revenue. During the course of search in the factory premises of the appellant-assessee, the officers detected shortage of 3500 Kgs of copper scrap valued at Rs. 3,85,000/-. Some records were also resumed by the officers from the factory premises of the assessee. Amongst the documents seized, spiral notebook "AUTHOR" [RUD 2] was recovered from Shri. Girish Chand, Production/Labour Supervisor of the respondent. The file having sixty eight loose papers [RUD 3], two Spiral Neelgagan Notebooks [RUD 4 and 5], Neelgagan duplicate notebook [RUD 6] and Neelgagan slip pad [RUD 7] were recovered from Shri. Devender Kumar Sharma, supervisor of the respondent.

3. The statements of various persons were recorded. On the basis of investigation, the Department issued a Show Cause Notice ['SCN'] dated 20.03.2006, seeking confiscation of Indian currency on the ground that the said currency was the sale proceeds of the goods cleared clandestinely.

4. On the basis of documents recovered from the factory of the assessee and the statements recorded, the assessee was served with another SCN dated 28.09.2007 alleging that the assessee had been receiving substantial quantity of copper scrap without any bills/documents and was not entering the details of sale in the statutory records, that the scrap was used for manufacturing ingots and cleared to various parties after drying into wire rods on job-work basis without being accounted in any statutory records and without payment of duty. The assessee was alleged to have cleared 3,62,515.90 Kgs of copper



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wire. It was further alleged that 19,52,267 Kgs of ingots/wire bars appear to have been manufactured as per *Bhatti* register and were cleared without payment of duty, and that 3500 Kgs of scrap allegedly found short during the search was admitted to have been cleared after converting it into ingots and then to wire rods, that electricity facility was manipulated/tampered with to accommodate recorded production. Demand of duty and education CESS of Rs. 1,21,42,057/- was raised on alleged clearance of copper wire rod and Rs. 2,93,17,554/- on alleged clearance of copper ingots without payment of duty and of Rs. 62,832/- on the alleged shortage of copper scrap.

5. Both the above two SCNs were originally adjudicated vide Order in Original dated 30.03.2009 upholding the charges and confirming the entire duty demand.

6. Respondent challenged the Order in Original dated 30.03.2019 before CESTAT and CESTAT remanded the matter back for *de novo* adjudication.

7. The matter was adjudicated again, and vide Order in Original dated 07.03.2012, the demand of duty on copper rods and confiscation of the seized currency was confirmed. The order dropped the duty on copper wire rods while accepting that the assessee could not have manufactured copper wire as they did not have wire drying facility.

8. Two separate appeals were preferred by the appellant as also by the respondent against the Order in Original dated 07.03.2012 before CESTAT. The appeal filed by the respondent was allowed while that of the Revenue was rejected by the CESTAT vide final order dated 08.06.2017.



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9. Appeal preferred against the said final order has been admitted on the following question of law:-

“Whether the finding of the Tribunal as contained in Para 6 and 7 of the impugned order is rendered perverse in light of the facts as they stand recorded in the Order-in-Original?”

10. Learned counsel for the appellant has argued that CESTAT did not properly examine and appreciate the evidence, fundamental to the case of the appellant. It is submitted that it is not feasible and not necessary to produce the evidence from the beginning to the end that is from the stage of surreptitious procurement of raw material, its utilization in the manufacturing of unaccounted finished goods, suppressed production of finished goods and clearance thereof. However, sufficient evidence showing surreptitious movement of raw material and clearance of unaccounted finished goods by respondent has been placed on record, which is corroborated by private records recovered from the possession of the employees of the company. It is the contention of the Revenue that since the documents were recovered from the possession of the employees of the company, the burden to prove that the documents based on which the demand was raised in SCN were not pertaining to respondent was on the assessee, to which they miserably failed. It is also argued that the Tribunal has erred in not appreciating the contents of the documents pertaining to the respondent and ignoring the statements of witnesses, substantiating the charges in the notice. It has also been contended that the Tribunal has failed to appreciate the evidence regarding realization of sale proceeds of clandestine removal of goods being available in the form of recovery of sale proceeds amounting to Rs. 6.2 lacs in cash from the residential



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premises of Sh. Rajender Prasad, father of Sh. Vinod Gupta, proprietor of M/s. ASPN during search on 21.09.2005. Sh. Rajender Gupta, who was present during search, had failed to explain the source from which it was acquired. It is thus argued that CESTAT has completely erred in allowing the appeal filed by the respondent and rejecting the appeal filed by the appellant department.

11. On behalf of respondent, it has been argued that Revenue has failed to prove the allegations and consequently the demand of dues and penalty. It has been submitted that the statements recorded under Section 14 of the Act were not voluntary. The statements were later retracted by the witnesses, and therefore, prudence demands that such retracted statements should not be accepted without independent corroboration. It is also argued that the recovered documents do not pertain to the respondent and there is no tangible evidence of clandestine removal of the goods or other evidence. According to the learned counsel, it is a case of no evidence and the view taken by the CESTAT is logical and as per law.

ANALYSIS & REASONING:

12. The charges of clandestine removal of goods connote accusations of serious nature. If the charges are of serious nature, evidence should also be equally strong to substantiate the charges, and therefore, the evidence needs careful scrutiny and appreciation.

13. In criminal cases, the standard of proof as required to prove the charges in a criminal trial is “proof beyond doubt”, whereas, the adjudication proceedings are in the nature of civil proceedings and not criminal proceedings and therefore, the standard of proof of civil



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proceedings i.e. preponderance of probability is applicable in adjudication proceedings.

14. It is equally well settled that in adjudication proceedings to establish the charge of clandestine removal and under valuation, Revenue is not required to prove the case with mathematical precision. Such charges are to be established on the basis of “preponderance of probabilities.” However, the conclusions to be drawn are necessarily to be logical and not on the basis of presumptions and assumptions. Suspicion, howsoever grave, cannot replace the test of proof.

15. Appellant’s case is that during the course of stock verification of raw material (copper scrap), the officers found shortage of about 3500 kgs. Stock verification was questioned before the Original Authority by the respondent, contending that the assessment was based on estimation by visual survey and not by actually weighing the copper scrap. Original Authority ruled that Panchnama bore the signatures of Authorized Representative of the respondent and therefore respondent cannot question the stock verification. However, CESTAT did not accept the said view and in Para No. 6 observed as under:-

“6. The case of un-accounted clearance against the appellant-assessee was sought to be supported mainly on the basis of certain documents recovered from Shri Girish Chand and Shri Devinder Kumar Sharma, stock verification of copper scrap and statements of certain person including these two individuals. It is contended that during the course of stock verification of raw material (copper scrap) the officers found shortage of about 3500 Kgs. The methodology adopted for stock verification is questioned by the appellant-assessee. It is contended that the officers made only an estimation by visual survey and not by actual weighment. The Original authority recorded that since the authorized representative has signed the Panchnama admitting the shortage, the stock verification cannot be questioned. However, it is not clear as to whether actually a physical weighment has been made of the stock of raw-material. Admission



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of the authorized representative by signing the Panchnama is the sole reason recorded by the original authority to uphold the shortage of raw-material. Even considering that there is such shortage, that cannot be automatically converted into a charge of un-accounted manufacture and clearance of excisable final product.”

16. The mode of verification i.e. by eye estimation, if true, is no verification and no demand can be based on such eye estimation.

17. Revenue had placed strong reliance on the documents and statements of Sh. Girish Chand and Sh. Devender Kumar Sharma, stated to be the employees of the respondent-assessee. CESTAT found that Sh. Girish Chand was a labour contractor, supplying labourers to the assessee. He used to supply labourers to his various other clients also. Sh. Devender Kumar Sharma is a dealer of copper items and scrap. Assessee claimed that both of them were not its employees and had placed reliance on the salary and employees register as also their affidavits. CESTAT took note that this aspect had not been examined by the Original Authority except stating that the affidavits were filed belatedly, and therefore, cannot be considered. As regards the statements of Girish Chand and Devender Kumar Sharma, CESTAT took note of the retraction letters sent by them to the Excise authorities. The observation of the CESTAT as contained in Para No. 8 of the final order are pertinent and are reproduced below:-

“8. We note that the fact that these two are employees of the appellant-assessee could not be established with any clear supporting evidence. In-fact, the appellant-assessee produced adequate evidence to the contrary. Further, the private records maintained by Shri Girish Chand were also relied upon by the Revenue to support the claim of un-accounted manufacture and clearance of copper ingots. The appellant-assessee contested the claim, as factually untenable. The capacity of the only furnace with the appellant - assessee is 3.5 M.T. Each heat takes 8 to 9 hours. Even if the furnace is operated round the clock, it is not possible to have more than 3 heats in a day.



The diary maintained by Shri Girish Chand indicated in some pages four bhattis against some dates. Even five bhattis are also mentioned. Apparently, such entry cannot be taken as heat, as it is not possible to have, more than three heats per day. This puts serious question mark on the reliability of record maintained by Shri Girish Chand to support the allegation of clandestine manufacture of copper ingots. The appellant-assessee indicated that the records maintained by Shri Girish Chand as a labour contractor is with reference to number of labourers working per heat in the appellant - assessee's unit. We find that these basic facts were not examined in right prospective and commented upon by the original authority. This has significantly weakened the case of Revenue."

18. With regard to the value of retracted confession, the Hon'ble Supreme Court in the case of **Vinod Solanki vs Union of India, 2009 (233) ELT 157 (SC)**, held that-

*24. However while the Ld. Member (Technical) has recorded that each of them retracted their statements, the retractions are brushed aside by holding that the same were not only belated but were bald retractions without any evidence from which it can be inferred that there was any threat, coercion or inducement used in recording the same. I am unable to agree with this proposition. It is contrary to the law laid down by the Hon'ble Supreme Court in **Vinod Solanki vs Union of India, 2009 (233) ELT 157 (SC)**, wherein while considering various judgments of the Hon'ble Supreme Court, on which reliance has been placed by Revenue, it was held that-*

"34 Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such."

"35 It is one thing to say that a retracted confession is used as a corroborative piece of evidence to record a finding of guilt but it is another thing to say that such a finding is arrived at only on the basis of such confession although retracted at a later stage."

"37 The inference that burden of proof that he had made those statements under threat and coercion was solely on the proceedee does not rest on any legal principle. The question of the appellant's failure to discharge the burden would arise only when the burden was on him. If the burden was on the revenue, it was for it to prove the said fact. The Tribunal on its independent examination of the factual matrix placed before it did not arrive at any finding that the confession being free from



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any threat, inducement or force could not attract the provisions of Section 24 of the Indian Evidence Act."

19. CESTAT observed that although the Officers of the Department did get some details regarding sale of copper ingots to various buyers which was alleged to be unaccounted, however, no verification was made from any buyers. CESTAT also did not find any evidence or discussion in the Order-in-Original regarding the excess electricity consumed and labour employed, transport of unaccounted raw material as well as finished goods etc. and thus concluded that the Revenue's case is not supported by credible/cogent evidence, which may lead to an inescapable conclusion of unaccounted manufacture and clearance.

20. **Commissioner of Central Excise Vs. Saakeen Alloys Pvt. Ltd. (2014) 308 ELT 655 (Guj.)** was a case of alleged clandestine removal. The High Court pointed out that there needed to be positive evidence to establish evasion. It was observed as under:-

"In absence of any material reflecting the purchase of excessive raw material, shortage of finished goods, excess consumption of power like electricity, seizure of cash, etc., the Tribunal noted and held that there was nothing to bank upon except the bare confessional statements of the proprietor and of some of the persons connected with the manufacturing activities and such statements were retracted within no time of their recording. The Tribunal also noted the fact that the requisite opportunity of cross examination was also not made available so as to bring to the fore the true picture and therefore, it concluded against the Revenue observing that not permitting the cross examination of a person in-charge of records of M/s. Sunrise Enterprises and absence of other cogent and positive evidences, would not permit it to sustain the demand of Rs. 1.85 Crores raised in the Demand notice and confirmed by both the authorities below."

21. The Special Leave Petition filed by the Department against the said order being SLP (Civil) (CC No. 19304-07 of 2014) has been dismissed by the Supreme Court.



22. Similarly, in the case of **Arya Fibres Pvt. Ltd. v. CCE, Ahmedabad-II 2014 (311) ELT 529 (Tri.-Ahmd.)**, the learned CESTAT discussed the entire law concerning clandestine removal and enumerated the legal position as under:

- “(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;
- (ii) Evidence in support thereof should be of:
 - (a) raw materials, in excess of that contained as per the statutory records;
 - (b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;
 - (c) discovery of such finished goods outside the factory;
 - (d) instances of sale of such goods to identified parties;
 - (e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;
 - (f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;
 - (g) statements of buyers with some details of illicit manufacture and clearance;
 - (h) proof of actual transportation of goods, cleared without payment of duty;
 - (i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.”

23. As regards the dropping of the demand for unaccounted clearance of copper wire rods, CESTAT noted that on physical verification of the premises of the assessee, no rolling mill was found installed in the factory and no evidence was placed in the proceedings before the lower authority to the effect that assessee got wire rods manufactured by using some other's facility and thus, did not believe the contention of the Revenue that assessee had got the wire rods manufactured using hired labourers.

24. The mere fact that the respondent agreed to deposit the duty amount to avoid any kind of litigation, itself cannot be held to be the



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basis for confirming the duty demand against the respondent. CESTAT found that the case of unaccounted manufacture and clearance was built upon only sketchy evidence without concrete corroboration and whatever evidences formed basis for the case of Revenue, fell short of the minimum requirement of credible case of clandestine removal.

25. On a careful perusal of the reasons assigned and the case law relied upon in the impugned order, we find that the CESTAT conducted a meticulous exercise to examine and appreciate the evidence on record in the light of settled principles and came to a categorical finding that the case of unaccounted manufacture and clearance was built on sketchy evidence without any concrete corroboration and whatever evidence formed basis of the case of the Revenue fell short of the minimum requirement of credible case of clandestine removal.

26. In the absence of any tangible evidence which would indicate that there was clandestine manufacture and clearance of the goods from the premises of the respondent, we hold that the impugned order dated 08.06.2017 passed by the CESTAT does not suffer from any serious error and does not merit interference. The appeal is therefore dismissed.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

05 December, 2024

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