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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision : 29.08.2018

\+ **CEAC 29/2017**

COMMISSIONER OF GOODS AND SERVICE TAX, DELHI (EAST) ..... Petitioner

Through: Mr. Harpreet Singh, Sr. Standing Counsel.

versus

ASHUTOSH METAL INDUSTRIES ..... Respondent

Through: Mr. V.S. Negi and Mr. Satish Chander Kaul, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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The questions of law framed in this case read as follows:-

> *"(1) Whether the Customs, Excise and Service Tax Appellate Tribunal was right in rejecting and not taking into consideration computer printouts and holding them as inadmissible for failure to meet the conditions specified in Section 36B of the Central Excise Act?*

(2) Whether the decision of the Customs, Excise and Service Tax Appellate Tribunal is contrary to facts and perverse?

(3) Whether the Customs, Excise and Service Tax Appellate Tribunal was right in excluding statement of Janki Sharma and computer printout and in holding that there was no evidence to show clandestine removal?"

2. Pursuant to search and seizure proceedings carried out in the premises of the respondent/assessee, a show cause notice for clandestine removal of dutiable goods was issued on 30.08.2007. The assessee resisted the notice contending that no incriminating material was discerned. The show cause notice relied upon certain recoveries made from the premises or the third parties as well as recoveries such as pen-drive and computer hard drive from the premises of one Ms.Janki Sharma. Her statement too was recorded. This formed the basis of the order-in-original of the Commissioner dated 30.03.2009. The order-in-original sought to analyse the data extracted from the electronic material recovered from the premises of Ms. Janki Sharma.

3. The relevant part of the discussion of the Adjudicating Authority is extracted below:-

"38.4 The scrutiny of the printouts as aforementioned, and duly corroborated by the statement dated 18.11.2005 of Smt. Janki Sharma, reveal that it contains the details of transactions of ATM (and SHIVA), which is abbreviated to mean Ashutosh Metal Industries, and Shri Jatinder Kumar Aggarwal is the proprietor of M/s.ATM. The papers of ATM

are page numbered from 1 to 165. Shri Manish Sethi, however, retracted his statement vide his letter no. Nil dated 02.02.06 received through post on 07.02.06. In response to the aforesaid letter, DGCEI vide letter F.No. DZU/INV/169/2005/474 dated 15.02.06 had advised him to co-operate in the investigation. I find that the retraction was sent after almost 3 months of it being recorded and appears to be more in the nature of an after thought and it appears to have been done with a motive to mislead the investigation.

39. The documents of M/s.ATM show the party-wise details of transaction and a consolidated details of sale and purchase made by M/s.ATM. The scrutiny of the seized printouts and the particulars mentioned therein from page no: 1 to 122 and from page no. 132 to 165 reveal that they were showing the party-wise ledger account of payment details, purchase of copper scrap, purchase account, sale of copper ingots and receipt of payment in cash. The details mentioned at page no. 123 to 131 are a consolidated statement which is in respect of parties to whom copper ingots/rods were sold clandestinely by M/s.ATM. The total sale of copper ingots/rods was shown for an amount of Rs. 18,22,35,303.30/- at page-131 for a period from 02.03.05 to 06.05.05.

39.1 Similarly another set of printout was also generated as per page numbered from 1 to 209, relating to the account of "SHIVA". As stated by Smt. Janki Sharma, the trarnsactions entered in the "SHIVA" account are created in respect of Ashutosh Metal Industries in order to keep some of its transactions related to clandestine removal. The details given in this account are maintained in an identical manner like ATM account. It is seen that ATM account are maintained up to 06.05.05 and thereafter for the subsequent period the account is maintained in the name of 'SHIVA'. The *documents show the party-wise transaction details and consolidated details of both sale and purchase by M/s. ATM. On scrutiny of the printouts marked as "SHIVA", the description mentioned from page 1 to 135 and from page no. 151 to 209 was party-wise ledger account of payment details, purchase of copper scrap, purchase account, sale of copper ingots/rods and receipt of payment in cash. The details mentioned at page no.136 to 150 were in respect of parties to whom copper ingots/rods were sold clandestinely and the total sale of copper ingots/rods was worth Rs. 35,02,87,889/- as shown at page no.150 for the period from 07.05.05 to 16.09.05.*

39.2 From scrutiny of the documents in the made up file page numbered 1 to 56 showing 9th transaction details of clandestine removal of copper ingots/rods, purchase of scrap and payments & receipt on account of clandestinely removed goods from M/s ATM, it is seen that these details were written by hand on small chits/kachhi parchi by Smt. Janki Sharma, who entered such transaction in a computer generated ledger as well as in pen drive. Both the Kachhi parchi/chits and pen drive were given by the Proprietor of M/s. ATM to Smt. Janki Sharma to create two accounts. Some transactions of M/s.ATM are entered in 'ATM' account and the remaining transactions of M/s.ATM are entered in a fictitious account named "SHIVA". In fact Smt. Janki Sharma was found entering the data in a computer with the help of attached pen drive when the officers visited her residence and conducted searches. The co-relation between some data in the kachhi Parchies (page from 1 to 56) with some entries in the printouts generated from computer clearly indicated that the data contained in kachhi Parchies were actually entered in computer to create a ledger data base.

39.3 The payment received on account of clandestine sale of ingots/rods, as reflected in the account of 'ATM' and 'SHIVA' were actually the transactions of M/s.ATM only as corroborated by the statement of Smt Janki Sharma and this indicates that a huge quantity of unaccounted ingots were manufactured and cleared clandestinely. The details of quantity reflected/written on the kachhi parchi can be seen from the sample kachhi parchies as evidence recovered during search from Smt. Janki Sharma. However, while entering these data in the computer, only relevant information such as receipt & payment details were entered and hence the printouts of ledger did not show the quantity.

40. Further, a huge quantity of unaccounted production and subsequent clearance thereof is corroborated from the evidence of higher consumption of LDO used in furnace which was purchased unaccounted; however some surreptitious purchases were recorded in computer data base as seen from the printouts recovered.

40.1 On scrutiny of the seized print outs marked as ATM account from page 1 to 165 and the details mentioned therein at page no. 67 of the above ATM account in respect of LDO from 01.03.05 to 05.05.05, it was observed that the noticee purchased LDO for an amount of Rs. 29,97,380/- during the aforesaid period which was paid in cash. The contents of page 67 can better be appreciated by looking at the scanned copy of the relevant page (incorporated in the show cause notice) reflecting the purchase of LDO.

40.2 Similarly on scrutiny of the seized print out marked as 'SHIVA' Account from page 1 to 209, the details of page 77 show ledger account of LDO from 12-05-05 to 04-11-05 which reflects the purchase of LDO for an amount of Rs. 59,47,600/- which was also paid in cash."

4. The assessee appealed to the Customs, Excise and Sales Tax Appellate Tribunal (hereinafter 'CESTAT') which was of the opinion that in the absence of any material seized from the premises by the Revenue Authorities in the course of search conducted separately, the duty demanded to the tune of ₹ 8,30,53,761/- could not be sustained. The CESTAT noticed that the show cause notice itself showed that the daily production from the appellant's factory was 5 tonnes and that it runs in a single shift and works for about 10-15 days in a month. It was concluded that the calculations regarding production in the appellant's factory deduced by the Revenue Authorities in the order-in-original in the form of a chart, which was the basis of the duty liability, was entirely fanciful. The CESTAT thereafter elaborately analysed both the digital material and the evidence as well as the statement of Ms. Janki Sharma. The CESTAT thereafter pointed out the improbabilities in the conclusions arrived at by the Adjudicating Authority and observed as follows:-

> *"11. It is settled law that documents recovered from a third party can be used against the manufacturer to prove clandestine removal only when these are supported with corroborative evidences. The Revenue has alleged that huge quantity of finished products have been manufactured and cleared clandestinely without payment of Central Excise duty. The computer printout of data recovered from the house of Smt. Janki Sharma, no doubt, gives rise to suspicion that these are details relating to clandestine clearance of the goods. However, clandestine manufacture and clearance*

alleged against the appellant is a very serious charge which needs to be proved by Revenue by producing tangible and reliable evidences. For clandestine clearance of such huge quantities of finished products, corresponding quantity of raw-materials ought to have been procured by the appellant. The finished products allegedly have been cleared to various customers. In fact, in the computer printouts recovered, names of several buyers have been indicated. However, we note that Revenue has failed to undertake proper investigation even for the procurement of raw materials without entering in their books, nor carried out any investigation on the buyers who are alleged to have purchased these finished goods, in cash without payment of duty. From the records recovered from the factory, there is no evidence of any physical receipt of raw materials used in production of such a huge quantity of finished goods. In fact on the date of search, no discrepancy was recorded in respect of stock of raw materials and finished goods vis-a-vis that recorded in statutory records. The Revenue has also not bothered to investigate about the transportation of raw materials as well as finished products. The total quantum of alleged clandestine production and clearance also show an over estimation, keeping in view the production capacity estimated by the Commissioner himself in the impugned order.

12. It is true that the evidence which is required to be produced in quasi judicial proceedings should be such that the charges get established on the basis of preponderance of probability. The standard of evidences need not be as high as in criminal proceedings, where the charges are required to be established beyond reasonable doubts. But in the present case, we are of the view that the allegation of clandestine manufacture and clearance has not been substantiated by any *tangible evidences. The only evidence unearthed by Revenue in the form of computer, from the residence of a third party cannot be considered as sufficient proof to support such allegation. This is particularly so since the authenticity of the evidence has been questioned. The Revenue has failed to produce any corroborative evidence in the form of purchase of raw materials, clearance of finished products or even the capacity to manufacture such a huge quantity of finished products alleged to have been cleared. The evidence, at best, raises suspicion in the minds but is not sufficient to prove the charges of clandestine removal.*

13. The appellant has placed reliance on the Tribunal judgment in the case of Essvee Polymers (P) Limited vs. CCE, Chennai - 2004 (165) ELT 291 (Tri. Chennai.) and Hon'ble Allahabad High Court decision in the case of Continental Cement Company vs. UOI- 2014 (309) ELT 411 (All.). We have gone through the above case laws which support the arguments of the appellant.

14. In view of the discussions in above paragraphs, we find that the evidences produced by the Revenue for sustaining the duty demand has not been corroborated by detailed investigation. The allegation of clandestine manufacture and clearance cannot be sustained on the basis of such flimsy evidences. Accordingly, the impugned order is set-aside and the appeal is allowed. Miscellaneous application also disposed of."

5. Learned counsel for the Revenue urged that the Tribunal erred in interfering with the finding of fact that in the absence of any concurrent material connecting the assessee with the recoveries made, duty liability could not be imposed. It is submitted that the statement

of Ms. Janki Sharma clearly implicated the assessee and in fact she had deposed that she left the job of one K.C. Electricals, one of the partners of which company was also a partner in the respondent's firm. It was also submitted that CESTAT opined with respect to the failure of justice, i.e. not providing opportunity to cross-examine Ms.Janki Sharma, is of no avail. In this regard, the Revenue relied upon '*Surjeet Singh Chandra vs. UOI*', 1997 (89) ELT 646. Learned counsel emphasized that the burden, in the event of adverse material presented before an Adjudicating Authority, is always upon the party, who wishes to prove the contrary. It was contended that in the present case, the respondent/assessee was aware of the nature of the material gathered and used against it in the form of the confessional statement of Ms.Janki Sharma as well as computer printouts and electronic evidence and that it could not dispel the reasonable inference that the Revenue proved against it.

6. It is evident from the above discussion as well as complete reading of the orders of the Adjudicating Officer and the CESTAT that the case built up against the assessee is entirely based on the evidence procured from third party. The lynchpin of the Revenue's case is the statement of Ms.Janki Sharma. Concededly, there was nothing recovered from the premises of assessee connecting it with her-either as an employee or as a consultant. It is not even Revenue's claim that during the course of adjudication, it asked any query from the assessee for directing her to furnish the bank statement etc. to find out possible connection with respect to any payments made or other

financial connection with Ms.Janki Sharma. In these circumstances, the word of Ms.Janki Sharma against the respondent/assessee was entirely hearsay one. In such event, the Revenue could have yet proceeded to establish its case provided some link with its allegations of clandestine removal and excess production had been there. The only material it was able to muster was in the form of electronic evidence. The printouts apparently also mentioned the names and details of the purchaser(s) however, no further inquiry was made into the details which existed on these printouts and electronic materials. The Tribunal reproduced the tabular chart which the Revenue had relied upon. The same is extracted below:

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S. No	*Account*	*Period*	*Cum-duty sale value shown in the printouts recovered and from the calculations from kachhi parchi (Rs.)*	*Assessable value on which duty is payable*	*Central Excise duty @ of 16% (Rs.)*	*Education Cess on Excise Duty @ 2% (Rs.)*	*Total Duty Recoverable (Rs.)*
1.	*ATM*	*2.3.05 to 06.5.05*	*18,22,35,303.30*	*15,66,67,214*	*2,50,66 754.22*	*5,01,335.08*	*2,55,68,089.3*
2.	*SHIVA*	*07.5.05 to 16.9.05*	*35,02,87,889.00*	*30,11,41,582.70*	*4,81,82 653.23*	*9,63,653.07*	*4,91,46,306.3*
3.	*ATM*	*17.9.05*	*77,80,242.0*	*66,88,653.*	*10,70,18*	*21,403.7*	*10,91,58*

		to *21.9.05*	*0*	*71*	*4.59*	*0*	*8.29*
4.	*ATM*	*22.9.05* *to* *12.11.05*	*5,16,58,179.00*	*4,44,10,401.47*	*71,05,664.25*	*1,42,113.28*	*72,47,777.53*
TOTAL			*59,19,61,613.30*	*50,89,07,851.88*	*8,14,25,256.29*	*16,28,505.13*	*8,30,53,761.42*

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7. The inference that the Revenue sought to draw a reference to "ATM"; the link it sought to make by the statement of Ms.Janki Sharma. As observed earlier, there was no scrap of paper or evidence linking the assessee with any allegations levelled against it vis-à-vis excess production and clandestine removal. On the other hand, the CESTAT noticed that the assessee's installed capacity was the production of five ton of copper ingots. Apparently, the assessee was able to function only half the month i.e. for about 15 days. Given this established and known capacity, the mere circumstance that the assessee had procured diesel equivalent to ₹ 29,00,000/- without any further calculation could not have led the Adjudicating Authority to conclude that clandestine removal to the extent of ₹ 8,30,53,761/- was made. The value of the goods, in that event was ₹50,89,07,851.88. The Court is of the opinion that the sheer probability of the allegations and sketchy nature of the material relied upon by the Revenue to base its liability could not therefore have been sustained. The CESTAT in our opinion correctly held that the assessee's appeal deserved to be allowed.

8. For the above reasons, the questions of law framed are answered against the Revenue and in favour of the assessee. The appeal is consequently dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

AUGUST 29, 2018
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