

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CEA No. 8 of 2018 (O&M)

Date of decision: 13.2.2019

Commissioner of Central Excise & Service Tax, Chandigarh-II

.....Appellant

Vs.

Kewal Garg

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL**

Present: Mr. Anshuman Chopra, Advocate for the appellant.

Ajay Kumar Mittal, J.

1. The delay in refiling the appeals is condoned.
2. This order shall dispose of CEA Nos. 8, 9, 10, 13 and 14 of 2018 as according to the learned counsel for the appellant-revenue, the issue involved in all these appeals is identical. However, the facts are being extracted from CEA No.8 of 2018.
3. CEA No.8 of 2018 has been preferred by the appellant-revenue under Section 35G of the Central Excise Act, 1944 (in short, "the Act") against the order dated 8.8.2016, Annexure P.3 passed by the Custom, Excise and Service Tax Appellate Tribunal, Chandigarh (in short, "the Tribunal"), claiming following substantial questions of law:-

“i) Whether the findings contained in the impugned order are perverse, contrary to law and to record and thus are liable to be set aside?

ii) Whether the learned Tribunal has acted illegally and with material irregularity while setting aside the well reasoned order

of the adjudicating authority?

- iii) Whether the Tribunal has passed a non speaking order and has failed to appreciate evidence produced by the parties?
- iv) Whether the learned Tribunal was justified in dropping the demands raised by the adjudicating authority against the respondents especially when the Tribunal has failed to give any cogent and legal reasons for the same?
- v) Whether the observations and findings of the learned Tribunal to the effect that the average weighment cannot be taken into consideration while imposing duty are perverse, and are liable to be set aside?
- vi) Whether the observations and findings given by the learned Tribunal are based on conjectures or surmises and whether the learned Tribunal has failed to apply its mind and failed to appreciate the complete evidence collected by the investigating agency?
- vii) Whether the learned Tribunal has acted illegally and with material irregularity while holding that there is no corroborative evidence to prove that the respondent and its sister concerns are engaged in clandestine removal of the goods?
- viii) Whether the learned Tribunal has failed to take into consideration evidence and statements recorded by the investigating agency and has simply passed the order on conjectures and surmises?"

4. A few facts relevant for the decision of the controversy involved as narrated in CEA No.8 of 2018 may be noticed. The respondent assessee is a manufacturing unit engaged in manufacturing of iron and steel goods falling under Chapter heading 72 and 73 of Ist Schedule to the Central Excise Tariff Act, 1985. The respondent unit is managed and controlled by two persons namely Sunny Garg and Kewal Garg. Apart from the respondent unit, these two persons manage and control other three sister units namely M/s Sada Shiv

Steels Mills (SSSM), M/s Sada Shiv Castings Limited (SSCL) and M/s Sada Shiv Ispat Limited (SSIL). The office of Directorate General of Central Excise Intelligence received an intelligence that these units were engaged in clandestine removal of finished goods i.e. alloy steel products without payment of duty through their trading firm in Delhi i.e. Raghav Enterprises, New Delhi which was being run and controlled by its proprietor Suresh Kumar Aggarwal who is brother in law of Kewal Garg. According to the intelligence, all these units used to dispatch the goods on *Kacha Parchi* to Delhi and on receipt of goods in Delhi, they used to destroy the *Kacha Parchi* and in this way they were engaged in clandestine removal of finished goods without payment of duty. Consequently, premises of all these units in Derabassi and premises of Raghav Enterprises, New Delhi alongwith residential houses of all the proprietors at Chandigarh and New Delhi were searched on 21.10.2005. It was found that there was shortage of non alloy steel ingots to the tune of 120.720 MT and shortage of cenvatable scrap of 50.140 MT at the premises of SSCL. Shortage of raw material was found at the premises of SSSM. Shortages of raw material and finished goods were also found at the premises of SSIL. The goods valued at ₹ 18,57,600/- were seized at the premises of M/s Raghav Enterprises. ₹ 47,00,000/- were also recovered from the residential premises of Sunny Garg and Kewal Garg. Thereafter, some statements were recorded. Show cause notice dated 13.10.2006 was issued to all the parties who were believed to be engaged in clandestine removal in order to evade excise duty. Statements of proprietors of the firms as well as other evidence was collected by the Investigating Agency and after giving due opportunity to the respondents, Commissioner vide order dated 5.6.2008 confirmed the duty as well as penalty against all the firms and their proprietors. Aggrieved thereby, six appeals were filed by the respondent units and their proprietors before the Tribunal. Vide

order dated 8.8.2016, Annexure P.3, the Tribunal set aside the order passed by the Commissioner. Hence the instant appeals by the appellant-revenue before this Court.

5. We have heard learned counsel for the appellant-revenue.

6. After examining the entire evidence on record, it has been categorically recorded by the Tribunal that demand of duty has been confirmed on account of shortage of raw material/finished goods in the factory premises of all the three manufacturers, on account of clandestine removal of goods by M/s SSCL; absolute confiscation of the currency of ₹ 47 lacs recovered from the residential premises of Sunny Garg and Kewal Garg and for imposition of penalty on all the respondent units. Further, during the course of investigation, except shortage of goods, no incriminating document was found in the premises of the respondent and no corroborative evidence had been produced except some statements only. In the case of SSCL, demand of duty has been confirmed on account of shortage of raw material and finished goods to the tune of ₹ 4,42,243/-. It has been further recorded by the Tribunal that duty has been demanded on shortage of melting scrap of 50.140 MT. It has not been alleged that this raw material had been used in manufacturing of final product which had been cleared without payment of duty. The demand of duty on shortage of raw material was not sustainable as duty could be demanded only on manufactured goods. Admittedly, raw material was not manufactured goods of the respondent. Further, weighment done on average basis to alleged shortage of finished goods was not sustainable in the absence of any corroborative evidence of clearance of finished goods without payment of duty. No corroborative evidence had been produced by the revenue in support of its claim. Similarly, the demand of duty against M/s SSSM on account of shortage of raw material was also not sustained in the absence of evidence. It was alleged

that they were using cenvatable inputs as well as non cenvatable inputs but in the impugned order, the authority had not given credence to the fact that the respondent was using cenvatable as well as non cenvatable inputs which had been found short during the course of investigation. Further, in the case of SSIL, the duty had been demanded on both inputs as well as finished goods. With regard to shortage of inputs, it was not held by the Commissioner that the inputs found short had been used in manufacturing of final product by the respondent. Therefore, the duty could not be demanded on the raw material found short during the course of investigation as the same was not manufactured goods by the respondent. The adjudicating authority also failed to prove that the cash recovered was the sale proceeds of clandestine removed goods. Thus, it was held that the seized currency during the course of investigation could not be confiscated without any evidence that the same was the sale proceeds of excisable goods cleared clandestinely. Consequently, the impugned order passed by the Commissioner was set aside and the appeals were allowed. The relevant findings recorded by the Tribunal read thus:-

“9. On the basis of the records placed before us and arguments advanced by both the sides, we find that in the case of SSCL demand of duty has been confirmed on account of shortage of raw material and finished goods to the tune of ₹ 4,42,243/-. We find that duty has been demanded on shortage of melting scrap of 50.140 MT. We find that the duty has been demanded on shortage of raw material and in the impugned order it is not alleged that this raw material has been used in manufacturing of final product which has been cleared without payment of duty. The demand of duty on shortage of raw material is not sustainable as duty can be demanded only on manufactured goods admittedly raw material is not manufactured goods of the appellant. Therefore, the demand of duty on melting scrap on account of shortages is not sustainable.

10. We have seen that in the impugned order duty has been

demand on shortage of finished goods the sole contention of the appellant is that weighment has been done on the average basis not on actual. The learned adjudicating authority while adjudicating has adopted the method of average weighment by sending the team to inspect and find out the average weight of different sizes. If the average weight during the course of adjudication has been taken in that case also the shortage of 120 MT is reduced to 38.796 MT i.e. too when the average weight of dimensions 3=4x4=4 and 44x54 are not available, therefore, we hold that the weighment done on average basis to alleged shortage of finished goods is not sustainable in the absence of any corroborative evidence of clearance of finished goods without payment of duty. Admittedly, no corroborative evidence has been produced by the revenue in support of their claim, therefore, we hold that demand of shortage against SSCIL is not sustainable.

11. We also take note that demand of duty has been confirmed against M/s SSSM on account of shortage of raw material. The contention of the appellant is that they were using cenvatable inputs as well as non cenvatable inputs but in the impugned order the adjudicating authority has not given credence to the fact that the appellant is using cenvatable as well as non cenvatable inputs which inputs has been found short during the course of investigation. Moreover, duty has been demanded on raw material which are not manufactured goods of the appellant and it has not been held by the adjudicating authority in the impugned order that the input found short has been used in manufacturing of final dutiable product. If that is the case in that case duty is to be demanded on the value of final manufactured goods alleged to be cleared without payment of duty. In the absence of such evidence, duty cannot be demanded on raw material found short in the premises of SSSM. Therefore, the demand of duty against M/s SSSM is not sustainable, the same is set aside.

12. With regard to demand of duty on account of shortage at the premises of SSIL we find that duty has been demanded on both inputs as well as finished goods. With regard to shortage of inputs it is not held by the adjudicating authority that the inputs found

short has been used in manufacturing of final product by the appellant, if that would be the case duty would have been demanded on the value of final manufactured goods i.e. not the case of the revenue. Therefore, the duty cannot be demanded on the raw material found short during the course of investigation as same is not manufactured goods by the appellant. We further find that while weighment of finished goods during the course of investigation it was found that as per statutory records the finished goods are of 110.207MT whereas on average weighment it was found that 102.465 MT, therefore, the shortage attributed to 7.742 MT. The details of actual average weighment has not been provided, therefore, benefit of doubt goes in favour of the appellant as weighment has been done on average basis. In that circumstances, the shortage found of finished goods is of meager quantity in the absence of any corroborative evidence of clandestine removal of goods is not sustainable. Therefore, demand of duty against SSIL is also set aside. Demand has been confirmed against SSCL on account of clandestine removal of goods. We find that in this case on the basis of statement of Shri Suresh Agarwal of M/s Raghav Enterprises demand sought to be confirmed against the appellant SSCL that Sada Shiv Group is selling goods to M/s Raghav Enterprises.

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13. Admittedly, nothing has been brought on record with corroborative evidence to allege clandestine removal against the appellant. Therefore, we hold that demand against M/s SSCL on account of clandestine removal of goods is not sustainable whereas the demand of Shri Suresh Agarwal is corroborative with the evidence that they are purchasing the goods from Sada Shiv Group and M/s SSIL is selling goods against statutory invoices.

14.xxxxx

15. On going through the observations made by the learned adjudicating authority we are disagreement with that as in the case of excise goods cannot be absolutely confiscated therefore the sale proceeds of the said goods cannot be absolutely confiscated which has been done by the adjudicating authority in the impugned order.

The adjudicating authority has also failed to prove that the cash recovered is the sale proceeds of clandestine removed goods. Therefore, the impugned order qua confiscation of cash seized is contrary to law which shows that the adjudicating authority has not applied mind for absolute confiscation of currency seized during the course of investigation. Therefore, we hold that the seized currency during the course of investigation cannot be confiscated without any evidence that same is the sale proceeds of excisable goods cleared clandestinely. Therefore, we hold that absolute confiscation of the seized currency of ₹47,00,000/- is not sustainable accordingly, the confiscation is set aside and the adjudicating authority is directed to release the said amount immediately to the appellants.

16. As we hold that demands against the appellants are not sustainable, therefore, penalty on all the appellants are not sustainable. In view of the above observations, the impugned order is set aside. Appeals are allowed with consequential relief, if any.”

7. Learned counsel for the appellant-revenue has not been able to point out any error or illegality in the findings recorded by the Tribunal warranting interference by this Court. No substantial question of law arises. Consequently, all the appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

February 13, 2019
‘gs’

Whether speaking/reasoned
Whether reportable

(Manjari Nehru Kaul)
Judge

Yes/No
Yes/No