$~59 to 61

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

\+ **<u>CEAC 8/2019, C.M. APPL.10389/2019</u>**

COMMISSIONER OF CENTRAL TAX G.S.T., DELHI EAST ..... Petitioner

versus

J V INDUSTRIES PVT. LTD. ..... Respondent

\+ **<u>CEAC 9/2019, C.M. APPL.10390-10391/2019</u>**

COMMISSIONER OF CENTRAL TAX G.S.T., DELHI EAST ..... Petitioner

versus

VINOD KUMAR JAIN ..... Respondent

\+ **<u>CEAC 10/2019, C.M. APPL.10393/2019</u>**

COMMISSIONER OF CENTRAL TAX G.S.T., DELHI EAST ..... Petitioner

versus

SUSHIL KUMAR JAIN ..... Respondent

Through : Sh. Amit Bansal and Sh. Aman Rewaria, Advocates, for petitioner.

Sh. Karan Sachdev, Sh. Yogendra Aldak and Ms. Avisha Khatri, Advocates, for respondent, in Item Nos. 59 to 61.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

<u>O R D E R</u>

% **06.03.2019**

1. In these three appeals, the Revenue urges that the findings of the Customs Excise and Service Tax Appellate Tribunal [hereafter referred to as "the CESTAT"] rendered in the course of appeals by the assessees are erroneous on two grounds. It is submitted that the first

count of error is that the CESTAT ignored a prior statement recorded of an employee of one of the assessees, which was subsequently retracted on a narrow ground and second, that the appraisal of technical issues with respect to the slicing or cutting of copper cathodes and its feasibility with the kind of equipments that the assessee possessed, was suspect and that the CESTAT's findings are erroneous on this score.

2. The facts in brief are that one of the assessees – M/s. J.V. Industries Pvt. Ltd. [hereafter "JVIPL"] which was manufacturing copper ingots and rods and other related materials, and another entity – M/s. Ganpati Rolling Private Ltd. [hereafter "GRPL"] was engaged in the manufacture of copper rods and scrap [hereafter collectively referred to as "the units"].

3. During the period in question – April 2006 to March 2008, these units had filed claim for CENVAT credit for copper cathodes for different quantities – 1959 MT and 824 MT respectively. On the basis of investigation of Anti-Evasion Wing of the then Central Excise Tax Department on 19.12.2007 and in the course of which the statement of one Sh. Shivji Gupta, Production Manager of JVIPL was recorded on 26.03.2008, Show Cause Notices (SCNs) were issued to JVIPL and its concerned officers alleging fraudulent claims. It was further urged that the modus adopted by the assessee/manufacturer was to move input goods to its units from another unit – M/s. JMWIPL at Jammu, which enjoyed area-based exemption and then to source locally un-invoiced inputs on which it could claim CENVAT

credits for the JVIPL unit. The SCNs, which were subsequently issued ultimately resulted in liability upon JVIPL and its Directors who were issued with penalty. The JVIPL and its directors appealed.

4. In the appeal to the CESTAT, it was contended that the reliance placed upon Sh. Shivji Gupta's statement was unwarranted because firstly, the statement was a subject matter of a previous SCN which had not culminated in final adjudication as such and secondly, the statement was subsequently retracted and lastly, the latter statement was in fact relied upon in the SCN which resulted in an adjudication, which is the subject matter of present proceeding.

5. The second issue urged was that the findings of the Commissioner of Central Excise with respect to the unfeasibility of the equipment for carrying out the cutting operation was in fact erroneous because it placed reliance upon the so-called 'expert opinion'. The assessee highlighted in their appeal before CESTAT that the said expert – one Sh. V.K. Mittal was not cross-examined at any stage of the proceedings.

6. The Judicial Member of CESTAT rendered findings adverse to the Revenue. The Technical Member, however, chose to record *prima facie* view and issued remand. In these circumstances, four questions were formulated specifically for consideration of a third Member, who agreed with the Judicial Member; resultantly, the appeal was allowed.

7. The Revenue urges that on both counts, i.e. with respect to the so-called 'retracted statement ' as well as the technical issue with

respect to unfeasibility of the equipment for the task claimed by the assessee with the motive of giving credence to its claim that it could carry out operations from scrap obtained for the unit, the CESTAT's findings were erroneous.

8. Learned counsel relied upon the statements of Sh. Shivji Gupta and Sh. V.K. Mittal and submitted with respect to the statement of the former, that his subsequent allegation that he was subjected to beating and coercion are unconvincing and that the CESTAT overlooked that the statement was recorded voluntarily and, therefore, had a probative value. With respect to he second point, it was urged that the expert opinion given by Sh. V.K. Mittal could not be brushed aside as was done by CESTAT.

9. With respect to the first issue, i.e. the statement made by Sh. Shivji Gupta, this Court is of the opinion that the CESTAT's appreciation of facts on this score are sound and do not call for interference. What is most important and was correctly noticed by the CESTAT is that the statement of 2008 has not resulted in any adverse order on the SCN which culminated immediately thereafter. The present adjudication proceeding is the result of a subsequent SCN as a result of later inspection. The Revenue's claim, therefore, has no basis on this aspect. Likewise, the CESTAT's acceptance of the explanation that the statement was retracted later has an intensely factual basis which does not appear to present any substantial question of law.

10. With respect to the second question, i.e. the feasibility of the

nature of equipment that the assessee possessed at site, the CESTAT discussed this in the following manner:

> *"29. The next issue is whether JVIPL was having the infrastructure to manufacture copper ingots or rods from copper cathode. The main reason, which weighed with learned Commissioner is that JVIPL was not equipped to use copper cathode. We note that SG in his subsequent statement dated 30/08/2010 have explained the manner in which the copper cathode was cut to 2-3 pieces before feeding the same in the furnace. Further it is admitted fact that JVIPL had one hand Cutter available in their factory. The finding of learned Commissioner that JVIPL was not having suitable Cutter or cutting device for cutting copper cathode, appears to be erroneous in absence of any authoritative test report. We further find that in spite of prayer by JVIPL the learned Commissioner did not choose to conduct appropriate test in their factory, to ascertain the facts. We also notice that it is not the case of Revenue that copper cathode cannot be used in the manufacture of copper ingots. We further find that the Commissioner have relied upon the statement of one Shri V. K. Mittal-partner of M/s Veekay Gen. Industries who in his statement dated 08/09/2010 has stated that copper cathodes cannot be cut into pieces by using hand Cutter or through hand operated scissors because of its thickness and hardness. We find that the said statement of Shri V. K. Mittal cannot be relied upon, as both JVIPL and GRPL had requested for cross-examination of Shri V.K. Mittal. The Revenue have failed to produce their witness for cross examination. Hence, no reliance can be placed on such unsubstantiated statement. We also hold that the said statement of Shri V. K. Mittal is not admissible under the provisions of Section 9D of the Act. As regards the allegation of less burning loss at JMWIPL Jammu and comparatively more burning loss at JVIPL,*

Delhi, we notice that it is admitted fact that JMWIPL, Jammu, have a close furnace, whereas the furnace of JV IPL Delhi is an open furnace. It is an admitted fact that burning loss is bound to be more in their open furnace. Thus, we hold that the allegation in the SCN, regarding capacity to utilize copper cathode by JVIPL is not tenable."

11. This Court is of the opinion that the analysis of the CESTAT – i.e. the Judicial Member's decision which was agreed by the third member to whom the question was referred, is sound and is a plausible one. The Revenue's disagreement with these findings *ipso facto* cannot result in substantial question of law.

12. For the above reasons, there is no merit in the appeals; they are accordingly dismissed along with the pending applications.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

MARCH 06, 2019/ajk