HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Central/excise Appeal No. 2/2018

Commissioner Of Central Excise, Jaipur-I, New Central Revenue Building, Statue Circle, Jaipur-302005

----Appellant

Versus

Mr. Arun Jain, Director, Vardhman Polymers (P) Ltd. Village, Dadar, Rajgarh Road, Alwar (Raj.) (Wrongly Mentioned As Director, Tara Chand Naresh Chand Balaji Rathore Ki Gali, Alwar (Raj.)

----Respondent

D.B. Central/excise Appeal No. 3/2018

Commissioner Of Central Excise, Jaipur-I, New Central Revenue Building, Statue Circle, Jaipu302005

----Appellant

Versus

Tara Chand Naresh Chand, Balaji Rathore Ki Gali, Alwar (Rajasthan)

----Respondent

For Appellant(s) : Mr. Anuroop Singhi
For Respondent(s) :

HON'BLE MR. JUSTICE K.S.JHAVERI
HON'BLE MR. JUSTICE VIJAY KUMAR VYAS

Order

14/03/2018

Delay in filing the appeals is condoned. The applications u/s 5 of the Limitation Act are allowed. Defects are waived.

In both appeals common questions of law and facts are involved, hence, they are decided by this common judgment.

By way of these appeals, the appellant has challenged the judgment and order of the Tribunal whereby the Tribunal has allowed the appeals filed by the assessee.

Counsel for the appellant has framed the following substantial question of law:-

> "**In Centra/Excise Appeal No. 2/2018 & 3/2018**
> i) Whether the Tribunal was correct in allowing the appeals of the assessee, solely by holding that there is no Sufficient corroborative evidence to statement tendered by partner of assessee, even when Statement tendered by Central Excise Officer is admissible before court of law as piece of evidence and thereby deleting the penalty of Rs. 2,00,000/-?

Now the controversy involved in the appeals is covered by the decision of this Court in case of Commissioner of Central Excise vs. Tara Chand Naresh Chand (DB Central/Excise Appeal No. 120/2017) decided on 6th December, 2017 wherein it has been held as under:-

> "5. Counsel for respondent contended that there is no substantial question of law. It is appreciation of fact and in view of decision by this Court reported in 2008 (221) E.L.T. 180 (Raj.), Union of India vs. Jain Plas Pack (P) Ltd., wherein it has been observed as under:-
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> "2. In appeal is the order passes by the Customs Excise and Service Tax Appellate Tribunal dated 3.8.2005 allowing the appeal of the respondent No. 1 by setting aside the demand of Rs. 72,707/- as the duty adjudicated on alleged removal of the fabric from the factory and like amount of the penalty levied by the Adjudicating Officer.
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> 4. The manufacturer's case from the beginning was that the register found during the visit of Excise Authorities in question was not a register maintained for recording production but was a document maintained for the purpose of keeping supervision over the factory workers and on their daily production was entered on estimate basis only. Before entries were made in RG-1 the product was

actually weighed and actual weight was entered in RG-1. In support of this contention, the manufacturer had also produced a chart of procuring raw material and its corresponding production. This explanation had not been accepted by the Adjudicating Officer.

5. However, the Tribunal found the explanation to be plausible and considering the fact that no attempt was made by Adjudicating Officer to verify the correctness of explanation put forward by the manufacturer in light of corroborative material produced by about the procurement and disposition of the raw material, there was no reason to doubt the correctness of the material. In view thereof the explanation furnished by the manufacturer was accepted by the Tribunal and the levy of the duty as well as the penalty was deleted.

6. The aforesaid narration clearly goes to show that findings reached by the Tribunal are findings of fact and does not give rise to question of law.

7. Accordingly, the appeal fails and is hereby dismissed."

6. He has also relied upon the decisions of Madras High Court in: 1. D.V.Kishore vs. Commr. Of Cus. (SeaportsImports), Chennai, 2017 (350) E.L.T. 527 (Mad.), wherein it has been observed:-

26. It is also the findings on the part of the Tribunal to state that there was no effective and reliable denial on the part played by the appellant either in the proceedings before the Commissioner or before the Tribunal.

27. In fact, the appellant had started retracting his statement of confession itself from the beginning and when that being so, such a finding as has been given by the Tribunal, would not stand in the legal scrutiny. The further reasons given by the Tribunal is that, even though the only defence apparently was that the statements had been retracted, the seizure of gold and the consensual deposition by other witnesses implicating the appellant and therefore, the same cannot be ignored.

2. S.M.A. Siddique vs. Government of India, 1989 (42) E.L.T. (Mad.), wherein it has been observed:-

2. Mr. K. Ramaswami, learned Counsel for the petitioner, would primarily urge that the decision of the Criminal Court on merits and on identical facts and charges having been rendered in favour of the

petitioner, anterior to the disposal of the appeal by the second respondent, it would be unfair and not in consequence with the principles of natural justice to ignore the said decision and penalise the petitioner by the imposition of the penalty. He places reliance on certain pronouncements of this Court, which I shall presently refer to. The submission of the learned Counsel for the petitioner that the judgment of the Criminal Court was on merits and on identical facts and charges is tenable because as I could see from the copy of the judgment in the criminal case, there has been a relevant and appropriate consideration of the factual materials, which are identical and in respect of identical charges and the Criminal Court has categorically opinion that the petitioner could not be found guilty of the charges. In D'Silva v. Regional Transport Authority 65 LW 73 , a bench of this Court observed as follows : "We have no hesitation in making it clear that a quasi-judicial Tribunal like the Regional Transport Authority or the Appellate Tribunal therefrom cannot ignore the findings and Orders of competent Criminal Courts in respect of an offence, when the Tribunal proceeds to take any action on the basis of the commission of that offence. Let us take the instance before us. The offence consist in smuggling foodgrains. For that same offence, the petitioner was criminal prosecuted. He has also been punished by his permit being suspended for a period of three months. If the criminal case against him ends in discharge of acquittal, it means that the petitioner, is not guilty of the offence and therefore did not merit any punishment. It would indeed be a strange predicament when in respect of the same offence, he should be punished, by one Tribunal on the footing that he was guilty of the offence and that he should be honourably acquitted by another Tribunal of the very same offence. A primarily the Criminal Courts of the land are entrusted with the enquiry into offences, it is desirable that the findings and orders of the Criminal Courts should be treated as conclusive in proceedings before quasijudicial Tribunal like the Transport Authorities under the Motor Vehicles Act."

3. Commissioner of Central Excise vs. Omkar Textile Mills Pvt. Ltd., 2010 (259) E.L.T. 687 (Guj.), wherein it has been observed:-

2. The facts of the case stated briefly are that the Respondent is engaged in the business of processing of cotton fabrics and man made fabrics falling under Chapter 52, 54 and 55 of the First Schedule to the Central Excise Tariff Act, 1985. The factory premises of the Respondent came to be searched on 9-7-

2003. According to the Appellant, during the course of search, on physical verification of finished processed cotton fabrics and man made fabrics at the various stages of processing i.e., bleaching, dyeing, printing, finishing, packed in HDPE bags on comparison with recorded stock, a shortage of 175178 L. mtrs. of processed MMF valued at Rs. 31,53,204/- involving Central excise duty of Rs. 3,15,329/- was detected. Accordingly, a panchnama came to be drawn recording the said facts. Statement of a Director of the Company, Shri Rajnikant Omkarmal Agarwal also came to be recorded, under Section 14 of the Act, wherein apart from several other admissions, he admitted the contents of the panchnama. Statements of other employees of the Respondent were also recorded under Section 14 of the Act. Subsequently, a show cause notice came to be issued to the Respondent calling upon it to show cause as to why Central excise duty amounting to Rs. 4,30,275/- should not be demanded under Section 11A of the Act, as well as, as to why mandatory penalty and penal interest should not be imposed.

5. As can be seen from the order made by the adjudicating authority, before the adjudicating authority, the Assessee had contended that the shortage of fabrics shown in the panchnama was not correct as they had produced the documents to show that the fabrics in question had not been cleared without payment of duty, but the officers who drew the panchnama did not take into consideration their request and did not even physically verify the stocks. Shri Rajnikant Agarwal, Director of the Assessee-Company submitted an affidavit wherein it was clearly mentioned that the stock verification was not conducted physically and was not compared with the recorded balance thereof. It was contended that the statements and panchnama were both recorded forcibly and the factual position of stock was not ascertained. He had, therefore, by affidavit dated 20-7-2003 retracted the facts mentioned in the panchnama and the statements.

9. Thus, all the authorities below viz., the adjudicating authority, Commissioner (Appeals) as well as the Tribunal have concurrently found that except for the statement of the Director of the Assessee Company, Shri Rajnikant Agarwal recorded on 10-7-2003, there was no other evidence in support of the charge of clandestine removal of goods. The statement recorded on 10-7-2003 had subsequently been retracted by Shri Rajnikant Agarwal. Thus, it is apparent that the only evidence in respect of clandestine removal against the

Assessee was in the nature of the statement recorded under Section 14 of the Act, which had been subsequently retracted. Before the adjudicating authority, the Respondent Assessee had led evidence to establish that the charge of clandestine removal is not made out and that there was no shortage of material as recorded in the panchnama which was accepted by the adjudicating authority. The findings of the adjudicating authority stand confirmed by both the appellate authorities. Learned Counsel for the Appellant is not in a position to point out any evidence to the contrary, in support of the case of the revenue as regards shortage of material or clandestine removal of goods. Thus, the conclusion arrived at by the Tribunal is based solely upon concurrent findings of fact recorded by all the authorities below. In absence of any perversity being pointed out in the findings recorded by the Tribunal, it is not possible to state that the conclusion arrived at by the Tribunal is, in any manner unreasonable so as to warrant interference. A case of clandestine removal of goods has to be made out on facts which find corroboration from the material on record. In absence of any corroborative material, no demand could have been raised merely on the basis of a statement recorded under Section 14 of the Act, which had been subsequently retracted.

4. Continental Cement Company vs. Union of India, 2014 (309) E.L.T. 411 (All.), wherein it has been observed:-

12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects:

(i) To find out the excess production details.
(ii) To find out whether the excess raw materials have been purchased.
(iii) To find out the dispatch particulars from the regular transporters.
(iv) To find out the realization of sale proceeds.
(v) To find out finished product receipt details from regular dealers/buyers.
(vi) To find out the excess power consumptions.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.

14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so called buyers, namely M/s. Singhal Cement Agency, M/s. Praveen Cement Agency; and M/s. Taj Traders are based on memory alone and their statements were not supported by any documentary evidence/proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts cannot be ruled out.

5. Commissioner of Central Excise, Ludhiana vs. Nexo Products (India), 2015 (325) E.L.T. 106 (P&H), wherein it has been observed:-

8. The said submission is without any merit. Specific defence had been taken by the manufacturer that no effort had been made to segregate the nuts and bolts into various sizes and to find the shortage by comparing the same with the recorded balance and there was huge stock of 91 lacs pieces of various sizes of nuts and bolts and it was impossible for the Department to come to a conclusive factual finding that there was shortage of 14,25,900 pieces of particular size and if they were all mixed together. The onus would lie upon the Department to undertake the said exercise which was not possible in such a short period due to the large number of inventory which was there at the site. Nothing was brought on record, in any manner, to show that to manufacture such a large amount of 14,25,900 pieces, there was material which had been consumed since neither any relevant record had been shown to show that electricity had been consumed or labour had been utilized to manufacture the said quantity. Neither the fact of purchase of raw material from the vendors or the sale to the consumers was brought on record. In the absence of any corroborative evidence, the levy of such a huge demand was, thus, totally arbitrary and has been rightly set aside.

9. It is apparent that the demand was raised and a sum of ` 14 lacs was taken on the same day and in order to justify the said demand which had been encashed, a show cause notice was issued on 25.04.2006 thereafter. Thus, not only the demand was confirmed but even the penalty had been

imposed, which was without any basis. The confirmation is not only on the manufacturer but also on the Proprietor. Such action which had illegally created the demand without even meeting the defence of the manufacturer, has, thus, been rightly set aside by the Commissioner (Appeals) and upheld by the Tribunal. The retraction was made at the earliest, the moment the show cause notice was served and in such circumstances, the questions of law which have been raised by the appellant are answered against the appellant-Revenue and the appeal is, accordingly, dismissed. 7. We have heard learned counsel for both the parties.

8. Taking into consideration the ratio laid down by the Allahabad High Court, as quoted above, only on the basis of statement of Tara Chand who was the partner of the Company, case of the department is not sustainable.

9. In that view of the matter, in our considered opinion, the Tribunal has not committed any error in reversing the view taken by the Commissioner Excise. In that view of matter, no substantial question of law arises. However, we make it clear that since no other material was available as per judgment of Allahabad High Court, therefore, we are not interfering. "

In view of the above, no substantial questions of law arises.

Hence, the appeals stand dismissed.

(VIJAY KUMAR VYAS),J (K.S.JHAVERI),J

A.Sharma/8-9