

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Excise Appeal No. 71145 of 2018

(Arising out of Order-in-Appeal No.224-CE/APPL/KNP/ADG-NACIN/2017-18 dated 16/05/2018 passed by Additional Director General, NACIN (ZTI), Kanpur)

M/s Raghuvveer Rolling Mills, ...Appellant

(Village Malon, Chaubepur, Bithoor Road, Kanpur-209203)

VERSUS

Commissioner of Central Excise, KanpurRespondent

(117/7, Sarvodaya Nagar, Kanpur-208005)

APPEARANCE:

Shri Amit Awasthi, Advocate &
Shri Raj Shukla, Advocate for the Appellant

Shri V.S. Yadav, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.70128 / 2022

DATE OF HEARING: 05 August, 2022
DATE OF PRONOUNCEMENT: 10 August, 2022

P. ANJANI KUMAR:

M/s Raghuvveer Rolling Mills Pvt. Ltd. the appellants are engaged in the manufacture of Iron Flats, spring Leaves and Agriculture implements. Officers of Central Excise visited the premises of the appellants and conducted investigations. A show cause notice dated 28.02.2015, demanding Central Excise duty of Rs.11, 11,790, invoking proviso to Section 11A, along with interest and proposing penalty under Section 11AC of the Central Excise Act, 1944. The Order-in-Original confirmed the

duty demanded and imposed equal penalty under Section 11AC *ibid*. On the appeal filed by the appellant learned Commissioner (Appeals) vide order dated 16-05-2018 upheld the order of the lower authority and therefore, the appellants preferred the instant appeal.

2. Learned Counsel for the appellants submits that the entire case of department based on the entries in a Shristi Brand Notebook recovered during the search. He submits that however, the person, who allegedly have made entries in the said notebook has neither been identified nor his statements were recorded; the proprietor of the company was made to accept the clandestine removal and to make deposit the amount towards duty. Learned Counsel submits that in addition to non-identification of the person who made the entries in the said notebook the show cause notice and investigation suffered from the following infirmities:-

- (i). Panchanama is not as per the Code of Criminal Procedure.
- (ii). Admission by the proprietor is not evidence in itself to prove clandestine removal as held by Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs M/s Dhingra Metal Works 2010-TIOL-693-HC-DEL-IT; in the case of M/s Vikram Cement (P) Ltd. Vs Commissioner of Central Excise reported as 2012 (286) E.L.T. 615 (Tri.-Del.), it was held that evidentiary statement of the director in the absence of any other evidence cannot establish the case of the assessee, the burden to prove is on the Department.
- (iii). Department has not established any shortage or excess in the raw material/final products to prove clandestine removal as held in the case of M/s Raj Ratan Industries Ltd. 2013 (292) E.L.T. 123 (Tri.-Del.).
- (iv). Statement was taken in duress and is not admissible as held by this Tribunal in the case of M/s Galaxy Indo Fab Ltd. 2010 (258) E.L.T. 254 (Tri.-Del.).

(v). No evidence of deployment of additional work force/ labour is not proved.

(vi). entries in the notebook show that alleged clandestine removal was also on the tractors; as tractors cannot be used for transportation of goods of that quantities mentioned therein, contents of notebook cannot be believed; some other entries however, relate to alleged transportation by tractor trolley.

(vii). A look at the notebook gives an impression that all the entries have been written with the same pen and at the same time; private record appears to have been sources and planted.

3. Learned Counsel further submits that in a similar situation Hon'ble Delhi High Court in the case of M/s Flevel International Vs Commissioner of Central Excise 2016 (332) E.L.T. 416 (Del.) held as under:-

"55. Mr. Hari Shanker, learned Senior counsel for the appellant, has also drawn the attention of the Court to a decision of the CESTAT in Arya Fibres Pvt. Ltd. v. CCE, Ahmedabad-II - [2014 \(311\) E.L.T. 529](#) (Tri.-Ahmd.) where the entire law concerning clandestine removal has been discussed and the legal position has been summarised 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.”

4. Learned Counsel further submits that Tribunal in the case of M/s Makers Casting Pvt. Ltd. vide Final Order No.75279-75281/2022 held that clandestine removal cannot be alleged only on the basis of the statement but it has to be corroborated with tangible concrete evidence and not on the basis of wild inferences or assumptions and presumptions.

5. Learned Authorised Representative for the revenue reiterates the findings of Order-in-Original and Order-in-Appeal and submits that the impugned order has extensively analyzed the evidence submitted by the revenue and have upheld the charge of clandestine removal. Hence, the appeal is liable to be rejected.

6. Heard both sides and perused the case records.

7. We find that the case of the Department is that the appellants have indulged in clandestine removal. The department came to this conclusion on the basis of entries made in a certain note book recovered from the appellant's premises. Learned Counsel for the appellants submits that the author of the notebook is not identified to verify the truthfulness of the entries made therein; his statement was also not recorded and that all the entries in the said notebook appeared to be made with the same ink at same time. I find that the writing in the

notebook and the entries thereof was not subjected to examination by a handwriting expert; the author of the notebook has been neither identified nor his statement/explanation was taken, more so, when the department relies only on the entries in the notebook and the statement of the proprietor of the appellant. I find that it has been held in a catena of judgments that a serious charge like clandestine removal cannot be established without tangible evidence or procurement of raw material, deployment of labour, consumption of electricity, manufacture of excisable goods, sale of excisable goods, transportation of excisable goods and receipt of consideration etc.

8. I find that other than the entries in the notebook and the statement of the appellants no other evidence has been put forth by the Department. Under these circumstances, the statement of the appellant has no validity as evidence. I also find that there are some entries related to transportation allegedly by Tractor. Learned authorized representative argues that only a tractor has registration and not the trolley and therefore, reference to tractor should be read as reference to tractor with trolley. However, I find that this is only an assumption as the entries in the diary distinctly mention tractor and tractor trolley separately. The person writing the diary was not identified and evidence was not established as to the truthfulness of contents. This becomes significance due to the lack of any other corroborative evidence.

9. I find that clandestine removal is a serious charge and requires to be substantiated by evidence encompassing various activities in the chain of events. I find that the Tribunal, in the matter of Nova Petrochemicals v. CCE, Ahmadabad-II, in its Final Order Nos. A/11207-11219/2013, dated 26-9-2013, held as under (in Para 40)

"After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenues which mainly are the following;

(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 sales 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 for in excess of what is necessary for manufacture of goods otherwise manufactured and validity 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.

10. in view of the above, I find that the department has not adduced any additional evidence, even on a sample basis to substantiate the allegation of clandestine removal as per above. In the absence of evidence, the allegations raised by the department are not substantiated. For this reason, impugned order cannot be sustained.

6. In the result, I set aside the impugned order and allow the appeal, with consequential relief, if any, as per law.

(Order pronounced on-10 August 2022)

(P. ANJANI KUMAR)
Member (Technical)