

**In The Customs, Excise & Service Tax Appellate Tribunal**

West Zonal Bench At Ahmedabad

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Appeal No : E/459-463/2009

(Arising out of OIA-168-172/2008-AHD-III-CE/KCG/COMMR-A- Dated 25/11/2008 passed by Commissioner of Central Excise-AHMEDABAD-III)

1. M/s Deora Wires N Machines Pvt Ltd

2. Sh. Suresh Chandulal Shah

3. Smt. Sneha Deora

4. Sh. Amit V Shukla : Appellant (s)

5. Sh. Sanjay V Deora

Vs

Commissioner of Central

Excise-AHMEDABAD-III : Respondent (s)

Represented by:

For Appellant (s) : Shri Alok Bhartwal, Advocate,

Shri R.K Jain, Advocate

For Respondent (s) : Shri Alok Srivastava, Authorised Representative

For approval and signature:

Mr. H.K. Thakur, Hon<sup>ble</sup> Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? No
3. Whether their Lordships wish to see the fair copy of the order? Seen
4. Whether order is to be circulated to the Departmental authorities? Yes

CORAM:

MR. H.K. THAKUR, HON'BLE MEMBER (TECHNICAL)

Date of Hearing: 16.06.2015

Date of Decision: 30.06.2015

Order No. A/ 10905-10909/2015 Dated 30.06.2015

Per: H.K. Thakur

These appeals have been filed by the appellants with respect to O.I.A No. 168 to 172/2008(Ahd-III)CE/KCG/Commr (A) Dated 25.11.2008 issued on 02.12.2008 under Order-in-Original No. 35/Addl. Commr./2008 Dated 31.03.2008 upheld by the first appellate authority. Under the Order-in-Original Dated 31.03.2008 a demand of Rs. 15,42,047/- was confirmed for clandestine manufacture and removal of excisable goods upon the main appellant M/s. Deora Wires N Machine Pvt. Ltd. alongwith interest and equal amount of penalty was also imposed upon the main appellant under Section 11 AC of the Central Excise Act, 1944, read with Rule 25 of the Central Excise Rules, 2002. Penalties of Rs. 10,00,000/- each were imposed upon Shri Suresh Chandulal Shah, Director of the main appellant and Shri Sanjay V. Deora, Director of M/s. Sampat Aluminium Pvt. Ltd. Penalties of Rs. 3,00,000/- each were also imposed upon Smt. Sneha S. Deora and Shri Amit V. Shukla, Directors of the main appellants under Rule 26 of the Central Excise Rules, 2002.

2. Shri Alok Bharatwal, Advocate and Shri R.K. Jain, (Advocate) appeared on behalf of the appellants and argued that the entire case of clandestine removal was based on the confessional statements of Shri Dilip B. Waghela, Production/Dispatch in-charge of the main appellant and the statement of Shri Sanjay V. Deora, who is the Director of the main appellant. That both these statements were retracted after their recording stating that the statements have been recorded under duress. Both these persons also stated that all the instructions were obtained from Shri Sanjay V. Deora, Director of M/s. Sampat Aluminium Pvt. Ltd. but, when statements of Shri Sanjay V. Deora were recorded by the investigation. That without giving any opportunity of explaining the case under the statement a penalty of Rs. 10,00,000/- has been imposed upon Shri Sanjay V. Deora. That statement of Shri Amit V. Shukla and Smt. Sneha S. Deora, Directors of the main appellant were also not recorded which is not sustainable as there is no evidence that these directors were in any way concerned with any clandestine activity. It was again argued by the Learned Advocate that other than two confessional statements, which were also retracted, there is no evidence available in the form of raw-material purchases that any excess raw-material for the manufacture of alleged clandestine manufacture of the finished goods. Learned Advocate also relied upon the following case laws on the issue to argue that clandestine removals cannot be held against the main appellant in the absence of any corroborative evidence in the form of excess raw-material purchases, transportation of the goods and recovery of any cash from the appellants:-

- (i) Emmtex Synthetics Ltd. Vs CCE, New Delhi [2003 (151) E.L.T. 170 (Tri. ☐ Del.)]
- (ii) Resha Wires Pvt. Ltd. Vs CCE, Bangalore [2006 (202) E.L.T. 332 (Tri. ☐ Bang.)]
- (iii) Vishwa Traders Pvt. Ltd. Vs CCE, Vadodara [2012 (278) E.L.T. 362 (Tri. O Ahmd.)]
- (iv) Arch Pharmalabs Limited Vs CCE, HYD. [2005 (182) E.L.T. 413 (Tri. ☐ Bang.)]
- (v) Nav Bharat Paper P. Ltd. Vs CCE, Ghaziabad [2004 (165) E.L.T. 564]
- (vi) S.T. Texturiser Vs CCE, Surat-I [2006 (200) E.L.T. 234 (Tri. ☐ Mumbai)]
- (vii) Gupta Synthetics Ltd. Vs CCE, AHM-II [2014 (312) E.L.T. 225 (Tri. ☐ Ahmd.)]

3. Shri J. Nair (AR) appearing on behalf of the Revenue argued that the clandestine removal is based on the confessional statements of Shri Dilip B. Waghela, Production/Dispatch in-charge of the main appellant and Shri Suresh Chandulal Shah, the Director of the main appellant. That as per we statements the clandestine manufacture and cleared goods were sold to small customers and only on the documents remains of claims

like M/s. L&T and M/s. Jyoti Engineering & Contractors was mentioned. That the retraction made by these persons after giving confessional statements is only and after thought and cannot be considered that statements given by these persons are not liable. Learned AR therefore, formally defended the orders passed by the lower authorities. Learned AR made the Bench go through Para 14.2 and 14.4 of the O.I.A Dated 25.11.2008 passed by the first appellate authority. Regarding imposition of penalties, it was argued that all the persons concerned well aware of the clandestine activity being done and penalties have been correctly imposed.

4. Heard both sides and perused the case records. It is observed from the case records that duty has been demanded with respect to alleged clandestine removals made by the main appellant based on the statements of Shri Dilip B. Waghela, Production/Dispatch in-charge of the main appellant and Shri Suresh Chandulal Shah, Director of the main appellant. It is also observed from the arguments made by the appellants that the statements recorded were retracted subsequently by way of affidavits within a few days from the date of recording of these statements. The statement of Shri Dilip B. Waghela was recorded on 16.06.2005 and the statement of Shri Suresh Chandulal Shah was recorded on 18.07.2006. The same was respectively retracted on 18.06.2005 and 19.07.2006. Letters Dated 19.08.2005 & 31.08.2005 written by M/s L & T and M/s Jyoti Engineers & Contractors were also available with the investigations on the date of retractions under which the said companies have intimated that they have not received the goods from the main appellant. In correctness of the statements given by Shri Dilip B Waghela, and Shri Suresh Chandulal Shah, were known to the Department on the date of retraction but, they were not confronted with the wrong statement and no efforts were made to know the exact customers to whom the goods, were cleared. There is also no evidence on record showing any excess raw-material procured by the appellant and also any seizure of clandestine by removal of goods or any seizure of cash involved in these transactions of clandestine removals. No statements of Shri Sanjay V. Deora, Smt. Sneha S. Deora or Amit V. Shukla were recorded during investigation in order to ascertain the correct Customers and Sources of raw materials purchased etc. It is now a well understood principle that a case of clandestine activity cannot be established simply on the basis of few confessional statements, which are retracted by the persons. In the case of Commissioner of Central Excise vs Saakeen Alloys Pvt. Ltd. 2014 (308) E.L.T. 65 (Guj.) it has been held by Hon'ble Gujarat High Court that in the absence of other corroborative evidences confessional statements alone are not sufficient to establish the case of clandestine manufacture and removal. Observations made by Hon'ble High Court in Para 4,7 to 10 of this case law, on facts and law, are relevant and are reproduced below:-

4. Messrs. Saakeen Alloys Private Limited, which is engaged in the manufacture of CTD/Round bars, is situated at Visnagar-Mahesana Road, District Mehsana. On the premises of Messrs. Saakeen Alloys Private Limited and Messrs. Sunrise Enterprises, Mahesana simultaneous searches were carried out wherein three note-books and one pen-drive were recovered containing details of illicit clearances made by the said M/s. Saakeen Alloys Private Limited. On 24th November, 2007, at the business premises of M/s. Kodyar Transport Services, Mahesana search was carried out and various documents containing the invoices issued by M/s. Saakeen Alloys Private Limited were recovered. Statement of one Mr. Mohammed Altaf Alambhai Kapadia connected with Messrs. Saakeen Alloys Private Limited was recorded on 23rd November, 2007 which was, within a short time, retracted. Statement also was recorded of the proprietor of M/s. Sunrise Enterprises where he agreed to be the main supplier of Messrs. Saakeen Alloys Private Limited. This statement too was retracted very soon. Likewise, statements of proprietor of M/s. Khodiyar Transport Service, Mahesana and Excise Manager of Messrs. Saakeen Alloys Private Limited were recorded and on the basis of pen-drive seized, panchnama and other documents were drawn. On the basis of entire material, show cause notice was issued by the Commissioner of Central Excise dated 7th October, 2010 demanding the duty amounting to Rs. 1,93,26,138/-. Out of this total amount, Rs. 1.85 Crores [rounded off] was based on the data contained in the note-books and pen drive recovered from Messrs. Sunrise Enterprises and remaining Rs. 8.50 lakhs [rounded off] from the parallel invoices recovered from the office of the transporter - M/s. Khodiyar Transport Services.

7. As can be noted from the decision of the Tribunal, it has extensively dealt with the entire factual matrix presented before it. The Tribunal rightly concluded that in the case of clandestine removal of excisable goods, there needs to be positive evidences for establishing the evasion, though contended by the Revenue. In absence of any material reflecting the purchase of excessive raw material, shortage of finished goods, excess consumption of power like electricity, seizure of cash, etc., the Tribunal noted and held that there was nothing to bank upon except the bare confessional statements of the proprietor and of some of the persons connected with the manufacturing activities and such statements were retracted within no time of their recording. The Tribunal also noted the fact that the requisite opportunity of cross-examination was also not made available so as to bring to the fore the true picture and therefore, it concluded against the Revenue observing that not permitting the cross-examination of a person in-charge of records of M/s. Sunrise Enterprises and absence of other cogent and positive evidences, would not permit it to sustain the demand of Rs. 1.85 Crores raised in the Demand notice and confirmed by both the authorities below.

8. As could be noticed from the material on record that for the remaining amount of Rs. 8.25 lakhs from the transporters premises, the parallel invoices were recovered which not

*only were confirmed by the proprietor of the said transporter but independent evidences also affirmed the same. The Tribunal has chosen to sustain such amount levied in order-in-original and in the appellate order of the Commissioner.*

9. *Penalties imposed on some of the persons being the? Managing Director, the proprietors and others on the basis of such material also hardly requires any indulgence.*

10. *All the appeals are based predominantly and essentially on factual matrix. The Tribunal elaborately and very correctly dealt with the details furnished by both the sides and rightly not sustained the demand of Rs. 1.85 Crores, which had no evidences to bank upon. Confessional statements solely in absence of any cogent evidences cannot make the foundation for levying the Excise duty on the ground of evasion of tax, much less the retracted statements. To the extent there existed substantiating material, Tribunal has sustained the levy. No perversity could be pointed out in the approach and treatment to the facts.*

5. The case before High Court was where some note books and pen drive were also seized. The case of the appellants is on much stronger footing when none of these evidences are available. In view of the above observations and settled proposition of law the case of clandestine manufacture and clearance is not established against the appellant and appeal filed by the main appellant is allowed. So far as imposition of penalties upon the other appellants is concerned the same are also set-aside as on merits the case has been decided in favour of the main appellant.

7. Appeals filed by the appellants are allowed.

(Pronounced in Court on 30.06.2015)

(H.K. Thakur)

Member (Technical)