CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

EXCISE Appeal No. 50218 OF 2019

(Arising out of Order in Appeal No. 468-472(SM)CE/JPR/2018 dated 05.11.2018 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Alwar)

Sh. Durga Prasad Sabu **...Appellant**
Selling Agent,
M/s. Rathi Bars Ltd.,
SP-7, RIICO Industrial Area,
Kushkhera, Bhiwadi (Raj.)

Versus

Commissioner of Customs, **....Respondent**
Central Excise & Central GST, Alwar
A Block, Surya Nagar, Alwar (Raj)

With

EXCISE Appeal No. 50219 OF 2019

(Arising out of Order in Appeal No. 468-472(SM)CE/JPR/2018 dated 05.11.2018 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Alwar)

Sh. S.K. Lakhotia, **...Appellant**
Dispatch Incharge,
M/s. Rathi Bars Ltd.,
SP-7, RIICO Industrial Area,
Kushkhera, Bhiwadi (Raj.)

Versus

Commissioner of Customs, **....Respondent**
Central Excise & Central GST, Alwar
A Block, Surya Nagar, Alwar (Raj)

And

EXCISE Appeal No. 50220 OF 2019

(Arising out of Order in Appeal No. 468-472(SM)CE/JPR/2018 dated 05.11.2018 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Alwar)

Sh. Sarjit Singh, **...Appellant**
Manager,
M/s. Rathi Bars Ltd.,
SP-7, RIICO Industrial Area,
Kushkhera, Bhiwadi (Raj.)

Versus

Commissioner of Customs, **....Respondent**
Central Excise & Central GST, Alwar
A Block, Surya Nagar, Alwar (Raj)

And

EXCISE Appeal No. 50221 OF 2019

(Arising out of Order in Appeal No. 468-472(SM)CE/JPR/2018 dated 05.11.2018 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Alwar)

Sh. Hukum Singh Rawat, **...Appellant**
Manager,
M/s. Rathi Bars Ltd.,
SP-7, RIICO Industrial Area,
Kushkhera, Bhiwadi (Raj.)

Versus

Commissioner of Customs, **....Respondent**
Central Excise & Central GST, Alwar
A Block, Surya Nagar, Alwar (Raj)

APPEARANCE:
Mr. R.K. Hasija, Advocate for the appellant
Mr. Ishwar Charan, Authorised Representative for the Respondent

CORAM : HON'BLE Ms. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: **02.05.2022**

FINAL ORDER No. 50408-50411/2022

RACHNA GUPTA

The present order disposes of four appeals, the order-in-appeal being common to four of these appeals.

2. The basic details for these appeals are as follows:

Sl. No.	Appeal No.	Order-in-Original No. and date	Order-in-Appeal No. and date	Show Cause Notice No. and date
1.	E/50218/2019 Durga Prasad Sabu	06/2018 dated 06.03.2018	497/2018 dated 29.11.2018	4359 dated 9.6.2016
2.	E/50219/2019 S.K. Lakhotia	06/2018 dated 06.03.2018	468-472/2018 dated 5.11.2018	4359 dated 9.6.2016
3	E/50220/2019 Sarjit Singh	06/2018 dated 06.03.2018	468-472/2018 dated 5.11.2018	4359 dated 9.6.2016
4.	E/50221/2019 Hukum Singh Rawat	06/2018 dated 06.03.2018	468-472/2018 dated 5.11.2018	4359 dated 9.6.2016

3. The facts in brief are as follows:

Appellants Shri S.K. Lakhotia, Sh. Sarjit Singh and Sh. Hukum Singh Rawat are the employees of M/s. Rathi Bars Ltd. and appellant Sh. Durga Prasad Sahu is the commission agent working for the said company. M/s. Rathi Bars Ltd. is engaged in manufacturing of MS TM Bars and as such are holders of Central Excise Registration. On the basis of intelligence gathered by DGCEI New Delhi, that the premises of a company named M/s. Bhiwadi Rolling Mills were searched on 6.9.2012. After conducting the physical verification of the stock and perusing the documents recovered from the premises including the hard disk of the desktop, print outs of the sale register and two laptops as were recovered from the residence of Director of M/s. Bhiwadi Rolling Mills along with certain documents recovered from a car found parked in the said residential premises that Department formed an opinion of clandestine removal of the goods by said M/s. Bhiwadi Rolling Mills. During further investigation, Department observed that M/s. Rathi Bars Ltd. is one of the major raw material supplier to the said M/s. Bhiwadi Rolling Mills. Accordingly investigation got conducted with respect to the documents of M/s. Rathi Bars Ltd. The statements of the four of these appellants got recorded during the said investigation. Based whereupon, Department observed that the appellants appears to have clandestinely cleared the finished goods without payment of excise duty for an amount of Rs. 26,45,487/-. Accordingly, vide a show cause notice bearing no. 4359 dated 9.6.2016, the aforesaid amount of duty was proposed to be recovered along with the proportionate interest and along with the penalty not only on the company but also on four of these appellants was proposed to be imposed in terms of Rule 26 of Central Excise Rules 2002. The said proposal was confirmed vide order no. 06/2018 dated 6.3.2018. Appeal thereof has been rejected vide order in appeal bearing no. 468-472/2018 dated 6.11.2018. Being aggrieved the appellant is before this Tribunal.

4. I have heard Mr. R.K. Hasija, learned counsel for the appellant and Mr. Ishwar Charan, learned authorised representative for the Department.

5. It is submitted on behalf of the appellant that M/s. Rathi Bars Ltd. has already applied under Sabka Vishwas Legacy Dispute Redressal Scheme 2019. A discharge certificate has already been issued in the favour of the said company. The present appellants are the employees / commission agent for the same. Hence, penalty imposed upon them be set aside in view of the said discharge certificate. In addition, while mentioning for the merits of the present case it is submitted that the findings of the adjudicating authorities below are merely the result of presumptions, there is no cogent evidence on the records. The statements of these appellants as were recorded during the stage of investigation are denied to have any admission about the alleged clandestine removal as has otherwise been held by the adjudicating authorities below. It is submitted that those findings are wrong and are liable to be set aside. Learned Counsel further mentioned that reliance of the Adjudicating Authorities below on the statements of the present

appellants otherwise got hit by the provision under section 9 D of the Central Excise Act. It is submitted that none of those witnesses were examined by the adjudicating authority itself. Those statements, hence wrongly been relied upon. Imposition of penalties is liable to be set aside on this ground of violation of section 9 D of the Central Excise Act. With these submissions, learned counsel has prayed for the order under challenge to be set aside and appeals under consideration to be allowed. Learned Counsel has also laid emphasis upon the findings of Tribunal Chandigarh Bench in an appeal no. **ST/60304/2017 in the case of Col. Randhir Singh Malik vs. CCE Rohtak as was decided vide Final Order no. 60913/2021 dated 23.08.2021** wherein penalty has been waived of by the present Tribunal Chandigarh Bench, in view of a discharge certificate to have been issued in favour of the main party.

6. While rebutting these submissions, learned DR has laid emphasis upon the findings in para 10 of the order under challenge wherein Commissioner (Appeal) has given specific reason for imposition of the penalty upon the present appellants holding that all of them knew and had reason to believe that they were dealing with the goods which were liable for confiscation for want of deposit of duty for the same. Hence, the confirmation of penalty on these appellants under rule 26 of Central Excise Rules 2002, is impressed upon as being reasonable and justified. Laying emphasis that there is no infirmity in the order under challenge that the appeal in hand is prayed to be dismissed.

7. I observe that the adjudicating authorities have fully relied upon the statements of the present appellants. Hence foremost it is deemed relevant to have a glance on those statements.

"Statement of Shri Durga Prasad Sabu was recorded on 23.9.2013 before the Sr. Intelligence officer DGCEI, New Delhi under Section 14 of Central Excise Act 1944. On being asked about the purchase and sale of miss roll to Bhiwadi Rolling Mills Pvt. Ltd. he stated that:

"He had sold miss roll to M/s Rathi Special Steel Ltd. and supplied the same to M/S BRMPL Bhiwadi that he used to deal with Shri B D Yadav and pass order to weighing section of M/s Rathi Bar Ltd, and Rathi Special Steel Ltd. for supplying the same through his account, that he was not responsible for payment; that the management had instructed him that they will take payment in advance before the dispatch of Miss Roll; that on being shown the purchase account of M/s BRMPL under ledger-Sabu for the period 2011-12 wherein total purchase of 770.07MT miss roll valued Rs 2,56,84,343/- were shown purchase through-'Sabu, he put his dated signature on the said two sheets in token of having seen and stated that he was not in a position to cross check the quantity of transaction as he did not have the records after passing 12-18 months."

He also stated that:

"He was not related with receipt and payment of money; that BRMPL had paid him commission on per ton basis which ranges from Rs.10 to 25 per MT; that he was not in a position to say how much commission received from BRMPL; that supplier had directly received the cash from BRMPL and he has nothing to do with the payments".

Shri Durga Prasad Sabu again tendered his statements on 8.5.2014 before the Sr. Intelligence officer DGCEI, New Delhi under Section 14 of Central Excise Act 1944 wherein also he deposed the same.

On 29.12.2015 wherein he stated that in continuation to his statements dated 23.9.2013 and 8.5.2014 he stated that he was not in position to bifurcate the quantity as how much supply made from M/s Rathi Bar and how much from Rathi Special Steel Ltd.; that he was in contact with Shri Anupam Rathi (presently he is no more) Director of M/S Rathi Bar Ltd. and Rathi Special Steel Ltd. and became an instrumental agent in supply of said goods to M/s Bhiwadi Rolling Mills P Ltd. Bhiwadi as mentioned in the ledger print in the books of accounts of M/s Bhiwadi Rolling Mills P Ltd. under the ledger head of Sabu on which he had already put his signature in token of correctness.

Statement of Shri Sarjit Singh, authorised signatory M/s Rathi Bar Ltd. and Rathi Special Steel Ltd. was recorded before the Sr. Intelligence officer DGCEI, New Delhi on 7.10.2013 wherein he stated that his job in the factory was to deal with the matters relating to Central Excise and VAT returns and other regulatory permissions; that he was responsible for purchase and sale of raw material & finished goods; that on receipt of bills from receipt and dispatch section he supervised the entry in RG1 register & Form IV register and on the basis of RG-1 register, he supervised the preparation of ER-1 returns and Vat returns; that he directly reported to Director of the company by sitting in the factory premises.

He further stated that he was Manager & authorised signatory and looking after the Central Excise working and monitor the dispatch of finished goods on behalf of Directors of M/s Rathi Bar Ltd. and M/s. Rathi Special Steel Ltd. SP-7, RIICO Industrial Area, khoda, Bhiwadi and SP-29 and 20-24, RIICO Industrial Area, Kushkheda, Bhiwadi by sitting in factory premises addressed above and responsible for the act assigned to him.

That on being asked to explain bifurcation of the transactions from M/s Rathi Bar Ltd. And M/s Rathi Special Ltd. Regarding clearance made to M/S BRMPL during 2011-12 and 2012-13, he replied that they had confirmed the supply made to M/s Bhiwadi Rolling Mills P Ltd., Bhiwadi through their agent Shri Durga Parasad Sabu; that they had already submitted the sales ledger accounts for 2011-12 and 2012-13 as maintained in their books of accounts, Shri Hukam Singh already stated the facts which were the same; that at this juncture it was not possible to bifurcate the same as they did not have any other records except submitted records; that on being pointed out that from ledger there appeared some difference in the value figures shown in the ledger maintained by the assessee and maintained by Bhiwadi Rolling Mills P Ltd., in the year 2011-12 and 2012-13 what was the reason for it, replied that he was unable to quantify this difference but they had already submitted the sales ledger of their both the companies for the year 2011-12 and 2012-13. However it might be due to discount, Vat and Bank charges figure; that on being asked the method of daily rate of ingot opens and how determine the selling price of the finished goods, he stated that he has nothing to do with the selling price as it was governed by the directions given from their head office as being decided by the Big Mandi viz. Mandi Govindgarh and Narayans and rate was circulated through whatsApp. In 2011-12 and 2012-13 it was conveyed through telephone; that they were selling the goods at prices decided mutually with buyer."

8. After hearing the rival contentions and perusing the entire record, I observe and hold as follows:

9. The Original Adjudicating Authority Commissioner (A) also relying upon the above said statements have held that the statements have are sufficient admission about the quantities of the MS Ingots, MS Rolls to be sold to M/s. Bhiwadi Rolling Mills through M/s. Rathi Bars Ltd. Without issue of invoice and without payment of duty. Accordingly the allegations of clandestine removal of the goods by M/s. Rathi Bars Ltd. have been confirmed and that the duty was demand was confirmed against the company and the penalty has been imposed upon the present appellants, they being the employee / commission agents for the company. But the allegations of clandestine removal are serious allegations which cannot sustain unless there is clinching evidence. Hon'ble Apex Court in the case of **Continental Cement Company vs Union of India – 2014 (309) ELT 411 (All.)** has held as follows:

> *"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.”

10. Reverting back to the facts of the present case it is observed that except for the statement of the present appellants there is no investigation on part of the Department either from anyone who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing of excisable goods. Not only this, it is observed that the investigation initially began with the search in the premises of M/s. Bhiwadi Rolling Mills and the show cause notice has been issued based on the documents (soft as well as hard) as were recovered from the factory of M/s. Bhiwadi Rolling Mills as well as the residential premises of its Manager, Sh. Ankit Keriwal. Apparently and admittedly no search was ever got conducted in the premises of M/s. Rathi Bars Ltd. No document has been recovered from the premises of the said company or from the premises of either of these appellants. In such circumstances, it stands apparently clear that the investigation against the present appellants got initiated based upon the third party evidence and it got confirmed also based on third party evidence i.e. the documents as were recovered from the premises of M/s. Bhiwadi Rolling Mills.

11. Since the sole challenge to the order is its reliance upon third party evidence, it is necessary to check the evidentiary value of the third party evidence. The relevant case law in the case of **Bajrangbali Ingots & Steel Pvt. Ltd. & Suresh Agarwal vs. CCE, Raipur in Appeal No. E/52062 & 52066/2018 heard on 16.11.2018**, which is held as follows:-

> *"9. The law i.e. as to whether the third party records can be adopted as an evidence for arriving at the findings of clandestine removal, in the absence of any corroborative evidence, is well established. Reference can be made to Hon'ble Allahabad High Court decision in the case of* ***Continental Cement Company Vs. Union of India – 2014 (309) ELT 411 (All.) as also Tribunal's decision in the case of Raipur Forging Pvt. Ltd. Vs. CCE, Raipur-I – 2016 (335) ELT 297 (Tri.-Del.), CCE & ST, Raipur Vs. P.D. Industries Pvt. Ltd. – 2016 (340) ELT 249 (Tri.-Del.) and CCE & ST, Ludhiana Vs. Anand Founders & Engineers – 2016 (331) ELT 340 (P&H).*** *It stand held in all these judgements that the findings of clandestine removal cannot be upheld based upon the third party documents, unless there is clinching evidence of clandestine manufacture and removal of the goods."*

12. Further, it is observed from the statements as mentioned above that Shri Durga Prasand Sabu, though deposed about sales to have been made to M/s. Bhiwadi Rolling Mills through M/s. Rathi Bars Ltd., however, there were few such consignments wherein the sales were made from M/s. Rathi Special Ltd. also. Apparently and admittedly there is no evidence of bifurcating the said consignment and bifurcation of the proposed / confirmed demands only on M/s. Rathi Bars Ltd. This lacuna on part of the investigation also hits the very basis of allegations and the demand confirmed against the appellant. In absence of the said corroborating evidence and in the

light of apparent fact that the appellants have time and again been requesting for the witnesses to be cross examined but the request had been turned down, it is clear that violation of section 9 D of the Central Excise Rules 2002 is very much apparent on the record. Commissioner (A) has though held that since the witnesses have sufficiently admitted about the alleged guilt the cross examination is not required, the legal concept applied is absolutely correct. However, the factual status that whether there is sufficient admission in the statement has not been thoroughly clarified and explained by Commissioner (A).

13. The statement as mentioned above, the perusal thereof shows that the detailed ledger account of MS Roll purchased by M/s. Bhiwadi Rolling Mills during 2011-12 from M/s. Rathi Bars Ltd. through Sh. Durga Prasad Sabu was provided. The witnesses have been explaining the mode of supply and have expressed their ignorance to few questions asked. But there is found no clear admission of removing goods clandestinely. Hence, it is held that the said statements are wrongly considered as the admission of appellant Sh. Durga Prasad Sabu and others.

14. None of these depositions are in the form of admission nor there is any evidence proving alleged guilt of appellant. Hence, it is held that the findings of Commissioner (A) are liable to be set aside. Penalty is held to have been wrongly imposed. I draw my support from the decision in the case of **Uniworth Textiles Ltd. vs. CCE Raipur reported as 2013 (288) ELT 0161 (SC)** wherein it was held as follows:

"Further we are not convinced with the findings of the Tribunal which placed the onus of providing evidence in support of bonafide conduct by observing that the appellants had not brought anything on record, to prove their claim of bonafide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of the malafide lies on the shoulders of the one alleging it."

15. Though I am not convinced with the submissions on behalf of appellant that since main party has been given a discharge certificate under SVDRL Scheme the penalty on appellants be set aside. I also differ with the findings in final order no. 60913/2021 dated 23.8.2021. But in view of the entire above discussion, it is held that there is no cogent evidence on record to proceed against the appellant so as to penalise them. Hence, it is held that the authority below has wrongly confirmed the demand. Question of imposition of penalty on the present appellants in the given circumstances does not at all arise. Confirmation thereof is thereof, liable to be set aside. Accordingly, the order under challenge is set aside. Consequent thereto all the appeals stand allowed.

(Order dictated and pronounced in the open court)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Bhanu