

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. IV

Excise Appeal No. 50465 of 2019-SM

(Arising out of order in original No. 27-28/PK/GST/DE/2018-19 dated 26.10.2018 passed by the Commissioner, Central Goods & Service Tax, Delhi East).

Sanjay Goel, Director of

M/s Master India Pvt. Limited
Plot No. 4, Gali No. 2
Friends Colony, Shahdara
Delhi-110095.

Appellant

VERSUS

**Commissioner of Central Goods and
Service Tax, Delhi (East)**

C.R. Building, I. P. Estate, New Delhi.

Respondent

WITH

Excise Appeal No. 50533 of 2019-SM

(Arising out of order in original No. 27-28/PK/GST/DE/2018-19 dated 26.10.2018 passed by the Commissioner, Central Goods & Service Tax, Delhi East).

M/s M. S. Metal Co.

458/466, Gali No. 8
Friends Colony, Shahdara
Delhi-110095.

Appellant

VERSUS

**Commissioner of Central Goods and
Service Tax, Delhi (East)**

C.R. Building, I. P. Estate, New Delhi.

Respondent

WITH

Excise Appeal No. 50534 of 2019-SM

(Arising out of order in original No. 27-28/PK/GST/DE/2018-19 dated 26.10.2018 passed by the Commissioner, Central Goods & Service Tax, Delhi East).

Sunil Gupta, Partner of

M/s M. S. Metal Co., Gali No. 8
Friends Colony, Shahdara, Delhi.

Appellant

VERSUS

**Commissioner of Central Goods and
Service Tax, Delhi (East)**

C.R. Building, I. P. Estate, New Delhi.

Respondent

AND**Excise Appeal No. 50535 of 2019-SM**

(Arising out of order in original No. 27-28/PK/GST/DE/2018-19 dated 26.10.2018 passed by the Commissioner, Central Goods & Service Tax, Delhi East).

M/s Master India Pvt. Limited

Plot No. 4, Gali No. 2,
Friends Colony, Shahdara, Delhi-110095.

Appellant

VERSUS

**Commissioner of Central Goods and
Service Tax, Delhi (East)**

C.R. Building, I. P. Estate, New Delhi.

Respondent**APPEARANCE:**

Shri V. S. Negi, Advocate for the appellant

Shri P. Juneja, Authorised Representative for the respondent

CORAM:**HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)****FINAL ORDER NOS. 51244 -51247/2021****DATE OF HEARING: 05.04.2021****DATE OF DECISION: 12.04.2021****RACHNA GUPTA:**

The present order disposes of four appeals arising out of the order of Commissioner, GST bearing 27-28/PK/GST/DE/2018-19 dated 26.10.2018 has been assailed before this Tribunal. The said order has been passed in compliance of the Final Order of this Tribunal bearing No. A/52184-52189/2017 dated 08.03.2017 as was announced against the common order-in-original No. 13/2009 dated 27.03.2009 being a common order of two show cause notices No.167 dated 17.03.2006 and 167 dated 28.09.2007 issued to M/s Kayceel Electricals and others i.e. M/s Smita Global Pvt. Limited, Shri Jatinder Kumar Aggarwal, Partner M/s Kaycee Electricals, M/s M. S. Metal Co.,

the Director thereof Shri Sanjay Goel and M/s Master India Pvt. Limited.

2. The facts in brief for the adjudication of present appeal is that M/s Kaycee Electricals is a manufacturing unit engaged in the process of hot rolling of copper ingots and thereby converting the same into copper wire ingots. The other appellants are also manufacturers of copper wire of their own and also on job work basis, for the ingots received from other manufacturers on fulfilment of the procedure in this respect. On 21.09.2005, the factory premises of M/s Kaycee Electricals were searched alongwith the residential premises of its Partners. Certain kachha parchies from the two Supervisors of M/s Kaycee Electricals were recovered alongwith the stock taking showing the excess of copper ingots and copper rod to have not been entered. Some currency of Rs. 20,87,310/- was also recovered from the office of M/s Kaycee Electricals and some amount from the Partner thereof Shri Jatinder Kumar Aggarwal and his nephew. Statements of employees as well as Partner of M/s Kaycee Electricals were recorded. Based thereupon the aforesaid two show cause notices were issued alleging clandestine removal of the copper ingots by the appellants herein with the proposal of recovery of interest at appropriate rate and imposition of penalty upon all the appellants. Both the said show cause notices were adjudicated by the common order-in-original initially on 27.03.2009. When the said order was challenged before this Tribunal the matter was remanded back for denovo adjudication. In furtherance where of the impugned order under challenge dated 26.10.2018 has been passed vide which

the proceedings initiated against M/s Kaycee Electricals and Shri Jatinder Kumar Aggarwal, Partner thereof have been dropped. However, demand against M/s M. S. Metal Co. and against M/s Master India Pvt. Ltd., alongwith the imposition of penalty upon the Partner/ Director thereof has been confirmed. Penalty has also been imposed on M/s Smita Global Pvt. Limited. Being aggrieved, these appellants are before this Tribunal.

3. I have heard Shri B. L. Yadav, learned Advocate for the appellant and Shri P. Juneja, learned Authorised Representative for the Department.

4. It is submitted on behalf of the appellants that the entire documents on which the demand has been confirmed against the appellant were recovered from the factory premises of M/s Kaycee Electricals and from the residential premises of its Partners. Further reliance has been placed by the Adjudicating Authority on the statement of Shri Shambhu Prasad, Supervisor, Shri Manik Chand Pareek, Supervisor and M/s Kaycee Electricals. However, the demand against the said M/s Kaycee Electricals has been dropped. Thus, there remains no reason for confirmation of demand against the appellant herein and their Partners / Directors. It is submitted that this Tribunal vide its earlier Final order dated 08.03.2017 had directed the Adjudicating Authority below for denovo adjudication after giving an opportunity for cross-examination of all the witnesses. However, none except Shri Sanjay Goel of M/s Master India Pvt. Limited and Shri Sunil Gupta of M/s M. S. Metal Co. Appeared. They testified that

their statements as were recorded during investigation were incorrect and were made under threat of arrest. The said statements are sufficient retraction of the earlier statements. The Adjudicating Authority still has confirmed the demand against the appellants. It is submitted that in view of the said retractions the reliance of the Adjudicating Authority below on Section 31, Section 58 and Section 106 of Evidence Act is bad in eyes of law. As these provisions have been improperly applied, accordingly appellants have prayed for setting aside of the said order and for all four of the appeals to be allowed.

5. While rebutting these arguments, learned Authorised Representative (AR) for the Revenue has submitted that the appellants at the preliminary stage itself had admitted about manufacturing of wire rod without bringing them into account and clearing the same without payment of duty. Those statements got well corroborated from the private records in the form of kachha slips recovered from M/s Kaycee Electricals. The unaccounted receipts of raw material and manufacture of unaccounted goods was corroborated by the statement of raw material suppliers. Since admission is the best piece of evidence against the person making admission, the Adjudicating Authority below has not committed any error while confirming the demand based upon the admission of the present appellants. In view of the said corroboration, the plea of the appellants of retracting while being cross-examined during denovo proceedings is of no relevance. Learned AR has therefore impressed

upon the correctness of the order under challenge and has prayed for dismissal of the impugned four of the appeals.

6. After hearing the parties and on perusal of the entire records, I observe as follows:-

The two show cause notices as were issued to six appellants were initially adjudicated vide one common order-in-original No. 131 dated 27.03.2009 and the appeal thereof was decided by this Tribunal vide Final Order No. 52184-52189/2017 dated 08.03.2017. By the said decision, the matter was remanded back for denovo adjudication. It was observed in the said order as follows:-

"11. After hearing the Ld. DR and after having gone through the impugned orders, I find that the Revenue's entire case is based upon the loose chits recovered during the course of search of the factory read with the statements of various persons. Though the appellant had made a request for cross examination of the said deponents so as to establish the veracity of the truth of the said statements, the adjudicating authority has neither referred to the said request nor decided on the same and proceeded to pass the final impugned order. The Hon'ble P&H High Court in the case of Ambika International Ltd. has observed that statement recorded during the investigation, under section 14 of the Central Excise Act whose makers are not examined in chief before the adjudicating authority would have to be eschewed from evidence and it would not be permissible for the Revenue to rely on the said evidence while adjudicating the matter. There is no justification for jettisoning the procedure statutorily prescribed by plenary legislation for admitting into evidence and statement recorded before the Gazetted central Excise Officer.

13. In as much as the law is settled I set aside the impugned order and remand the matter to the original adjudicating authority for consideration of the appellant's request for cross examination. If the deponents of the said statement are not produced for the cross examination it goes without saying that the statement would not be considered as an evidence. The adjudicating authority would also consider the availability of other evidence, if any on record, and the appellants would be at liberty to draw the attention of the adjudicating authority to the precedent decisions. As such without commenting upon the merits of the case, I remand the matter to the adjudicating authority for de-novo adjudication. The appellants are at liberty to raise all the grievances before the Commissioner, including their grievance about the confiscation of the seized Indian Currency.

14. All the appeals are allowed by way of remand”.

7. It is after the said order that the order under challenge dated 26.10.2018 has been passed. Perusal thereof reflects that during the denovo proceedings none of the witnesses except Shri Sanjay Goel and Shri Sunil Gupta appeared before him for being examined / cross-examined by M/s Kaycee Electricals. The Adjudicating Authority below has specifically recorded that both the said witnesses stated that their statements as were recorded during investigation were under threat of arrest and that they had voluntarily deposited the duty for the goods alleged to have been cleared without payment of duty in order to buy peace with the Department and to avoid undue pressure and threat to arrest. Despite the said findings, the Adjudicating Authority has held that there appears no retraction of previous statements by any of the person who had made those statements and accordingly section 31 of Indian Evidence Act alongwith Section 158 and 106 of the Indian Evidence Act has been relied upon while confirming demand against Shri Sunil Gupta and Shri Sanjay Goyal, Partners/ Director of M/s M. S. Metal Co. and M/s Master India Pvt. Limited respectively. However, the demand against M/s Kaycee Electricals has been dropped holding that since none from M/s Kaycee Electricals appeared for being cross-examined, the earlier evidence against them cannot be considered.

8. To my opinion these findings of the Adjudicating Authority are not at all correct as the direction of the order of remand has not been properly complied with. The Adjudicating Authority is rather opined to have not correctly interpreted the said order of remand.

Once it has come in the statements of the appellants at the stage of cross-examination that the earlier statement was got recorded under threat, those statements come out of the scope of being called as admission to which Section 58 of Evidence Act applies. Admissions to be admissible into evidence without any further proof have to be voluntarily, cogent and convincing. The statements recorded at the stage of denovo adjudication are sufficient enough to show that the statements were under threat and coercion, hence, can no more be called as voluntary. Hon'ble Apex Court in **Chikham Koteswara Rao vs. Subbarao** reported as **AIR 1981 SC 1542** held that admissions to be substantive evidence should be clear and conclusive and there should not be any doubt and ambiguity. In another decision of **Nagindas Lamdas vs. Dalpatram Ishharam** reported as **1974 (1) SCC 242**, the Hon'ble Apex Court held that for being the best proof as mentioned under Section 58 of Evidence Act, admission should be true and clear without any retraction thereof in any form. In the present case apparent and clear retraction has come on record. The statements of appellants as were recorded earlier remained no more true nor even voluntary. The Adjudicating Authority therefore, is held to have wrongly applied Section 58 of the Indian Evidence Act. Resultantly, the burden was still on the Department to prove the alleged clandestine removal against the present appellants with some cogent and corroborative evidence.

9. Apparently and admittedly, no search was conducted in premises of any of the present appellants. No physical verification of the stock of present appellants was conducted. Both the show cause

notices, the initial order-in-original and the impugned order under challenge are based merely upon the loose parchies and other handwritten documents as was recovered from the premises of M/s Kaycee Electricals and also on the basis of statements of the Supervisor as well as Partner that too of M/s Kaycee Electricals itself. The entire evidence is therefore nothing but a third party evidence. The law in this respect has been settled as is apparent from the decision of the Hon'ble Allahabad High Court in the case of **Continental Cement Company vs. Union of India -2014 (309) ELT 411 (All.)** wherein it was held-

“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. Any demand and the proportionate penalty on the Director of the manufacturer is not sustainable. There have been plethora of judgements to hold that to stand upon the charges as that of clandestine removal, there has to be some clinching evidence and the demand cannot be confirmed based on presumptions and assumptions. It was specifically held by the Hon'ble High Court that the charge of clandestine removal is a serious charge, which is required to be proved by the Revenue by tangible and sufficient evidence. Mere statements of buyers that too based on memories were not sufficient without support of any documentary evidence”.

Thus, it stands clear that neither the documents as were recovered from the premises of M/s Kaycee Electricals can be read against the appellants nor the statements of employees of M/s Kaycee Electricals can be considered to be the admission on part of appellants. I hold that confirmation of demand against the appellants based on these two grounds is therefore not sustainable. The Adjudicating Authority has dropped the entire demand against M/s Kaycee Electricals and the penalties upon its Partners no question survives for confirmation of demand on the job workers or the raw material suppliers of M/s

Kaycee Electricals. The Adjudicating Authority below is held to have given a wrong interpretation to the order of remand vide which denovo adjudication was directed after providing the opportunity of cross-examination to the parties. The authority below has failed to appreciate the said direction and also the law with respect to the admission.

10. Section 31 of Evidence Act has also been wrongly applied. Section opens up saying that admissions are not conclusive proof, but may estop. The intent of section 31 of Evidence Act is also that admissions can always be explained and can be shown to be wrong. It is in the absence of such explanation that the admission may estop the maker thereof. Hon'ble Apex Court in **Nagubhai Ammal & Others vs. B. Shama Rao & others** reported in **AIR 1956 SC 593** has held that admission is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, in which case only admission may become conclusive by way of estoppel. In view of the directions of the order of remand by this Tribunal, the appellants are held to have proved their admission as untrue i.e. before the order under challenge could have been passed, question of their statements recorded previously cannot act as estoppel against them cannot arise. Findings of Adjudicating Authority are held to be wrong for this reason as well. Law is settled that burden of proof for alleged clandestine removal of goods by appellant is upon the department. Section 31 and 58 of Indian

Evidence Act are held not applicable to the given facts and circumstances. I hold that Adjudicating Authority has also erred in applying Section 106 of the Evidence Act.

11. As a result of entire above discussion the order under challenge is hereby set aside. The Adjudicating Authorities below are warned to make complete & proper compliances of the orders of remand. They need to be careful while making the interpretation of the orders of the Tribunal. Resultantly, thereto four of the appeals stand allowed.

(Pronounced on 12.04.2021).

(Rachna Gupta)
Member (Judicial)

Pant