

**Shree Engineering Vs. Commissioner of Central Excise**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Dec-21-2000

**Reported in :** (2001)(75)ECC88

**Judge :** J S Murthy

**Appellant :** Shree Engineering

**Respondent :** Commissioner of Central Excise

**Judgement :**

This appeal is filed by the above appellant against the above captioned order dated 10.1.94 praying for setting aside the same and order for De novo adjudication, after hearing the appellant.

1. The brief facts of case are that squad of Central Excise Officers, Preventive Branch, Head Quarters, Vadodara, under direction of Deputy Collector, arranged for transit check on 8.10.88. During road petrolling, they found a truck in transit at 10.50 a.m., carrying empty drums under the cover of Central Excise GPI No. 1959/8.10.88, issued by the appellant. To verify its correctness, visited appellant's premises, holding Central Excise Licence to manufacture Drums falling under chapter heading No. 73.10 and paying duty of excise 20% adv. under Notification No. 102/88 dated 1.3.1988. During check it was observed that M/s. Gujarat Refinery, Jawahar Nagar had given contract to manufacture drums on job work basis to M/s. Petrochem Steel Fabricators Pvt. Ltd., Jawahar Nagar, which on closure gave sub-contract to the appellant.

2. During the check of statutory records RGI, it was noticed that duty was debitted in PLA for the clearance of drums under the above GPI. RGI was not written from 7.10.88 for drums and from 1.6.88 for waste/scrap.

In view of clearance of drums on 7.10.88 and 8.10.88 it was doubted clandestine removal by the appellant. As a sequel to the above carried out preliminary stock verification with reference to production reports and RGI and found that appellant had not entered production from 7.10.88. To arrive at the balance on 8.10.88 same production reports were compared with the recorded RGI, which showed variation in recorded production, in production report and production shown in RGI, to the extent of 345 drums, with opening balance in RGI on 7.10.88--4700 drums, production as per production report 3000 drums, in all 7700 drums. Despatch under GPI1947 to 1961 on 7.1.1988--2565 drums, closing balance in RGI should have been 5135 drums. Despatch on 8.10.1988 till Panchas Central Excise Officers arrived, under GPI No. 1962 to 1969 issued by 10.50 a.m. is 1350 drums. Opening balance on 8.10.88 in RGI should been 3785 drums. Actual physical stock was 3440 drums. Shortages of drums found was 345 drums. Sri M.H. Sukumar, Authorised signatory of appellant explained in the presence of Panchas as production was not properly accounted for. Regarding difference in RGI entry and production report, he replied that production report was prepared for Refinery people and RGI Register was maintained for Central Excise purpose. For the purpose of scrap/waste, RGI Register examination showed it was written upto 1.6.1988 with opening balance 237.289 M.Ts., for which Sukumar explained in the presence of Panchas that scrap/waste was not cleared and also not maintained RGI register for the period from 1.6.88 to 8.10.88. About actual stock of waste/scrap on 8.10.88, on further enquiry he explained opening stock was 800 gms. of waste generated on every drum manufactured is the actual stock on 8.10.1988.

Accordingly original quantity works out to 148.457 M.Ts. against RGI balance shown as 237.289 M.Ts. on 1.6.1988. Scrap/waste quantity was not accounted in RGI worked out to 211.168 M.Ts. Officers placed under seizure 211.168 M.Ts. scrap/ waste on the reasonable belief it is a contraband in nature, unaccounted goods as liable for confiscation under the panchanama, dated 8.10.1988, which

was valued at Rs. 6,33,504 and subsequently handed over to appellant for safe custody under supratname of same date. RGI Register, Production report, note book, were also seized under the same panchanama for verification. Statements and further statement under Section 14 of the Central Excise Act of Sri M.H. Sukumar, V. Sivramakrishnan, Excise Clerk, M.K. Zala, Production Manager, L.J. Radhakrishnan, Accountant of appellant's unit were recorded.

3. As a follow up action summons was issued to Senior Production Manager of Gujarat Refinery to produce the required details of production for the period Nov. 1987 to February 1988 and after interium replies, finally supplied details under the letter dated 15.2.1989.

Details of production and clearance based on production reports given by appellant fabricators, duly signed by Senior Material Officer of Gujarat Machinery. Detail scrutiny of records produced, production reports, GPI, RGI for the period 1.3.88 to 7.10.88 of appellant's factory revealed production reports show more production when compared to RGI. Work-sheet showing comparison of production as per production report and RGI were prepared. Their comparative work-sheet revealed that there was excess production of 9053 drums, which appears not accounted in RGI. Work-sheets prepared from reports of Gujarat Machinery for Nov. 87 to Feb. 88 also revealed unaccounted production of 8388 drums. Thus production worked out and comes to  $9053 + 8388 = 17441$  drums valued at Rs. 18,41,769.60. It appears appellant had manufactured and removed without accounting in statutory records, without payment of duty or without following Central Excise law procedures, by suppressing the facts of such production in its disposal. Correct position worked out from production reports of appellant factory for 15.11.87 to 28.2.88 and 1.3.88 to 7.10.88 and also records, and Gujarat Refinery letter giving details from 22.1.87 to 28.11.88, regarding production and clearance from M/s. Petrochem Steel Fabricators ass referred above, and summary statements were confronted to M.K. Zala of appellant's Company, who clarified that original contract for supply of drums to Gujarat Refinery was made between M/s. Petrochem Steel Fabricators and Gujarat Refinery, but since the closure of M/s. Petrochem Steel Fabricators, remaining contract have been mutually diverted to new Unit of appellant's, as such the drums referred to in

refinery's letter to have been supplied by appellant. He confirmed the figures worked out for the suppressed product of 17440 drums in excess to RGI. As regards net difference of 17441 drums, which are produced in excess of RGI i.e. 17441 drums, manufactured by appellant factory and not accounted in RGI Register, he has to enquire from M/s. Petrochem Steel Fabricators, and Gujarat Refinery, as appellant is manufacturing drums on job-work basis, as per contract on behalf of M/s. Petrochemicals Steel Fabricators Pvt. Ltd. Contract is not available. On further query, regarding whereabouts of the removal of excess production of 17441 drums, he stated that they are not supplying drums except to Gujarat refinery, Difference of 17441 drums between RGI and production reports found in excess will be explained after verifying the record of M/s. Gujarat Refinery and M/s.

Petrochem Steel Fabricators Pvt. Ltd., after receipt of show cause notice. Shivaramakrishnan, Excise Clerk of appellant also stated in his further statement, supported the Production Manager, M.K. Zala's say, in that regard. He stated that he maintains Excise records and prepares production reports, after production of drums in factory premises, and submit to Gujarat Machinery daily.

4. The charges against the appellant as emerged from the above is appellant by recourse to fraud, wilful mis-statement and suppression of facts with deliberate and wilful intent to evade payment of duty failed to account for in the statutory records of the manufacture/production of scrap/waste i.e. 211.168 M.Ts. valued at Rs. 6,33,504 involving duty of Rs. 80,821.14 and also by suppressing the production and removal of 345 drums, valued at Rs. 36,432 involving duty of 7650.72, further suppressing their production/removal of 17441 drums valued at Rs. 18,41,769.00 involving duty of Rs. 3,86,771.62 and removed the same without payment of duty leviable therein, without accounting the same in RGI Register, and without observing Central Excise procedure. Show cause notice was issued to appellant on 4.4.89 charging for contravention of the provision of Rule 53 read with 173G(4). Rule 226 read with Rule 9(i), Rule 173F read with Rule 52A of the Central Excise Rules, calling upon to show cause on why above duty should not be recovered under Rule 9(2) read with proviso to Section 11A(1) of Central Excise Act for the period mentioned above, and why 211.165 M.Ts. waste/scrap

seized should not be confiscated under Rule 173Q(1)(a) of Central Excise Rules, and penalty should not be imposed under the above rules, and why Plant, Building, Land and Machinery belonging to appellant should not be confiscated under Rule 173Q(1)(a) of Central Excise Rules as used to produce the offending goods seized where they were stored and removed as mentioned above, and why presumption under Section 36A of Central Excise Act should not be raised of documents seized. The matter was adjudicated on 25.3.91 by Additional Collector, against which appellant preferred appeal to Tribunal, which remanded on 18.6.92 to adjudicating authority, for readjudication, after appellant filing reply to show cause notice within 15 days from the date of communication of remand order, and hearing it. Appellant was directed to ensure his presence in personal hearing, failing which it will be at its risk. Appellant filed reply on 22.8.92 and further reply on 2.2.93. On 17.12.92 and 12.2.93 appellant was allowed inspection of documents and take copies. It was complied by 15.4.93. Personal Hearing was fixed on 10.11.93 giving 15 days clear advance notice was received on 25.10.93. On 2.11.93 appellant sought adjournment on the ground that their Excise Executive looking after accounts and Excise matters was not available. On 4.11.93 appellant was informed to make arrangements to attend and arrange to submit on 10.11.93 in personal hearing already fixed, which was not availed. The remand order was thus complied. After perusal of reply to show cause notice, written submission, the Additional Commissioner passed the Impugned order, confirming duties demanded, and confiscating 221.168 M.Ts. waste/ scrap, with redemption fine of Rs. 1 lakh and penalty of Rs. 2.50 lakhs was imposed. Confiscation of land, building, plant and machinery of appellant used to manufacture, production, storage, removal of drums, waste and scrap under Rule 173Q(2)(a) of Central Excise Rules with redemption fine of Rs. 50,000. Hence this appeal.

5. In support of the appeal, Sri. D.M. Mehta learned consultant has filed synopsis and argued in support of it. According to him on 8.10.1988, officers during factory visit has not at all seen another RGI (Modvat) for dutiable scrap. Admissions in statement is without scope to scrutinise records of factory and other documents and clarification about it was required to be given in the reply to show cause notice stage. No show causes notice was served prior to 1st adjudication. Impugned order is clear in that regard, and the letter of appellant, after remand. Inspection

was allowed after interium reply.

It was not practicable to attend personal hearing in (on) 9.11.93, and accordingly replied to adjudicating authority which was received at 10.50 a.m on 10.11.93 by Additional Commissioner. It was ignored and after 2 months Impugned order was passed. Para 3 & 4 of affidavit of Sukumar and Para 5 of affidavit of Shivaramakrishnan is clear. There is no non-accountal of scrap. Not liable for confiscation. Documents were not given, nor allowed inspection. Adjournment was not granted.

Extended period is prevailed in Tribunal Order. Difference is explained in Para 7 of the Impugned order. No suppression was there. Reply to show cause notice in Para 8 of order shows motive was absent. Duty is paid. There is no investigation correlating raw materials, scraps 800 drums. It is a verifiable issue. There was no sufficient chance to explain. Statements contain explanation. Precedent order on E/491/92 Bom 21.1.1998 for earlier period covers the case. What is in nature of evidence required for clandestine removal is laid down in Tribunal decision. Sri J.M. George, learned JDR for Respondent has argued that as per Para 15 of impugned order, principle of natural justice is complied. RGI should show the column of interest as per page 22 of order. There is shortage (of) 345 drums as per page 4. Records are scrutinised in para 9 in pages 8 & 9. 17441 drums are in excess (9053 + 8388). There is no explanation as per page 23. Period is Nov. 87 to Feb. 88. As per page 21, RGI + Production report--Tallied--reply is not recorded. There is no record for scrap from 1.6.88 to 8.10.88 duty is not paid. P16 and P19 of impugned order is relevant. In the reply it is clarified Para 7 of statement of M.K. Zala explains the difference (345). There is no shortage of drums. (Page 118 of P8).

6. The stand of the appellant, in the reply dated 17.8.92 and 2.2.93 to the show cause notice dated 4.4.89, and appeal memorandum and Synopsis filed in the course of arguments and arguments, is as follows: viz. (a) Appellant is a small scale unit, manufacturing Steel Drums (metal containers) under chapter heading 7310.00 of the Tariff Act, on Job work basis from the raw materials steel sheets received from Indian of Company, Gujarat Refinery (Govt. of India Undertaking)

and clearing the same or payment of duty after following Central Excise procedure, and gets job charges for the same. During manufacture small quantity of scrap/waste is also obtained. Plant Machinery, Land is owned by Petrochem Steel Fabricators and job charges are received through them.

Machinery is hired from Vijay Tanks & Vessels Pvt. Ltd., on Rs. 10,000 per month rent. Labour charges at Rs. 2.50 per drum is passed on by Petrochem Steel Fabricators, after receipt of the same, (b) When Preventive Officers visited the appellant factory on 8.10.88 entries for 7.10.88 was to be made in the morning in RGI account which was maintained upto 6.10.88. Entries for scrap were made upto 1.6.88.

Production of scrap is written after weighment. Production of metal containers was started since Nov. '87. Modvat declaration was filed only in May '88 and no modvat was availed earlier. Modvat credit was taken on duty paid sheet/strips from 1.6.88. Prior to it scrap/waste exempted from payment of duty under notification No. 91/88 dated 1.3.88. It was accounted separately as exempted goods. Scrap/Waste contained from sheets, in which Modvat credit was taken, being chargeable to duty has been accounted in a separate register. Balance of scrap is 418.457 M.Ts. total waste/scrap as per theoretical calculation based on 800 gms. 237.289 M.Ts. scrap in balance as per RGI of non-modvat goods. 211.168 M.Ts. is the modvat scrap, for which account is maintained in separate RGI. Balance shown is correct. There is no excess or unaccounted scrap. Non-accounted scrap of stock balance is due to the officers not seeing the entries in RGI for dutiable scrap, and only exempted scrap RGI was seen. Scrap found in balance is duly accounted. There is no contravention of any provisions of Central Excise law, as can be seen from the adjudication order dated 25.3.91.

(c) Difference of 345 drums in physical balance, is due to the fact that numbers of half-painted drums have not been taken into account by officers. During storage period, paint gets faded. Drums have not been taken in calculation, while verifying physical balance. There is no removal of excisable goods without payment of duty, (d) Statements, under Section 14 of the Central Excise Act, of employees are recorded without, issuing summons, and giving opportunities to

scrutinise records, and other documents. For further reply or clarification, officers told to reply in response to show cause notice, and there is only a technical lapse and will be viewed leniently. But serious charges are levelled as evident from the adjudication order relating to evasion of duty on presumptions and assumption, (e) Production shown in private account book/production report regarding number of containers related to number of totally fabricated in a day irrespective of whether they are painted or tested with or without bottom or not.

Production report is meant for reporting to Indian Oil Corporation, Gujarat Refinery, total number of containers fabricated for giving the idea about the raw materials consumed, (f) Number of coils cut for fabrication of drums. On the basis of this they and Job-workers can further plan for the raw materials required, which are sent by them after calculating the consumption in terms of coils consumed.

Production report reveals actual number of drums fabricated, which required painting, testing. If it is found leaky in testing or contains any other defects, the same is further processed, and repairable defects are repaired and again accounted for in production report. The labour charges are determined on the basis of fabrication work done by labourers. Drum is treated as complete and fully manufactured only when it is in fully finished condition and ready for delivery to the refinery. Testing is important as drum should be leak proof. Painting is also important. All these events taken (take) place after they are accounted for on the production report (not RGI). RGI register entry is made regarding number of drums manufactured after complete verification of all drums made ready for delivery in a day. Difference is bound to be in the private production reports and as entered in RGI register, regarding number of drums manufactured in a day. Since there is a difference in method/ manner of showing number of drums produced in a day, for the purpose of production report and RGI register. Suppression of production, presumption is wholly incorrect. Contravention of rules under Central Excise as alleged in show cause notice is not correct as can be seen from the adjudication order. There is no evidence in that regard, (g) Raw materials supplied by Refinery are accounted regularly.

There is a fixed verifiable ratio between the raw materials consumed and metal containers manufactured therefrom. Stock inventory is duly verified by the suppliers of raw material and appellant. No discrepancy has been noticed so far during 1987-88, 1988-89 till date. Express production of 17441 metal containers is merely a presumption, and incorrect. No attempt is made to correlate the quantum of raw material consumed with the quantum of excisable goods manufactured therefrom.

Initially, to show prompt action of fabrication speed, appellant had fabricated drums without fully finishing. Production report showed greater number of drums, fabricated during the period under reference, as compared to total no. of drums shown as manufactured as entered in RGI register. There is an account of the system--the difference in the system of recording production entries in the production report v. RGI register, (h) There is also strict correlation of waste/scrap. Scrap is also fully accountable. There is no scope for illicit and clandestine removal of either the metal containers or scrap/waste of sheets/coils.

(i) There is no suppression of fact or any suppression of production of excisable goods. Appropriate amount of duty is paid at the time of removal of excisable goods from factory premises. The scrap/waste of sheets/ strips rising during manufacture operation has been fully accounted for and there is no excess balance or unaccounted balance of scrap as alleged.

7. Perused the panchanama, Statements under Section 14 of the Central Excise Act, Show cause notice, Reply, Affidavits filed, Tribunal order dated 18.6.92, Order-in-Original dated 25.3.91, Correspondence between the appellant and department, Impugned Order, Appeal memorandum and case laws and Synopsis. Tribunal order 18.6.92 has put a restriction for fresh adjudication, regarding the appellant to appear in the personal hearing without fail, and if he fails to avail the opportunity, it will be at their own risk. The appellant was directed to ensure presence. In spite of this, appellant has failed to appear, in spite of rejection of request for adjournment, and its communication before hearing date. Still appellant has preferred to address one more letter, about the impracticability to engage consultant. He has not tried to appear in person but dates held with writing a letter. This is quite contrary to remand order. The result is as observed in tribunal at their

own risk. Failure to perform the conditions of remand goes against the appellant. Excuse put forward in that regard is not satisfactory. Appellant should have properly prepared to appear with all equipments and made submissions. Appellant has not even tried to prepare a written submission and send to adjudicating authority, when his request for adjournment was rejected and communicated before hearing date. Even thereafter he should have sent the same if he was seriously concerned with the proceedings in the light of the remand order. In the absence of it, contention of the appellant, adjournment should have been given cannot be upheld, and it is rejected.

8. From the perusal of Impugned order, it is seen that the adjudicating authority has considered all the defence of appellant in the reply to show cause notice, itemwise and discussed in the light of the material available on record, exhaustively and given clear and cogent reasons to discard the defense set up. There are no satisfactory grounds to accept the contentions to repeal them. Now, matter requires consideration on merits. Panchanama dated 8.10.88 in page 6 it is stated that "Sri Sukumar explained that there is combined RGI for Metal containers and waste, as such there are no separate RGI, and since inception of their factory today. Two RGI Registers are taken into custody by Central Excise officers at the time of verification of stock of drums under this Panchanama". He was the authorised person, present throughout, and clarified all the details, when asked by Central Excise officers, about the drums, waste/scrap, and accounting in RGI and Production report, and difference in between the two. He has never said that he does not know about the maintenance of statutory registers and concerned official should be asked. On the other hand his statement shows contrary. Under these circumstances affidavits filed by him and Shivaramakrishnan, Excise Clerk dated 11.12.91 loses (sic) [loses] its value. It is not clear whether these affidavits were filed in the adjudication proceedings or during investigation to draw the attention of concerned officers. So also extracts of registers of RGI and Pages 1 to 9 showing availment of Modvat credit on scrap/waste. Show cause notice annexure shows documents relied on are already with appellant in some items, 1 to 5, 10 & 11 and others are ready for inspection.

Order-in-original dated 25.3.91 is already set aside for de novo adjudication by the Tribunal interim and order dated 18.6.92, and it cannot be considered at this stage as contended by appellant in 12.2.93. Permission to inspect and take copies of documents relied on in the show cause notice is given to appellant by Superintendent of Customs and Central Excise adjudication cell, received by appellant on 16.2.93. He was also asked to file reply to show cause notice. The appellant sought for time on the ground that consultant is not available, and staff members are new. Srikumar, authorised person, is the competent person to appear before adjudicational authority, as per his statement. M.K. Zala, another responsible person was also available, as per his statement. There is no reason why none of them personally attended the hearing on 16.11.92 as per remand order. In the absence of it, the contention of appellant on the merits of the case does not hold good now; as statements recorded of all the concerned persons in the appellant factory, after confronting the statements by suppliers/refineries and their deposition about it, are still intact, and have got evidentiary value. The adjudicating authority has considered all the aspects on the documents and statements and to just and proper conclusion. As observed, none of the persons, who have given statements, have brought to the notice of Investigating officers, about the existence of separate registers for duty paid and exempt goods, nor produced voluntarily with explanations in writing before the show cause notice was replied. No reason is forthcoming in this regard. There is no indication whether they produced before adjudicating authority after remand. In the absence of all these things, the case of appellant cannot be upheld.<sup>9</sup> Now coming to the case laws, Precedent order the bench is cited that it cover this case. It is Order No. 355/WZB/1997/CI dated 21.1.98 in E7491/92 Bom of M/s. Petrochem Steel Pvt. Ltd., through whom appellant receives labour charges for job work. The facts are to some extent same. Visit was on 9.1.85 by Central Excise Officers. Shortage of 462 drums were found. Unauthorised removal of 39152 steel drums during 1981-82 to 1985 86 was found, on the basis of difference found in no.

of drums as per private production record and figures entered in RGI register. Statements of persons in charge of Central Excise Work were recorded. Show cause notice dated 2.6.98 was issued for recovery of duty of Rs. 9869.98 on 462 drums under Rule 9(2) read with Section 11A of Central Excise Act and duty of Rs.

4,30,029.92 on 39152 drums unauthorisedly removed during 1.5.1981 to 31.5.1985 under Rule 9(2) as above and for penalty under Rule 173Q of Central Excise Rules. After considering reply, additional amount confirmed the demand imposed penalty of Rs. 50,000. Para 3 of order shows similar situation of da novo adjudication in this case. The fact and evidence considered in this para shows difference from this case, as no such material is available in this case viz. Two fortnightly statements of drums received 1.12.85 to 15.12.85 and 16.12.85 to 31.12.85, and RT12 returns for December 1985. Central Excise Audit scrutiny make on the control on utilisation of raw materials by Gujarat Refinery over the appellant is waiting in this case. It is in these circumstances, tangible proof was to be established by the department for illicit removal. So the finding in that case cannot be made applicable to the instant case on hand.

10. The facts and circumstances of the case, as evident from the Panchanama, show cause notice, and Impugned order complied with the admissions in statements under Section 14 of the Central Excise Act of all the concerned persons in charge in the appellant factory, and the conduct of the appellant in replying the show cause notice, and the remand order observation that prior to 1st adjudication, show cause notice was received and it was misplaced by employee, and in the IInd adjudication, appellant was directed to personally appear in the personal hearing, failing which it will be his own risk, and the fact of separate maintenance of different type of registers for duty and exempt goods manufactured, was not informed at any stage of the proceedings, and the fact that there was no retraction of statements by concerned persons, depicting the actual facts and situation, clearly supports the case of department about the charges in the show cause notice. So under these circumstances this is not a fit case to disturb the Impugned order. The contention of appellant cannot be upheld and it is rejected. Hence I pass the following order.

For the reasons discussed above, the appeal cannot be allowed. It is dismissed.

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