आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 555 & 556/JP/2016
निर्धारण वर्ष/Assessment Years : 2010-11& 2011-12

Raghuveer Metal Industries Limited 21 Adarsh Nagar, Ajmer.	बनाम Vs.	The DCIT, Central Circle, Alwar.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCR 7496 R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Rano Jain (C.A.),
Shri Himanshu Goyal (C.A.),
Shri Prathu Singal (C.A. &
Praneti Agarwal (C.A.)
राजस्व की ओर से/ Revenue by : Shri K.C.Gupta (JCIT)

सुनवाई की तारीख/ Date of Hearing : 30/01/2020
उदघोषणा की तारीख/Date of Pronouncement : 12/03/2020

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are two appeals filed by the assessee against the respective orders of ld. CIT(A)-IV, Jaipur dated 23.03.2016 for the assessment years 2010-11 & 2011-12 respectively.

2. With the consent of both the parties, these appeals involving common issues were taken up for hearing and the matter was heard, and now being disposed off by this consolidated order.

3. For the sake of present discussion, with the consent of both the parties, assessee's appeal in ITA No. 555/JP/2016 for the assessment year 2010-11 has been taken as a lead case wherein the assessee has taken the following grounds as appeal:-

> *"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad, both in the eyes of law and on facts.*
>
> *2. (i) On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the addition of Rs.2010567/- made by the AO by applying the rate of 1.60% of gross profit on the alleged clandestine removal of goods worth Rs.125660484/- from the premises of the appellant.*
>
> *(ii) That the learned CIT(A) has erred in sustaining the above addition by arbitrarily rejecting the explanations and evidences brought on record by the assessee.*
> *(iii) That the ld. CIT(A) has erred in relying on the order of the AO with respect to his reliance on the findings of the Excise Department ignoring the detail explanations filed before him and ignoring the fact that the assessee has filed an appeal and has challenged the action of Excise Department before the Honorable CESTAT, New Delhi.*
>
> *3. (i) On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the addition of Rs.7564761/- made by the AO by applying an estimated rate of 6.02% of stock turnover ratio on total alleged*

clandestine removal of goods worth Rs.125660484/- and considering the amount of Rs.7564761/- as undisclosed initial investment in stock/ purchases.

(ii)That the learned CIT(A) has erred in sustaining the above addition by arbitrarily rejecting the explanations and evidences brought on record by the assessee.
(iii)That the ld. CIT(A) has erred in relying on the order of the AO with respect to his reliance on the findings of the Excise Department ignoring the detail explanations filed before him and ignoring the fact that the assessee has filed an appeal and has challenged the action of Excise Department before the Honorable CESTAT, New Delhi.

4. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law in passing the order without providing adequate opportunity to the appellant.

(ii)That the CIT(A) has erred in not considering the adjournment application filed by the appellant on 23.03.2016 wherein time for just one day was sought as the counsel was in Delhi.

(iii)That the ld. CIT(A) has erred in not accepting the rejoinder to remand report filed before him and also refusing to accept the rejoinder sent through courier.

(iv)That the CIT(A) has erred in not accepting the plea of the appellant that since the case of the appellant was pending at Honorable CESTAT New Delhi the present case in appeal to be adjourned sine die till the disposal of the said appeal by CESTAT, New Delhi.

(v)That the ld. CIT(A) has erred in not accepting the plea of the asssesse for applying ratio of the decision passed by Honorable Rajasthan High Court in the assessee's own case

wherein the proceedings for AY 2008-09 & 2009-10 have been stayed for the want of order by Honorable CESTAT.

5. On the facts and circumstances of the case, the learned CIT(A) has erred, in dismissing the ground for error made by AO in charging interest under section 234B 86 234D of the Act.

6. On the facts and circumstances of the case, the learned CIT(A) has erred, in dismissing the ground for initiation of penalty by AO under section 271(1)(c) of the Act."

4. Briefly the facts of the case are that the assessee is engaged in manufacturing and trading of TMT bars. It filed its return of income declaring total income at nil on 26.09.2020 and thereafter the matter was selected for scrutiny by issuance of notice u/s 143(2) of the Act. During the course of assessment proceedings, it came to the knowledge of the Assessing officer that the assessee company was indulged in evasion of Central Excise duty by resorting to clandestine manufacture and clearance of finish goods. DGCEI conducted search operations at the assessee's factory premises and other premises of its associates. During the course of search, certain incriminating documents and assets were recovered and physical verification of finished goods and raw material was also conducted which resulted in detection of various discrepancies. Statement of Shri Sunil Khurana, Director of the assessee company was also recorded. Thereafter, Additional Director General, DGCEI, Delhi Zone issued a show cause notice to the assessee on 11.03.2011 and 25.11.2011. Thereafter, Commissioner Central Excise, Jaipur adjudicated the case of the assessee and held that the assessee was indulged in evasion of Central Excise duty by resorting to clandestine manufacture and clearance of finished goods. As per show

cause notice dated 25.11.2011 of DGCEI, the assessee has removed goods from his factory premises worth Rs. 23,21,52,189/- during the period 24.02.2009 to 26.02.2010 and for Rs. 17,88,40,952/- during the period 27.02.2010 to 31.08.2011. Basis said information in possession of the Assessing officer, during the course of assessment proceedings, an exercise was carried out to identify the quantum of clandestine removal of goods during the period 01.04.2009 to 31.03.2010 which worked out to 4585.145 MT valued at Rs. 15,13,68,615/- and accordingly, a show cause was issued as to why the amount of Rs. 15,13,68,615/- should not be added to the assessee's income for A.Y. 2010-11 being the unrecorded sales made out of books. In response, the assessee filed its submissions. The submissions so filed were considered however, not found acceptable to the Assessing Officer and he proceeded to make an addition of Rs. 75,64,761/- on account of undisclosed investment in stock and another addition of Rs. 20,10,567/- on account of profit on sales of undisclosed stock and the relevant findings of the Assessing officer are contained at paras 7 to 10 of the assessment order which are reproduced as under:-

> *"7. The reply filed by assessee has been considered. During the course of hearing, the Ld. A.R. vehemently argued that the action of Central Excise Department was biased and has been challenged. Moreover, the assessee is in the process of filing of appeal CESTAT where total relief is expected. It was also argued that even if the turnover of 15.13 Cr. is to be adopted, in no condition the total sales can be added. The assessee has cited certain case laws in favour of its claim. A request has also been*

made to keep the proceedings abeyance till decision of CESTAT appeal.

8. The matter has been considered. But the plea of the assessee is not acceptable in toto. The assessee pleaded the average of rate of sale of finished goods in the case of the assessee as per the balance sheet is Rs. 27,406/- per MT.

It is pertaining to mention here that during the year under consideration the assessee has made undisclosed production and sale of Rs. 12,56,60,484/- (4548.145 MT @ 27,406 PMT works out to Rs. 12,56,60,484/-). It is an admitted fact that the sales is of finished goods for which the assessee has to incur some cost in process of manufacturing and in investment in stock, therefore, the entire sales cannot be treated as income of the assessee.

9. Now, the question arises that for making this much of production and sales how much stock investment would be made by the assessee and how much profit would arise to the assessee. To ascertain the undisclosed investment in stock the assessee was asked to submit stock turnover ratio as reflected in regular financial statements as on 31.03.2010 and 31.03.2009. As per the financial statements of the assessee, the stock turnover ratio of manufactured finished goods for 31.03.2010 was 6.52% and for 31.03.2009 was 5.52%, therefore, the average of both i.e. 6.02% can reasonably taken as undisclosed investment made in stock by the assessee for achieving production and sale of Rs. 12,56,60,484/-. Therefore, the undisclosed investments in stock

*is worked out at Rs. 75,64,761/- (12,56,60,484*6.02%) and the same is added to the total income of assessee.*

10. Further, from the perusal of manufacturing account of the assessee, it reveals the assessee declared Gross Profit rate of 1.60% on sales. Therefore, a G.P. rate of 1.60% can be reasonably applied on undisclosed sales of Rs. 12,56,60,484/- which comes to Rs. 20,10,567/- resulting in addition of Rs. 20,10,567/- to the total income of the assessee."

5. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A) who has sustained the said addition made by the AO. The ld. CIT(A) stated in his order that he has gone through the order passed by the Commissioner, Central Excise, Jaipur wherein on the basis of findings of search conducted by DGCEI, it was found that the assessee was indulged in evasion of Central Excise duty by resorting to clandestine manufacture and clearance of finish goods. The ld. CIT(A) further held that the AO has made addition based on findings of search conducted by DGCEI which is duly approved by ld. Commissioner Central Excise, Jaipur. He also acknowledged the fact that against the said order of Commissioner Central Excise, the assessee is in appeal before CESTAT, New Delhi. Finally, he confirmed the addition made by the Assessing officer. Against the said findings, the assessee is in appeal before us.

6. During the course of hearing, the ld. AR submitted that the present appeal filed by the assessee is against the order of the CIT(A), whereby he has confirmed the order of A.O. making two additions of

Rs. 75,64,761/- and Rs. 20,10,567/- on the basis of certain enquiries made by the Excise Department. A search and seizure operation was conducted at the premises of the assessee and also some other dealers and transporters by the Excise Department. On the basis of this search, the Excise department alleged that the assessee had procured scrap from various parties which was not accounted for and has processed it and such production was also not accounted for. It was also alleged that this production has been cleared clandestinely by the assessee without payment of duty. Total clandestine removal of goods alleged by the Excise Department for the period from 01.11.2006 to 31.08.2011 was Rs.177,93,97,766/-, resulting in evasion of duty amounting to Rs. 23,85,67,946/-.

7. It was further submitted that the Assessing Officer in the present Income Tax proceedings, on the basis of investigation done by the Excise department alleged the following amounts as undisclosed production and sale by the assessee amounting to Rs. 12,56,60,484/- for A.Y. 2010-11, Rs 10,49,36,677/- for A.Y. 2011-12 and Rs 90,30,90,223/- A.Y. 2012-13.

8. It was further submitted that the assessee went into appeal in Excise proceedings against the demand raised before the Commissioner (Appeals), who gave the following relief to the assessee, vide his order No. 80-81/2012/C.EX/JPR-II-COMMISSIONER, dt. 31.12.2012:

Clandestine removal of goods Rs. 5,15,23,781/-

Resulting in duty thereon Rs. 51,47,390/-

Thereafter, the assessee went in further appeal before the CESTAT against this order of the Commissioner (Appeals). The CESTAT passed the final order dt. 20.10.2017 in Appeal No. A/57285-57299/2017-EX[DB], deleting the whole demand raised by the Excise department and reference can be drawn to Para 44 of the order of the CESTAT wherein the following directions are given:

"*(a) the demand of Rs. 7,33,57,221/- is set aside;*

(b) the demand of Rs. 16,00,60,335/- is set aside"

It was submitted that in this manner, a relief of total Rs. 23,34,17,556/- (7,33,57,221+ 16,00,60,335), has been granted by CESTAT. A relief of Rs. 51,47,390/- was already granted by the Commissioner (Appeals). In total, a relief of Rs. 23,85,64,946/- (23,34,17,556+ 51,47,390), has been granted, which was exactly the amount of total demand raised by the Excise department. In view of the above, it may be seen that all the allegations levied on the assessee by the Excise department have been held non-sustainable and the matter has been decided in assessee's favour.

9. It was further submitted that as the Assessing Officer in the present Income Tax proceedings has wholly relied on the findings in Excise proceedings and the assessee having been discharged in Excise proceedings and the whole demand being set-aside, the additions made by the Assessing officer doesn't survive and need to be deleted. Further, ld AR drawn our reference to the assessment order where the A.O. had solely relied on the Excise proceedings and has not done any independent exercise. The Ld. CIT(A) also preferred not to make any

independent verification etc. and just confirmed the order of the A.O. In view of the above, it was submitted that the whole addition having been made on the basis of Excise proceedings and assessee having been discharged against all the allegations made by the Excise Department by the Hon'ble CESTAT, the additions made by A.O. are liable to be deleted.

10. Per contra, the ld. DR is heard who has vehemently argued the matter. He has again taken us through the findings of the Assessing officer and submitted that it is a clear case of evasion of excise duty by the assessee and which has been detected of DGCEI and basis such detection of clandestine manufacture and clearance of finished goods, the AO has determined undisclosed production and sale of finished goods amounting to Rs. 12,56,60,484/- and basis, the same, he has determined undisclosed investment in stock of Rs 75,64,761/- and undisclosed profits of Rs 20,10,567 on such undisclosed sales. He accordingly supported the order of lower authorities.

11. We have considered the rival submissions and perused the material available on record. We find that the additions made by the Assessing Officer is arising out of the search action carried out by DGCEI conducted at the assessee's factory premises wherein it was found that the assessee was involved in clandestine manufacture and clearance of finish goods. During the course of assessment proceedings, basis such search action and subsequent proceeding completed by the ld Commissioner, Central Excise, the AO quantified the value of such clandestine goods for the year under consideration which was determined at 4585.145 MT which was valued at Rs

15,13,68,615/- @ Rs 33,012.83 per MT and a show cause was issued to the assessee as to why Rs. 15,13,68,615/- should not be added to the assessee's income being unrecorded sale made out of the books. In response, the assessee filed its submissions stating that action of Central Excise Department is not acceptable and the assessee is in the process of challenging the same by way of filing an appeal before CESTAT and a request was made to keep the proceedings in abeyance till the decision of CESTAT. The assessee also submitted that in any case, the total sales cannot be added in its hands and in support certain decisions were cited before the AO. The same so filed was considered but not found fully acceptable to the Assessing Officer. The Assessing officer finally determined undisclosed production and sale of Rs 12,56,60,484 where 4585.145 MT was valued at Rs 27,406/-. Here, it is noted that as against value of Rs 33,012.83 per MT, the AO finally applied value of Rs 27,406/- per MT as submitted by the assessee. On such undisclosed production and sales, the AO determined an amount of Rs. 75,64,761/- on account of undisclosed investment in stock and another addition of Rs. 20,10,567/- was made on account of profit on sales of undisclosed stock at the declared G.P of 1.6%. Therefore, we find that the whole addition of Rs. 95,75,328/- has been made by the Assessing Officer basis the findings of DGECI relating to manufacture and clandestine removal of finished goods and which has been confirmed by the order of the ld Commissioner Central Excise. At the same time, it is also an admitted fact that the assessee has moved in an appeal against the order of ld Commissioner Central Excise before the CESTAT who vide order dated 20.10.2017 has set-aside the whole demand raised against the assessee. The ld. CIT(A) has also recorded a

similar finding that the AO has made addition based findings of search conducted by DGCEI which is approved by ld. Commissioner Central Excise, Jaipur. Further, the fact that the assessee has moved in an appeal was also noted by the ld CIT(A). Apparently, at the time of passing of the order by ld. CIT(A) on 23.03.2016, the order of the CESTAT was not pronounced and therefore, couldn't be considered by him.

12. We refer to the order dated 20.10.2017 passed by the CESTAT and we deem it appropriate to reproduce the same as under:-

"These appeals including one appeal of Revenue arise from common Order-in-Original No.80-81/2012/C.Ex/JPR-II, Commissioner dated 31 December, 2012. The details of the appeals are as follows:-

Sl.No.	*Appeal No.*	*Appellant's Name*	*Demand/Penalty*	*Reason*
1	*E/56611/2013*	*Rughuveer metal Industries Ltd.*	*Duty- Rs.233420556/- Penalty- Rs.233420556/-*	*Charge of clandestine clearance.*
2	*E/56612/2013*	*Rughuveer metal Industries Ltd.*	*Redemption Fine- Rs.1000000/- Confiscation of goods worth – Rs.70,49,861/- & Currency of Rs.66,30,000/-*	*Confiscation under Rule 25 of CER, 2002 (Panchnama dated 15.09.2010*

				(RUD-1)
3	*E/56613/2013*	*Mr. Anil Pokharna*	*Rs.1,00,00,000/-*	*Rule 26 of CER, 2002*
4	*E/56614/2013*	*Rajasthan Commercial House*	*Redemption Fine-Rs.2,00,000/- Confiscation of goods worth-Rs.10,24,676/- & Currency of Rs.23,00,000/-*	*Confiscation under Rule 25 of CER, 2002 [Panchnama dated 14.09.2010 (RUD-6)]*
5	*E/56615/2013*	*Mr. Raj Kumar Pokharna*	*Rs.1,00,00,000/-*	*Rule 26 of CER, 2002*
6	*E/56616/2013*	*Mr. Sunil Pokharna, Director of RMIL*	*Rs.1,00,00,000/-*	*--do--*
7	*E/56617/2013*	*Mr. Suyog Kabra*	*Rs.2,00,000/*	*--do--*
8	*E/56618/2013*	*Rajasthan Steels*	*Rs.1,00,00,000/-*	*Rule 25 of CER, 2002*
9	*E/56619/2013*	*Rajasthan Commercial House*	*Rs.1,00,00,000/-*	*--do--*
10	*E/56620/2013*	*Rajasthan Steel*	*Redemption Fine-Rs.2,00,000/- Confiscation of Currency of Rs.13,00,000/-*	*Confiscation under Rule 25 of CER, 2002 [Panchnama dated 14.09.2010*

				(RUD-6)]
11	*E/56621/2013*	*Mr. Surendra Kumar (Authorized Signatory)*	*Rs.5,00,000/-*	*Rule 26 of CER, 2002*
12	*E/56687/2013*	*Mr. Prateek Garg*	*Rs.50,000/-*	*--do--*
13	*E/56688/2013*	*Mr. Suresh Garg*	*Rs.50,000/-*	*--do--*
14	*E/56689/2013*	*Mr. Sanjay Garg*	*Rs.50,000/-*	*--do--*
15	*E/56670/2013*	*Department's Appeal against Raghuveer Metal Industries Ltd.*	*Rs.51,47,390/-*	*Charge of clandestine clearance dropped on account of duplication of demand.*

As all these appeals arise from the same investigation and are interconnected/common issue, are accordingly taken up together for disposal.

2. The main appellant-M/s. Reghuveer metal Industries Limited (RMIL for short) are engaged in manufacture of TMT bars under the brand name of "KAMDHENU" and MS ingots classifiable under chapter 72 of Centre Excise Tariff Act, 1985. The appellant is regularly paying the Central excise duty and also availing benefit of Cenvat credit on inputs. The main raw materials used are steel scrap and sponge iron.

3. The brand name "KAMDHENU" belongs to 'Kamdhenu Ispat Ltd.' (KIL for short), who charged a royalty of Rs.150 per metric ton of sales made by the appellant excluding service tax.

4. On the basis on information that RMIL- appellant were indulging in evasion of duty by clandestinely manufacture and clearance of finished goods, a search operation was conducted on 14-15/09/2010 at the factory and related premises by the officers of DGCEI. During the course of search some discrepancies were noticed in stock of raw materials and finished goods. The details of the physical stock taking are as follows:-

Sl.No.	*Item*	*Quantity as per Records (MT)*	*Actual Quantity as per panchnama (MT)*	*Difference*	*Value (Rs.)*
1	*Ingots*	*1452.242*	*1137.386*	*(-) 314.856*	*72,41,688/-*
2	*Miss Rolls*	*205.995*	*52.29*	*(-) 153.705*	*28,43,542/-*
3	*Billets*	*68.84*	*65.225*	*(-)3.615*	*77,722/-*
4	*Furnace Oil*	*28.799*	*0*	*(-) 28.799*	*6,77,813/-*
5	*Scrap (Excisable)*	*143.564*	*20.1*	*(-)125.464*	*22,58,352/-*
6	*Scrap (Non-Excisable)*	*0.625*	*371,23*	*(+)370.605*	*66,70,890/-*
7	*Runner &*	*24.991*	*809*	*(-)16.091*	*3,06,729/-*

	Riser				
8	*Slag*	*1821.881*	*5.85*	*(-)1816.031*	*90,801/-*
9	*TMT Bars*	*380.165*	*626.5*	*(+)246.335*	*70,49,861/-*

5. The excess 246.333 M.T. of TMT bars valued at Rs.70,49,861/- was seized on 15.09.2010. Search of residential premises of Shri Sunil Pokharna, Director of RMIL, resulted into recovery of some documents and cash Rs.63,20,000/-. Further search at residence of Shri Rajkumar Pokharna, Director, resulted in recovery of some documents and cash Rs.60 Lacs.

6. Search was also conducted at business premises of M/s. Rajasthan Commercial House (RCH) and M/s. Rajasthan Steels (dealer/distributor of RMIL), cash or Rs.23 lakhs and certain documents were recovered. Quantity of 32,55,29.4 M.T. of KAMDHENU TMT Bar, valued at Rs.19,24,676/- were detained. Investigation was also carried out with the suppliers of raw materials and buyers of the finished goods and also from the transporters of the goods and certain documents were recovered and resumed. Further statements of proprietor/partner/manager/authorised person/s etc. were recorded. Some of them admitted to have cleared unaccounted raw material without bills to the appellant and having received payment in cash. Some of the buyers of the finished goods Admitted to have received the final products without invoice or bills and without payment of duty of excise.

7.Investigations were also done at the premises of two transporters of the appellant, namely M/s Khawaja Garib Nawaj Transport Company, Ajmer and M/s Vikas Transport Company, Ajmer. No corresponding invoice/bill was found to be issued against some of the entries in the booking register of the said transporters. Further, for some of the GR's, no corresponding invoice was found to be issued. In respect of information collected from the commercial tax Department revealed that entry in respect of 162 vehicles as per sale entries were not found recorded in appellant's records. Further appellant purchased material through three vehicles, which were not recorded in their records.

8. As per the agreement dated 01/07/2006 and 22/09/2009 between the appellant-RMIL and Kamdhenue Ispat Ltd. (M/s KIL), Bhuwadi, Royalty was being paid at the rate of Rs. 150 per M.T. There appeared to be excess payment of Rs. 25,79,797/-, made during the period April 2008 to October 2008 as compared with the clearances effected in ER-1 returns. There also appeared to be some discrepancy in the electricity consumption pattern vis-a-vis product norms as per ER - 5 returns.

9. Show cause notice dated 11/03/2011 was issued proposing confiscation of excess TMT Bar seized in the factory premises of RMIL and the promises of its dealer/distributor RC H and Rajasthan Steels. Further confiscation of Indian currency of Rs. 63,20,000/-, Rs. 60 laikhs and Rs. 23 lakhs, seized during

investigation was proposed to be confiscated with proposal to impose penalty.

10. Another show cause notice dated 05/ 11/2011 was issued demanding Central excise duty of Rs. 23,85,67,946/-with proposal to appropriate Rs. 2,13,50,500/- already deposited by RMIL with interest and further penalty was proposed under section 11 AC along with penalty under Rule 25 and also under Rule 26 on the directors & others.

11. The SCN was adjudicated on contest, vide the impugned Order-in-Original dated 31/12/2012 confirming the demand and penalties along with confiscation of goods and currency as more fully described herein above.

12. That the details of the duty demand is more fully given hereinabove. However the breakup of Rs. 23,34,20,556/- is (a) based on appellant royalty account, as per books of KIL- Rs. 16,00,60,335/ and

(b) Based on entries in the booking registers and GR's seized from M/s New Vikas Transport Company and M/s Khawaja Garib Nawaj Transport Company - Rs. 7,33,57,221/-.

13. Being aggrieved the appellants are in appeal before this Tribunal. Whereas the Revenue is in appeal against dropping of charge of clandestine clearance on account of duplication of demand.

14. The learned counsel for the appellant Mr. B.L. Narsimhan urges, with regard to the demand of Rs. 16,00,60,335/- based on royalty payments as follows: -

The learned Commissioner have recorded the finding that the payment (credit) of Rs. 4 lakhs on 04/04/2008 as royalty by appellant to KIL and again debit of Rs. 4,28,104/- on 30/04/2008, in appellants account with KIL shows that the total royalty payment for the month of April 2008 was Rs. 8,29,441/-, as against royalty payment of Rs. 4 lakhs only recorded in the appellant's account. There is no substance in the submission that payment of Rs. 4 lakhs on 04/04/2008 was advance against the actual 'royalty due' entry of Rs. 4,28,104/- made on 30 April, 2008, since the appellant have not produced any vouchers in support of such contention. It was further observed by the Commissioner that it is highly unlikely that the appellant would show any royalty payment on paper, with respect to clandestinely removed 'KAMDHENU' brand TMT Bars, since it would enhance their chances of being caught during scrutiny. Such excess payment of royalty would only have been available in the records/books of KIL.

The learned counsel states that the appellant's account in the books of KIL seized by the Department - RUD 88, reflects the entries for royalty due and paid. When the royalty amount is actually paid by the appellant during the month, it's account, in KIL books is credited and when the royalty income is recognised/due in the books of KIL, the appellant's account is

debited. This is how the account of appellant is maintained by KIL in its books of account. However, the Department have wrongly interpreted it by treating both the royalty due as well as royalty paid amounts every month appearing in the Ledger account of the appellant in the books of the KIL, as separate payments of royalty by the appellant to KIL. The learned Commissioner lost sight of the fact that the account of the appellant was credited with the royalty payment entry dated 04/04/2008, for Rs. 4 lakhs, and debited with royalty due entry dated 30/04/2008, for Rs. 4,28,104/-. Thus, these two, amounts one being Debit amount other being credit amount cannot be added to get total royalty paid by the appellant. Thelearned counsel also demonstrated this in the course of hearing. Referring to the seized document being account of appellant in the books of KIL-RUD 88.

15. Further, the learned counsel also urges that at the end of KIL there is no proof of receipt of extra consideration relation to the alleged excess royalty, recorded in their books of account (as per Revenue).

16. Having considered the rival contentions, we are satisfied that the Department have wrongly read the account of the appellant in the books of KIL. It is evident that both the transaction on the debit column and the credit column have been added, arriving at erroneous conclusion. Thus, we hold that the show cause notice with respect to the demand of Rs. 16,00,60,335/- is erroneous and not sustainable. Accordingly, we

set aside the demand of Rs. 16,00,60,335/- in respect of royalty payments by appellant to KIL, and remand the matter to the learned Commissioner for re-verification of the mistake in calculation, apparent on the face of record.

17. Further the Ld. Counsel for the appellant submitted on the issue of, stock verification and related findings of Ld. Commissioner, that no actual stock taking was done by the officers and the statements recorded during search and investigation were under pressure, is not correct. This is clear from the immediate and repeated retraction filed by appellants before DGCEI & others. Further, one Shri Daulat Ram, one of the Panchas stated that he did not witness the Panchnama proceedings and was called only at the end of search for an hour to sign the statements. The entire Panchanama loses its credibility and becomes void. He added that when Panchanama proceedings itself is doubtfull, entire case of the Department based on such Panchanama will not be sustainable. The cross-examination of Shri Daualt Ram also supports the credence to retractions made by the directors/employees of the appellant on 16.09.2010.

18. He further emphasized that there is no corroborative evidence to prove that the actual stock taking was undertaken by the officers in absence of weighment slips, details of vehicles used for weighment, payments to labour used for weighment, etc.

19. In such circumstances, no charge of shortage/excess of finished goods, or of clandestine clearance thereof, is sustainable. In this regard, reliance was placed on the following judgments:-

- *CCE, Raipur, v. Devi Iron & Power Pvt. Ltd., 2015 (321) E.L.T. 270 (Tri. Del.)*
- *CCE, Meerut-I V. Silvertone Papers Ltd., 2013 (287) E.L.T. 478 (Tri. Del.)*
- *Hissar Pipes Pvt. Ltd. V. CCE, rohtak, 2015 (317) E.L.T. 136 (Tri. Del.)*

20. He also asserted that even the expertise of the employees could not have led to weighment of around 2200 MT of stock within the short span of 15 hours, taken in the Panchanama proceedings, since the time required to load, unload and weigh the vehicle could not be curtailed. Such stock taking required around 228 truck loads of 10 MT per truck.

21. The second Pancha, Shri Praveen Kumar could not be produced by Revenue for cross-examination, even though the appellant had requested for the same. Had he been produced, he would also have given similar statements as made by Shri Daulat Ram, during the cross-examination.

22. That further As regards, the assumption of the department that each test noted in the notebook of chemist was one heat, and multiplying the number of heats with the capacity of furnace, and accordingly drawing of conclusion that 2409 MT of production took place during the period of dispute, as against

recorded quantity of 1229 MT, he submitted that there is no basis whatsoever for the above assumption. He submitted that multiple tests are required to be conducted during one heat of the finished goods, if it does not conform to desired quality and remedial measure are taken. He added that even in its reply to Show Cause Notice the appellant had submitted that the said note book did not reflect the number of heats of the furnace. The entries merely reflect the chemical test undertaken by their chemist. This was also stated by Shri Sunil Pokharna, Director during the course of investigation. Further, no statement of Naveen Tyagi, who maintained the said diary, was recorded which is a serious lapse of investigation. The Affidavit of Naveen Tyagi Substantiates the explanation of the appellant. Therefore, he submitted that no clandestine manufacture or clearance could be proved on this ground.

23. He further submitted that the allegation of clandestine clearance can be confirmed only on the basis of positive and tangible evidence, and the same cannot be based on mere presumptions and assumptions. In support of this submission, he placed reliance on following decisions:

- *Continental Cement Company v. UOI, 2014 (309) ELT 411 (All.)CCE v. Brims Products, 2011 (271) ELT 184 (Pat.)*
- *CCE, Chandigarh-I v. Laxmi Engineering Works, 2010 (254) E.L.T. 205 (P & H)*

- *Ashutosh Metal Inglilstries v. CCE&ST, Delhi, F.O. No. 50477/2017-CU[DBL.dated 25.01.2017*
- *Nabha Steels Ltd. v. CCE, Chandigarh, 2016 (344) E.L.T. 561 (Tri. - Chan.)*
- *Sunrise Food Products & Ors. v. CCE, Delhi, 2017 (1) TMI 84 - CESTAT NEW DELHI*
- *M/s. S.H. Haryana Wires Ltd. & Ors. v. CCE, Faridabad, 2016 (10) TMI 449 - CESTAT NEW DELHI*

24. That the entire finding is legally untenable on account of the fact that the Ld. Commissioner at the end of para 16 (of order-in-original) has held that no cenvat credit demand could be confirmed against the appellant on this ground in the absence of any attempt from the department to quantify the amount. Thus, the investigation on this point appears to be way-ward and mis-directed.

25. Further, there is no logic in buying scrap without bills from a party, and thereafter, in subsequent invoices inflating the quantity vis-a-vis the scrap supplied. This finding in itself destroys the case of the department. There is no evidence regarding how the scrap without invoices was transported to the Appellant.

26. He also pointed out that for the alleged clandestine production and clearance of 42,300 MT of finished products, the Appellant would have required around 47,000 MT of scrap. The impugned order vaguely and without evidence merely could uphold only 2230 MT, as unaccounted procurement of scrap. There is no evidence led by the department to prove

such huge quantity of unaccounted scrap procurement by the Appellant and the other relevant necessary overheads/factors of production required for their conversion like labour costs, electricity, fuel, consumables, etc.

27. As regards, the demand of Rs. 7,33,57,221/- based on six booking registers and loose GRs of the transporter(s) is concerned, Ld. counsel submitted that Shri Moin Khan (Transporter) himself stated during cross-examination in response to question 11 & 12, that the booking register reflects only the approximate requirement whereas the actual weight in Kg is known after the actual loading of goods only. Further, in response to Questions 8 & 9, he had already stated that all the entries mentioned in the booking register may not have been actually transported. Thus, on a conjoint reading of the responses given by Shri Moin Khan to the cross-examination, it clearly emerges that entries in booking register did not reflect actual transportation of TMT/finished goods.

28. The Revenue has alleged that the booking register contained all the bookings made by various parties, including the Appellant, with I1 it transporter. Non-appearance of the entries in the booking registers corresponding to the loose GRs, on the basis of which demand of Rs.22,60,412/- has been confirmed in the impugned order, in itself reflects the inconsistency among the records (hooking register and the loose GRs) resumed from the transporter which have been

relied upon by the department. Thus, the evidentiary value of these records becomes doubtful. A bare look at the booking register would amply evince the fact that the same is nothing better than a rough record.. He added that these submissions were given even during the reply to the SCN, however, the same has not been considered by the Ld. Commissioner .

This stand of the appellant is not an after-though. Rather this is based on the cross-examination of Shri Moin Khan Proprietor of the transport entities, whose statements were relied upon by the department. The responses to the Questions 8, 9 and 14 of the cross-examination supports their contention.

29. It have been held by this Tribunal repeatedly that charge of clandestine clearance cannot be confirmed merely on the basis of third party records, in the absence of any corroborative evidence. Ld. Counsel placed reliance on following decisions:

- *Bhawani Moulders Pvt. Ltd. 00 Ors. v. CCE, Raipur, 2017 (1) TMI 493 - CESTAT NEW DELHI*
- *M/s. N.R. Sponge Pvt. Ltd. v. CCE&ST, Raipur, 2015-TIOL-1600-CESTAT-DEL*
- *Albright Steel Industries Ltd. v. CCE, Raipur, 2015 (322) E.L.T. 542 (Tri. - Del.)*
- *Sakeen Alloys Pvt. Ltd. V. CCE, Ahmedabad, 2013 (296) E.L.T. 392 (Tri. - Ahmd.), as maintained by the Hon'ble Gujarat High Court in CCE v. Sakeen Alloys Pvt. Ltd., 2014 (308) E.L.T. 655 (Guj.)*

- *CCE, Indore v. Rajratan Synthetics Ltd., 2013 (297) E.L.T. 63 (Tri. - Del.)*

30. Ld. AR have reiterated the findings in the impugned order. Regarding royalty he submitted that payments of Rs. 4,00,000/- on 04.04.2008 as royalty by the appellant to Kamdhenu and again debit of Rs. 4,28,104/- on 30.04.2008 in Appellant's Account with Kamdhenu shows that the total royalty payment for the month of April 2008 was Rs. 8,29,441/-, as against royalty payment of Rs. 4,00,000/- only recorded in the Appellant's account. There is no substance in the submission that payment of Rs. 4,00,000/- on 04.04.2008 was advance against the actual royally due entry of Rs. 4,28,104/- made on 30.04.2008.

31. It-is highly unlikely that the Appellant would show any royalty payment on paper with respect to clandestinely removed Kamdhenu brand TMT bars since it would enhance their chances of being caught during scrutiny. Such excess payment of royalty could only have been available in the records of M/s Kamdhenu Ispat Ltd. Therefore, the Ld. Commissioner has correctly confirmed the demand of clandestine clearance in this regard.

32. Further, in the matter of demand based on six booking register and loose GR of the transporter, Ld. AR submitted that on the basis of cross examination of Mr. Moin Khan, Proprietor of the transport entities, the Appellant argued that all the bookings made in the morning by the Appellant which were reflected in the booking register may not be finally transported.

33. He submitted that the arguments of the Appellant that since the booking register did not reflect weight in Kg but only in tonnes or half tonnes, thus, same cannot be taken to be the Kamdhenu TMT actually transported, cannot be accepted because at the time of booking the actual weight could not have been known, which was known only at the time of actual stuffing and written on GRs/ bilties accompanying the goods. Further, the office copies of GRs also did not mention actual weight, for this reason only.

34. He asserted that GRs prepared by M/s New Vikas Transport Company which are not reflected in the booking register further falsifies the stand taken by the Appellant that all entries made with respect to Kamdhenu TMT in the booking register are not actually transported. On the contrary, these GRs further reflect the clandestine clearances of goods by the Appellant.

35. The stand of the Appellant that all bookings reflected in the booking register of the transporter and for which GRs were prepared may not have been actually transported is not acceptable and has to be considered as an after-thought.

Regarding other observation of the Commissioner to confirm the charge of clandestine manufacture and clearance against the appellant, the Ld. AR submitted that Physical stock taking leading to shortage and excess of raw material in the factory was done in the presence of the employees of the factory. As per the cross examination of Shri Daulat Ram, even if he was present in the

factory only for an hour and did not witness the physical stock taking, this does not mean that stock taking did not take place. The employees of the Appellant had expertise in weighment which must have been relied upon by the officers.

36. He further submitted that as detailed in Para 19-24 of the SCN dated 25.11.2011, it has been clearly brought out from the `Payal Export Quality Ex. Note Book (RUD-22)' that the Appellant was taking more heats from the induction furnaces than what they were reflecting in their statutory records, thus, this reflects clandestine production by the Appellant.

37. As per Para 63 of the SCN, certain suppliers have confirmed that they supplied non-cenvatable scrap without bills to the Appellant on cash basis and were raising invoices for three times the quantity of scrap actually supplied under the cenvatable invoices.

38. As per Para 36-61 of the SCN, it comes out that the Appellant was procuring Cenvatable scrap by showing higher quantity of scrap than what was actually supplied by raw material suppliers and non cenvatable scarp from market without bills by making cash payments and without recording the scrap so obtained in their statutory records.

39. We have heard both the sides and have perused the appeal records and written submission given by both the sides

40. On the first issue, regarding Physical verification of stock we observe that such exercise was challenged by the appellant immediately after search, the Pancha witness Shri Daulat Ram during cross examination confirms not und ertaking of stock taking exercise. During subsequent statements the Appellant or its directors were never again confronted on the aspect of retractions and from this w e find force in the appellants arguments that no such stocktaking was actually clone. Further, it can also be understood that stock of approximately 2200 tons of s teel (approximately 228 trucks load) cannot be undertaken in the to tal duration of 15 hours.Therefore, this finding of the Commissioner is not sustainable.

41. We also observe that Ld. Commissioner's finding that each test recorded in the diary of chemist is one heat and calculating total production by an arithmetic calculation is not sustainable in view of the specific statement of the director during investigation and not recording of the any statement of the chemist who had made entries in the said diary. Further, it is a legally settled position that no demand for clandestine manufacture can be sustained based on theoretical and uncorroborated calculations.

42. On the issue of clandestine removal based on register of vehicles booking maintained by New Vikas. Transport company we find force in the appellants arguments that these are not record of vehicles actually transported but only a memoranda

record of bookings recorded by transporter for approximate vehicles to the supplied to the appellant. This is very clear from the record of cross examination of the transporter Moin Khan, which leaves no room for any other interpretation and therefore any such demand is not sustainable. This also applies to the demand based on loose CRs.

43. The substantial demand based on the Ledger account of royalty amount, resumed from the premises of Kamdhenu Ispat Ltd., We observe that as per the basic principle of the accounting the entries in the debit side and credit side of ledger cannot be totaled together. A perusal of ledger resumed from Kamdhenu Ispat Ltd Shows separate column for Debit and credit amount whereas Revenue has put the amount of debit column as well as credit column in one single Column and then totaled it, which is nearly doubled because of wrong merging of the Debit side and credit side column. In our view any confirmation of demand based on such doubling of amount(s) cannot be sustained. There is no plausible reasoning given by, Revenue in support of totaling of debit amount and credit amount, while calculating demand of duty because of difference in royalty. Further, not recording of statement of kandhenue Ispat Ltd, on such resumed ledger account, also shows that here is no substance in the finding ofthe Revenue that alleged difference in royalty leads to clandestine clearances.

44. To sum up, the appeal No. E/56611 of 2013 is allowed in part of follows-

(a) the demand of Rs. 7,33,57,221/- is set aside;

(b) the demand of Rs. 16,00,60,335/- is set aside and remand to the learned Commissioner, for re-verification, in terms of directions and observations hereinabove;

(c) order of confiscation of cash and goods is set aside;

(d) all penalties stand deleted;

(e) Appellant is entitled to consequential benefit(s).

45. All other appeals are allowed with consequential benefits."

13. In light of above findings of CESTAT where the whole demand relating to clandestine manufacture and clearance of finished goods has been set-side, the findings of the AO which are solely based on the proceedings under Central Excise therefore doesn't survive and the consequential addition made by him are liable to be deleted. At the same time, the Revenue would be at liberty to take action as per law where the matter so decided by the CESTAT is appealed against by the Revenue and is decided in its favour by the Courts. We find that the similar issue has been decided by the Coordinate Bench in case of M/s Natani Rolling Mills Pvt. Ltd. Vs. ITO *(in CO No. 29 & 30/JP/2019 arising*

out of ITA No. 537 & 538/JP/2018 dated 11.08.2019) wherein the relevant findings read as under:-

> *"9. We have heard the rival contentions and pursued the material available on record. As we have noted above, the whole case of the Revenue regarding undisclosed sales rest on the orders of the Central Excise authorities which has since been set-aside by the CESTAT vide its order dated 7.02.19. In view of the same, the additions so made by the Assessing officer towards gross profit on unrecorded sales and unaccounted purchases is directed to be deleted. At the same time, the Revenue would be at liberty to take action as per law where the matter so decided by the CESTAT is appealed against by the Revenue and is decided in its favour. In the result, the ground no. 1, 1.1 and 2 in assessee's cross objection is decided in favour of the assessee."*

14. In the result, matter is decided in favour of the assessee and the appeal of the assessee is thus allowed.

ITA No. 556/JP/2016

15. For assessment year 2011-12, both the parties fairly submitted that the facts and circumstances of the case are exactly identical and basis the aforesaid search proceedings by DGCEI under the Central Excise regarding the manufacture and clandestine removal of finished goods, the Assessing officer has made the additions in the hands of the assessee by rejecting the books of accounts of the assessee. Therefore, considering the submission of both the parties and perusal of

records, our findings and directions contained in ITA No. 555/JP/2016 shall apply *mutatis mutandis* to this appeal and the matter is decided in favour of the assessee.

In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open Court on 12/03/2020.

Sd/-	Sd/-
विजय पाल राव)	(विक्रम सिंह यादव)
(Vijay Pal Rao)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 12/03/2020.
*Santosh
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Raghuveer Metal Industries Ltd., Ajmer.
2. प्रत्यर्थी/ The Respondent- DCIT, Central Circle, Alwar.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 555 & 556/JP/2016}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar