IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos. E/852 & 851/2011-EX[SM]

(Arising out of Order-in-Appeal No. 390-391/CE/LKO/2010 dated 19/11/2010 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Lucknow)

Shri Gopal Krishna Gupta Director,

Shyam Ferrous Ltd. **Appellant (s)**

Vs.

Commissioner of Central Excise & Service Tax, Lucknow **Respondent (s)**

Appearance:

Ms. Stuti Saggi (Advocate) for Appellant
Shri Gyanendra Kumar Tripathi (Asstt. Commr.) AR for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 18/12/2017
Date of Decision : 18/12/2017

FINAL ORDER NOs. – 71058-71059/2018

Per: Anil Choudhary

The issue in these appeals is whether the excise duty have been rightly demanded on the basis of third-party records.

2. The brief facts are that the appellants are manufacturer of MS Ingots, Runners & Risers and registered with the Department. Their raw material is melting scrap, sponge iron, ferro alloys, etc., by using electromagnetic induction furnace. A search operation was conducted at the factory premises of

one M/s Sarada Steel Industries Ltd., Malwan, Fatehpur (SSIL for short) and M/s Shubh Metals, Malwan, Fatehpur and their various related premises, wherein certain documents etc. were resumed evidencing unaccounted receipt of raw material and unaccounted clearance of final products as well as under valuation by the said SSIL and Shubh Metals. Separate show cause notices were issued to the said SSIL and Shubh Metals. From the premises of SSIL some private document, namely daily incoming material report and consolidated monthly report were resumed as per SI. No. 2(i) of Annexure to the Panchnama dated 05/11/2004. These documents indicated daily and consolidated monthly quantities of ingots received in the factory premises of SSIL from various manufacturers of ingots. These reports relating to the month of July, August and September, 2004 revealed that the total quantity of ingots received by SSIL from various manufacturers differed widely from the corresponding figure of accounted for receipt as maintained by SSIL in their proper books of account. Thus it appeared that SSIL unit was indulging in huge suppression of the actual quantity of ingots received in the books of account. The actual quantity of ingots received from manufacturers of ingots was much larger than the recorded quantity of ingots as shown in their Form IV Register.

3. A perusal of the daily incoming material report revealed the name of the supplier/manufacturer of ingots to mention

under the heading "Party". The vehicle number written under heading lorry number reflected the registration number of the vehicle used for transportation of the ingots from various supplier/manufacturers to SSIL. Similarly perusal of consolidated monthly report of SSIL revealed the name of the supplier/manufacturer from which the ingots had been received by SSIL, during the month along with the quantity and the value of those ingots. In order to ascertain the quantity of ingots received by SSIL from the appellant – Shyam Ferrous Ltd. (SFL for short), the entries mentioned in the daily incoming material report and consolidated monthly report against the name of SFL were segregated and accordingly it appeared that SSIL have received 1079.465 MT of ingots. It appeared that in the official books of accounts of SSIL, a suppressed quantity of ingots actually received from SFL – appellant had been shown. Further SFL had also not accounted for all the supplies of ingots made to SSIL in their books of account for the corresponding period. Further on scrutiny of daily incoming material report and consolidated monthly report of SSIL for the month of July, September and October, 2004 it was revealed that the details of the receipts of ingots by SSIL from appellant – SFL differed widely with the corresponding figures of accounted for clearance/receipts as maintained by them in their proper books of accounts.

4. Statement of Deepak Hada authorized secretary of Sarada Steel Industries Ltd. was recorded wherein, he stated

that the daily incoming material report and consolidated monthly report were resumed from their office premises, give the details of ingots received by SSIL from various ingots manufacturers. All the purchase of ingots shown in the aforementioned private records are not reflected in the excise records of SSIL. Further, the authorized representative of the appellant – SFL Mr. Santosh Kumar Gupta was interrogated on 10/12/2008, who stated that the production in his unit is closed since last two years before that the MS ingots manufactured in the factory were mainly sold to units like M/s Sarada Steel, M/s Premier Alloys, M/s V. V. S. Alloys etc. located in the industrial area, Malwan, Fatehpur and to M/s Premier Ispat Jainpur. On being shown the documents pertaining to his unit, wherein receipt of MS ingots by M/s Sarada Steel Industry Ltd. dispatch from the appellants were shown, he clarified that MS ingots weighing 139.195MT was sent from their unit in the month of July, 2004 only vide Invoice No.120–128, the attested copies of these invoices were submitted by him. Except 139.195MT of MS ingots, no other goods were dispatched to SSIL from their unit during July to September, 2004. On being shown the documents recovered from SSIL, he clarified that he knew nothing about the said shown quantities and they have not supplied MS ingots in such magnitude to SSIL and Shyam Ferrous Ltd. On these facts, it appeared to Revenue that the appellant SFL is responsible for the clearance of unaccounted ingots to SSIL without their accounting in their books of accounts and without payment of duty and thus, the appellant company and its Director G.K. Gupta, were involved in suppression of production and clearance of the final products, namely MS ingots which appear to be liable to confiscation. Accordingly show cause notice was issued dated 03/08/2009, followed by corrigendum dated 04/08/2009, demanding duty of Rs.28,60,826.52 plus Rs.57,216.53, totaling Rs.29,18,043.05 on the apparent differential quantity of ingots being 940.270 MT, alongwith interest and further penalty was also proposed. It was also proposed on the director Mr. G.K. Gupta.

5. The SCN was adjudicated on contest and reduced amount of Rs.14,96,158/- was confirmed out of the proposed amount of Rs.29,18,043/- taking the value of clearances at Rs.13,000/- PMT instead of different value shown in private records of SSIL for which no corroborative evidence in favour of Banking transaction etc., was available. Such rate of Rs.13,000/- PMT was obtained from the Jurisdictional Deputy Commissioner of Raebareily based on the returns and payments etc. of the appellant. Further equal amount of penalty was confirmed under Section 11AC read with Rule 25 of CER, 2002. Further penalty Rs.1 lakh was imposed upon Shri G.K. Gupta, Director under Rule 26.

6. Being aggrieved the appellant preferred appeal before Learned Commissioner (Appeals) who vide the impugned

order was pleased to dismiss the appeal. Being aggrieved the appellants are before this Tribunal.

7. The Learned Counsel for the Appellants have argued that the whole case of Revenue is based on assumptions and presumptions. In the course of investigation at the end of the appellants nothing incriminating have been found. There is no admission on the part of the authorised signatory or the director of the appellant in support of the case of Revenue. Further, Revenue have not brought any material on record to corroborate allegation of clandestine manufacture and clearance. Under such circumstances, the appeals are fit to be allowed with consequential benefits.

8. The Learned A.R. for Revenue have relied on the findings in the impugned order.

9. Having considered the rival contentions, I find that the whole case of Revenue is based on third-party records (private records) and the statement of the third-party. I further find that in spite of interrogation of the responsible persons of the appellant company, there is neither any admission on their part nor Revenue have brought any corroborative evidence in support of this allegation. It is established principle that suspicion howsoever strong cannot take place of evidence, particularly in the case of clandestine removal.

10. I further find that Hon'ble Allahabad High Court in the case of Continental Cement Company versus Union of India, 2014 (309) E.L.T. 411 (All.) have held that in the matters of

clandestine removal clinching evidence is required on purchase of raw material, use of extra electricity, sale of final products, clandestine removal, transportation, payment, realization of sale proceeds, mode of flow back of funds, etc., by way of proof. Demand cannot be confirmed based on presumptions and assumptions as it is a serious charge required to be proved by Revenue by sufficient evidence. Mere statement of buyers based on their memories was insufficient without support of corroborative evidence.

11. Accordingly, these appeals are allowed and the impugned order is set aside. The appellants shall be entitled to consequential benefits, in accordance with law.

(Dictated & Pronounced in Court)

Sd/-
(Anil Choudhary)
Member (Judicial)

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