CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/99/2009-DB, E/390/2009-DB

[Arising out of Order-in-Appeal No. 80/2008 dated 04/11/2008 passed by Commissioner of Central Excise, Calicut]

[Arising out of Order-in-Appeal No. 88-89/2008 dated 14/11/2008 passed by Commissioner of Central Excise, Calicut]

Commissioner of Central Excise,Customs and Service Tax CALICUT
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE, - 673001
KERALA

Appellant(s)

Versus

LAL STEELS PVT LTD
NEW INDUSTRIAL DEVELOPMENT AREA,
KANJIKODE, PALAKKAD, KERALA

Respondent(s)

M.M ABUTHAHIR
MANAGER, LAL STEELS PVT LTD, NEW
INDUSTRIAL DEVELOPMENT AREA,
KANJIKODE, PALAKKAD

Respondent(s)

Appearance:

Mr. K. Murali, Superintendent, AR — For the Appellant

Mr. G.Derrick Sam, Advocate — For the Respondent

Date of Hearing: 22/02/2019

Date of Decision: 22/02/2019

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

HON'BLE MR. SANJIV SRIVASTAVA, TECHNICAL MEMBER

Final Order No. 20195-20196 / 2019

Per : SANJIV SRIVASTAVA

The present appeals have been filed by the Revenue against the Order-in-Appeal No. 80/2008-CE dated 04.11.2008 & 88-89/CE dated 14.11.2008 passed by the Commissioner

(Appeal). By the said order Commissioner (Appeal) has dropped the demand of duty and set aside the Order-in -Original of the Additional Commissioner Calicut. Additional Commissioner has held as follows:

> a. *I demand Rs. 29,82,117/- (Rupees twenty nine lakhs, eighty two thousand, one hundred and seventeen only) from M/s. La! Steel Pvt. Ltd. Under Section 11A(1) of Central excise Act read with Rules 9(1), 173 G of Central Excise Rules 1994, and Rules 4,8 and 25 of the Central Excise Rules, 2001.*
> b. *I impose a penalty of Rs. 29,82,117/- (Rupees twenty nine lakhs, eighty two thousand, one hundred and seventeen only) on M/s. Lai Steel Pvt. Ltd. Under Section 1 lAO of Central excise Act, 1944.*
> c. *The assessee is to pay interest under Section 1 lAB of the Central excise Act, 1944, on the duty demanded.*
> d. *I impose a penalty of Rs. 50,000/- (Rupees fifty thousand only) on M/s. Lai Steels Pvt. Ltd. under Rule 25 of the Central Excise (No.2) Rules, 2001.*
> e. *I impose a penalty of Rs. 1,00,000/- (Rupees one lakh) each on Mr.Rathan Lai Tantia and Mr. Abuthahir, under Rules 173Q and 209A of the Central Excise Rules, 1944, and Rule 25 & 26 of the Central Excise Rules, 1944 and Rule 25 & 26 of the Central Excise (No.2) Rules, 2001.*

2.1 These proceeding were undertaken by the Additional Commissioner as per the remand order of Tribunal making observations as follows:

> *On a careful consideration and perusal of both the orders, we are of the considered opinion that the order of*

the Commissioner 'Appeals) is not a speaking order. The Revenue has relied on large pieces of evidence to establish the allegation of clandestine removal. The most important evidence is of higher electric consumption. The Revenue has referred to the letter of M/s. Peekay Steels who has contended that the power consumption in their plant is between 10 to 120 units for manufacture of similar item of goods during the relevant period. The charge against the appellant was that during the earlier period, the electrical consumption was lower while in the present period, the consumption is very high without higher recording of excess production in the registers. The other pieces of registers have been relied including statements of the personnel of the appellant factory. The weigh bridge register is an indicator of higher clearances. This is rebutted by the appellants by producing letters of other factory owners who have claimed to have got the weighment 'dbnd in the respondent's' weigh bridge. This aspect of the matter has not been looked into, by the Commissioner (Appeals). The respondents are relying on another 0I0 rendered by the Joint Commissioner who has dropped charges of clandestine removal against another similar industry on similar grounds. We are of the considered opinion that the matter has to go back to the Original Authority for de novo consideration for re-consideration of the material on record after granting full opportunity to the assessee including the plea for cross-examination of the witnesses. The matter is required to be re-adjudicated within four months from the date of receipt of this order, as the matter is an old one. All the pleas raised by the assessee are required to be reconsidered. The authority shall also consider the ruling of the Apex Court *judgment in the case of Triveni Rubber and Plastics (cited supra) which clearly lay down that higher consumption of electricity is a pair higher production of goods. This matter is remanded to the original authority for do novo consideration.*

2.2 Adjudicating Authority in the remand proceedings has confirmed the demand which has again been set aside by the Commissioner (Appeal).

3.1 Aggrieved by setting aside the order, the Revenue has filed this appeal.

3.2. In their appeal, Revenue has stated that Commissioner (Appeal) has not considered various evidences arrive while dropping the demand and stated as follows:

(i) The Commissioner (Appeals) has not considered the Weighment Register together with the statement of the drivers who have brought the M S Ingots from M/s. Southern Ispat Ltd, which clearly showed that raw materials were in fact transported from M/s. Southern Ispat Ltd almost on all working days but the assessee did not account for it in full in the raw material register. The assessee appears to have received 3570 MT of M.S Steel ingots but accounted for only receipt of 1069.87 the differential quantity of 2500 MT was used for unaccounted production and clandestine removal of finished goods.

(ii) The receipt of ingots from M/s. Southern Ispat Ltd is confirmed even by its Manager and he recognized the vehicle

Reg.No. KL-9L-1625 that used to transport the ingots from the said factory and its Driver. Non appearance of the number of this vehicle in the whole weighment receipts shows arrival of unaccounted ingots from the said factory almost on all working days. The assessee failed to show satisfactorily what happened to the unaccounted ingots received by them or how they have disposed it. M/s. Southern Ispat has confirmed receipt of freight charges for the above truck but no transaction exists in the ledger of M/s. Lal Steels. The ingots from M/s. Southern Ispat were used for manufacturing goods for clandestine removal. These evidences were not examined by the Commissioner (Appeal).

(iii) The weighment receipt for outgoing finished goods in respect of the 3 vehicles were not found supported by any invoices prepared by the assessee for payment of duty. In the case of one vehicle (Reg.No. KL-13-2675) the unretracted statement recorded from its driver Shri P.M. Vivekandan shows that the said vehicle was used for clandestine clearances from the factory to the dealer.

(iv) The Commissioner (Appeals) failed to appreciate the fact that the drivers and the vehicles used for transportation of ingots from M/s. Southern Ispat and the vehicles and drivers transported the finished goods to the dealers were not the same but entirely different people.

(v) Statements from the dealers of the assessee (Srhi P. Selvan and Shri P. Radhakishnan) shows that there

was enough evidence for intention on the part of the assessee for clandestine removal to customers who are interested in such materials. These aspect were also not considered by the Commissioner (Appeals).

(vi) In the remand order, the Hon'ble CESTAT citing Apex Court judgment in the case of M/s. Triveni Rubber and Plastics Vs. CCE, Cochin that laid down that higher consumption of electricity is a pointer to higher production of goods, has directed the original authority to consider it. Thus the contention of the Commissioner (Appeal) that the principle enunciated in the above judgment are not applicable to the facts of me present case is not correct.

(vii) Shri Abuthair, the Manager of M/s. Lal Steels had not denied the receipt of furnace oil in the factory carried by M/s. Matha Transport, Edapally, Kochi vide their transport Bill No. 591 dt. 10-10-2000 and payment of transportation charges in their accounts. They have not accounted for the same in the Form IV Register or in any other registers. The transport bill of the transporter and the admission of its receipt in the factory by the Manager points to the fact that this was used for clandestine manufacture. Here also the assessee failed to satisfactorily explain the disposal of unaccounted fuel received by them.

(viii) The aspect that M/s. Peekay Steels statement of consumption of electricity was never gone beyond 120 Units per tonne in their factory was specifically mentioned in the remand order by the CESTAT but the Commissioner (Appeals) failed to go into this aspect. The contention of the Commissioner (Appeals) that no limit for consumption has been

fixed by the Commissioner and that no expert opinion has been taken have no relevance in this case as every increase in per tonne consumption ought to have corresponding increase in the production of finished goods. All the likely reasons stated by the assessee for increase in consumption of electricity without any increase in production were examined in detail and found that all the reasons were assumptions that have no effect on the production of finished goods in the relevant period.

(ix) In the remand order the Hon'ble Tribunal had observed that the "revenue relied on large pieces of evidences to establish the allegation of clandestine removal "and that all the evidences were not looked into by the Commissioner (Appeals)". In the present Order-in-Appeal also the Commissioner (Appeals) relying largely on the observation of his predecessor made at the time of setting aside the order-in-original erred in appreciating the evidences produced by the Department to establish the clandestine removal.

4.1 We have heard Sh. K. Murali, AR for the Department and Sh. Sam Derrick, Advocate for the appellants.

4.2 Arguing for the Revenue, Ld. AR emphasized that that

i. there has been huge variation in the consumption of electricity during from the period and this supported by various other evidences enough to satisfy the test laid down by the Hon'ble Apex Court and the Tribunal to justify the confirmation of demand.

ii. Some of the evidences relied upon against the appellants are based on consumption of electricity, weighment receipt book & receipt of material, furnace oil, weighment receipt book & FGs, statements of dealers, non-maintenance of records/registers and statements of employees etc.

iii. On the basis of such evidences, he submitted that the test laid down by the Hon'ble Apex Court in the case of Collector of Customs, Madras and Others vs. D.Bhoormull, 1983 (13) ELT 1546 (SC), that the in case of clandestine removal the revenue is required to prove the case not with mathematical precission but within the preponderance of probability is satisfied. Thus he prayed for setting aside the order of Commissioner (Appeal) and upholding the demands, as per the order of Additional Commissioner.

4.3 Arguing for the respondents, the Ld. Counsel submitted that

i. the matter was specifically remanded back to the Original Authority for consideration of the evidences in relation to the consumption of power. He has made detailed submissions on the same which have been recorded in the order of the adjudicating authority at Para 5 is reproduced below:

"5. As per the submission the following are the factors causing variation of power consumption.

a. labour efficiency
b. machinery consumption
c. raw materials' nature and quality
d. additional provision of machinery
e. fluctuation and failure in power supply
f. nature of finished products
g. consumption of power for lightning and other purposes
h. maintenance of machinery
i. breakdown of machinery
j. wear and tear of machinery
k. indifference of work force with regard to energy saving principles.
l. installation of roughing mill during the subject period
m. *power is used for various other purposes."*

ii. Adjudicating authority has even after direction of Tribunal not given any specific finding in this regard. The same fact has been observed by Commissioner (Appeal) in his order while dropping the demand.

iii. The Commissioner (Appeal) has considered all other evidences against him and finally arrived at a conclusion that remand cannot be sustained.

iv. In case of his own sister concern, namely Palakad Street RA Ltd. on whom the demand in the similar manner made the same was dropped by the Joint Commissioner and Revenue has not filed any appeal against the same. He accordingly prayed that appeals may be dismissed.

5.1 We have heard submissions of both sides.

5.2 We find that from Para 4 of the remand order that matter was remanded back to the adjudicating authority to render a finding in respect of power consumption specifically. The respondents have made detailed submissions in this regard, however, adjudicating authority has dealt the entire submission on the issue of power consumption in Para 14 of his order stating as follows:

> "*The factors causing variation of power consumption explained by the assessee against serial numbers "a" to "m" above are elaborately discussed by the original authority in the Order-in-Original and have been found unsustainable as there was no merit in such arguments*."

5.3 For making such observations, Original Authority has relied upon the Order-in-Original which has been set aside by the Commissioner (Appeal) long back and the order of the Commissioner (Appeal) was set aside by the Tribunal and matter remanded back. It is not understood how adjudicating authority could have relied upon the findings rendered in the order which has been set aside. when the matter was remanded for re-consideration of the same. Having not been done so, the Revenue cannot be aggrieved by the order of Commissioner (Appeal) holding as follows:

> *"The remand order stated "All pleas raised by the assessee are required to be reconsidered. The original authority shall*

also consider the ruling of the Apex Court judgment in the case of Triveni Rubber and Plastics Vs. CCE, Cochin [1994 (73) ELT 7 (SC)], which has clearly laid down that the higher consumption of electricity is a pointer to higher production of goods." Several points were raised in order to establish clandestine removal. The Hon'ble CESTAT particularly emphasized the point on power consumption. The learned adjudicating authority has observed only this much of power consumption. " The factors causing variation on power consumption explained by the assessee against serial number "a" to "m" above are elaborately discussed by the original authority in the Order-in-Original and has been found unsustainable as there was no merit in such arguments. It is clear therefore that contrary to the decision of Hon'ble CESTAT the Ld. Adjudicating Authority has not re-examined the issue of power consumption as specifically directed by Hon'ble CESTAT. We have to therefore go back to first Order-in-Original along with the appellate order. There are 3 more bases of the case. One of them is excess receipts of raw material namely, furnace oil and ingots. On furnace oil adjudicating authority's conclusion is "the investigating officers were able to verify the veracity of the statement regarding the Bill No. 566 dated 12.08.2000 and accept the party's explanation of the appellant. He has stated "it is argued by the department that it cannot be expected that the assessee could give details of actual purchases from the said supplier, where in the first place it was charged that those purchases were unaccounted. Separate cases had been booked against the supplier for clandestine removal of ingots re-rolling mills; and the drivers of vehicle No. KL-9G-1625 had categorically given statement to this effect." This obviously cannot be the ground for confirmation of a case against the present appellant. "

5.4 Since adjudicating authority has not rendered any finding in respect of the issue for which the matter was earlier remanded back to him. We hold that he was not in a position to give any adverse finding in this regards. We are firmly of the view that the backbone of the case made against the appellants is variation in power consumption. Since adjudicating authority has not found it fit to render any finding in this respect we draw adverse inference on it as has been done by the Commissioner (Appeal).

5.5 Since matter was quite old, we do not find any reason for again remanding back the matter to the adjudicating authority, for rendering the finding on this aspect.

5.6 All the other evidences have been well considered by the Commissioner (Appeal) in his order for dropping the demands.

5.7 We also agree with the finding of the Commissioner (Appeal) that in the case similarly placed therefore demand of duty has been dropped by the Joint Commissioner. It is a settled law that cannot pick and choose for making the demands in respect of similar, identical place or persons on the same issue.

6. Accordingly, both the appeals filed by the Revenue are dismissed.

(Operative portion of the Order was pronounced
in Open Court on **22/02/2019**)

SANJIV SRIVASTAVA
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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