

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

Appeal(s) Involved:

E/82-86/2009-DB

[All are arising out of common Order-in-Original No. 16/2008
dated 31/10/2008 passed by Commissioner of Central Excise,
BANGALORE-I]

**1. KAMAL KUMAR BHUWALKA,
MANAGING DIRECTOR**

M/S BHUWALKA CASTINGS AND
FORGINGS PVT LTD (FORMERLY
KNOWN AS M/S BHUWALKA STEEL
INDUSTRIES LTD) PLOT NO.18 &19,
TAMAKA INDUSTRIAL AREA, KOLAR

**2. M/s. BHUWALKA CASTINGS
AND FORGINGS PVT LTD**

PLOT NO.18 & 19, TAMAKA
INDUSTRIAL AREA, KOLAR

**3. KISHAN KUMAR BHUWALKA,
DIRECTOR**

M/s. Bhuwalka Alloys Pvt Ltd,
Whitefield Road
BANGALORE
KARNATAKA
00

**4. Shri Nisith Chakraborty
Assistant Manager
(accounts)**

M/s. Bhuwalka Castings And Forgings
Pvt Ltd, (formerly Known As M/s.
Bhuwalka Steel Industries Ltd.), Plot
No. 18&19, Tamaka Industrial Area
KOLAR
KARNATAKA
00

Appellant(s)

**5. Shri B V Raghu Weighment
In Charge**

M/s, Bhuwalka Castings And Forgings
Pvt Ltd, (formerly Known As M/s.
Bhuwalka Steel Industries Ltd), Plot
No. 18&19, Tamaka Industrial Area,
KOLAR
KARNATAKA
00

Versus

C.C.E.-BANGALORE-I

POST BOX NO 5400...CR BUILDINGS,
BANGALORE,
KARNATAKA
560001

Respondent(s)

Appearance:

Mr. Jaikumar, Advocate

SWAMY ASSOCIATES
G-8, FORTUNA ICON, APARTMENTS, JODIDAR
ASHWATHAPPA FARM, SAHAKARA NAGAR,
BANGALORE 560 092

For the Appellant

Mr. Madhup Sharan, AR

For the Respondent

Date of Hearing: 19/11/2018

Date of Decision: 08/03/2019

CORAM:

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

HON'BLE MR. C. J. MATHEW, TECHNICAL MEMBER

Final Order No.20244-20248/2019

Per : C.J.MATHEW

These appeals of M/s Bhuwalka Steel Industries Pvt Ltd and four others assail order-in-original no. 16/2008 dated 31st October 2008 of Commissioner of Central Excise, Bangalore-I which has confirmed duty liability of Rs.7,71,73,608/- under section 11A of Central Excise Act, 1944, along with applicable interest and imposed penalties of like amount at the section 11AB of Central Excise Act, 1944, besides imposing penalties against the company as well as other individuals under rule 25 and rule 26 of Central Excise Rules, 2002.

2. Proceedings were initiated against the Kolar Unit of the appellant's company who were in the business of manufacture of 'MS ingots' that were entirely cleared to their re-rolling unit at Whitefield. The case against the assessee was that, following the termination of their assessment under computed levy scheme, in which they had claimed power consumption of 500 units of per metric tonne of ingot manufactured, the electricity consumption between 2002 and 2007 were much beyond the possible threshold of over 700 units per tonne. The impugned order justified the computation of consequential differential duty on the removal of 'steel ingots', allegedly manufactured in addition by use of power so concealed, with reference to absence of registers for inward and outward movement, the weighment slips, recovered during the search, indicating use of transport facilities and the undisputable expenditure on electrical energy.

3. Challenging these findings, Learned Counsel for the appellants submits that there is no dispute that the goods allegedly manufactured by them are also cleared to Whitefield and that, even so, valuation could only take recourse to rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. According to him, the quantum of power consumed did not make allowance for the utilization of 'diesel generating sets', that

the nature of scrap could alter the power required, the need for energy to restart consumed energy at different efficiency, that the furnace efficiency is impacted by continuous use and that the norms of the survey report of National Institute of Secondary Steel Technology clarifies that no benchmark could be insisted on in the absence of any international data pertaining to induction furnace of 0.5 to 8 T capacity, that theoretically 400 KWh/T of power is required to melt one ton of mild steel in the induction furnace of 0.5 to 8 T capacity and to raise the temperature to 1630 C in any melting furnace. It was also pointed out that ideally, overall efficiency of an induction furnace comes to about 60% and specific power consumption rises to about 66KWh/T and that considering all practical operating parameters and conditions such as efficiency of DRI, tapping temperature, lining condition of induction furnace, yield percentage of liquid steel to solid ingot and the switching off the furnace during slag off, about 1427 KWh/T of power could be required to produce 1 MT of pencil ingots. In the said report, it is further stated that the specific power consumption goes up further depending upon negative variation/deviation of factors from ideal furnace operating conditions/parameters i.e., age of the furnace, suction of waste gases through APCD, quality of input power supply, frequent power cuts leading to shut down of the furnace, auxiliary equipment's load of 15-20%, more rejection of solid

ingots, bath boiling and consequent killing of the bath, period of operation per day etc. We also note that, in the said survey report, it is indicated that out of the 42 furnaces surveyed, 19 (42%) showed specific energy consumption of more than 1500 KWh/T and all with 60-90% direct reduced iron usage.

4. It is also further submitted that the decision of the Hon'ble Supreme Court, upholding the findings of the Hon'ble High Court of Allahabad, in *Commissioner of Central Excise, Meerut-I v. RA Castings Pvt Ltd [2012(26) STR 262 (All.)]*, that excess production of 'steel ingots' estimated on the basis of higher electricity consumption is not sufficient proof of clandestine removal, is applicable to the present dispute. It is pointed out by Learned Counsel that it is beyond imagination that 33,000 MTS of 'MS ingots' could be handled clandestinely without bears a logistic nightmare and is inconsistent with the wherewithal available at the manufacturing unit. It is contended that the failure of the jurisdictional authorities to test the production efficiency, the insustainability of various allegations that relied upon recorded statements disproved during cross-examination and the fact that an audit of the enterprise under section 14A of Central Excise Act, 1944 and, more particularly, the resort to inappropriate Rules for computation of assessable value justified the setting aside of the

impugned order.

5. Learned Authorized Representative relies upon the decision of the Tribunal in *Bhagwati Ispat Pvt Ltd v. Commissioner of Central Excise, Bhopal* [2015 (328) ELT 423 (Tri. Del.)] and in *Rattan Steel Works v. Commissioner of Central Excise, Chennai* [2009 (236) ELT 152 (Tri. Chennai)]. According to him, the adjudication order has not gone beyond the submissions of the assessee for ascertaining the utilization of power which was well covered by further removal of downstream goods by their own unit.

6. It was fairly conceded by Learned Counsel that the production of their downstream unit, which utilized the goods that were, admittedly, supplied to a third of its total capacity was not clear of the taint of clandestine removals which, nevertheless, had been settled under the appropriate provisions of law. He relies upon circular no. 1053/2/2017-CX dated 10th March 2017 of Central Board of Excise & Customs which directs that

'14.9 Corroborative evidence and Cross-examination: Where a statement is relied upon in the adjudication proceedings, it would be required to be established though the process of cross-examination, if the notice makes a request for cross-examination of the person whose

statement is relied upon in the SCN. During investigation, a statement can be fortified by collection of corroborative evidence so that the corroborative evidence support the case of the department, in cases where cross-examination is not feasible or the statement is retracted during adjudication proceedings. It may be noted retracted statement may also be relied upon under given circumstances. Frivolous request for cross-examination should not be entertained such as request to cross examine officers of CERA.'

to point that failure to validate through cross-examination renders the statements, and slips, unacceptable for sustaining the case of Revenue. We take note that the adjudicating authority has not recorded any finding on the submissions relating to receipt of the alleged clandestinely removal inputs at the downstream unit or of diversion of such clandestinely manufactured goods to any other destination. It is undisputedly clear that there is neither an allegation, nor evidence, of any additions to the cost of production beyond that computed under rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 for the purpose of discharge of duty liability on the licit clearance of the goods.

7. The total cost of production over the period of dispute is

not questioned. All that is doubted is the 'unit cost' arrived at for discharge of duty liability. The finding that the value declared by the appellant, on the basis of an inference that the cost at which the goods are procured by the downstream unit was higher than that for the clearance of the final product, was mis-declared does not appear to have a logical base as the cost of production, net of the notional profit for the purposes of valuation, is certainly below the sale price of goods manufactured by the downstream unit. The various decisions cited by Learned Authorized Representative will not stand Revenue in good stead as the circumstances of exclusive clearance to their own unit and the failure to render any finding other than that of electricity consumption in excess of that which was ascertained to be the per unit requirement compared to the assessment under the compounded levy scheme does not appeal to us.

8. In the absence of any finding of un-accounted expenditure on manufacture or of any evidence of illicit removal, it would appear that there is a fundamental flaw in the findings of the original authority. The adjudication order has relied upon power consumption to allege that there has been an additional production and has applied the per unit rate to this additional production without taking into consideration the indisputability of

the total cost of production. In the absence of an attack on the total cost of production, the duty liability discharged on the said value for the entire period of two years is not susceptible to challenge as that which has not been paid as duties of Central Excise.

9. In the absence of any logic for calculation of additional duties, there is no justification for sustaining this impugned order. Accordingly, we set aside the impugned order and allow the appeals.

(Order was pronounced
in Open Court on **08/03/2019**)

S.S GARG
JUDICIAL MEMBER

C.J. MATHEW
TECHNICAL MEMBER

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