CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. 1

Central Excise Appeal No. 768 of 2009

(Arising out of Order-in-Original No. 12/2009-CE dated 25.05.2009 passed by the Commissioner of Central Excise & Customs, Calicut)

M/s. M.A Steels Pvt Ltd. **....Appellant**
Nida, Kanjikode, Palakkad(Kerala)

VERSUS

C.C.,C.E.& S.T-Calicut **....Respondent**
Central Revenue Building,
Mananchira, Calicut,
Kozhikode,
Kerala
673001

WITH

Central Excise Appeal No. 769 of 2009

(Arising out of Order-in-Original No. 12/2009-CE dated 25.05.2009 passed by the Commissioner of Central Excise & Customs, Calicut)

Smt. K.K Hajira, Managing Director **....Appellant**
of M/S MA steels Pvt Ltd.
Nida, Kanjikode, Palakkad(Kerala)

VERSUS

C.C.,C.E.& S.T-Calicut **....Respondent**
Central Revenue Building,
Mananchira, Calicut,
Kozhikode,
Kerala
673001

AND

Central Excise Appeal No. 770 of 2009

(Arising out of Order-in-Original No. 12/2009-CE dated 25.05.2009 passed by the Commissioner of Central Excise & Customs, Calicut)

Shri. Yousuph Mekkoth, Director of **....Appellant**
M/s. MA steels Pvt Ltd
Nida, Kanjikode,Palakkad(Kerala)

VERSUS

C.C.,C.E.& S.T-Calicut **....Respondent**
Central Revenue Building,
Mananchira, Calicut,
Kozhikode,
Kerala
673001

APPEARANCE:

Shri V.M. Doiphode, Advocate for the appellant
V.M. Doiphode & Co.
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Shri…P.Gopa Kumar, Joint Commissioner, Authorized Representative for the Respondent

CORAM: HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO. 20017-20019/2019

DATE OF HEARING: 29th November, 2019
DATE OF DECISION: 7th January, 2020

PER: P. ANJANI KUMAR

The Appellants, M/s M.A. Steels, are manufacturers of MS Ingots. Preventive officers of Central Excise, Calicut visited the premises of the appellants on 14-2-2006 and noticed that production was not accounted for since 14.12.2005 and raw material was not accounted since 14.7.2005;

there was a bag containing production slips, some invoice books and scrap purchase slips concealed in a bag secreted under a table in the room occupied by the Production manager Shri Shanavas, who admitted that the documents relate to unaccounted procurement of scrap, manufacture of ingots and clearance of the same. Statements of Shri Mamu Paloli, Administrative Manager and Shri Shanavas, Production supervisor were recorded.

(i). In a follow up action premises of M/s Gasha Steels Pvt Ltd were also searched; it was found that there were several clearances of CTD Bars/scrap on parallel invoices; there was an excess of 78.080 MT of MS ingots and 12.500 MT of Bars/Rods; Shri P.A. Amanulla, director of M/s Gasha Steels accepted unaccounted receipt of ingots from the appellants. They paid 50, 00,000 towards duty liability.

(ii). Premises of M/s Scot free Steels Ltd was also visited and 11.21 MT of ingots were found in excess; Shri Mohammed Mustafa, Director of M/s Scot free Steels Ltd, though initially could not explain the difference and blamed it on weighment difference, in his statement dated 27.4.2006 accepted that during January and February 2006, they received 300 MT of unaccounted ingots from the appellants. They paid 8, 20,000 towards duty liability.

(iii). Premises of M/s Lal steels Pvt Ltd were visited on 27.4.2006 and excess quantity of 7.735 MT of ingots was found; Shri Bharat Tantia, Director accepted that they have purchased unaccounted ingots from the appellants. They paid 2, 09,000 towards duty liability.

2. Investigation was conducted; various other premises were also searched; statements of different persons were recorded. Scrutiny of the records, documents, statements revealed that

(i). As per the weighment slips the appellants have concealed receipt of 5206.456 MT of scrap during May 2004 to April 2005; as per two handwritten statements regarding purchase of scrap, 9,333.34 was unaccounted during March-November 2004; as per statement of payments they have purchased scrap worth 11.69 Cr during March, 2004 - March, 2005.

(ii). as per statement showing production and sales of MS ingots, the unaccounted production was 912 MT during January, 2004 to October, 2004; 585.946 MT during February, 2005 to October, 2005

(iii). appellants were penalised for power theft; unaccounted production as per average consumption of electricity was 367.600 MT.

(iv). As per weighment slips and the parallel invoices 231.520 MT ingots were cleared o M/s Gasha Steels.

In view of the above, it was concluded that the appellants have supressed a production of 16,274.565 MT of ingots. A show cause Notice no 65/2006 dated 9/8/2006 was issued to the appellants demanding duty of Rs 3,63,32,351; seeking confiscation of excess stock of 78.080 MT seized at M/s Gasha Steels, 11.21 MT seized at M/s Scot free Limited and 7.735 MT seized at M/s Lal Steels Pvt Ltd; seeking to impose penalty on Smt Hajira K.K. Managing Director, Shri Yousuf Mekkoth, Director and Shri T.P. Shanasvas, Production supervisor of the appellants and M/s Gasha Steels, M/s Scot free Limited and M/s Lal Steels Pvt Ltd. The Show Cause Notice was adjudicated vide order No 12/2009 dated 12-5-2009. Commissioner confirmed duty with equal penalty under section 11AC of CEA, 1944; confiscated goods seized while allowing redemption on payment of fine of Rs 3, 17,880, Rs 46,330 and Rs 38,250; imposed penalty of Rs 20,000 on Smt Hajira K.K. Managing Director, Rs 20,000 on Shri Yousuf Mekkoth, Director and penalty of 10,000 each on M/s Gasha Steels, M/s Scot free Limited and M/s Lal Steels Pvt Ltd. Hence, appeals 768,769 and 770 of 2009.

3. The Learned Counsel for the appellants submits that on the same set of evidences, a SCN dated 10.08.2006 was issued to M/s Gasha Steels Pvt. Ltd. which came to be adjudicated by the same Commissioner vide OIO No. 11/2009 dated 12.05.2009. Learned Counsel submits that the following are common to both the SCNs:

(i) Documents seized from the premises of the appellants on 14.05.2006 and the averment that most of the clearance of MS Ingots were affected to M/s Gasha Steels Pvt. Ltd. up to December, 2005.

(ii) Sh. P.A. Amanulla, Director of M/s Gasha Steels in his statement dated 15.02.2006 stated that purchase of Ingots from the appellants was made without any documents in cash.

(iii) Statement of Sh. Yosuph Mekkaoth, Director of appellants states that entire sales were to M/s Gasha Steels Pvt. Ltd.

(iv) Sh. K.Anandan, Accounts Manager of appellants in his statement dated 21.02.2006 said that more than 90% of the sales were made to M/s Gasha Steels.

(v) Sh. Jai Prakash and Sh. Manikandan, Drivers in their statements dated 24.02.2006 stated that Ingots were mainly transported to M/s Gasha Steels in three trucks. This was also stated by Sh. Shanavas, Production Supervisor of appellants.

4. Learned Counsel further submits that the following are common to the case of the appellants decided vide OIO No. 12/2009-CE dated 12.05.2009 and OIO No. 11/2009 dated 12.05.2009 passed against M/s Gasha Steels:

(i) In respect of the appellants, it was held that Investigating Officers have built up a case on plethora of evidences resting on suppression of raw material, unaccounted production, clandestine removal by raising parallel invoices which were confessed in the statements of Directors, Managers, Supervisors and other persons; mutually confirmatory statements are arrayed.

(ii) As per weighment slips recovered from the appellants 14632.400 MT of Ingots were cleared mainly M/s Gasha Steels, Palakkadu.

(iii) on the one hand, Learned Commissioner holds that admission statements and parallel sets of invoices recovered from the files and the Annexure -C statement of production of steel are some of the relevant and affirmative evidences, on the other hand, in respect to M/s Gasha Steels, he finds on the allegation that in all probability, 15898.175 MT of MS Ingots were removed from M/s MS Steels, I find that other than the statement of certain individuals, documents/evidences to show quantification has been carried out do not (barring some instances) have any clear indication that the goods were specifically cleared to M/s Gasha Steels Pvt. Ltd; the only tangible evidence of clearances made to M/s Gasha Steels Pvt. Ltd. are the 150 duplicate invoices recovered from M/s MA Steels Pvt. Ltd; Learned Commissioner also observed, in respect of M/s Gasha Steels, that even assuming that M/s Gasha Steels Pvt. Ltd. had received a quantity of 15898 MT of MS Ingots from the appellants, the realization of sale proceeds at the prevailing rates would exceed Rs.26 crores whereas as per Annexure-III it works out to Rs.13 crores only.

(iv) In respect of the appellants, Learned Commissioner finds that the appellants in their reply dated 24.03.2007 stated that the weighment slips used factual evidence dispatch of MS Ingots whereas in respect of M/s Gasha Steels, he finds that Annexure-III weighment slips cannot be relied upon as a valid evidence as most of the slips are blank.

(v) In respect of the appellant, he holds that the appellants had suppressed the production of 16274.565 MT of Ingots and cleared the same without accounting and without payment of duty whereas in respect of Gasha Steels, he finds that in the light of conflicting nature of evidences, I find that Annexure-I parallel invoices raised by M/s MS Steels (appellants) to M/s Gasha Steels which contained the required date, invoice number, quantity etc. can be relied as a valid tangible piece of evidence to sustain the allegations to a reasonable level that around 2374.4 MT of Ingots were received by M/s Gasha Steels for conversion.

5. Learned Counsel submits that the inconsistency in the orders passed by same authority points out to the fact that the evidence available therein is not enough to sustain the allegation of evasion of duty against the appellants. He relies upon Castrol India Ltd., 2015 (323) ELT 726 (Madras). He submits that as the Department has not appealed against the order of Learned Commissioner in respect of M/s Gasha Steels, it was not correct to confirm the demand against the appellants on the same set of evidence. He relies upon P&B Laboratories Ltd., 2015 (319) ELT 553 (SC). Relying on Joy Vs Regional Transport Authority, 1999 (105) ELT 275 (Ker.) and Changzhou Yongfa Corduroy Co. Ltd., 2011 (269) ELT 218 (Kar.), he submits that inconsistency cannot be accepted. He further submits that as the

Commissioner held that demand against M/s Gasha Steels is not maintainable, the demand against the appellants which is also on the same set of evidence cannot be held to be maintainable and therefore, he is liable to be set aside.

6. Learned AR for the Department reiterates the findings of the Ld. Commissioner and submits additional written submissions wherein he submits that the case pertains to clandestine removal of steel by the appellant; the case is built up on solid evidence collected from all concerned with the clandestine operations; Learned Commissioner has considered all the aspects in establishing clandestine removal. Learned AR further submits that it was proved by the statements of persons who are holding key positions in the appellant's factory that they were indulging in purchase of scrap in cash without accounting for the same and using the same in the manufacture of Ingots cleared clandestinely; Sh. K.Mammu Paloli, Administrative Manager, Sh. Shanavas, Production Supervisor and Sh. Anandan K, Accounts Manager of the appellants have accepted the *modus operandi*; the excess stock seized at M/s Gasha Steels, M/s Scot Free Steels etc. prove the clandestine removal; duplicate invoices were recovered; weighment slips were recovered and the case is strengthened by the electricity bills. The argument of the Learned Counsel for the appellants that there is a mis-match between these two cases is not valid as two cases are separately dealt in two OIOs with substantiating facts. He relies upon the following case laws:

- *Kairali Steels and Alloys Pvt. Ltd., and others Vs CCE, Calicut, 2019 (8) TMI 872-CESTAT Bangalore.*
- *Paragon Steels (P) Ltd. Vs CCE, Calicut, 2018 (15) GSTL 298 (Tri. Bang.).*
- *Prakash Industries Ltd. Vs CCE, Raipur, 2017 (358) ELT 1149 (Tri. Delhi).*
- *K.K. Plastics Vs CCE, 2019 (1) TMI 909- CESTAT Bangalore.*
- *Reliance Cable Industries Vs CCE, Delhi, 2018 (1) TMI-1314- CESTAT Delhi.*
- *Raghav Ispat Vs CCE, Hyderabad-III, 2018 (1) TMI 259-CESTAT Hyderabad.*
- *Prakash Metal Works VS Collector of C.Ex. Ahmedabad, 2007 (8) TMI 32 (SC).*
- *S.M. Steel Ropes Vs CCE, Mumbai, 2014 (304) ELT 591 (Tri. Mumbai)*
- *CCE, Indore Vs Pithampur Alloys Casting Ltd., 2014 (314) ELT 113 (Tri. Del.)*
- *Ramchandra Rexins Pvt. Ltd. Vs CCE, Bangalore-I, 2013 (295) ELT 116 (Tri. Bang.).*
- *Lawn Textile Mills Pvt. Ltd. Vs CCE, Salem, 2013 (297) ELT 561 (Tri. Chennai)*
- *Lucky Dyeing Mills P. Ltd. Vs CCE, Surat, 2008 (222) ELT 543 (Tri. Ahmd.)*
- *Prakash Industries Ltd. Vs CCE, Raipur, 2017 (358) ELT 1149 (Tri. Del.)*
- *CCE, Trichy Vs Anjaneya Steel Rolling Mills, 2005 (185) ELT 158 (Tri. Chennai)*
- *Ahmednagar Rolling Mills Pvt. Ltd. Vs CCE, Aurangabad, 2014 (300) ELT 119 (Tri. Mumbai)*

- *Sri Rama Machinery Corporation Ltd. Vs CCE, Chennai-I, 2017 (348) ELT 540 (Tri. Chennai)*
- *CCE, Raipur Vs Steels Abrasives, 2017 (357) ELT 678 (Tri. Del.)*
- *Gulabchand Silk Mills Pvt. Ltd. Vs CCE, Hyderabad-II, 2005 (184) ELT 263 (Tri. Bang.)*
- *Somani Iron & Steels Ltd. Vs CESTAT, 2011 (270) ELT 189 (All.)*
- *R.S. Company Vs CCE, 20174 (351) ELT 264 (M.P.)*
- *Collector of Customs Vs D.Bhoormull, 1983 (13) ELT 1546 (SC)*

7. Learned Counsel for the appellants vide written reply dated 18.12.2019 rebuts the written submissions of the Learned AR and states that the submissions of Learned AR are irrelevant as the two cases are not independent to be decided separately on the basis of evidence available therein. The allegations in both the SCNs are based on same set of evidences unearthed in the same investigation. The allegation in one SCN is negated in another order and therefore, the submissions on this count are not valid. Learned Counsel once again relies on the decision of Hon'ble Kerala High Court in the case of Joy (supra) and says that the Tribunal referred to this case in Wipro G.E. Medical Systems Pvt. Ltd., 2010 (253) ELT 234.

8. Heard both sides and perused the records of the case. On going through the records of the case, we find that both the issues have genesis in the investigation initiated by the Department against the appellants. On finding that majority of the clandestine removals by the appellants were made to M/s Gasha Steels, investigation was extended to M/s Gasha Steels and SCNs were issued to both the parties. We find that the entire evidence in the cases is on the basis of documents recovered in the form scrap purchase slips, weighment slips, parallel invoices, suppressed electricity consumption. The case also stands on the alleged confessional statements of Shri Mamu Paloli, Administrative Manager, Shri Shanavas, Production supervisor, Shri P.A. Amanulla, director of M/s Gasha Steels, Shri Mohammed Mustafa, Director of M/s Scot free Steels Ltd, Shri Bharat Tantia, Director of Lal Steels, Shri Yousuf Mekkoth, Director of the appellant, Sh. Abdul Gafoor, Managing Director of M/s Gasha Steels Pvt. Ltd. and others were recorded. On the basis of the statements and records, it was alleged that the appellants have clandestinely removed a quantity of 16274.565 MT of MS Ingots without payment of duty. We find from the statements of different persons that most of the clearances were made to M/s Gasha Steels in fact, the SCN at Para No. 38 categorically avers that *"from the above, it is found that M/s MA Steels Ltd. had removed a total quantity of 15898.175 MT of MS Ingots by way of sale and without payment of duty to M/s Gasha Steels Pvt. Ltd. during the period from March 2004 to February 2006 (up to 14.02.2006)"*. We find that other than M/s Gasha Steels only two other parties like M/s Scot Free Steel Ltd. and M/s Lal Steel Ltd. have been mentioned in the SCN. No name of any other purchaser is ever whispered.

9. Under the circumstances, it is to be construed that out of 16274.565 MT of Ingots alleged to have been removed by the appellants, 15898.175 MT of Ingots are alleged to have been cleared to M/s Gasha Steels. We find that Learned Commissioner in his order in respect of M/s Gasha Steels has categorically observed at Para 107 that "*in all probability 15898.175 MT of MS Ingots were removed from M/s MA Steels Pvt. Ltd. during the period March 2004 to February 2006 (up to 14.02.2006), as mentioned supra. However, I find that other than the statements of certain individuals, the documents/evidences on which the quantification has been carried out do not, barring some instances, have any clear indication that the goods were specifically cleared to M/s Gasha Steels Pvt. Ltd. The only tangible evidence of clearances made to M/s Gasha Steels Pvt. Ltd. from M/s MA Steels Pvt. Ltd. are the 150 Nos. of duplicate invoices recovered from M/s MA Steels, as per which, it is seen that during the period from 16.01.2002 to 14.02.2006, they have removed 2406.52 MT of MS Ingots to M/s Gasha Steels Pvt. Ltd. On subtracting the removals made prior to March 2004, the quantity cleared during the period 25.06.2004 to 14.06.2006 works out to 2278.24 MT. The previously discussed quantity of 649.880 MT of CTD Bars and 63.220 MT of Scrap found to be cleared by the noticee under the 102 Nos. of parallel invoices, during the short period from 01.07.2004 to 08.07.2004, were evidently manufactured/generated out of this lot of non-duty paid MS Ingots received by the noticee.*

10. We find that on the basis of above finding, Learned Commissioner has concluded that M/s Gasha Steels have clandestinely removed 2112.154 MT of CTD/TMT bars and 44.0032 MT of scrap cleared without payment of duty. We find that if the learned Commissioner finds that M/s Geisha Steels have only received about 2406.52 MT of MS Ingots form the appellants, as against the alleged removal of 15898.175 MT of MS Ingots by the appellants to M/s Gasha Steels, he cannot confirm duty on the alleged removal of 16274.565 MT of MS Ingots totally by the appellants. Commissioner finds that out of alleged 15, 898.175 MT of Ingots, only 2406.52 MT of MS Ingots are proved to have been removed by the appellants to M/s Gasha Steels. We find that as the department has not appealed against the OIO passed by Commissioner in respect of M/s Gasha Steels. Therefore, it is to be construed that as per the available evidences, the appellants have removed only 2406.52 MT of ingots to M/s Gasha Steels. We find that as submitted by the learned Counsel, Hon'ble Kerala High Court held in case of Joy Vs Road Transport Authority (Supra) consistency requires to be maintained even if there was an error on the part of the adjudicating authority. Commissioner cannot confirm demand on the appellants and drop the demand against M/s Gasha Steels (though to that extent), more so, where both cases stand on the same set of documents, records, evidence and statements. Logically, Learned Commissioner should have reduced the demand against the appellants, at least to the extent of quantity that was alleged to have been removed to M/s Gasha Steels, when he holds that clandestine receipt by M/s Gasha Steel is not evidenced. If the clandestine receipt by M/s Gasha Steel is not established, logical conclusion is that clandestine clearance by the appellants is not also established to that extent. The inconsistency becomes more glaring when we note that both the orders are passed on the same day. We find that the appellants cannot be victimised for the inconsistency.

11. The SCN alleges that the appellants have also cleared ingots, clandestinely without payment of duty to other units like M/s Scot Free Steel, M/s Lal Steels etc. We find that the Director of these units have accepted that they have purchased Ingots from the appellants and have not accounted for the same and payments were made in cash. They have also deposited amounts towards the duty liability. On the other hand evidence of purchase of scrap, production of ingots and sale clandestinely by the appellants has been accepted by the persons in charge and persons managing the affairs of the appellant. We find that the commissioner has given elaborate findings on the purchase of scrap, production and sale of ingots in an un-accounted manner. The clearances to these units and other units have not been separately quantified. It has been proved that goods are manufactured. MS Ingots would not evaporate in thin air. Appellants have to discharge the duty on the same. As held in plethora of cases, we find that the activities of this nature will not be documented well for obvious reasons and as far as possible any trail of evidence would be destroyed. Such cases cannot be proved by arithmetical precision. We find that the investigation has reasonably established all the ingredients required for establishing clandestine removal. Consequentially, we hold that duty evasion by the appellants shall have to be restricted to 2406.52 MT + 376.39 MT (16274.565 MT-15,898.175 alleged to have been removed to other units like M/s Scot free and Lal steel). In order to calculate the duty liability on the 2,782.91 MT of Ingots held to have been clandestinely removed, the issue needs to go back to the original authority. We hold that for the purposes of calculation of duty, lowest value per MT over the years, as discussed in the SCN shall be taken in to account.

12. Learned AR for the department has relied upon various case laws. We have gone through the same and find that the facts of the cases discussed therein are different though they deal with cases of clandestine removal or smuggling. The ratio of the cases cannot be applied just because they deal with clandestine removal or smuggling. As discussed above, the instant case could well be one of the rare of its kind where the adjudication authority has taken completely different view in two cases, though they are built up on same set of evidences. We find that the adjudicating authority has given contradictory conclusions in the two cases and the department has not appealed against the other order passed in respect of M/s Gasha Steels. Therefore, we confirm the demand to the extent of allegations in respect of clearances to other units and to the extent the adjudicating authority found to be to be acceptable in the case of clearances to M/s Gasha Steels.

13. Regarding the penalties imposed on Managing Director and Director of the appellants, we find that Smt. K.K. Hajira, MD had no role in the day to day activities of the company. No role played by her has been brought on record to establish that her acts of omission and commission have rendered the goods liable for confiscation and that she was actively involved in the duty evasion resorted to by the appellant. Therefore, we find that no case has been made to impose penalty on her. As regards, the penalty imposed on Sh. Yousuph Mekkoth, Director of the appellants, we find that the penalty imposed is already very low. Looking into the role played by Sh. Yousuph Mekkoth, Director in the facts of the case, we find that no case is made out to interfere with the impugned order therefore the penalty imposed on Sh. Yousuph Mekkoth, Director is sustainable.

14. In the result:

(i) We allow the appeal No. E/768/2009 by way of remand to the adjudicating authority, restricting the demand to 2,782.91 MT of Ingots. We direct that for the purposes of calculation of duty, lowest value per MT over the years, as discussed in the SCN shall be taken in to account. Penalty under Section 11 AC shall be restricted to be equal to the amount of duty so calculated.

(ii) The appeal No. E/769/2009 is allowed.

(iii) The appeal No. E/770/2009 is rejected.

(Order pronounced in the open court on 7th January, 2020)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Pk/pak