IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH, CHENNAI

E/300/2009 (By Assessee)
E/365/2009 and E/CO/64/2009 (By Deptt.)

(Arising out of Order-in-Original No. 3/2009 dated 27.2.2009 passed by the Commissioner of Central Excise, Chennai – II)

M/s. Sidhi Smelters Pvt. Ltd.
Commissioner of Central Excise, Chennai — Appellants

Vs.

Commissioner of Central Excise, Chennai – II
M/s. Sidhi Smelters Pvt. Ltd. — Respondents

Appearance

Shri S. Venkatachalam, Advocate for the Assessee
Shri P. Anbuchelvan, Superintendent (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **22.12.2017**

Final Order Nos. 43371 - 43372/2017

Per Bench

Since both the appeals arise out of a common impugned order, they are heard together and are disposed by this common order. For the sake of convenience, the appellant M/s. Sidhi Smelters Pvt. Ltd. is herein after referred to as the 'assessee' and the respondent is referred to as the 'Department'.

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2. Brief facts are that the assessee is engaged in the manufacture of MS ingots and also get manufactured CTD bars on job work basis. They are registered with the Central Excise Department. On gathering information that assessees are irregularly availing and utilizing CENVAT credit facility on imported scrap as well as locally procured raw materials, the Preventive Unit visited the factory on16.2.2007 and conducted investigation. The physical stock of inputs and finished goods were verified and officers found shortage of raw materials / scrap. The stock in the book / RG – I register and the physical stock showed variations. Statements of various persons were recorded. It appeared that assessee had availed irregular credit on raw materials which were found short at the time of investigation. Show cause notice was issued proposing to demand an amount of Rs.64,80,958/- being the CENVAT credit availed on imported / locally procured scrap and sponge iron, which was found short on the date of visit. It was also proposed to impose penalty under Rule 15 of CENVAT Credit Rules, 2004 r/w section 11AC of Central Excise Act, 1944. After due process of law, the original authority confirmed the demand but however did not impose penalty under section 11AC. Being aggrieved by the confirmation of demand and imposition of penalty of Rs.1,00,000/- under Rule 15 of the CENVAT Credit Rules, 2004, the assessee has filed appeal

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No.E/300/2009. The Department has filed Appeal No. E/395/2009 being aggrieved by the non-imposition of penalty under section 11AC.

3. On behalf of the assessee, Shri S. Venkatachalam, ld. counsel submitted oral and written arguments which can be broadly summarized as under:-

a. The allegation in the show cause notice is that the assessees have irregularly availed CENVAT credit of 24,36.013 MTs of scrap / sponge iron found short on 16.2.2007 when the Preventive Unit visited the assessee's factory. The allegation that there is shortage of raw materials is without any basis. The department has not conducted any physical verification of the stock by the officers. The stock taking was done merely based on eye estimation. The mahazar does not contain the weighment details of the scrap. The entire proceeding including the writing of mahazar was completed in just three hours when there was hundreds of tons of stock to be physically verified. He relied upon the decision of the Tribunal in the case of Commissioner of Central Excise Vs. Bajrang Castings Ltd. - 2007 (216) ELT 623 (Tri. Ahmd.) to argue that allegation of shortage of stock by mere eye estimation cannot be the basis for demanding duty.

b. The department does not dispute the credit taken in respect of the duty paid on raw materials. There is no allegation of clandestine removal of raw materials or finished products. The only allegation is that at the time of visit, the physical stock estimated by them did not match with the book entries. The assessee had explained the reason for the shortage being common, the assessee's explanation has not been considered by the department.

c. The assessee by their letter had submitted reconciliation statement with regard to the alleged details of shortage of 1148.175 MTs of imported scrap.

d. It is submitted that the scrap received by them contained mud, tyre, stone, rubber, plastic etc. which had to be segregated. These are not usable for the manufacture of finished products. The scrap would always contain such unwanted things which are unavoidable. While calculating duty, the department would never give any margin though they very well knew the aforesaid fact of mixing of unwanted raw materials with the scrap imported / purchased. CENVAT credit was availed on the duty paid on the scrap imported / purchased. The shortage could have been due to removal of such unwanted materials from the scrap.

e. The assessee had requested cross-examination of four witnesses. The adjudicating authority has denied the request stating that it is a delay tactics. He submitted that the assessee had not taken even a single adjournment during the proceedings and the denial of cross-examination of the witnesses has resulted in denying an opportunity to the assessee to establish their case. To support his argument, he relied upon the decision of the Hon'ble High Court of Madras in the case of Thilagarathinam Match Works Vs. Commissioner of Central Excise – 2013 (295) ELT 195 (Mad.).

f. It is pertinent to note that the adjudicating authority himself was of the opinion that there is no clandestine removal of inputs or finished goods and at the most it was only improper accounting of inputs ~~of inputs~~. Thus, the adjudicating authority refrained from imposing penalty under section 11AC and imposed penalty only under Rule 15 of CENVAT Credit Rules, 2004. This would go to show that the case of the department alleging shortage of raw materials and irregular availment of credit is without any basis. The ld. counsel relied on the following case laws:-

(i) Plastic Duniya Vs. Commissioner of Central Excise, New Delhi – 2005 (190) ELT 381 (Tri. Del.)

(ii) Arya Abhushan Bhandar Vs. Union of India – 2002 (143) ELT 25 (SC)

(iii) G.Tech Industries Vs. Union of India – 2016 (339) ELT 209 (P&H)

4. Against this, the ld. AR Shri P. Anbuchelvan reiterated the findings in the impugned order. He submitted that the assessee had availed credit on the raw materials shown as per

the books of accounts. However, on physical verification, stock of raw materials was found short. The department had conducted verification of records of the Custom House Agent through whom the assessee was importing the scraps. A visit was made to the custom licensed shipping C&F agent and transporters who had dealt with the delivery of the imported scrap. However, no discrepancy was found with regard to the quantity of raw materials imported by the assessee. The assessee could not produce the weighment slips of the containers although the transporters stated that they issued weighment slips. So also trip sheets for the movement of the cargo was not maintained by the assessee. Since the stock was found short during the time of visit of the officers, the availment of credit is irregular. The basic document for accountal of inputs is Form – 4 register maintained by the assessee. This clearly did not tally with the physical stock and established improper accountal of inputs and the availment of irregular CENVAT credit. Though the assessee contends that the imported raw material contains unwanted things and after the segregation, the quantity of stock will stand reduced etc. is not acceptable for the reason that the assessee has not maintained any worksheet with regard to the unwanted things segregated and the raw materials issued for production. The adjudicating authority has denied the request for cross-

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examination giving reasons and therefore there is no prejudice caused to the assessee by such denial of cross-examination. He submitted that the adjudicating authority though confirmed the demand has erred in not imposing penalty under section 11AC when there is huge difference between the quantity of raw materials entered in the books and the stock found in the premises. It is clear that there is shortage of raw materials and therefore the adjudicating authority ought to have imposed penalty under section 11AC of the Central Excise Act, 1944. He pleaded that the impugned order may be modified imposing equal amount of penalty on the assessee.

5. Heard both sides.

6. The foremost contention put forward by the ld. counsel for the assessee is that the department has not conducted physical verification of stock and during the visit the stock lying in the premises was quantified by mere eye assumption. The adjudicating authority in para 44 of impugned order has stated that the argument of the assessee that ascertaining stock by eye assumption is incorrect for the reason that the assessee has not objected to the methodology adopted by the officers at the time of stock taking itself. That therefore they cannot later raise objections. It is also stated that the Director and other staff have admitted the shortage. We do not find much favour with this reasoning put forward by the adjudicating authority.

Eye assumption cannot be the method for stock taking when the sole allegation is ~~short~~ shortage of raw materials. Further, the director and other staff have admitted variation in the stock with respect to book of accounts and have explained that the shortage may be due to the unwanted materials in the scrap imported / procured by them. It is also pertinent to say that during investigation the officers had conducted detailed enquiry at the end of the CHA, C&F Agent as well as transporters. They could not find any discrepancy. The discussion made in para 51 of the impugned order is noteworthy in this regard. The adjudicating authority has observed that there is no clandestine clearance of finished products or diversion of raw materials. That the only logical conclusion that can be arrived for shortage is the inputs are not properly accounted. For the same reason the adjudicating authority has refrained from imposing penalty under section 11AC of the Central Excise Act. The assessee has put forward a consistent explanation for the shortage, if any, in the quantity of raw materials. They have stated that the scrap contains much unwanted materials like mud, tyre, rubber, plastics etc. That this has not been considered by the adjudicating authority. Further, the assessee had paid duty on the quantity of the inputs / raw materials imported by them. The total ~~purpose~~ quantity of scrap and also the import of scrap duty paid is not disputed.

These being the facts, the explanation put forward by the assessee would be sufficient to hold that the shortage, if any, is due to the impurities in the scrap. Moreover, the department has not conducted any physical stock taking. Even though the director and staff have given statements that there may be shortage, the same is not relevant for the reason that in the very statements they have explained the reasons for the shortage. Ld. counsel has relied on the judgment in the case of Plastic Duniya (supra). In the said case, the Tribunal held that when the person whose statement is relied upon was not present at the time of stock taking cannot be the sole basis for concluding shortage of raw materials and demanding duty thereon.

7. Another grievance put forward by the assessee is that they were not permitted to cross-examine four witnesses. In Arya Abhushan Bhandar (supra), the Hon'ble Supreme Court had observed that it would be denial of natural justice if the assessee is not allowed to cross-examine the witnesses whose statements are being relied by the department. Similar view was taken in the case of G.Tech Industries (supra).

8. From the above discussions, we are able to safely conclude that the department has failed to establish that there is shortage of raw materials. The impugned demand is

unsustainable and requires to be set aside, which we hereby do. The appeal filed by the assessee is allowed.

9. Consequently, the appeal filed by the department is dismissed.

10. In the result, both the appeals are disposed of in the manner indicated above.

(Operative portion of the order was pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Rex

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सहायक पंजीकार / Assistant Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण,
चेन्नई / CESTAT, CHENNAI

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