CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH- COURT NO. II

Excise Appeal No. 51476 of 2019

(Arising out of order-in-original No. RPR-EXCUS-000-COM-CEX-017-2019 dated 28.03.2018 passed by the Pr. Commissioner of Central Tax, Central Excise & Customs, Raipur)

M/s Sourabh Rolling Mill Pvt Ltd. **Appellant**
Accholi Road, Kanhera,
Urla, Raipur (C.G)

VERSUS

Principal Commissioner, **Respondent**
Central Tax, Central Excise & Customs,
Central Goods and
Service Tax, Raipur (C. G)

With

Excise Appeal No. 51477 of 2019

(Arising out of order-in-original No. RPR-EXCUS-000-COM-CEX-017-2019 dated 28.03.2018 passed by the Pr. Commissioner of Central Excise & Customs, Raipur)

Shri Pankaj Agarwal, Director,
M/s Sourabh Rolling Mill Pvt Ltd. **Appellant**
Accholi Road, Kanhera,
Urla, Raipur (C.G)

VERSUS

Principal Commissioner, **Respondent**
Central Tax, Central Excise & Customs,
Central Goods and
Service Tax, Raipur (C. G)

Appearance:

Shri Anurag Mishra and Ms. Aditi Seetha, Advocates for the appellant

Shri H C Saini, Authorized Representative for the respondent

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING: 30.09.2019
DATE OF DECISION: 13.12.2019

FINAL ORDER NOs. 51641-51642/2019

BIJAY KUMAR:

1. These appeals have been filed against Order-in-Original dated 28.03.2019 passed by the Principal Commissioner, Raipur wherein the Ld. Commissioner has confirmed demand of Central Excise Duty to the tune of Rs. 3,38,76,645/- along with interest under Section 11AA of the Central Excise Act,1944 and also imposed an equivalent penalty under Section 11AC of Central Excise Act, 1944. The Ld. Commissioner also appropriated an amount of Rs. 70,00,000/- deposited by the appellant during the investigation of the case. A separate penalty of Rs. 50,000,00/- has been imposed against Director of the Company, Shri Pankaj Agarwal under Rule 26 of the Central Excise Rules, 2002.

2. In brief, the appellant is the manufacturer of M.S Ingot and TMT Bars falling under Chapter 72 of the First Schedule of the Central Excise Tariff Act, 1985. The officers of DGCEI, Regional Unit, Raipur visited the factory premises of the appellant on 31.01.2014 and found that there is no stock of raw material (Sponge Iron, Pig Iron, Ferro Silicon, Silico-Manganese, Scrap MS Ingots, MS billets) and finished products (MS Ingots, TMT Bars, Runners & Raisers, End Cuttings). During the search of the factory premises, the records of production and clearances of the excisable goods like the Daily Stock Account, the raw material Account Register, the Sale invoice Book etc. were not found. No incriminating documents were found by the officers during the search of the Factory, City office and the business premises at Kabir Nagar, Raipur. Shri Pankaj Agarwal, Director of the company informed the officers that the power connection of the factory was terminated by the Chhattisgarh State Power Distribution Company (CSPDCL) since

the month of July 2013 on account of their failure to clear the electricity charge dues. It was also noticed by the officers that there was no production activity in the factory since long and there was no staff or worker available in the factory. The ER-1 and ER-6 submitted by the appellant for the month of November 2013 shown the stock of raw material and finished goods as under:-

Description of the Goods	Quantity of Goods in M.T Closing Balance as on 30.11.2013	Clearance during Dec, 13 in M.T	Closing Balance as on date i.e. 31.01.2014, in M.T
Raw Materials:-			
Sponge Iron	6371.130	-Nil-	6371.130
Finished Goods:-			
M.S Ingots	3075.220	997.950	2077.270
Runner & Risers	37.080	-Nil-	37.080
M.S Scrap	137.290	-Nil-	137.290
TMT Bar	1177.040	-Nil-	1177.040

3. The officers recorded the statement of Shri Pankaj Agarwal in respect of the stock of raw material and finished goods. Shri Pankaj Agarwal, Director of the company submitted that the persons those who were in charge of maintaining the records have left the job since long and therefore he was not in a position to explain anything regarding the balances of the raw material and finished goods showing in the returns. He also admitted that the last invoice which was issued by them in Unit no. (I) was on 31.12.2013 and in respect of Unit II was dated 24.07.2013. Further, again a statement dated 20.01.2016 was recorded by the officers and on the basis of the said statement, it was concluded by the officers that the raw material Sponge Iron (of 6371.130MT) shown in the balance as on 31.01.2014 was actually consumed by the appellant for manufacturing of M.S Ingots (of 2077.270MT) which was then used for manufacturing of TMT bars

alleged to have been cleared by the appellant without payment of duty prior to July 2013.

4. Similarly the quantity of MS Ingot (of 111.430MT) found in the recorded balance for manufacturing of TMT Bars was also cleared without payment of duty prior to July 2013. The quantity of TMT bars i.e (of 1177.040MT) was cleared by the appellant prior to closure of their factory and the invoices issued in respect with the TMT bars during the period 08.01.2014 to 10.01.2014 are fictitious in nature and no goods were cleared. To prove this allegation in respect of the quantity (of 1177.040MT), it is alleged that the transport documents showing vehicles no. are incorrect, the buyers are also not the actual recipients of the goods and only for clearance of such quantity fake invoices were shown.

5. Similarly, demand of duty against 620.660 MT of Slag was demanded. The show cause notice dated 04.05.2016 was issued for demand of duty amounting to Rs. 3,34,93,077 in respect of clearance of 8085.320MT of TMT Bars cleared without payment of duty by the appellant prior to July 2013. Similarly demand of duty on 620.660MT of quantity of slag amounting to Rs. 3, 83,568 has been demanded on the same ground. Accordingly, Show Cause Notice dated 04.03.2016 issued to the appellant for demand of the Central Excise Duty which is totally based on two products namely; TMT Bars and Slag. The said demand was adjudicated by the Ld. Commissioner and the Ld. Commissioner has confirmed demand of Duty, penalty and interest as stated above.

6. Heard Learned Counsel, Anurag Mishra and Aditi Seetha on behalf of the appellant. They have submitted that the entire demand is based on

the closing balances shown in the ER-1 and ER-6 return. The entire show cause notice is based on inconsistency and the department is taking two stands while calculating the duty on the said finished goods. The department is demanding duty on TMT Bars and Slag only whereas no demand in respect of 'runners and risers' and 'M.S scrap' was raised in the present SCN. The vital question of law is when the allegation of the department is based on some statutory document, how some entries of that document are considered legitimate for the demand and rest are not considered and therefore under such inconsistency, no demand can be raised. The stand of the department is inconsistent and it cannot take two stands while interpreting the same statutory document. The Hon'ble Tribunal in the case of "**Sunpra energy and recovery engg. Pvt. Ltd versus Commr. Of C.E., pune" 1996 (88) E.L.T 551** has held that the department cannot adopt two stand at one time. On one hand, duty on part of the goods has been demanded by the department whereas on other part of the goods, no demand of duty has been made in Show Cause Notice. This clearly proves that the department is itself inconsistent about the said document and on the basis of such inconsistent document no demand of duty can be made from the appellant. This inadvertently proves that the entries of the said document are not a reliable piece of evidence to sustain duty on the appellant.

6.1 They relied on the judgment of the Hon'ble Apex Court namely **Commissioner of Central Excise versus Gas Authority of India Ltd. 2008 (232) E.L.T 7** in which it was held that the show cause notice is the foundation of the demand of Central Excise Duty. Therefore, the allegation made in the show cause notice should be specific and should not be contradictory in nature. In the present case, part of the finished goods were made liable for duty wherein other finished goods like Runners & Risers and M.S Scraps has not been made liable for duty. Therefore, two contrary stands in the show cause notice has been taken and the entire demand is liable to be set aside on the ground that the show cause notice is vague and not sustainable.

6.2 They further submitted that no material evidence has been brought into the record for the alleged manufacturing of 4915.030MT of TMT bars from Sponge Iron on which demand of Central Excise Duty of Rs. 2, 03, 60,300 has been made in the present Show Cause Notice. While calculating the said demand, the department has applied percentage of yield for production (of 84.71%) from Sponge Iron to M.S Ingot derived from Form IV Register from the month of June 2013. Similarly the yield for production (of 91.07%) or conversion of M.S Ingot to TMT bar has been derived from Form IV Register for the month of June 2013. Therefore by applying the yield percentage, the said demand has been raised against the appellant. This entire demand is based on one raw material i.e., Sponge Iron. It is presumed by the officers that this Sponge Iron is being used for the manufacturing of M.S Ingots and subsequently these M.S Ingots were used for manufacturing of TMT bars. As a matter of fact, M.S ingots cannot be alone manufactured from Sponge Iron only. For manufacturing of M.S Ingot, other raw materials such as Pig iron, Cast Iron Scrap, Mild Steel Scrap, Ferro Alloys etc. are also essentially needed. The conclusion of the department that 5396.980MT of M.S Ingots were manufactured out of 6371.130MT of Sponge Iron is not sustainable and not practically possible. Once the manufacturing of M.S Ingot has not taken place, question of manufacturing of 4915.030MT of TMT bar is not maintainable in the eyes of law. Therefore demand of duty of Rs, 2, 86, 17,242 which is based on average yield production for the month of June 2013 is not maintainable at all.

6.3 They further submitted as a matter of fact, the percentage of yield is totally dependent on availability of electricity, raw material quality, labour and also on the demand in the market. On the basis of yield production of the month, it cannot be concluded that the appellant has achieved that percentage uniformly in the entire financial year. It is an admitted fact in the show cause notice that this entire demand is based on the formula of percentage of yield in production. The pre-requisite or requirement for production like availability of electricity, raw material, labor force, demand in the market etc which are necessary to achieve the said percentage of production has not been adduced by the department and the entire demand of Central Excise Duty is merely based on said average production, which is not sufficient to prove clandestine production and clearance. The production based on such a formula is not sufficient to prove serious charges of clandestine removal. To substantiate their claim, the Ld. Advocate had relied upon the judgments of this Tribunal in case of **Real Ispat and Power Ltd. versus Commissioner of C.Ex., Raipur 2015 (330) E.L.T.311**; **Commissioner of C.Ex & S.T.,Udaipur versus Mittal Pigment Pvt. Ltd. 2018 (16) G.S.T.L. 41; Commissioner of C.Ex & S.T**., **Ranchi versus Akshay Roll Mill Pvt. Ltd. 2016 (342) E.L.T. 277;D.P Steels Industries versus Collector of Central Excise, Jaipur 1995 (78) E.L.T 492; Commissioner of Central Excise, Indore versus Magnum Steels Ltd. 2017 (357) E.L.T. 226.**

Therefore demand based on such average yield production total amounting to Rs. 2,86,17,242/- is unsustainable and liable to be set aside. The Larger Bench in case of **Aum Aluminium Pvt. Ltd. Versus Commissioner of C. Ex., Vadodara 2014 (311) E.L.T 354** has set the parameters to prove the charge of clandestine removal and it was held that charges of clandestine removal cannot be based on series of assumptions and presumptions. Charges should be based on evidences like unaccounted purchase of raw materials, receipt and consumption of raw materials, freight payment for movement of such raw material, dis-proportionate power consumption, capacity utilization and labor employed, unaccounted sales proceeds, substantial cash transaction and cash recovered from office or factory premises, and so on. In the present case, these clinching evidences are absolutely missing and therefore charges of clandestine removal cannot be held sustainable as far as the demand of Rs. 2,86,17,242/- is concerned. The only basis that has been relied upon in the show cause notice to prove the charges of alleged clearance is the statement of Shri Pankaj Agrawal. It is well settled principle of law that serious allegation of clandestine removal has to be adduced by illicit purchase of raw materials, use of the said raw materials for manufacturing of goods, transportation of such raw materials and sale of such illicit goods and receipt of payment of such clearances in cash. The Ld. Advocate has submitted that the only evidence which has been relied upon by the Department is the statement of Shri Pankaj Agarwal who has simply provided the yield of production of a particular month which cannot be uniformly applied for the entire period of demand. Such a statement has to be corroborated by purchase of raw material, consumption of electricity, sale of goods, transportation of such goods and receipt of payment in cash from such buyers. These clinching evidences are completely missing as far as this demand is concerned. The Hon'ble Allahabad High Court in case of **Commissioner of CUS., C.E, S &T, Ghaziabad versus Auto Gollon Industries P. LTd. 2018 (360) E.L.T 29, Continental Cement Company versus Union of India 2014 (309) E.L.T 411 and Commissioner of Central Excise, Lucknow versus Sigma Castings Ltd. 2012 (282) E.L.T 414** has held that statements should have been corroborated with other evidence also.

6.4 In respect of demand of Rs. 48,75,834 which are based on the fake invoices, the Ld. Advocate submitted that the said demand is based on the quantity showing in the ER-1 Returns. Out of the said quantity the appellant has shown clearance of 1059.920MT bars during the period 08.01.2014 to 10.01.2014 and the rest of the quantity is lying in the balance. For quantity 1059.920MT, it is alleged that merely paper transactions were made but goods were actually not moved. For this the department is relying upon the details of vehicle no. and certain statements of the vehicle owners or their authorized persons. Against the said clearances, it is alleged that in respect of the said quantity only invoices were issued but no goods were actually cleared. The vehicle no. mentioned in the said invoices, they are either incapable of transporting the goods or the vehicles no. are fictitious itself. As a matter of fact, it is an admitted fact that Shri Robin Jethani who is concerned person for issuing the invoices has left the job on 6th January 2014 and most of the invoices were issued thereafter. The appellant is not aware of who had issued the said invoices or it might be possible that since Shri Jethani was not getting the salary for a long period has intentionally mentioned the wrong vehicles no. in the invoices to equal the score with the company. It is also possible that the transport company or the transporter has informed the wrong vehicle no. to the accountant and accordingly some of the digit of the vehicle no. might have been changed during mentioning in the invoices or it might also be possible that the vehicle no. was correctly provided by the transport company but inadvertently some of the digits were wrongly mentioned and for which the difference is being shown in the vehicle type and their capacities. The department is solely relying upon the inquiries made from transport department and it is alleged that most of the vehicles are not registered with the state transport department. It is a well known fact that the vehicles which become outdated cannot register themselves with the state transport department, but it does not mean that they are inoperative. Therefore only on the basis of transport inquiry, it cannot be concluded that the said transport vehicles are non-existent.

6.5 The Ld. Advocate further submitted that even otherwise out of 27 transporters, the department has obtained statements only from 7 transporters who have stated that they have never transported the alleged goods. The department should have made inquiries from all the transporters or should have made efforts to take the statement of all the transporters, which has not been done in the present case. The appellant asked for the cross-examination of the said transporter(s) out of which only 2 appeared for cross-examination. Therefore on the basis of deposition of said transporter(s) it cannot be concluded that the vehicle used in transportation are not capable of transporting the said goods or the said vehicles are non-existent. The department has also failed to make any inquires from the buyers to whom goods have been sold during the period of 08.01.2014 to 10.01.2014. No efforts were made by the department to ascertain whether they have received the goods from the appellant or not during the period 01.01.2014 to 10.01.2014. In absence of statement of any of the buyer, it cannot be concluded that goods were clandestinely removed by the appellant on fake invoices. Therefore demand of duty amounting to Rs 43,75,834/- is also not maintainable. It is well settled principle of law that charge of clandestine removal has to be proved by adducing positive evidences and same cannot be based on mere assumptions and presumptions. Hence, the demand based on the invoices issued for the period of 08.01.2014 to 10.01.2014 is also not maintainable in the eyes of law. The entire demand is based on assumptions and presumptions and lack of evidences in the absence of inquiry from the recipients of the goods, it cannot be concluded that the invoices which were issued during the period of 08.01.2014 to 10.01.2014 are fictitious or fake.

7. Heard Ld. Departmental Representative who has reiterated the findings of the Ld. Commissioner and further submitted that the Director of the company in his statement has stated the percentage of yield production and also admitted that the goods under question were manufactured and cleared by them without payment of duty and the demand of duty and penalty is rightly confirmed by the Ld. Commissioner. The Ld. DR further submitted that the quantum of finished goods clandestinely manufactured out of the raw materials

has been computed on the basis of the production/ yield submitted, deduced from the records of the appellant for the month of June 2013 and as such the demand based on the yield of production is correctly calculated. In respect of demand of duty on the goods cleared during the period 08.01.2014 to 10.01.2014, the Ld. DR submitted that for quantity 1059.920 MT, merely paper transaction was made but no actual goods were cleared from the factory of the appellant. He further submitted that the quantity alleged to have been cleared on the vehicles which are incapable of transporting the goods and therefore the demand amounting to Rs. 45,78,834/- is based on the invoices, on which there is no actual movement of goods.

8. Considered the rival submissions made by both Ld. Advocate and the Departmental Representative.

9. We are of the considered view that the entire demand is based on the yield of production of M.S Ingot which is further used in the manufacturing of TMT Bars. We have also considered that the yield of production was in respect of only a particular month which was uniformly applied for entire demand of Central Excise Duty. At no point or stage, Department has able to prove that the appellant during the relevant period was having electricity connection to manufacture M.S Ingots and TMT Bars. It is an admitted fact that for the period the demand has been raised, the appellant did not have any power connection. Department has also failed to produce that there is any other alternate source of power to manufacture those goods. In such a situation, it is very clear that the entire demand is based on mere average yield of production and no concrete evidence to manufacture the alleged goods has been brought on the record by the department. The statement which has been relied upon by the department is only

in respect of month of June 2013 which is uniformly applied for calculating the demand. It is a settled law that the charges of clandestine removal cannot be based on some formula as already held by the Hon'ble Rajasthan High Court in **C.C.E Udaipur vs. Mittal Pigments Pvt. Ltd. reported at 2018(16)G.S.T.L 41.** It is a well settled principle of law that charges of clandestine removal cannot be based on series of assumptions and presumptions whereas should be based on evidences like unaccounted purchase of raw materials, receipt and consumption of raw materials, freight payment for movement of such raw material, dis-proportionate power consumption, capacity utilization and labor employed, unaccounted sales proceeds and substantial cash recovery from office or factory premises, and so on. In the present case, these clinching evidences are absolutely missing and therefore charges of clandestine removal cannot be held sustainable for demand of Rs. 2,86,17,242.

10. Demand of Rs. 48,75,834/- which is based on the invoices issued by the appellant during the period 08.01.2014 to 10.01.2014 for a quantity of 1059.920, we are of the considered view that the said demand is confirmed by the Ld. Commissioner merely on the ground that some of the vehicle number shown in the invoices are incapable of transporting the alleged goods. The said conclusion was drawn by the Ld. Commissioner only citing the few incidents, wherein number of cases no inquiries were made either from the transporters or from the recipients of the goods. Out of 27 transporters, statements of only 7 transporters were recorded by the officers and only 2 appeared for their cross-examination. In such a scenario, we are inclined to accept the contention of the appellant that in absence of the statements of

the recipients of the goods and cross-examination of all the transporters whose statements were recorded, it cannot be concluded that no goods were cleared from the appellant's premises. As such, in absence of sufficient evidences which are essential to prove the charges of clandestine manufacture and its removal from the factory of the appellant, the demand which are based on the invoices issued by the appellant during the period of 08.01.2014 to 10.01.2014 is also not maintainable and hence liable to be set aside.

11. In view of the above findings, we are of the considered view that the demand is not sustainable and accordingly, we set aside the impugned order and allow the appeals filed by the appellant and its Director with consequential relief to the appellant.

(Order pronounced in court on 13.12.2019)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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