CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 51925 of 2017 [SM]

[Arising out of Order-in-Appeal No.BHO-EXCUS-002-APP-172-17-18 dated 05.09.2017 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Raipur (C.G.)]

M/s.Balajee Steel Industries **...Appellant**
Plot No.220-221 Urla Industrial Area, Urla
Raipur (C.G.)

VERSUS

Commissioner of Customs, Central Excise and Service Tax, Raipur (C.G.) **...Respondent**
Central Excise Building, Tikrapara,
Dhamtari Road, Raipur (C.G.)

WITH

Excise Appeal No. 51927 of 2017 [SM]

[Arising out of Order-in- Appeal BHO-EXCUS-002-APP-173-17-18 dated 05.09.2017 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Raipur (C.G.)]

Shri. J.P. Agarwal
Director of M/s. Balajee Steel Industries **...Appellant**
Plot No.220-221 Urla Industrial Area, Urla
Raipur (C.G.)

VERSUS

Commissioner of Customs, Central Excise and Service Tax, Raipur (C.G.) **...Respondent**
Central Excise Building, Tikrapara,
Dhamtari Road, Raipur (C.G.)

APPEARANCE:

Shri Manish Saharan, Advocate for the Appellant
Shri K. Poddar, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 14/11/2019
DATE OF DECISION : 10.06.2020

FINAL ORDER No.50686-50687/2020

RACHNA GUPTA:

The present order disposes of two appeals, the order in appeal bearing No. BHO-EXCUS-002-APP-172-17-18 dated 05.09.2017 being common and both the appellants being co-noticees.

2. The facts in brief for the purpose are as follows:

2.1 M/s Balajee Steel Industries are engaged in the manufacture of MS Angle, Bar, Round, Square, Flat etc. They are also availing Cenvat credit of duty paid on the inputs and capital goods as provided under Cenvat Credit Rules 2004 and utilizing such credit towards payment of duty on their final products. Acting upon intelligence about the appellant to be engaged in clandestine removal of excisable goods, the factory premises of appellant were searched on 18.01.2012.

2.2 On comparison of the physical stock of their finished goods and raw materials with that of the declared stock, the officers found shortage in the stock of Round/Square/Bar, Angle, Flat, MS Scrap(finished goods) and Plate cuttings/Rail Cuttings/End Cuttings (Raw materials), vide Panchnama dated: 19.01.2012.

2.3 The Appellant paid Rs. 3,86,081/- vide Cenvat Credit on 19.01.2012 and remaining duty of Rs. 20,000/- vide challan dated 20.01.2012 against the shortage of finished goods and raw material found during the physical verification of stock on 19.01.2012

2.4 During the course of preventive operation at the factory premises of appellant some loose sheet of papers were also recovered which were handwritten containing entries related to detail of clearance and receipt of goods in respect of loading and unloading of goods.

2.5 It was found that the particulars of dispatches of the goods mentioned in the Central Excise Invoices issued by Appellant were found to be entered in the loose papers in respect of some of the entries, whereas, they have not issued Central Excise Invoices in respect of several entries made in the loose papers under the heading "loading".

2.6 Shri. Pawan Agarwal when asked about the difference could not explain the reason. The appellant paid Rs. 3,86,081/- vide Cenvat Credit Entry No. 227 dated 19.01.2012 and remaining duty of Rs. 20,000/- vide GAR challan no. 50019 dated 20.01.2012 against the shortage of goods found during the physical verification of stock.

2.7 Thus, it was alleged that 939.218 MT of MS Flats as found entered in the loose papers recovered during the course of search have been removed in a clandestine manner without making necessary entries in their statutory records and without payment of Central Excise Duty with the intention to evade payment of duty and an amount of Rs. 39,24,978/- was proposed to be recovered along with interest at appropriate rate and proportionate penalties.

2.8 The Ld. Joint Commissioner vide its order in original dated 28.03.2016 confirmed the demand of Central Excise Duty of Rs. 39,24,978/- along with interest and penalty. Also imposed Rs.5,00,000/- penalty on Shri. JP Agarwal under Rule 26 of Central Excise Rules, 2002. Further Commissioner Appeals upheld the adjudication order vide order dated 05.09.2017. Hence the present Appeals before this Tribunal.

3. I have heard Mr. Manish Saharan, learned Counsel for the Appellant and Mr. K. Poddar, learned D.R for the department.

3.1 It is submitted on behalf of the Appellant that the Ld. Commissioner in the impugned order merely on assumptions and presumptions basis has considered the shortage in stock due to non-accountal of clearances without payment of duty. In the impugned matter he ignored the statement of Shri. JP Agarwal, Director of Company, in his statement dated 27.12.2012, which has clearly explained the circumstances resulting into difference between the physical stock and the recorded balance in their books.

3.2 The reason given by JP Agarwal has nowhere been disputed by the Commissioner. It is also submitted that the stock has been determined on the basis of sectional weight due to this only variation is found, which can be ignored, else there is not an iota of evidence of clandestine removal. Except the noticed shortages there is not a single evidence relied upon by the department for the confirmation of demand. The said shortage is impressed to have been duly explained.

3.3 Some of the judgments relied upon by the Appellants are as under:

1. **2018 TIOL 3078 DVS Steel & Alloys vs CCE Gaziabad (Cestat All.),**

2. **2016 TIOL 1981 Raikalispat Udyog Pvt. Ltd. Vs CCE Raipur(Cestat Del.),**

3. **2015 TIOL 2655 CCE Ludhiana VS Anand Founders & Engineers (P&H HC),**

4. **2016 TIOL 919 Jalan Concast vs CCE Allahabad(Cestat All.)**

3.4 Impressing upon the above decisions the order under challenge is prayed to be set aside and the appeals are prayed to be allowed.

3.5 To rebut these submissions it is mentioned by ld DR that the allegation made in the SCN issued to the Noticees are based on the information reflected in the documents containing data and the outcome of physical stock verification of Noticee No. 1 evidencing shortage of stock of finished goods and raw materials, as was conducted by Central Excise officers in the presence of independent panchas and representatives of the Noticee No.1. This fact of the shortage was accepted by one of the directors of the company in his statement. The said evidence and said statement has been relied upon by the adjudicating authority below while confirming the demand. Hence there is no infirmity in the order under challenge. Appeals are accordingly prayed to be dismissed.

4. After hearing the rival contentions and perusing the entire record of appeals, I am of the opinion as follows:

4.1 The alleged clandestine removal of 939.218 MT of MS Flat etc. in the SCN is on the basis of some loose papers recovered during search, the physical verification of stock, its weighment and the admission of Shri. JP Agarwal, the director M/s Balajee. But I observe that the most important aspect of the whole case is that in the show cause notice there is no statement of any person, employee or director of the appellant company which can show that the impugned loose papers/ rough papers recovered from the factory of appellant are actually related to the clearance made by the Appellant. Moreover the revenue officer did not find the author of said loose paper/rough paper, there is no any other evidence available to corroborate the charge of the show cause noticee. The department did not verify the contents of the said loose papers with any alleged buyer of the said goods or recorded the statements of the said buyers or transporters who transported the said goods. In the absence of such corroborative evidence, no reliance can be placed on the said loose papers/rough papers. Further no evidence has been placed on record to show that excess raw materials were purchased or there was excess power consumption to corroborate the fact that there was clandestine removal.

4.2 Hon'ble High Court of Allahabad in the case of **Continental Cement Co. Vs Union of India reported as 2014 (309) ELT 411 (Allahabad)** had earlier laid down the criteria of investigation to prove the allegation of clandestine sale in following words:

> *"Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence."*

4.3 On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

(i) To find out the excess production details.

(ii) To find out whether the excess raw materials have been purchased.

(iii) To find out the dispatch particulars from the regular transporters.

(iv) To find out the realization of sale proceeds.

(v) To find out finished product receipt details from regular dealers/buyers.

(vi) To find out the excess power consumptions.

4.4 Thus, to prove the allegation of clandestine sale, further corroborative evidence was also required but no investigation was conducted by the Department. Hence, I observe that there is no evidence to support the allegations against the appellants.

4.5 Also it has been the settled law that the loose papers/documents cannot be the sufficient proof of charges of clandestine removal unless there is corroborative evidence as was held by **Hon'ble High Court of Delhi in case of CCE vs Kuber Tobacco Products ltd. 2016(339) ELT A130(Del.)**

4.6 Further on going through the SCN it can be seen that it is specifically explained therein that the physical verification of stock of finished goods and raw materials was conducted by way of counting the pieces and calculating weight by adopting sectional weighment method/ basis. Conducting verification of such small stock on sectional weight method/basis adopted by the department cannot be the basis of working out actual weighment of entire stocks as contended by the appellant. Panchnama dated 19.01.12 clearly recites that physical verification of the stock could not be conducted. From SCN also I also observe that the said stock was ascertained by counting the number of bundles of the same and multiplying the same with the weight of each bundle. The entries of record about loading and unloading of stock were admittedly in cryptic manner and admittedly been deciphered in department's own interpretation. Thus I am of the opinion that stock taking is merely on eye estimation basis. In the case of **Shiva Steel Rolling Mills vs CCE Kolkata 2005 (186) ELT 326 (Tri. Kol)** it was held that Stock verification done only on the basis of eye estimation and not to be the basis for quantifying demand for deciding charge of clandestine removal.

4.7 In case, clandestine removal/ shortages is alleged after stock verification by Department, it is Department only who has to discharge burden to establish the charges of shortages and clandestine removal as appears from Rules 9(1) and 173Q of Central Excise Rules 1944. Also errors may creep in the eye estimation of huge quantity of stock when there is no corroborative evidence regarding clandestine removal of goods, charge of clandestine removal stands un-established. In the name of corroboration department has emphasized upon the statement of Shri JP Agarwal alleging it as admission of shortage in stock and of clandestine removal. Payment of Rs. 4,06,081/- without protest is also emphasized as sufficient corroboration, but I observe that on being asked Mr. JP Agarwal has explained the reason of shortage as:

> *"On the date of physical verification of stock on 19.01.12 huge quantity of raw material and finished goods were lying in the factory. In physical verification, the stock has been determined on the basis of sectional weight of the goods which is not the proper way of ascertainment of stock specially in such huge quantity. This may be the major reason of such shortage."*

4.8 He also explained about daily record submitting:

> *"Since there is huge production of goods in our unit, it is not possible to take actual weight of the goods daily for the recording the production. The production is ascertained on the basis of sectional weight but at the time of clearance of goods, we take actual weight for payment of duty."*

4.9 With respect to loose papers also Mr Agarwal replied:

> *"These papers are rough papers, may be maintained by any person such as any transporter, broker, vendor etc. I have no idea about these papers. Transporters/ brokers frequently visit our factory. The papers might have been relating to such persons."*

4.10 I hold that none of these explanations amount to admission on part of director of the appellant about clandestine removal of their goods. Question of these statements to be the corroboration of alleged guilt does not at all arise.

4.11 In the case of **Kanpur Strips Ltd. Vs CCE Kanpur 2001(137) ELT 1198 (Tri-Del)** it was held that in the absence of direct admission of clandestine removal the mere fact of the shortage found cannot sustain the charge of clandestine manufacture and removal. Accordingly the confirmation of demand is merely presumptive hence, not sustainable.

4.12. In the case of **2013(297) ELT 370 (Tri. Ahmd) Zincollied vs CCE, Vapi** it was held that in absence of corroborative evidence demand not sustainable on presumptive ground either for removal of input as such or using same in manufacture of final product [**2008(221) ELT 231** followed (para 5, 8)].

4.13 Also In **Anand Founders & Engineers -2016 (331) ELT 340 (P&H)**, the Punjab & Haryana High Court held that mere shortage of finished goods in stock taking is not enough to hold the charge of clandestine removal. In **Chandarpur Enterprises Ltd.- 2014(310) ELT 904 (Tri. Del)**, the Tribunal held that when the quantity of finished goods was determined on estimation basis only, the same cannot be treated as real shortage for alleging clandestine removal. In **RS Industries 2014(301) ELT 382 (Tri. Calcutta),** it was held by the Tribunal that even when shortage is admitted but no investigation was done to establish clandestine removal of goods, no penal action can be taken against the assessee.

4.14 Also the deposit of duty without protest is highly insufficient to become the conclusive proof of alleged shortage and clandestine removal. I draw support from the decision of this Tribunal in the case of **2013(292) ELT 397 (Tri. Delhi) Everest Rolling Mills Pvt. Ltd. Vs CCE Jaipur** mere payment of duty on shortage noticed without any corroborative evidence of clandestine removal, the demand becomes unsustainable.

5. Resulting to the entire above discussion, it is held that adjudicating authority below has wrongly confirmed the demand despite there was no evidence to prove the alleged clandestine removal of goods by the appellants. Therefore, the impugned orders are hereby set aside. Consequently, both the appeals are hereby allowed.

[Pronounced in the open Court on 10.06.2020]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita