CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No.50213 of 2018

[Arising out of Order-in-Appeal No.BHO-EXCUS-002-APP-287-17-18 dated 12.10.2017 passed by the Commissioner (Appeals), Raipur]

M/s. N R Sponge Private Limited ...**Appellant**
Siltara Growth Centre,
Phase –I, Siltara,
Raipur (CG) - 493111

VERSUS

Commissioner
Customs, Central Excise & Service Tax, ...**Respondent**
Central Excise Building,
Tikrapara, Raipur (CG) - 492001

APPEARANCE:

Mr.K. Krishnamohan Menon & Ms. Parul Sachdeva,
Advocates for the Appellant
Mr.K.Poddar, Authorised Representative for the Respondent

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

DATE OF HEARING : 15/11/2019
DATE OF DECISION : 01/07/2020

FINAL ORDER No. 50707/2020

RACHNA GUPTA:

The appellant has assailed the Order-in-Original No.287/17-18 dated 12.10.2017 passed by Commissioner (Appeals).

2. The facts relevant for the disposal of the impugned appeal are as follows:-

The appellant is engaged in manufacture of sponge iron and dolochar. They are availing the benefit of Cenvat Credit of duty paid on inputs and capital goods under Cenvat Credit Rules, 2004. Based on an intelligence, the Central Excise Officers of Preventive Wing, Headquarters, Raipur conducted searches at the factory as well as office premises of the appellant simultaneously on 15.03.2014 in presence of Shri Devi Lal Sahu, OSD of the appellant. Certain documents were recovered from the weighbridge inside the appellant's factory premises on the basis whereof sponge iron weighing 124.790 MT involving Central Excise duty of Rs.3,47,359/- was alleged to have been removed clandestinely. The Officers also conducted the verification of the stock of raw-material and finished goods and alleged shortage in stock of coal by 11797.865 MTs invoking Central Excise duty of Rs.6,62,759/- and also shortage of sponge iron weighing 72.160 MTs. invoking the duty of Rs.8,42,031/-.

3. After recording the statement of said Devi Lal Sahu that a show cause notice No.2658 dated 18.11.2017 was served upon the appellant proposing the recovery of afore mentioned amounts of Central Excise duty proportionate interest alongwith penalty was also proposed. The said proposal was confirmed vide Order-in-Original No.73/JC/CEX/RPR/2016 dated 29.02.2016. The amount of Rs.12,78,435/- which was already paid by the noticee was ordered to be appropriated against duty demand. Being aggrieved, an appeal was preferred before Commissioner (Appeals) who vide

the Order under challenge has rejected the same. The appellant thus has preferred appeal before this Tribunal.

4. We have heard Shri K. Krishnamohan Menon and Ms. Parul Sachdeva, learned Advocates for the appellant and Shri K.Poddar, Authorised Representative for the Department.

5. It is submitted on behalf of the appellant that the original adjudicating authority has confirmed the entire demand on the basis of the discrepancies in the records of the appellant and shortages in the stock of raw-material as well as finished goods but presuming that such discrepancies and shortages are admitted by the employee of the appellant. It is submitted that perusal of statement of Devi Lal Sahu is clear enough that there is no such admission of the alleged gain. There is otherwise no evidence on record for confirming demand raised by the department. But such order of original adjudicating authority has still been confirmed by Commissioner (Appeals), hence, the same is liable to be set aside. Otherwise also there is sufficient evidence to falsify the allegations raised in the show cause notice. The clearances of appellants were duly declared in their ER-1 /ER-6 returns. The copies thereof were duly provided to the adjudicating authorities but they have ignored the same and have proceeded on their own wrong presumption of it to be a case of clandestine removal. It is further submitted that any record of weighbridge slips is not at all relevant for checking the clearances because the weighbridge exist inside the premises of

the factory. The question of payment of duty on the basis of weighment slips does not at all arise unless and until those goods were actually found to have been cleared from the factory. With respect to shortage of coal, it is submitted that the same was only due to the fact that the coal was cleared as such on reversal of input credit which clearly find mention in ER-1/ER-6 Returns. Also the coal was crushed to coal dust and was cleared on payment of duty which is also visible from the said return. No question of any shortage in coal as alleged at all arises. With respect to the alleged shortage of sponge iron, it is mentioned that the opinion has been formed on the basis of weighment which was on estimation basis and was never on actual basis. Above all, the entire case revolves around, the loose papers recovered during the time of search but there is no evidence collected by the aiding/ investigating team as to who was the author of those slips. Devi Lal Sahu has clearly denied himself to be the author. Question of any admission of guilt on his part does not at all arise. With these submissions, the order under challenge is alleged to be wrong and baseless and is prayed to be set aside. The appellant has relied upon the following case laws:-

1. **CCE v. Star Steels – 2015 (315) ELT 495 (All.)**
2. **Raika Ispat Udyog Pvt. Ltd. v. CCE – 2016 (340) ELT 598 (Tri.-Del.)**
3. **Amba Steels v. CCE – 2016 (335) ELT 97 (Tri.-All.)**
4. **Vehalana Steel v. CCE – 2015 (329) ELT 947 (Tri.-Del.)**

6. While rebutting these arguments, it is submitted that at the time of the raid, the inputs were not found available. In fact were not used in manufacture of final product thereby resulting into the spillage of inputs. It definitely becomes the case of clandestine removal. The same has duly been admitted by the appellant's OSD. Admissions need not be proved. Hence, there is no error committed by Commissioner (Appeals). While relying upon the decisions in the case of **Commissioner of Central Excise, Madras vs. Systems & Components Pvt. Ltd. reported in 2004 (165) E.L.T. 136 (S.C.) & Win Pipes vs. CCE, Cochin reported in 2005 (192) E.L.T. 449 (Tri. – Bang.),** ld. D.R. has prayed for appeal to be dismissed.

7. After hearing both the parties and perusing the entire record I observe and hold as follows:-

Raid in the premises of the appellant was conducted on 15.03.2013. The raiding team collected the record of weighbridge slips, factory's outgoing register, daily stock account register, dispatch and sales register. They also physically verified the quantity of the stock of raw-material and finished goods. After recording the statement of OSD of appellant, Shri Devi Lal Sahu, the clandestine clearance of 640.4 MT of sponge iron and 11797.8 MT of coal was alleged. The adjudicating authorities below have completely relied upon those documents while confirming the impugned demand of Rs.26,55,784/- alongwith the interest and penalties. From the show cause notice, it is observed that existence of weighbridge is admittedly within the factory premises. The weighbridge slips are considered as one of the important documents by the adjudicating authorities below providing the alleged clandestine removal. Once the weighbridge exists within the factory premises, the factum of clearance of goods from said weighbridge does not at all arise. This observation is sufficient to hold that weighbridge slips cannot be the evidence for proving that the goods were cleared from the appellant's factory clandestinely. The weighbridge being within the factory premises, the weighment of any commodity or any entry in outgoing register from the said weighbridge cannot reflect clearance at all. There is a clear submission of the appellant that the orders even with respect to weighed goods used to get cancelled and such goods despite being weighed, used to be sent back to the godowns. The adjudicating authority has miserably ignored the admitted existence of weighment bridge within the factory premises and the said submission of the appellant the consideration whereof falsifies the allegations of clandestine removal.

8. I also observe that the shortage is alleged on the basis of an estimate weighment of sponge iron the estimation cannot take place of evidence. Specially, when there is no investigation as to where from the noticed excess inputs were sourced so as to manage such excess clearances. No investigation as regard electricity excess usage. No third party investigation as regards transporters buyers etc. Above all, no attempt to track any money

trail as alleged. Law has been settled that where the allegation of duty evasion is based on the documents and records procured or seized from other person or premises the burden of proof does not lie on the person accused of such evasion. As it was held in the case of **Agrasen Syntex Pvt. Ltd. Vs. Commissioner Central Excise Hyderbad, ELT (154) ELT 431,** Hon'ble High Court Allahabad also in the case of **Kumar Trading Company Vs. Commissioner of Trade Tax Lucknow reported as 208 (230) ELT 240 Allahabad** has held that if the Revenue wants to rely upon the entry of the documents seized from the premises of third-party the burden lies upon the Revenue Authority to prove the genuineness and authenticity of the said entry and to connect the said entry with the dealer in case the dealer denies to have any connection with such entry.

9. Hon'ble High Court of Punjab & Haryana in the case of **CCE & ST, Ludhiana Vs. Anand Founders & Engineers reported as 2016 (331) ELT 340 (P&H)** has held that clandestine removal charges based on shortages in stock cannot be upheld in the absence of any other evidence brought on record by the Revenue showing such illegal activities on the part of an assessee. 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. 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.

10. Thus, to prove the allegation of clandestine sale, further corroborative evidences as mentioned in above decisions, are also required. Apparently, there is no investigation conducted by the Department qua any of said aspects.

11. Coming to the alleged admission of Shri Devi Lal Sahu, his statement as annexed on record is perused. I am of the opinion that the statement contains only a declaration to comply with the law. It cannot be taken as an admission of any clandestine removal. Question of the said statement to be the corroboration of the alleged guilt does not at all arise. I take support from 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.

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**]

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.

14. Apparently the appellant had earlier deposited an amount of Rs.12,78,435/- which was got adjusted towards the confirmed demand by the original adjudicating authority. But apparently the said deposit was with protest. Absence of protest also is highly

insufficient to be called as 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 is not sufficient to prove the allegations. Therefore, the demand becomes unsustainable.

15. In view of entire above observation, I hold that the adjudicating authority below has based the decision on assumptions and surmises and in total ignorance of the documents and submissions produced/made by the appellant. Those documents and the facts submitted are sufficient to falsify the allegations, as already discussed above. Therefore, the order under challenge is held to be not sustainable and the same is, accordingly, hereby set aside. Consequent thereto the appeal in hand stands allowed.

[Order pronounced in the open Court on 01/07/2020]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita