CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. III

Excise Appeal No. 51067 of 2022 (SM)

(Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-156-2020-21 dated 31.03.2021 passed by the Commissioner (Appeals) Customs, CGST & Central Excise, Indore(M.P).)

M/s Sameer Industries **Appellant**
Plot No. 130-131, Sector-e,
Sanwer Road, Industrial Area,
Indore,
M.P.-452015

VERSUS

Commissioner, Central Excise & CGST **Respondent**
Indore
Manik Bagh Palace,
Post Box No. 10,
Indore,
Madhya Pradesh-452014

APPEARANCE:

Mr. Vijay Kumar, Advocate for the Appellant
Mr. Gopi Raman, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER: 50870 / 2022

Date of Hearing: 05/09/2022
Date of Decision: 16/09/2022

AJAY SHARMA:

This appeal has been filed challenging the order dated 31.03.2021 of the Commissioner (Appeals) Customs, CGST & Central Excise, Indore, M.P. in Order-in-Appeal No. IND-EXCUS-000-APP-156-

2020-21 by which the Adjudicating Order was set aside and the Appeal filed by Revenue was allowed by the learned Commissioner by directing that the goods can be redeemed by the Appellant herein by paying redemption fine of Rs. 15 lakhs and penalty of Rs. 5 lakhs.

2. The facts of the matter in brief are as follows. Acting upon intelligence, Central Excise Officers of Preventive Branch conducted search at the premises of the appellant on 16.7.2013. During physical verification of goods, 44531.50 kgs. of 'Lead Ingots' valued at Rs.56,42,507/- was found un-accounted in the factory premises which, according to the department, were not entered in RG-1 register. The same was seized and thereafter handed over to Shri Mukesh Maheshwari s/o proprietor of the appellant. A show cause notice dated 8.1.2014 (hereinafter referred to as '1st Show cause notice') was issued to the appellant for confiscation of the same. Those *Lead Ingots* were provisionally released to the appellant on 17.6.2014. Based upon that search, investigation was carried out in which the department allegedly found evidences regarding unrecorded production and clandestine clearances of *Lead Ingots*. Therefore another show cause notice dated 5.4.2018 (hereinafter referred to as '2nd Show cause notice') was issued to the appellant demanding Central Excise duty of Rs. 81,10,648/- alongwith Education Cess Rs.1,62,213/- and Secondary & Higher Education Cess Rs.81,106/-, totalling Rs.83,53,967/- for the period from 9.6.2013 to 12.7.2013. The 2nd show cause notice was adjudicated firstly, in which the Adjudicating Authority vide Order-in-Original dated 28.12.2018 confirmed the demand but the 1st Appellate Authority i.e. Commissioner (Appeals) vide Order-in-Appeal dated 28.6.2019 set

aside the demand raised in the 2nd show cause notice and held that the adjudication order was based on assumptions and presumptions and is not sustainable. The said order was accepted by the competent authority of the department on 21.10.2019 and no appeal was preferred by them.

3. Relying upon the Order-in-Appeal dated 28.6.2019 of the Commissioner (Appeals), the Adjudicating authority while adjudicating the 1st show cause notice regarding confiscation, directed that those 44531.50 kgs. of 'Lead Ingots' be finally released to the appellant without any fine or penalty. But on appeal being filed by the department, the learned Commissioner (Appeals) vide impugned order dated 31.3.2021 reversed the order of the adjudicating authority and held the issued involved herein is separate proceedings and the 2nd show cause notice and the order of Commissioner (Appeals) therein had not made any comment on goods seized at factory premises. Accordingly, goods were ordered for confiscation and directed to be released only after payment of redemption fine of Rs. 15 lakhs and penalty of Rs. 5 lakhs by the Appellant.

4. I have heard learned counsel for the appellant and learned Authorised representative for the Revenue and perused the case record including the written submissions/synopsis filed by respective sides. Both the show cause notices were issued on the basis of the search conducted in the premises of the appellant on 16.7.2013 and both the show cause notices contained the fact about the confiscation of 44531.50 kgs. of 'Lead Ingots' valued at Rs.56,42,507/- from the factory premises of the appellant. The goods were seized mainly on the belief that they were unaccounted with intent to clear them

without payment of duty but according to the finding recorded by the Commissioner (Appeal) while dropping the demand in 2nd show cause notice, no tangible evidence was produced supporting the allegation of clandestine removal. Admittedly the said order of the Commissioner (Appeals) in the 2nd show cause notice, by which demand has been dropped, has been accepted by the department. I have gone through the impugned order and find that the order of Adjudicating Authority in the 1st show cause notice has been reversed by the learned Commissioner only on that basis without discussing about any tangible evidence, as according to him in the 2nd show cause notice as well as in the order of Commissioner (Appeals) therein, nothing has been recorded regarding the goods seized at the factory premises i.e. 44531.50 kgs. of *Lead Ingots*, which in my opinion is totally misplaced. Paragraph 3 of the 2nd show cause notice specifically mentioned about this fact and the relevant portion of the same is extracted as under:-

> 3..................Physical verification of some of the stock of goods i.e. "Lead Ingots" and raw materials was conducted and the stock of "Lead Ingots" of 44531.5Kgs was found in excess and value of the same was calculated as to Rs. 56,42,507/-. The detail of stock of various kinds of lead ingots was recorded in the Panchnama. On being asked to produce statutory records related to Lead Ingots and other raw materials, Shri Mukesh Maheshwari could not produce the same. Therefore, on reasonable belief that 44531.5 Kgs of the "Lead Ingots" amounting Rs. 56,42,507/-, was kept unaccounted with the intention to clear the same without payment of duty in violation of the provisions of the Central Excise Rules, 2002. The said stock was seized under the provisions of the Central Excise Act, 1944 and handed over for safe custody to Shri Mukesh Maheshwari. Similarly, officers called the Invoices/Bills of the stock of the raw materials found in the factory but Shri Maheshwari failed to produce the same before the officers. The stock of the few of the raw materials (only chemical) recorded are detailed in Annexure-B to the panchnama.
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> ....As the Noticee No.1 failed to justify excess quantity

> of 44,531.50 Kg of "Lead Ingots" valued at Rs. 56,42,507/- during the course of physical verification on 16/07/13 therefore show cause Notice was issued vide C. No. V(78)18-44/11A/C-III/2013-14/5756 dated 08/01/2014 by the Deputy Commissioner Central Excise Division-I, Indore proposing, therein, confiscation of the same."

5. Similarly the Order-in-Appeal dated 28.6.2019, dropping the demand in the 2nd show cause notice, also specifically recorded in paragraph 2.3 about 44531.5 kg of "Lead Ingots", which is extracted as under:-

> "2.3.............Physical verification of stock was done and and stock of "Lead Ingots" weighin 44531.5 KG valued at Rs. 56,42,507/- was found in excess. As the Appellant No. 2 could not produce statutory record, the said Lead Ingots were seized on a reasonable belief that they were kept with intent of clearing without payment of duty. The same was handed over to the Appellant No. 2 for safe custody. Stock of few raw materials (only chemicals) was also recorded in Panchnama dated 16.07.2013. For seizure part a show cause notice C.No. V(78)18-44/11A/C-III/2013-14/5756 dated 08.01.2014 was issued by the Deputy Commissioner, Central Excise Division-I, Indore for confiscation of the same."

6. A perusal of the 2nd show cause notice as well as the order of the learned Commissioner (Appeals) therein would show that the issue in both 1st and 2nd show cause notices is identical i.e. clandestine removal of goods and both the notices are based on the search conducted on 16.7.2013. It can safely be said that the further investigation as well as the issuance of 2nd show cause notice is the result of seizure of 44531.50 Kgs. of *Lead Ingots* from the premises of the Appellant on the premise that the appellant is into clandestine removal of the goods. I have seen the order of the learned Commissioner (Appeals) in the 2nd show cause notice in which it has been held that the allegations against the appellant was based on assumptions and presumptions and there is no evidence of power consumption, evidence of excess raw material procurement,

production and clearance of them without payment of duty and that the same is based solely on so-called confessional statement and few loose papers. Learned commissioner therein has specifically recorded that the 2nd show cause notice has relied upon a chart for the period from April, 2012 to July, 2013 showing the quantity of input battery scrap issued for manufacture of *Lead Ingots*, quantity of *Lead Ingots*, plastic scrap and miscellaneous scrap produced out of this input scrap. Whereas in the instant matter i.e. the matter concerning 1st Show cause notice, the learned commissioner has specifically recorded that *Shri Shyam Singh Jadon, Excise Assistance of the appellant* in his statement dated 23.7.2013 has admitted that from May, 2013 onwards, no entries were made of daily production in any register and that the search of appellant herein was conducted on 16.7.2013 and there are no records of goods manufactured by the appellant from May, 2013 onwards and non-accounting of goods for such a long time and such a huge quantity will attract Rule 25 of Central Excise Rules, 2002. So according to me when the learned Commissioner while dropping the demand in the 2nd show cause notice has examined the chart regarding the manufacturing activity under taken by the Appellant for the period from April, 2012 to July, 2013 then that would also include the *Lead Ingots,* which according to revenue must have been produced somewhere between May, 2013 upto the date of search i.e. 16.7.2013 and which is the core issue in the 1st show cause notice herein.

7. I agree with the learned Commissioner that the issue involved herein is whether the goods seized by the department are liable for confiscation under the Act? But then the question would arise on what

ground the goods can be confiscated. No material has been produced on record to justify the confiscation. A perusal of the 1st Show cause notice, which is presently in issue, would show that it is based on the statements of Mr. Mukesh Maheshwari as well as the statement dated 23.7.2013 of Shri Shyam Singh Jadon, Excise Assistant of the appellant coupled with RG-1 register. The said statements were also part and parcel of the 2nd show cause notice in which the demand was dropped by the learned Commissioner (Appeals) therein after discarding the statements relied upon therein. In the instant matter apart from the statements as above, I am unable to find any supporting evidence to corroborate the allegations and merely on the basis of statements the appellant cannot be saddled with any fine or penalty. The law is also well settled that the onus is on the department to prove that there has been unaccounted production of goods, which according to me the department has failed to prove. There may be some procedural lapses on the part of the appellant but that by itself would not be sufficient to confiscate the goods and would not justify the imposition of redemption fine and penalty. Such procedural lapses should not be given the colour of clandestine removal with intent of evading duty without any corroborative evidence. Admittedly, a particular act is required to be done in a particular manner as provided under the statute but an inadvertent mistake to follow the procedural aspect cannot be adopted for arriving at the conclusions against the assessee. In view of the fact that in the 2nd show cause notice, the Commissioner (Appeals) has held in favour of the appellant herein and dropped the demand coupled with the discussions made in preceding paragraphs, this case would not fall within the four corners of either Section 34 or Rule 25. Therefore, the confiscation or redemption fine or penalty are not sustainable and the impugned order is liable to be set aside.

8. The appeal is accordingly allowed with consequential relief, if any, as per law.

(order pronounced in the open court on 16.09.2022)

(Ajay Sharma)
Member(Judicial)

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