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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/3097,3098,3099&3100/07,3000&2999/07,3057,3058,3059,3060,3061,3062,3245/07 ,21&22/08,3034,3042/07 Date 20/06/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S R A CASTING PVT LTD
7TH KM STONE, MEERUT ROAD,
MUZAFFARNAGAR(UP)
M/S R A CASTING PVT LTD Appellant
Vs
C.C.E. MEERUT I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 356-372/2008** **Excise** dated 19-6-08 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E. MEERUT I
EXCISE CHOWK, UNIVERSITY ROAD, MANGAL PANDEY NAGAR, MEERUT - 250005.
2. Adv. / Consult
MR.R. SANTHANAM
C-3/210, JANAK PURI, NEW DELHI - 110 058.

2. SH. BIPIN GARG, ADV.,
B-1/1289-A, VASANT KUNJ, N. DELHI-70
3. SH. ALOK ARORA, ADV.,
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3. C.D.R.
~~4. JCDR~~.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file
16. SH. V.K. GUPTA, ADV.,
F-56, DWARIKAPURI, NAVEEN SHAHDARA, DELHI-32

Assistant Registrar
(Excise Appeal Branch)

2. M/S. KAMAKHYA STEELS(P) LTD, NAJIBABAD ROAD, BIJNOR(UP)
3. SH. SANJAY SWARUP, DIRECTOR.
4. SH. GAURAV SWARUP, DIRECTOR.
5. SH. CHITRANJAN SWARUP, DIRECTOR.
6. SRMTI NEETA SWARUP, DIRECTOR.
7. SH. AJAY SWARUP, DIRECTOR

8-9. SRMTI KAMLESH GUPTA
M/S. GUPTA & ASSOCIATES,
1117/12, 3RD FLOOR, NAIWALA
BAROL BAGH, N. DELHI

10. M/S. LIFTMAK UDYOG PVT. LTD.
VILL. KHERKI DAULA,
OLD KHANDSA ROAD, GURGAON

11. SH. VIKAS KUMAR PROP.
TULARAM VIKAS KUMAR
66-B, NEW MANDI, MUZAFFARNAGAR(UP)

12. SH. VINAY KUMAR, PROP.
VINAY KUMAR VIKAS KUMAR & CO.
93, SP COMPLEX, NEW MANDI, MUZAFFARNAGAR(UP)

13. SMTI RAJKUMARI JAIN, PROP.
R.K & SONS,
66-B, NEW MANDI, MUZAFFARNAGAR(UP)

14. SH. ASHOKGUPTA, DIRECTOR
M/S. JRD STOCK BROKERS (P) LTD.,
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DARYAGANJ, N. DELHI-2

M/S. R.A. CASTINGS PVT. LTD. 7TH K.M STONE, MEERUT ROAD, MUZAFFARNAGAR(UP)
15. SH. HAMID MUSTAFA,
16. SH. S.M. NASIR,
17. SH. KOMAL AGGARWAL

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH AT NEW DELHI
COURT NO. III

1 – 4 Excise Appeal Nos. 3097, 3098, 3099 & 3100 of 2007
5 – 6 Excise Appeal Nos. 3000 & 2999 of 2007
7 – 15 Excise Appeal Nos. 3057, 3058, 3059, 3060, 3061, 3062, 3245, 21 & 22 of 2007
16 Excise Appeal No. 3034 of 2007
17 Excise Appeal No. 3042 of 2007

(Arising out of Order-in-Original No 33/Commr/Mrt.I/2007 dated 30.7.2007 and Order-in-Original No 32/Commr/Mrt.I/2007 dated 30.7.2007 passed by the Commissioner, Customs & Central Excise, Meerut-I.)

For approval and signature:
Hon'ble Mr P.K. Das, Member (Judicial)
Hon'ble Mr. A.K. Srivastava, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	: Yes
4.	Whether Order is to be circulated to the Departmental authorities?	: Yes

M/s R.A. Castings Pvt Ltd — Appellants
Shri Hamid Mustafa
Shri S.M. Nasir
Shri Komal Agarwal
Shri Kamlesh Gupta
Shri Kamlesh Gupta
Shri Ashok Gupta
M/s Kamakhya Steels Pvt Ltd
Shri Sanjay Swarup
Shri Gaurav Swarup
Shri Chitranjan Swarup
Smt Neeta Swarup
Shri Ajay Swarup
Shri Vikas Kumar
Shri Vinay Kumar

Smt Raj Kumari Jain
M/s Liftmak Udyog (P) Ltd

Vs

Commissioner of Central Excise, Meerut I Respondents

Appearance:

1- 4 M/s R.A. Casting Pvt. Limited and Others
...Appellants
[Rep. by Mr. R. Santhanam, Advocate]

5 – 6 Mr. Kamlesh Gupta, Proprietor of M/s Gupta Associates
[Rep. by Mr. Bipin Garg, Advocate]

7 – 15 M/s Kamakhya Steels Pvt. Ltd., & Others
[Rep. by Mr. L.P. Asthana with Mr. Alok Arora, Advocates]

16 M/s Liftmake Udyog Pvt. Ltd.,
[Rep. by Mr. V.K. Gupta, Advocate]

17. Mr. Alok Gupta, Director
[None]

Vs.

Commissioner of Central Excise
Meerut I ...Respondents
[Rep. by Mr. Deepak Garg, SDR]

CORAM:

Hon'ble Mr P.K. Das, Member (Judicial)
Hon'ble Mr. A.K. Srivastava, Member (Technical)

Date of Hearing: 13/14.5.2008

Date of Decision: 19/6/.2008

FINAL ORDER NO. 356-372/08-EX

Per: Mr A.K. Srivastava, Member (Technical)

1. These appeals have been filed against the Order-in-Original No 33/Commr/Mrt.I/2007 dated 30.7.2007 and Order-in-Original No 32/Commr/Mrt.I/2007 dated 30.7.2007 passed by the Commissioner, Customs & Central Excise, Meerut I. The Commissioner, vide Order-in-

Original-in-Original No 33/Commr/Mrt I/2007 dated 30.7.2007, while granting certain relief, has confirmed the Central Excise duty amounting to Rs 2,77,69,628/- under Section 11A (2) of the Central Excise Act, 1944 together with interest and imposed equivalent amount of penalty under Section 11AC *ibid* on M/s R.A. Castings (P) Ltd (appellants in appeal E/3097/07). He also imposed personal penalty of Rs 5 lakhs each on the Directors of the Company. He further imposed personal penalty of Rs 1 lakh each on Shri Kamlesh Gupta, proprietor of M/s Gupta & Associates and Shri Ashok Gupta, Director of M/s RJD Stock Brokers Pvt Ltd, amongst others. The Commissioner, vide Order-in-Original No 32/Commr/Mrt I/2007 dated 30.7.2007, while granting certain relief, has confirmed the Central Excise duty amounting to Rs 98,66,104/- under Section 11A (2) of Central Excise Act, 1944 together with interest and imposed equivalent amount of penalty under Section 11AC *ibid* on M/s Kamakhya Steels Pvt Ltd (appellants in appeal E/3057/07). He also imposed personal penalty of Rs 5 lakhs each on the Directors of the Company. He further imposed personal penalty of Rs One lakh each on S/Shri Vikas Kumar, Vinay Kumar, Smt Raj Kumari Jain, Shri Kamlesh Gupta and M/s Liftmak Udyog (P) Ltd amongst others.

2. Heard both sides and perused the records.

3. The appellant companies are engaged in the manufacture of 'M.S. Ingots' falling under chapter heading 7206.90 of Central Excise Tariff Act, 1985. They have in their factory, the facility to melt scrap of iron & steel including sponge iron alongwith other additives to produce M.S. ingots. The melting is carried out in electric induction furnace. The raw materials for the manufacture of ingots being used by the appellant companies are

M.S. Scrap, Sponge Iron etc as inputs. They are availing the facility of Cenvat Credit on the inputs/capital goods under the provisions of Cenvat Credit Rules, 2001/2004.

4. Acting on an intelligence regarding suppression of production by the manufacturers of M.S. Ingots in comparison to a technical opinion of Dr N.K. Batra, Professor of Material and Metallurgical Engineers, IIT, Kanpur that an induction furnace unit should consume electricity in the range of 555 to 1046 units for the manufacture of 1 MT of MS Ingots, the balance sheet, financial statements like party ledgers, other income ledgers, documents relating to other income, electricity bills for the financial year 2001-02, 2002--03, 2003-04, 2004-05 and 2005-06 of the appellant companies were summoned for examination and for knowing the reasons of excess utilization of electricity and less value of clearances.

5. On scrutiny of the balance sheets and profit and loss accounts submitted by the appellant companies for the Financial Years 2001-02, 2002-03, 2003-04 and 2004-05, it was observed by the Department that they were recording less production in comparison to electricity consumption norms prescribed by IIT report and selling their product at a loss during the period under scrutiny, but on the other hand they have shown/booked huge profits to the tune of crores of rupees through 'share trading' & 'sales commission' in their books of accounts. It was further observed by the Department that the appellants did not undertake any genuine transaction with regard to any share trading as shown by them in their financial statements and in fact, have procured fictitious entries of income/profit after providing cash to such persons who provided fictitious entries, to balance losses of their balance sheets which appeared to be

coming up into their books of accounts on account of loading of all manufacturing expenses inclusive of actual 'electricity charges' incurred on the quantum of actual production of M.S. Ingots, though they accounted for less quantity of production of M.S. Ingots in their production records.

6. After following the necessary adjudication proceedings, the Commissioner passed the impugned orders as referred to above. In the said orders, he observed as under:

> "While arriving at the conclusion of electricity consumption required to manufacture 1 ton of M.S. Ingots, Dr Batra has considered a number of factors like basic principle and design of induction furnace, stirring effect in induction furnace, use of capacitors, melting practice, furnace capacity, heat balance, electricity load, slag rate, thermal efficiency, electrical efficiency etc. I find that the report is exhaustive and all the factors affecting the production of M.S. Ingots by induction furnace have been discussed in detail. After a detailed study, the report has arrived at a finding that demand of specific energy for production of 1 MT of MS ingots should be in the range of 555 to 1046 units (KWH/Ton). The consumption of electricity by the party in the manufacture of 1 MT of M.S. Ingots is between 1287 to 1367 units in the case of M/s Kamakhya Steels (P) Ltd and 2072 to 2443 units in the case of M/s R.A. Castings (P) Ltd, which are higher than the norms specified in the IIT technical opinion report. I find that the production has been calculated by the Department taking into consideration the maximum consumption of 1046 units and not the lowest or average of both. The party instead of justifying the excess use of electricity vis-à-vis production of

M.S. Ingots, have tried to deviate from the main issue by questioning the credentials and expertise of Dr N.K. Batra. On perusal of the report, I find that though the report is theoretical in the sense that no specific data of a unit or group of units has been taken into account, yet the report must be regarded as genuine and acceptable for the reason that it has been assigned a specific project number and it is quite specific in determining the range of power consumption required for unit production of M.S. Ingots after taking into account the entire spectrum of parameters that go into determining such production norms."

7. He also observed that the share/stock broker etc have connived with the appellant companies by providing fictitious entries of share trading/sales commission/brokerage and helped them in the evasion of Central Excise duty.

8. The learned advocate Shri R. Santhanam, representing appellant company M/s R.A. Castings (Pvt) Ltd and their Directors, has contended as under:

(i) The disputed demand has been raised based on the alleged technical opinion of late Shri N.K. Batra, who was a Professor in IIT, Kanpur before his death and who is alleged to have given the opinion that 555 to 1046 units would be required for producing 1 (one) tonne of ingot. The alleged opinion is stated to be of December, 2000. They sought cross examination of Shri N.K. Batra, which was declined on the ground that he is no more. If this be so, the very technical opinion alleged to have been given by him, which cannot be the subject matter of verification and cross examination ought to have been disregarded.

(ii) The IIT, Kanpur have clearly stated by their letter dated 4/5.12.2007 that they do not have any report on productivity of induction furnace against project no. C-MET/20000217 and that the report was prepared by the concerned faculty member and not by the Institution so it is not available with them. Therefore, the appellants maintained that based on the personal view of any individual, the central excise authorities cannot make out a case of assumed production imagined by them and alleged clandestine removal thereof.

(iii) Without prejudice to the above, the data sought to be relied upon in the report of late Shri Batra appears to be from some technical literature of 1977 of Moscow and 1985 of USA and there is nothing relevant out of the same to the period, product, technology and furnace of the appellant. The alleged report is unsigned and has no factual basis or experiment conducted by its author in any furnace. A purely academic/theoretical write up cannot be the basis for the central excise authorities to raise demand and imagine the same as applicable universally and binding on every one. The factors taken in Mr Batra's report are *per se* exclusively connected with the manufacturing activity only and no weightage or consideration has been given to the auxiliary loads. The report deals with the productivity of the furnace only and not the factory as a whole.

(iv) No one from the appellants side had been ever asked to go through and give any statement on the factual, technical, commercial and legal aspects of the alleged report being adopted to raise demands by invoking extended period of limitation. Nor any enquiry or investigation was done, to ascertain the alleged additional raw materials having been received in the factory and additional production of ingots having been made in the factory and clandestine removal thereof.

(v) No discrepancy, whatsoever, has been found in the records of the appellants relating to raw materials, finished goods, production, clearances, opening and closing stock, work in progress etc. No experiments were conducted to ascertain the normal production of the appellants' factory.

The consumption of electricity depends upon a number of factors in the production of ingots from scrap & sponge iron by an electric induction furnace. The factors like nature and character of scrap, efficiency of the labour, upkeep of the furnace, the desired characteristics of the final material and flow of power etc determine the quantum of electricity consumption. No uniform criteria could be applied to all the manufacturers placed in different situations.

(vi) The Commissioner has sought to justify the demand on the ground that the profits on share dealings are fictitious. This is not so. The profits on share dealings derived by the appellants in respect of quoted shares traded by them in the stock exchange with DMAT account in the name of the sharebroker with whom transactions of purchase and sale of shares and securities were regularly carried out and the profits derived were correctly accounted for as income from business for which all payments have been made through account payee cheques or drafts and the entire share transactions including the income therefrom have been verified and duly accepted by the Income Tax authorities. They enclosed the relevant assessment orders passed by Income Tax authorities for the period in question besides the sales tax/trade tax assessment orders. The records of share transaction with the respective brokers during the period of dispute were also enclosed. The appellants contended that all these have been duly verified, audited both under the Company law and under the Income Tax Special Audit and accepted not only of them but also of the brokers concerned. The Central Excise authorities have no power in law to determine the legality or otherwise of the financial transactions of the appellants and to disregard the profits from share dealing, which have been duly verified, accepted and assessed to income tax by Income Tax authorities. Therefore, the action of the Revenue by disbelieving and disregarding the profits from share trading transactions and to assume the same to be sale proceeds of ingots clandestinely manufactured and cleared is totally without jurisdiction;

(vii) They had earlier an old and outdated furnace of 2.5 MT capacity which was dismantled because of total uneconomic and non-usable position and the new furnace of 4 MT was installed on 21.8.2004 in which commercial production started on 5.10.2004 and thereafter the production improved because of the furnace being new with higher capacity. In the whole show cause notice, the Revenue has proceeded on the assumption that 1046 units would be required for producing 1 (one) tonne of ingots. The Revenue has altogether ignored the statutory records and documents and all the assessments as well as audits carried out for the entire period. The Revenue has assumed that the higher electricity consumption is the only manufacturing cost or input and all other items of inputs and their costs are irrelevant. This is legally impermissible. The electricity is only one of the items of costs in producing ingots and not the only item. If there are multiple inputs and costs, the revenue cannot take only one of the items of input or cost thereof as the basis to assume and allege clandestine production or removal.

(viii) The Revenue has ignored the fact that the installed capacity of the furnace was 8000 MT with the old furnace of 2.5 MT before 21.8.2004 and 9600 MT from 21.8.2004 for 4 MT new furnace. The 100% installed capacity can only be achieved if the furnace works continuously in all the three shifts and ten heats a day for all the 365 days, which is totally impracticable and impossible to achieve because of the various factors beyond the control of the manufacturer. The Revenue has assumed that the appellants have utilized their production capacity to the extent of 100.655% in 2001-02, 96.969% in 2002-2003, 111.59% in 2003-04 and 106.670% in 2004-05, all of which are totally unthinkable. The Revenue has assumed that the production in the furnace is only of ingots and there are no waste and scrap, no runner and riser and no process loss and have further assumed that the entire power consumption is only for the ingot production and the ancillary equipments for material handling and other allied functions in the factory do not require electricity. On the other hand, there is a detailed report dated 16.8.07 of Shri D.K. Jain, Chartered Electrical Engineer, which shows that out of the total consumption of electricity 65% is towards production of ingots and remaining 35% is for ancilliary and allied activities relating thereto. This is also supplemented and confirmed by the report of the Joint Plant Committee of the GOI in September, 2004 that the consumption of electricity is 1800 units per tonne and this report also bifurcates the electricity consumption scientifically between production of ingots and other functions. The Commissioner of Central Excise, Indore and the Commissioner of Central Excise Bhopal vide their Order-in-Original No 23/Commr/Ind/07dated 28.8.2007 and No 44-46/Commr/CX/2007 dated 10.12.07 respectively have dropped the entire demand which were issued based on Mr N.K. Batra's opinion.

(ix) He pointed out that the cross examination of the investigating officer and the various share brokers was most essential as the alleged statements of the share brokers were obtained under coercion and duress by the investigating officer behind their back and used against them to disregard the accounts and financial records as well as share dealing and profits derived therefrom.

They were denied the opportunity to cross examine them in spite of repeated requests made for the purpose.

9. The Ld Advocate, Shri L.P. Asthana, representing appellant company M/s Kamakhya Steels (Pvt) Ltd and their Directors advanced arguments more or less on the same lines as advanced by the Ld Advocate Shri R. Santhanam. He stated that the report given by Shri Batra in his individual capacity cannot be given the status and the credibility, which a report of the IIT will enjoy as the report of IIT will have inputs of different experts and collective analysis by the Institute, entailing responsibility and reputation of the Institute. His other contentions were as under:

(i) The finding of the Ld Commissioner regarding electricity consumption is erroneous because he has relied upon an unsigned report of a professor, who is no longer available for cross examination; who has not visited the factory of the appellants; not conducted experiment in the factory; the report is of the year 2000 and no definite conclusion can be drawn on such a report for subsequent several years;

(ii) The consumption of electricity depends upon several factors – kind and quality of input (whether it is sponge iron or scrap or a mixture or combination of two or more of the inputs), efficiency of labour, maintenance of machines and equipment, regular or irregular supply of power, voltage fluctuations etc There are thus many variables and Mr Batra's report cannot be of much help in determining the exact quantity of electricity consumed by a factory for the production of one MT of ingot without examining various factors and variables;

(iii) The report of June-July, 2006 of the National Institute of Secondary Steel Technology (NISST) for evolving appropriate bench mark on the power consumption norms in the case of secondary steel sector holds that "considering all practical operating parameters and conditions about 1427 KWH/t of power could be required to produce one tonne of pencil ingots."

(iv) The Joint Plant Committee constituted by the Government of India gave a report in 2004 titled "Survey of Electric Furnace Industries in India." It states that "the total energy requirement of steel production from scrap is only 1800 KWH/t which is less than 1/3 of 6500 KWH/t required for steel making from iron ore;

(v) In his letter dated 14.8.2006, Shri R.P. Varshney, Executive Director, All India Induction Furnaces Association has listed various operating parameters which adversely affect the power consumption. These are, age of the furnace, suction of waste cases through APCD, Quality of inputs, power supply, frequent power cuts, leading to shut down of the furnace, switching off furnace during slag off, auxiliary equipment load of 15-20%, mere rejection of solid ingot, bath boiling and consequent killing of the bath, 8 hours operations per day leading to cooling down of the furnace etc.

(vi) He relied upon a number of case laws to show that the clandestine removal cannot be established and a demand raised only on the basis of electricity consumption, without any corroboration. He also cited several case laws in support of his argument that the burden of proof in the case of clandestine removal is on the Department and it cannot be discharged on the basis of suspicions and surmises;

(vii) The second aspect relied upon in the order of the Commissioner is mention of profits on account of trading of shares, commission etc in the balance sheet of the appellants. The Ld Commissioner has relied upon certain statements, which were subsequently retracted. He also did not allow cross-examination of the persons whose statements were recorded under duress and coercion. Thus on the basis of such statements, the facts as stated in the balance sheet cannot be rejected. It is a settled principle of law that if there is a conflict between the documentary and oral evidence, preference should be given to the documentary evidence. In this connection, provisions of Section 92 to 96 of the Evidence Act are also relevant. Moreover, these incomes were disclosed to the Income Tax Authorities, who alone were competent to decide upon the true nature of the profits, whether they were from trading of shares, commissions etc., or otherwise. Their Income Tax returns have already been assessed by the Income Tax authorities. The Central Excise authorities have no jurisdiction to deal with such matters.

(viii) Lastly, the demands are time barred as the show cause notice has been issued in December, 2006 demanding duty for the period from December, 2001 to March, 2005. He pointed out that the extended period of five years cannot be invoked as Mr Batra's report is of December, 2000 and it was available with the Department. In spite of that, no action was taken for six years by the Department on Mr Batra's report.

10. The Ld Advocate also filed the Income Tax returns of M/s Kamakhya Steels (Pvt) Ltd for the relevant period, duly assessed by the Income Tax authorities.

11. The Ld S.D.R. Shri Deepak Garg argued on behalf of the Revenue and stated as under:

(i) There is inordinately high electricity consumption in both the units, which would indicate that the appellants were not recording the actual production of ingots, particularly when they have not given any reasons whatsoever explaining the high consumption of electricity and did not even come forward in response to summons issued to them to explain this fact;

(ii) The units are selling ingots at a huge loss over the last 4-5 years, which is economically and commercially not possible No unit can sustain losses over a period of 4-5 years unless there are unaccounted profits or earnings flowing in through any unaccounted transactions;

(iii) There is clear cut evidence regarding generation of fictitious profits in the balance sheets by depositing huge amount of cash with the stock brokers and receiving cheques of profits against the cash so deposited. The only business activity, the Steel Companies are engaged, is manufacturing of steel ingots. The huge amount of cash generated to generate fictitious profits could, therefore, only be inferred to be generated from this business activity i.e. manufacture and sale of steel ingots. The appellants are again silent during investigations or later during adjudication as to how such huge amounts of cash income was generated. This gives rise to a reasonable inference that the cash has been generated through clandestine sale of ingots, as this is the only business activity that the appellants are engaged with;

12. Regarding the authenticity of Dr Batra's report, the Ld S.D.R. contended as under:

(i) The report was given by an eminent Professor of Material and Metallurgy Engg of an eminent Institution i.e. IIT, Kanpur and no discredit can be given to the report only on the ground that an official copy of the report is not available in the office of the IIT;

(ii) A bare perusal of the report will show that it is a scientific report;

(iii) The report is categorically supported and collaborated by a report of NISST relied upon by the appellants, where also exactly similar norms have been arrived at;

(iv) In the article Electric Steel Making Technology in 21st Century published by R.P. Varsney, Executive Director, All India Induction Furnace Association, New Delhi, the power consumption for manufacture of 1 MT tones of ingots for Induction Furnace, has been shown to range from 650 units to 820 units, depending upon the percentage mix of sponge iron and scrap. These figures are within the range given in Dr Batra's report;

(v) In the case of *Nagpal Steel vs CCE, Chandigarh* reported in 2000 (125) ELT 1147 also norm of 851 units for manufacture of 1 MT tones ingots has been accepted by the Tribunal.

Therefore, the adoption of norm of 1046 unit based on Dr Batra's report for manufacture of 1 MT tones of ingots is reasonable.

13. The Ld S.D.R. submitted that M/s R.A. Castings have put forth an explanation that the income from share broking transactions has been accepted by the Commissioner (Appeals) as "other business income" and, therefore, has to be considered legitimate. On perusal of this Order of Commissioner (Appeals) of Income Tax dated 12.9.2007 submitted by M/s R.A. Castings in the course of the hearing, it has to be appreciated that income from share transactions has been accepted as "other business income" simply because in earlier years also the same was treated as business income. Moreover, the results of investigation conducted by Central Excise Department showing fraudulent and fictitious nature of these profits were not there before the Commissioner (Appeals). Therefore,

these findings of Commissioner (Appeals) of Income Tax would have no bearing on the conclusion that has been drawn by Commissioner, Central Excise in the impugned orders that these were fictitious profits as this conclusion is based on clear cut and direct evidence, which the appellants have been unable to rebut.

14. Regarding the dropping of demand by the Commissioner of Central Excise, Indore, vide Order dated 28.8.2007 based on the same report of Dr Batra, the Ld SDR submitted that the Order of the Commissioner has not been accepted and an appeal has been filed before the CESTAT, New Delhi.

15 The Ld S.D.R. maintained that the onus of rebutting the initial evidence relied upon by the Department has shifted on the party in terms of established position of law relating to burden of proof. Since the appellants were unable to provide any rebuttal, based on which reasonable inference of clandestine clearance had arisen against the appellants, an adverse inference of clandestine clearance arises on the basis of collective appreciation of the evidence relied upon and failure of the appellants to rebut the same as the initial evidence could only be negative by proof of fact which is in the special knowledge of the appellants. They have provided no evidence either to justify the huge consumption of electricity or to explain how huge amounts of cash were generated in their business.

16. The Ld S.D.R. submitted that the plea of limitation deserves to be rejected as this is a case of clear cut fraud and clandestine clearance. No plea can be entertained that demand for clandestine clearance of goods should be raised within the normal period of limitation.

17 The Ld S.D.R. also relied upon the following decisions of the Supreme Court and the Tribunal:

(i) CC, Madras and Others vs. D. Bhoormull -1983 (13) ELT 1546 (SC)

(ii) Triveni Rubber and Plastics vs. CCE, Cochin -1994 (73) ELT 7 (SC)

(iii) Gulabchand Silk Mills (P) Ltd., vs CCE, Hyderabad-II -2005 (184) ELT 263 (Tri. Bang.)

(iv) Nagpal Steel Ltd vs CCE, Chandigarh 2000 (125) ELT 1147 (T)

18. We have carefully considered the rival submissions and perused the records. Since all the appeals arise of the Orders-in-Original both dated 30.7.2007 and the issue involved in both the orders is common, all appeals are being taken up for disposal by the common order.

19 The main question to be decided in the instant appeals here is whether the appellants during the period December 2001, to March, 2005 have actually manufactured M.S Ingots in excess of what has been recorded in their statutory records and removed the said quantity clandestinely from their factory without payment of duty. The excess production has been worked out on the basis of electricity consumption for which the standard norms are imported from the report of late Mr N.K. Batra, Professor of Material and Metallurgical Engineers, IIT Kanpur.

20. We find that the following reports have been referred to either by the appellants or the Revenue laying down the norms for the consumption of electricity for the manufacture of one MT of steel ingots:

(i) 555 to 1046 (KWH/T) as per Dr Batra's report;

(ii) 1800 KWH/T as per the report by Joint Plant Committee constituted by the Ministry of Steel, Government of India;

(iii) 1427 KWH/T as per the report of NISST, Mandi, Gobindgarh given in June-July, 2006;

(iv) 650 units to 820 units/MT as per the Executive Director, All India Induction Furnace Association, New Delhi;

(v) 851 units/MT in the case of *Nagpal Steel vs CCE, Chandigarh* reported in 2000 (125) ELT 1147.

20.1 From the perusal of these reports, we find that wide variations in the consumption of electricity have been reported for the manufacture of one MT of steel ingots. This renders the norm of 1046 units adopted by the Revenue as arbitrary. Why not adopt the norm of 1800 KWH/T or 1427 KWH/T or 650 to 820 units/MT or 851 units/MT as per various reports referred to above or why not adopt some figure between 555 to 1046 units as norm as per Dr Batra's report?

20.2 We note that no experiments have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing one MT of steel ingots. It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation. In this case, there is added problem. Estimation of production fluctuates wildly depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are leviable to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture of the steel ingots is proved to the hilt by authentic, reliable and credible evidence, duty cannot be demanded on the basis of hypothesis and theoretical calculations, without taking into consideration the ground realities of the functioning of the factories. High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots. The reasons for high consumption of electricity in the case of the appellants' factories have not at all been studied and analysed by the Revenue independently. Instead, the norm of 1046 units fixed as per Dr Batra's report has been blindly applied to the appellants' cases to work out the excess production. This approach is flawed and does not have sanctity.

21. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date. There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. In the following case laws, it has been held that the

consumption of the electricity alone is not sufficient to determine the production:

(i) Pure Enterprises (P) Ltd.. vs. CCE, Rajkot -1999 (111) ELT 407 (Tri.)

(ii) Kapadia Dyeing Bleaching & Finishing Works, vs. CCE, Surat -2000 (124) ELT -821 (Tri.)

(iii) Aarti Leathers (P) Ltd.. vs CCE &C, Ahmedabad -2001 (136) ELT 1255 (Tri-Mum.)

(iv) Parshuram Cement Ltd., vs. CCE, Lucknow -2003 (160) ELT 213 (Tri.Del)

(v) Mukesh Dye Works vs. CCE, Mumbai-VI -2006 (196) ELT 237 (Tri-Mum).

(vi) Hans Castings Pvt Ltd vs CCE, Kanpur 1998 (102) ELT 139 (T);

(vii) M/s Padmanabh Dyeing and Finishing Works vs CCE, Vadodara 1997 (90) ELT 343 (T):

(viii) M/s Madhu Products vs CCE, Hyderabad 1999 (111) ELT 197 (T).

22. The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to:

(i) Receipt of raw material inside the factory premises, and non accountal thereof in the statutory records;

(ii) Utilization of such raw material for clandestine manufacture of finished goods;

(iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;

(iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;

(v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.

In the instant case, no such evidences to the above effect have been brought on record.

22.1 For want of evidence relating to the above points, clandestine removal cannot be sustained merely on the basis of the technical opinion report of Mr Batra. In this connection, the following case laws are relied :

(i) Emmtex Synthetics Ltd vs Commissioner of Central Excise, New Delhi reported in 2003 (151) ELT 170 (Tr-Del);

(ii) Commr of Central Excise, Chennai vs Dhanavilas (Madras) Snuff Co reported in 2003 (153) ELT 437 (Tri-Chennai);

(iii) Commissioner of Central Excise, Madurai vs Madras Suspensions Ltd reported in 2003 (156) ELT 807 (Tri-Chennai);

(iv) Commissioner of Central Excise, Coimbatore vs Sangamitra Cotton Mills (P) Ltd reported in 2004 (163) ELT 472 (Tri-Chennai);

(v) Commissioner of Central Excise Coimbatore vs Velavan Spinning Mills reported in 2004 (167) ELT 91 (Tri-Chennai).

(vi) M. Veerabhadran and others vs Commissioner of Central Excise, Chennai II reported in 2005 (98) ECC 790 (T).

23. The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside and the Revenue had been directed to carry out experiments in different factories on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. The impugned demand based merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.

24. The law is well settled that in every case of alleged clandestine removal, the onus is on the Revenue to prove what it alleges with positive and concrete evidence. In the absence of any positive evidence brought by the Revenue to discharge its onus, the impugned order cannot be sustained.

25. The law does not entitle the Revenue to disregard all the statutory excise records as well as audited financial accounts and records of the assessee company, which have been duly verified and accepted by the competent authorities from time to time not only for central excise but also for purposes of income tax etc. The Gujarat High Court in Arabian Express Line Ltd vs Union of India (1995) ITR 31 has held that "the Income Tax Officer does not have any authority or jurisdiction to levy tax on the petitioner company. Further, the ITO was not having jurisdiction to decide whether or not the petitioner which is incorporated in United Kingdom is a genuine company. It seems that he has forgotten the fact that he is not having the jurisdiction to assess the petitioner company in view of the covenant under Section 90 of the Income Tax Act between the Government of India and Government of United Kingdom. In any set of circumstances, the fact whether or not the petitioner company which is incorporated in the United Kingdom which is a genuine company is not required to be investigated by the Income Tax Officer under the Indian Income Tax Act, that too by ignoring the necessary certificates produced by the petitioner company." Applying the *ratio* of this decision, the Central Excise authorities have no jurisdiction to examine or determine whether the share transactions of the assessee company are genuine or not and whether the income from share trading duly verified, accepted, and assessed to the Income Tax authorities could be disregarded by them to treat the same as proceeds of ingots alleged to have been clandestinely produced and sold by the appellants. The entire action of the Revenue in this regard is without jurisdiction.

26. The Central Excise authorities cannot ignore the facts, records, documents and transactions actually carried out and reflected in the books of accounts and records duly assessed, audited and accepted by other revenue authorities.

27. Since the incriminating statements of the share brokers etc have been relied upon in the proceedings, it was incumbent upon the Revenue to produce them as well as the investigating officer for cross examination by the appellants, as was repeatedly requested by them. In the absence of the same, the statements of the share brokers etc cannot be relied upon. Even if, for the sake of argument, it is accepted that the income shown in the balance sheets is not the income derived from the sources declared by the appellants, there is nothing on record to link it with the so called clandestine removal of the goods and that cannot be made the basis to establish a case of clandestine removal. In any case, the Commissioner has not determined the duty liability on the basis of the profit shown in the balance sheets. He has used this only as corroboration and not the primary basis for determining the quantum of production of steel ingots. Once the main evidence itself is found to be unreliable, such figures of profits etc in the balance sheets cannot form a basis for rejecting the quantum of production appearing in the records of the appellants.

28. We have gone through the case laws relied upon by the learned S.D.R. We are of the opinion that the ratio of decisions of the above case laws cited by the Ld S.D.R. is not applicable in the instant case for the reasons mentioned hereunder.

i) In Bhoormull's case, sufficient evidence was available to raise a 'presumption' with regard to the smuggled nature of the goods. The totality of circumstances reinforced by the inferences arising from the conduct of Bhoormull and Babboothmull could reasonably and judicially lead one to conclude that the goods had been illicitly imported into Madras Sea Port. However, in the instant case, the facts are totally different. Hence, the ratio of decision of D. Bhoormull's case cannot be applied in the instant case.

(ii) In the case of Triveni Rubber, the issue before the Hon'ble Supreme Court was all together different and was relatable to the excess production than the ceiling limit, which the Hon'ble Court found, was based upon lot of evidences in the shape of statements of various persons and on finding of fact of doctored accounts. In this case, the accounts were found fabricated and untrue and the figures of raw materials supplied or the particulars of labour employed were not available. The officers found that a substantial quantity of tread rubber was removed from the factory without making an entry and the Managing Partner had admitted not only removing of goods without any entry but doctoring their accounts so as to show that their annual production was below the exemption limit. Further, the norms were fixed after study of production of the factory. In the instant case, the circumstances are totally different. Hence the ratio of the aforesaid case law cannot be applied in the instant case.

(iii) In the case of Gulabchand Silk Mills (P) Ltd., excess goods were found in the factory premises and discrepancies in stock were also revealed. Vehicle carrying non-duty paid goods without invoice was intercepted. Managing Director and Accountant also admitted payment of lesser duty. Others also stated that they did not receive any Delivery Challan or invoice along with the goods.

The ratio of decision of the above said case is not applicable in the instant case as the facts and circumstances are totally different.

It may be emphasised that the instant case has been booked only on the basis of theoretical conclusions drawn on the basis of the 'technical opinion report' of Shri N.K. Batra, Professor of I.I.T. Kanpur and no evidence relating to clandestine manufacture and removal of goods is on record.

(iv) In the case of Nagpal Steel Ltd. there was seizure of excisable goods, second consignment of ingots was being transported on the same gate pass, admission of the Managing Director of the company, records of octroi post, rough pads showing unaccounted production with weighment entries, records of sales tax barrier etc whereas no such ingredients are present in the present case. The norm of 851 KWH units/tonne of steel ingots was arrived at after noting the consumption of electricity during 31 days for the month of January, 90 and also taking into consideration the expert opinion and the actual consumption of electricity in other factories as indicated by the technical personnel of those factories. This was not the only basis but was further corroborated by other incriminating evidences as indicated above. In the case before us, no such evidence of the experiments being conducted in the appellants' factories to work out the norm for the consumption of electricity per MT of the steel ingots has brought out. Hence, the *ratio* of this case law is not applicable to the present case, where facts are different.

29. In the light of the above discussions, we hold that the demands of duty are not sustainable. The same are set aside.

30. Since the demands themselves have been held to be not sustainable on merits, the question of imposition of penalties on the appellant Companies, their Directors and other appellants herein does not arise. The same are set aside.

31. The impugned orders passed by the Commissioner are modified to the extent indicated above. The appeals are allowed with consequential relief, if any, as per law.

(Dictated in Court on 19/6/08)

(P.K. Das)
Member (Judicial)

(A.K. Srivastava)
Member (Technical)

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