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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. E/1496/2007 – SM[BR] &E / 1986 / 2007 –SM[BR] Date **28/02/2011**

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

To :
M/S PRAGATI STEELS PVT. LTD.
111A/400, ASHOK NAGAR, KANPUR

[2] M/S ETAH STEELS PVT.LTD.
10/22, KATRA WAZIR KHAN HATHRAS ROAD, AGRA, [U.P.]

M/S PRAGATI STEELS PVT. LTD. Appellant

Vs

C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No. 137 – 138 / 2011 –SM[BR]** dated 10.2.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. KANPUR
117/7, SARVODAYA NAGAR,
KANPUR 208005.

2. Adv. / Consult
MR.R. SANTHANAM
C-3/210, JANAK PURI, NEW DELHI - 110 058.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III
Excise Appeal No. 1496 of 2007 (SM)

[Arising out of the Order-in-Appeal No. 51/CE/APPL/KNP/ 2007 dated 24/01/2007 passed by The Commissioner (Appeals), Central Excise, Kanpur.]

M/s Pragati Steels Pvt. Ltd. — Appellant

Versus

CCE, Kanpur — Respondent

Excise Appeal No. 1986 of 2007 (SM)

[Arising out of the Order-in-Appeal No. 36/CE/APPL/KNP/ 2007 dated 24/01/2007 passed by The Commissioner (Appeals), Central Excise, Kanpur.]

M/s Etah Steels Pvt. Ltd. — Appellant

Versus

CCE, Kanpur — Respondent

For Approval and signature :
Hon'ble Shri Rakesh Kumar, 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? :

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :

3. Whether their Lordships wish to see the fair copy of the order? :

4. Whether order is to be circulated to the Department Authorities? :

Appearance

Shri R. Santhanam, Advocate – for the appellant.

Shri R.K. Gupta, Authorized Representative (SDR) – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 10/02/2011.

Final Order No. 137-138/2011 SM(BR) Dated : ____________

Per. Rakesh Kumar :-

The facts leading to these ~~cases~~ appeals and issues involved are common and the same are, in brief, as under.

1.1 The appellant in both the cases manufacture M.S. Ingots. In the case of M/s Etah Steels Pvt. Ltd., they in addition to M.S. Ingots, also manufacture Iron and Steel Casting~~s~~, and hubs for animal drawn vehicles. The M.S. Ingots are manufactured from scrap in induction furnace. In both the cases, the Department issued show cause notices to the appellants, alleging suppression of production and clandestine removal of M.S. Ingots without payment of duty on the basis that they have under-reported their production and clearances of M.S. Ingots, which is clear from the excessive power consumption for manufacture of per metric ton of Ingots – 2400 unit in case of M/s Pragati Steel and 1700 units per M.T. in case of M/s Itah Steel, whereas according to the department, the average consumption should be around 1067 units per M.T. It is on this basis, that in both the cases, the department estimated the production of M.S. Ingots and after comparing the same with the production recorded in the RG-1 register, has raised duty demands on alleged clandestine clearances without payment of duty. Both the show cause notices were adjudicated by the respective Adjudicating Authorities, who confirmed the duty demands and also imposed penalty. The duty demands were confirmed by taking the average consumption of electricity per M.T. as 1100 units based on some experiment conducted in the case of M/s Hans Casting which was adopted in both these cases. On appeal to Commissioner (Appeals), the Commissioner (Appeals) in both the cases upheld the original Adjudicating Authority's orders. It is against these orders that the present appeals have been filed.

2. Heard both the sides.

2.1 Shri R. Santhanam, Advocate, the learned Counsel for the appellants, pleaded that in both the cases the show cause notices have been issued only on the basis that the average consumption of electricity for manufacture of per M.T. of M.S. Ingots is 1067 units and subsequently while adjudicating the show cause notices, the Adjudicating Authority adopted the average consumption figure as 1100 units per M.T., that the figure of 1100 per M.T. was adopted on the basis of some experiment conducted in the unit of M/s Hans Casting, that no experiment whatsoever was conducted in the factories of the Appellants for ascertaining the average power consumption, that the machinery of one appellant cannot be compared with the machinery of other manufacturers, that other than the average power consumption per M.T., there is no other evidence collected by the department indicating that the appellants had under reported their production and clearances of M.S. Ingots, that on similar basis, cases of duty evasion had been booked by the department against **R.A. Castings Pvt. Ltd.** in Meerut – I Commissionerate and the Tribunal in this case, vide its judgment reported in **2009 (237) E.L.T. 674 (Tri. – Del.)** set aside the duty demand observing that the electricity consumption cannot be the only factor for determining the duty liability in the case of an induction furnace unit, especially when the Commissioner did not prescribe the norms of electricity consumption per metric ton as per rules and there is no evidence regarding unaccounted purchase of raw material, under reporting of production or unreported clearances of finished goods, that this judgment of the Tribunal has been upheld by Hon'ble Allahabad High Court vide judgment dated 9/9/10, that the Department filed SLP to Hon'ble Supreme Court against the judgment of Hon'ble Allahabad High Court and the same was dismissed by the Apex Court vide judgment dated 31/1/2011, that in view of this, the impugned orders-in-appeal are not sustainable.

2.2 Shri R.K. Gupta, the learned Departmental Representative, defended the impugned order reiterating the findings of the Commissioner (Appeals) and pleaded that while average power consumption in the case of M/s Pragati Steel is 2104 units per M.T., the average power consumption in the case of M/s Etah Steels 1700 unit per M.T., which is too high, that it shows that the production of finished product had been under reported, that the Tribunal in the case of **U.P. Alloys Pvt. Ltd. vs. CCE, Kanpur** reported in **2007 (213) E.L.T. 412 (Tri. – Del.)** had directed that the electricity consumption per M.T. determined on the basis of experiment conducted in the factory should be adopted for estimating the actual production, and in that case the manufacturer had stated that the power consumption varies between 900 units per M.T. to 1100 units per M.T., that the power consumption of 2104 units per M.T. in case of M/s Pragati Steel and 1700 units per M.T. in the case of M/s Etah Steel is too high, that at this rate of power consumption, the manufacture of M.S. Ingots is not commercially viable and that in view of this, there is no infirmity in the impugned orders-in-appeal.

2.3 Shri Santhanam, in rejoinder pleaded that in case of **U.P. Alloys Pvt. Ltd. vs. CCE, Kanpur** (supra), cited by the learned DR, an experiment for determining the average power consumption per M.T. has been conducted but the department discarding that norm, had adopted the average power consumption of some other units and had raised the duty demand, which was not allowed, while in these cases, no such experiments had been conducted for determining the average power consumption and therefore the judgment in case of M/s U.P. Alloys is not applicable to the facts of these cases. He also pleaded that in the case of M/s Etah Steel, the department while calculating the average power consumption per M.T. has ignored the fact in addition to M.S. Ingots they manufacture other iron products – iron & steel castings and the steel hubs for animal drawn vehicles and the entire power consumption is not in respect of the manufacture of M.S. Ingots.

3. I have carefully considered the submissions from both the sides and perused the records.

4. In both the appeals, the only basis of the department's case against the appellant is that their average power consumption per M.T. should be 1100 units and it is on this basis the production of M.S. Ingots in the case of both the appellants has been estimated and after comparing the same with the production recorded in their RG-1 register, the allegation of under reporting of production and clandestine clearance of unreported production, without payment of duty has been made. No experiment for determining the average power consumption for production of one M.T. of M.S. Ingots has been conducted and the figure of 1100 per M.T. has been adopted from some experiment conducted in the unit of M/s Hans Casting. In my view, the power consumption of one induction furnace unit cannot be compared with the power consumption of other unit without ascertaining the type of furnace, the technology used, the age of the machinery, power supply pattern and, the type of scrap used and for this, the only reliable method is to conduct actual experiment in the unit and ascertain the average power consumption per M.T. which has not been done in these cases. In view of this, I am of the view that the adopting of power consumption norm of

another unit is arbitrary and the confirmation of duty demand on this basis would not be sustainable. I find that same view has been taken in the case and the Tribunal judgment in the case of **R.A. Castings Pvt. Ltd. vs. CCE, Meerut – I** (supra), which has been upheld by the Hon'ble Allahabad High Court and the department's appeal has been dismissed by the Apex Court. In view of this, the impugned orders are not sustainable. The same are set aside. The appeals are allowed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

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