

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

Date 26/03/2012

Appeal No. E/3191/2007 - EX[DB]
E/M/407-408/2009&449/2010-EX

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

To :
C.C.E. INDORE

MANIK BAGH PALACE, POST BOX NO. 10, INDORE
452001 (M.P.)
C.C.E. INDORE

Appellant

Vs

Respondent

M/S VENUS ALLOY PVT. LTD.

MISC ORDER NO. 272-274/2012-EX

2012 EX[DB] dated 20-3-12

I am directed to transmit herewith a certified copy of Final order No. A/348/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S VENUS ALLOY PVT. LTD.
67, INDL. AREA, MANDSAUR, M.P.

2. Adv. / Consult

SH. K.K. ANAND, ADV.,
A-103, DEFENCE COLONY,
N. DELHI - 24

3. C.D.R

4. Bar association. CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai - 17

8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

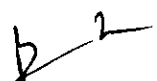
9. Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file


Assistant Registrar
(Excise Appeal Branch)

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

Excise Appeal No. 3191 of 2007

E/Misc/407-408/2009

2449/2010

[Arising out of Order-in-original No. 23/Commr/CEX/IND/07 dated 28.8.2007 passed by the Commissioner of Customs & Central Excise, Indore (MP)]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Rakesh Kumar, Member (Technical)

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- | | |
|--|------|
| 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? | Seen |
| 4. Whether Order is to be circulated to the :
Departmental authorities? | Yes |
-

Commissioner of Customs
& Central Excise, Indore

Appellants

Vs.

M/s. Venus Alloy Pvt. Ltd.

Respondent

Appearance:

Shri R.K. Verma, SDR for the Appellants

Shri K.K. Anand, Advocate for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Rakesh Kumar, Member (Technical)

Date of Hearing : 30. 01.2011

Date of Pronouncement : .03.2012

MISC ORAL ORDER NO. 272-274/2012-EX (BR)
 FINAL ORAL ORDER NO. A/348/2012-EX (BR)

Per Archana Wadhwa:

Being aggrieved with the order passed by the Commissioner vide which he has vacated the show cause notice issued to the respondents, the Revenue has filed the present appeal.

2. We have heard Shri R.K. Verma, learned DR for the Revenue and Shri K.K. Anand, Advocate appearing for the respondent.

3. As per facts on record, the respondents are engaged in the manufacture of MS ingots falling under Chapter 72 of the Central Excise Tariff by melting sponge iron and MS scrap in the induction furnace of 3MT capacity installed in their factory. The respondents factory was visited by the Central Excise officers on 25.3.06, who conducted verification. The consumption of electricity was examined for the financial year 2005-2006 vis-a-vis production of their final product. The officers entertained a view that power consumption for the manufacture of per MT of ingots was ranging between 1159.72 to 2019.37 units in the year 2005-2006.

4. The bills raised by M.P. State Electricity Board were examined and compared vis-à-vis the record of production of every year. It was also found that the respondents had during the period May, 2001 to March, 2003 taken a induction furnace of M/s. Pan Steel (P) Ltd. on lease. The study of productivity of induction furnace was got conducted by the officers of IIT Kanpur in the year 2000. As per the technical opinion report of IIT, Kanpur the energy requirement of

induction furnaces for manufacture of one MT of steel ingots by melting of scrap ranges between 555 to 754 KWH. The requirement in case of manufacture of ingots by melting of sponge iron ranges between 815 to 1046 KWH. Thus, the electricity consumption by the party was much higher than the normal requirement.

5. According to the expenditure of electricity alone varied from 34% to 71% of the total sale value and if the other expenditure on account of raw materials etc. are taken, the expenditure would be around 99% to 112% of the total sale value. As the respondents were showing profit in their balance sheet, Revenue entertained a belief that the same was possible by showing 'other income' besides income from sale, from profit and loss account.

6. The statement of Shri Nand Kishore Gaur, authorised signatory of the party was recorded wherein he stated that they are using steel scrap, ship breaking scrap, imported scrap and sponge iron fines and lumps for manufacture of steel ingots. He further stated that besides the induction furnace, there is an auxiliary load of 225 units per hour for cooling the furnace which is constant even when the furnace is not in operation. Electricity is also required for operating the water pumps, circulation pumps, hoists, tilting arrangements, compressor, welding transformers, weightbridge, scrap cutter, lights, fans etc. Also, there is loss of electricity in stepping down the voltage from 33KV to 440 volts. Therefore, he stated that the electricity consumption in their factory is not more than the normal requirement for the recorded production.

7. Regarding the figures of electricity expenses shown in the balance sheets for the year 2001-2002 and 2002-03, Shri Nand Kishore Gaur stated that from time to time Additional Cash security is charged by MPSEB in the electricity bills, which is not in the nature of expenditure on electricity. He also stated that arrears of electricity charges in respect of M/s. Pan Steel Pvt. Ltd. have not been paid by them due to some dispute with MPSEB. Therefore, he stated that actual expenditure on electricity shown in the balance sheets is less than the total amount in the bills.

8. Shri Nand Kishor Gaur further stated that the other income shown in the balance sheets pertains to the commission income earned in the trading of machinery etc. He stated that no profit is being earned from the manufacturing activity. He deposed that the unit is being run with the expectation that circumstances would be favourable in future and it would start earning profit.

9. On the above investigation, Revenue was of the view that respondents had not accounted for the entire production that could be manufactured from the electricity consumed by them and cleared the same clandestinely without payment of duty. If the consumption of electricity for manufacture of 1MT of ingots is taken as 1046 kwh, which is the maximum requirement as per the technical opinion report of IIT, Kanpur on productivity of induction furnaces, the total quantity of ingots that could be manufactured by the party during the period April, 2001 to March 2006 works out to 43286.483 MT. However, the party

have shown production of only 31522.950 MT in their records. Therefore, it appeared that the party suppressed the production of 11763.533 MT of ingots and cleared the same without payment of duty amounting to Rs.2,92,94,329/- leviable thereon.

10. On the above basis, show cause notice dated 30.5.06 was issued to the respondents proposing the confirmation of demand and imposition of penalty.

11. In their reply to the above SCN, the respondents submitted that the higher consumption of electricity cannot be indicative of clandestine removal of goods. They stated that despite losses, they were running the factory as closure would be uneconomical as the expenditure towards minimum electricity charges, salary, wages, interest on inventories, repayment of loans and interest thereon would have been much more as compared to the expenditure which is required for running the factory into loss. However, they have been able to run the factory by earning income from other sources.

12. The respondents stated that the expenditure on electricity shown in the balance sheets for the years 2001-02 and 2002-03 was lower than the amounts as per the electricity bills, as in the bills the outstanding amounts of the past bills are repeated in the current bill till the same are paid or settled. The bills also include the security deposits taken by MPSEB. They submitted a certificate dated 5.9.06 issued by Chartered Accountant certifying that the power expenses have been correctly shown in the balance sheets of the respondents.

13. The respondents also submitted a certificate dated 16.8.07 of chartered engineer wherein he has certified that 35% of the power is consumed in auxiliary loads and losses. If the auxiliary load is taken into account the consumption in the induction furnace is only 934 unit per MT which is well within the parameters laid down in the technical opinion report of IIT, Kanpur.

14. The Commissioner decided the above show cause notice vide order in original No. 23/Commr/CEX/IND/07 dated 28.8.07. The Commissioner has held that the report of IIT, Kanpur deals with the productivity of the furnace only and not the factory as a whole. The Commissioner observed that the party have submitted an elaborate list of items which can increase the auxiliary loads such as running water pumps, circulation pumps, water supply pumps of tube well and well, cooling tower, DM water softening plant, 3 hoists, tilting arrangements, compressors, welding transformers, weight bridge, bundling machine, factory maintenance work, lights and fans, air conditioners etc.

15. The Commissioner further held that the charge of clandestine removal based on electricity consumption alone without any corroborative evidence is not sustainable. He observed that in this case there does not exist any direct evidence of clandestine removal. He held that demand on clandestine removal cannot be raised on the basis of estimated production as no evidence has been garnered to prove that the goods were actually manufactured and then removed from the factory premises without payment of duty. The Commissioner,

therefore, set aside the proceedings initiated under the show cause notice dated 30.5.06.

16. Hence, the present appeal by the Revenue.

17. After hearing both the sides, and after going through the impugned order as also the grounds of appeal, we find that the same reasons stand reiterated before us which were available in the show cause notice. The entire case of the Revenue is basis^{ed} upon the consumption of electricity and the reports of IIT Kanpur as also of the Chartered Engineer. It stands strongly contended before us that electricity is one of the major inputs and consumption figures of the same would be directly proportionate to the manufacture of the ingots. Revenue has also relied upon certain decisions of the Tribunal as also of the Hon'ble High Court to buttress their plea that ^{where} ~~whether~~ the accounts are found fabricated and untrue and ^{where} ~~whether~~ figures of raw materials utilised or the particulars of labour employed may not be available, the deemed normal production on the basis of electricity consumption cannot be faulted. They have also submitted that in the report of IIT Kanpur all the relevant factors relating to energy consumption in the induction furnaces have been taken into account and it is not merely theoretical. The demand is based on maximum consumption limit stated in the report. The Commissioner relied upon the Tribunal's decision in the case of Padmanabh Dyeing and Finishing Works vs. CCE [1997 (90) ELT 343] wherein it was held that the clandestine removal cannot be alleged on the basis of higher production per unit of electricity

consumed by the party for a short period is not appropriate inasmuch as it was one time achievement in that case. They have also referred to various other cases, relied upon by the Commissioner to arrive at the finding in favour of the respondents and have submitted that such decisions are not applicable. We find that an identical issue was considered by the Tribunal in a recent judgement in the case of R.A. Castings P. Ltd. vs. CCE Meerut [2009 (237) ELT 674 (Tri-Del)]. The allegations made and the evidence sought to be relied upon in the present proceedings are identical. In that case also, the revenue relied upon Shri Batra of IIT, Kanpur's report to advance their case of excess production, based upon the electricity consumption.

18. The Tribunal in the said decision held as under:-

"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 widely 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 liable 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. v. CCE, Rajkot - 1999 (111) E.L.T. 407 (Tri.)*
- (ii) Kapadia Dyeing Bleaching and Finishing Works v. CCE, Surat - 2000 (124) E.L.T. 821 (Tri.)*

- (iii) *A. Arti Leathers (P) Ltd. v. CCE & C, Ahmedabad - 2001 (136) E.L.T. 1255 (Tri.-Mum.)*
- (iv) *Parshuram Cement Ltd. v. CCE, Lucknow - 2003 (160) E.L.T. 213 (Tri.-Del.)*
- (v) *Mukesh Dye Works v. CCE, Mumbai-VI - 2006 (196) E.L.T. 237 (Tri.-Mum.)*
- (vi) *Hans Castings Pvt. Ltd. v. CCE, Kanpur - 1998 (102) E.L.T. 139 (T)*
- (vii) *M/s. Padmanabh Dyeing and Finishing Works v. CCE, Vadodara - 1997 (90) E.L.T. 343 (T)*
- (viii) *M/s. Madhu Products v. CCE, Hyderabad - 1999 (111) E.L.T. 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. v. Commissioner of Central Excise, New Delhi* reported in 2003 (151) E.L.T. 170 (Tri.-Del.);
- (ii) *Commr. of Central Excise, Chennai v. Dhanavilas (Madras) Snuff Co.* reported in 2003 (153) E.L.T. 437 (Tri.-Chennai);
- (iii) *Commissioner of Central Excise, Madurai v. Madras Suspensions Ltd.* reported in 2003 (156) E.L.T. 807 (Tri.-Chennai);
- (iv) *Commissioner of Central Excise, Coimbatore v. Sangamitra Cotton Mills (P) Ltd.* reported in 2004 (163) E.L.T. 472 (Tri.-Chennai);
- (v) *Commissioner of Central Excise Coimbatore v. Velavan Spinning Mills* reported in 2004 (167) E.L.T. 91 (Tri.-Chennai);
- (vi) *M. Veerabadhran & others v. Commissioner of Central Excise, Chennai-II* reported in 2005 (182) E.L.T. 389 (T) = 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.*

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.*

19. After observing so, the Tribunal also took into consideration various precedent decisions of the judicial and quasi-judicial authorities and held that the demands of duty are not sustainable. The said decision of the Tribunal was appealed against by the Revenue before the Hon'ble High Court of Allahabad and the appeal filed was rejected as reported in Commissioner of Central Excise vs. R.A. Castings Pvt. Ltd. [2011 (269) ELT 337 (All)]. The relevant paragraph of the said decision is reproduced below for better appreciation as under:

“3. Being aggrieved by the impugned orders, the respondents filed appeals before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. The Tribunal observed that it is settled principle of law that the electricity consumption can not be the only factor or basis for determining the duty liability, that too on imaginary basis, especially when Rules 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. The Tribunal further observed that no experiment have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing on MT of steel ingots. Tribunal also observed that the electricity consumption varies from one heat to another and from one date to another and even from one heat to another within the same date. Therefore, no universal and uniformly acceptable standard of electricity consumption 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. The Tribunal has also considered the report of Dr. Batra, which has been relied upon for making the allegations that there was higher electricity consumption. It appears that Dr. Batra in his report has observed that for the production of 1 MT of steel ingots, 1046 units electricity required."

20. The Revenue further carried the matter before the Hon'ble Supreme Court and the appeal filed was rejected by the Hon'ble Supreme Court as reported in [2011 (269) ELT A 108 (SC)]. The respondents have also placed before us some other decisions on the issue, like the Tribunal's decision in the case of Southern Ispat Ltd. vs. CCE, Calicut [2009 (248) ELT 270 (Tri-Bang)] laying down that the demand based on electricity consumption is not sustainable. Reference also stands made to another decision of the Tribunal in the case of Bhawani Shanker Castings Ltd. vs. CCE, Jalandhar [2009 (246) ELT 332 (Tri-Del)] wherein allegation of clandestine removal made on the basis of disproportionate consumption of electricity were not found favour with and confirmation of demand was set aside. However, we

find that the issue is squarely covered by the Tribunal's decision in the case of R.A. Castings Pvt. Ltd. which stand confirmed by the Hon'ble High Court of Allahabad as also by the Hon'ble Supreme Court. As such, we find no infirmity in the impugned order of Commissioner dropping the demand against the appellant. Consequently, no merits are found in the Revenue's appeal and same is accordingly rejected.

21. Misc. applications also stand disposed of.

(Pronounced in the open court on 20.3.2012)

(Ardhana Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)