CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Excise Appeal No.E/1737/2012-EX [DB]
Excise Appeal No.E/1739/2012-EX [DB]
Excise Appeal No.E/1740/2012-EX [DB]
Excise Appeal No.E/1741/2012-EX [DB]
Excise Appeal No.E/1738/2012-EX [DB]

[Arising out of Order-in-Original No.Commissioner/RPR/CEX/25/2012 dated 26.03.2012 passed by the Commissioner of Central Excise, Raipur]

M/s.Sks Ispat And Power Ltd, …Appellants
Shri. Anant S Shet (Former GM),
Shri. T Rama Rao,
Shri Deepak Gupta,
Shri. R. M. S Tomar

Vs.

C.C.E. & S.T.- Raipur … Respondent

Present for the Appellant : Shri.Alok Barthwal, Advocate
Present for the Respondent: Shri. R.K Maji, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing: 30/09/2016
Date of Pronouncment: 25/01/2017

FINAL ORDER NO. 50496-50500/2017

PER: S.K. MOHANTY

Brief facts of the case are that the Appellant M/s SKS Ispat & Power Ltd. (appellant No. 1) is engaged in the manufacture of Sponge Iron and other products falling under

Chapter 72 of the Central Excise Tariff Act, 1985. The Central Excise Officers of Headquarters (Preventive), Raipur visited the factory of the appellant on 06.05.2008. During the course of verification of goods vis-a-vis the records, the officers found shortage of 246.084 MT of Sponge Iron, 293.966 MT of Bloom Billets, 482.972 MT of Rolled product and 483.363 MT of Ferro Alloys in presence of Shri R.S. Tomar, President (Works), who admitted the shortages and undertook to pay the duty. Later, the Appellant vide letter dated 14.05.2008 of Shri Anant S. Sheth (General Manager of Ferro Alloy Division) disputed the stock taking of Ferro Alloys, stating that the stock taking has not been conducted in proper manner. The officers also visited the residence of Joint Managing Director Shri Deepak Gupta and seized an amount of Rs. 59,58,000/- from different places. On a query, Shri Deepak Gupta stated that the cash amount has been brought from factory and Mumbai office of the company for distribution of salaries. The Appellant vide their letter written by Shri R.S.Tomar (President – Works) and Shri T. Rama Rao, (AGM – Tax) requested to release the cash, stating that the cash pertains to the company and has been properly accounted for and annexed copy of accounts to this effect.

1.1 On the basis of such verification with regard to discrepancy in the stock and finding of cash, the Department issued the SCN, seeking recovery of the Central Excise duty attributable to the shortage of finished goods, alleging the same to have arisen out of clandestine removal of short found goods and also sought to confiscate the seized cash in terms of Section 121 of the Customs Act, 1962 as made applicable to Central Excise by virtue of Notification No. 68/63 dated 04.05.1963. Penalty was also proposed to be imposed upon Appellant Nos. 2 to 5 i.e. Shri R.S Tomar, Shri Anant S Sheth, Shri T Rama Rao and Shri Deepak Gupta. The Show Cause Notice dated 27.10.2008 issued in this regard, culminated in the Adjudication Order No. COMMISSIONER/RPR/CEX/25/2012 dated 26.03.2012, wherein the Central Excise duty of Rs. 1,04,20,177/- on shortages was confirmed along with interest against the appellant No.1. It was also ordered for confiscation of seized cash and its appropriation against the demand. Besides, penalty equivalent to amount of duty was imposed under Section 11AC of the Central Excise Act, 1944. Further, penalty of Rs. 1,00,000/- each was imposed against Appellant No.2 to 5. Hence the present appeals are before this Tribunal.

2. The Ld. Advocate appearing for the Appellants submits that demand cannot be raised merely on basis of shortages, as there is no acceptance by Appellants that the goods found short were removed without payment of duty nor there is any evidence of clandestine removal. It is apparent from Panchnama dated 07.05.2008, the stock verification was carried out on estimation basis. The verification of Stock of Beam, Angle and Channel was done as per their Sectional Weight and of Bloom/ Billet, as per cross sectional weight. The verification of Heap of Sponge Iron was done as per length, width and height and by multiplying the same with the Density. In case of Sponge Iron Hopper and Bunker, the weight was ascertained with the Dip Method and of Sponge Iron Lumps and fines lying near Storage Yard and Bunker, the same was also verified by Volumetric method. The Rolling Mill Scrap was of random size and quantity was very huge, hence physical verification was not done and resultantly, shortages were alleged. He submits that the Appellants were also recording stock on estimation basis, as may be seen from the statement dated 25.07.2008 of Shri Deepak Gupta, which have led to detection of shortage by officers. He submits that the shortages as against declared stock in case of Angle, Beam, Channel, bloom billet was hardly 3% of the stock and in case of Sponge Iron, it is hardly 2.74%. In case of Ferro Alloy i.e.

Silicon Maganese, he submits that the verification was not done properly as pointed out by Shri Anant Sheth (GM – Works) in his statement. That Shri Deepak Gupta refused to pay duty as may be seen from his answer to Question No.22 and 23 of his statement dated 25.07.2008, as he stated that the shortages has arisen on account of method of stock accounting and they do not accept any clandestine removal. That Shri R.S. Tomar President (Works) only accepted the shortages and agreed to pay duty, whereas, he was not concerned with the manner of recording of stock. That nowhere he has stated that the goods were removed clandestinely and hence duty cannot be demanded. As regard seizure of cash, he pointed out that the Appellant had produced the cash book and other records annexed to the appeal before the authorities, showing that the cash was recorded in accounts and does not pertain to any proceeds towards clandestine removal of short found goods. He submits that since the shortages has arrived only due to method of accounting of goods by the Appellant and even the physical verification of stock was conducted on estimation basis, it cannot be said that there has been actual shortages. He also submits that Shri Deepak Gupta in his statement dated 25.07.2008, in answer to question no. 21, had clearly stated that since there has been no removal of goods, therefore they will not deposit any duty as per the management's decision. He relies upon the judgments of Tribunal in case of CCE, Kanpur -Vs.- Minakshi Castings 2011 (274) E.L.T. 180 (All.), CCE, Ludhiana -Vs.- Nexo Products (India) 2015 (325) E.L.T. 106 (P & H), CC EX. & S.T., Ludhiana -Vs.- Anand Foun. & Eng. 2016 (331) E.L.T. 340 (P & H) and Comm.. -Vs.- Vikram Cement (P) Ltd. 2014 (303) E.L.T. A82 (All.), to show that shortage of goods cannot lead to inference of goods having been removed without payment of duty. He also submits that since the cash does not pertain to any proceeds of clandestinely removed goods nor it is notified goods hence the same cannot be confiscated and places reliance upon the judgment of CCE, Meerut -Vs.- Moon Beverages Ltd. 2002 (150) ELT 976 (TRI – DEL). He also files written submission in this regard.

4. On the other hand, the ld. D.R. appearing for the respondent reiterates the findings recorded in the impugned order and further submits that since the shortages has been found duty has been correctly ordered and cash has been confiscated.

5. Heard both the sides and perused the records.

6. For confirmation of demand, the ld. Commissioner has relied upon the statement of Shri R.S Tomar accepting the shortages and agreed to pay duty. He also held that as per Rule 10 of Central Excise Rules, 2002, the records has to be maintained properly and that the Appellant has no option to adopt the recording of production on sectional weight basis and removals on actual. Even if such a method has been adopted, the Appellant cannot disown the difference arrived at on actual physical weighment method, which was also agreed to be satisfactory during proceedings. Therefore, the duty demand is correctly made on shortages. As regard cash, he has ordered confiscation on the ground that in view of preponderance of evidence regarding indulgence of Appellant in un-accounted manufacture and removal of goods, the seized cash is sale proceed of goods so removed and hence ordered for confiscation to be appropriated against demand.

7. We find from the records of the case and the written submission filed by Appellants that the Appellant has been recording production of sponge iron as per the dip method for goods lying in hoppers and in case of goods lying in heap, on the basis of volumetric measurement. In case of Ingot, Billets

and other goods, the quantity was recorded on cross sectional weight. As per panchnama, same practice has been adopted by the officers for conducting physical verification and the shortages occurred are around 2.5% to 3% of the stock lying at the factory. Shri Tomar, President Works, though admitted such shortages arrived at, but nowhere stated that the same has arisen due to clandestine removal of goods. We also find that Shri Deepak Gupta, the Joint Managing Director in his statement has clearly stated that the stock was recorded on cross sectional weight basis or by dip method. No instance of any removal of goods, found to be shortage, has been adduced by the authority. No buyer of goods or evidence of removal such as, transportation of goods, receipt of consideration is appearing on record nor there seems to be any investigation on this account. In such case, only on the basis of acceptance of shortages by Shri R.S Tomar, who is employee of Appellant company, the duty demand cannot be upheld. Our views are supported by the ratio in the judgment of Allahabad High Court in case of M/s CCE, Kanpur -Vs.- Minakshi Mills Ltd. (supra), wherein it was held that shortage of goods by itself could not result in demand, unless it is related to clandestine removal of finished goods, for which there was no material evidence, inferring evasion of excise duty. Further, same analogy has been adopted by Hon'ble High Court of Punjab & Haryana in case of CCE. & S.T., Ludhiana -Vs.- Anand Founders & Engineers (supra) .We further find that demand cannot be made only on the ground of acceptance of shortage by Shri R.S Tomar, as he has nowhere stated that the shortages has arisen due to clandestine removal of goods. It is more so, in case where the quantity of finished goods were being recorded on estimation basis and even the officers during physical verification, adopted the same method. From the statement of Shri Deepak Gupta, Joint Managing Director, it is seen that he refused to deposit any duty on the ground that no goods were cleared without payment of duty. We find that in case of Commr. -Vs.- Vikram Cement (P) Ltd. (supra), the Hon'ble High Court has upheld the order of Tribunal, dropping duty demand as except statement of director, there was no evidence of clandestine removal. In such view of facts, we hold that the duty demand cannot be held merely on the grounds of shortages. Even such shortages have been reported to be in the range of less than 3% of the total quantity recorded in the books.

8. As regard confiscation of seized cash and appropriation thereof against the demand, we find that the Commissioner has confirmed confiscation merely on ground of preponderance of probabilities, stating that the amount is of sale proceeds of short found goods. We find that no investigation has been done to link the said cash with any receipt of clandestine removal. The Appellant had produced the copies of their accounts to the authorities, showing the cash appearing in books. In such circumstances, when no evidence has been adduced to show the cash as pertaining to sale proceeds of any clandestine removal, we are of the view that the cash seized from residence of Shri Deepak Gupta cannot be confiscated and adjusted against demand. We also note that absolute confiscation of cash is legally unsustainable. Even if they are attributable to sale proceeds, when the seized goods are entitled for redemption, the purported sale proceeds cannot be absolutely confiscated. In view of above findings, we hold that the duty demand and penalty imposed against the appellant No.1 M/s SKS Ispat cannot be sustained and are set aside. For the same reason, we also set aside the confiscation of cash amount and its appropriation against the demand.

8. As regard imposition of penalties against Shri R.S. Tomar, Shri Deepak Gupta, Shri Anant S. Sheth and Shri T. Rama Rao (appellant Nos. 2 to 5), we hold that since the

demand against M/s SKS Ispat does not survive, therefore no case for penalty is made out against the said persons. We, accordingly, set aside the same.

9. In view of our above findings and observations, we set aside the impugned order and allow all the appeals with consequential reliefs.

[Pronounced in the Open Court on_25.01.2017_]

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Sakshi