IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

BENCH-DB

COURT –III

Excise Appeal No.E/2593/2007-EX [DB]
Excise Appeal No.E/2611/2007-EX [DB]

[Arising out of Order-in-Original No.11/2007 dated 30.04.2007 passed by the Commissioner, Central Excise, Jaipur-I].

M/s.Nirmal Inductomelt Pvt. Ltd.
Bharat Bhushan Malik …Appellant

Vs.

CCE, Jaipur … Respondent

Present for the Appellant : Mr.Amit Jain, Advocate
Present for the Respondent: Mr.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 Pronouncement: 27/01/2017

FINAL ORDER NO. _50517-50518/2017_

PER: S.K. MOHANTY

These appeals are directed against the impugned order dated 30.04.2007 passed by the Commissioner of Central Excise, Jaipur, whereby Central Excise duty of Rs.2,65,80,272/- was confirmed alongwith interest and penalty of equivalent amount was imposed on the appellant M/s. Nirmal Inductomelt Pvt. Ltd. Besides, penalty of Rs.40,00,000/- was imposed on Shri.Bharat Bhushan Malik, Director of the appellant company.

2. Brief facts of the case, leading to this appeal, are as follows:-

2.1 The appellant is engaged in the manufacture of M.S. Ingots falling under Chapter 72 of the Central Excise Tariff Act, 1985. The Central Excise Officers visited the factory of the appellant on 03.10.2005 and during the course of enquiry, found certain documents relating to production of M.S. Ingots for the period 02.08.2005 to 01.10.2005, which contained the details of date-wise and heat-wise production of M.S. Ingots. On examination of the monthly electricity bills, it was detected that the appellant had consumed electricity on an average of 1232 Units in the month of August, 2005 and 1570 Units in the month of September, 2005 for manufacture of Per M.T. of M.S. Ingots. However, the records recovered by the Department showed that the electricity consumption was between 688 and 691 Units PMT respectively. On the basis of investigation, the Department issued the show cause notice dated 12.10.2006, seeking confirmation of duty demand for the period 10.05.2005 to 01.10.2005 alleging removal of M.S. Ingots without payment of duty. The said allegation was leveled against the appellant on the basis of private records and information relating to electricity consumption. The appellant accepted its duty liability partially and approached the ld. Settlement Commission, who vide Final Order dated 16.07.2007 has settled the dispute.

2.2 Relying on the same investigation conducted by the Department on 03.10.2005, the present proceedings were initiated by the Department vide show cause notice dated 11.12.2006, demanding duty of Rs.2,65,80,272/- for the period from May, 2004 to July, 2005. The SCN alleged that there is wide range of variation in average consumption of electricity, ranging from 1059.26 to 1801.40 units per MT and that this wide variation in consumption of electricity is on account of receipt of unaccounted inputs, which the appellant utilized for manufacture of M.S. Ingots, without reflecting in its books of accounts. Further, based on the private records for the months of August and September, 2005 recovered from the appellant, the SCN has alleged that the average consumption of electricity was 689 units per MT. Accordingly, for the period from May, 2004 to July, 2005; production of M.S. Ingots was worked out to 21,294.694 MT. Since the appellant had recorded production of 12,122.060 MT during the relevant period, the SCN has concluded that that 10,424.608 MT of M.S. Ingots were removed by the appellant clandestinely.

3. The show cause notice dated 11.12.2006 was adjudicated vide the impugned order dated 30.04.2007 by confirming the duty demand, *inter alia*, on the ground that average consumption of electricity as reflected in the private records for the period August to September, 2005 was 689 units per MT; whereas, for the period May,2004 to July, 2005,

the appellant had deliberately shown excess consumption of electricity, ranging from 1059.26 to 1801.40. Thus, the impugned order has concluded that the actual production of M.S. Ingot has been suppressed and removed from the factory without issuance of invoice and without payment of Central Excise duty. Further, it has been observed that the appellant has admitted suppression of production and clandestine removal without payment of duty during the period 02.08.2005 to 01.10.2005 and that no evidence was produced that the appellant did not indulge in similar modus operandi during the prior period. The impugned order has also relied on the statement of the accountant of appellant, input-output norms and report submitted by Dr. N.K. Batra, professor, IIT, Kanpur for confirmation of the adjudged demand.

4. The ld. Advocate appearing for the appellant submitted that the period involved in the present case is from May, 2004 to July, 2005; whereas, based on the average electricity consumption for the month of August and September, 2005, the demand has been confirmed, which cannot be sustained inasmuch as, suppression, if any, during one period does not automatically lead to the inference of suppression during earlier period also. Thus, he submits that since there is no evidence of any excess procurement of raw-material , labour employed, transportation of raw-material and of finished goods, reference of buyers to whom the finished goods were allegedly removed clandestinely etc., the adjudged demand

cannot be sustained being confirmed on the basis of assumptions and presumptions only. The ld. Advocate has relied on the judgement of Hon'ble Supreme Court in the case of State of Kerala vs. C.Velukutty (1966) 17 S.T.C. 465 (S.C.) and also the decisions of this Tribunal in the case of R.A. Castings Pvt. Ltd. vs. CCE, Meerut- 2009 (237) E.L.T. 674 (Tri.-Del.) and SRJ Peety Steels Pvt. Ltd. & Ors. Vs. CCE – 2014 –TIOL –582 – CESTAT – Mumbai & 2014 – TIOL- 1530 – CESTAT – Mum. to state that charges of clandestine removal cannot be sustained without the help of positive evidence and electricity consumption cannot be the sole criteria for confirmation of demand.

5. On the other hand the ld. A.R. appearing for the Revenue reiterated the findings recorded in the impugned order.

6. Heard both sides and perused the records.

7. We find that relying on the investigation report submitted by the Central Excise officers on 03.10.2005, the impugned order was passed in confirming the duty demand for the period May 2004 to July, 2005. The said report was furnished for confirmation of the duty demand for the period 10.05.2005 to 01.10.2005. The Department has not brought any iota of evidence of receipt and utilization of excess raw-material in the clandestine manufacture of finished goods, manufacture of finished goods with reference to installed capacity, labour employed and payment made to them, clandestine removal of M.S. Ingots with reference to the vehicle for transportation of such goods, statement of lorry drivers , amount received from the buyers and their statement regarding receipt of

M.S. Ingots without proper and valid invoices. The law is well settled that in case of allegation of clandestine removal, the onus entirely lies on the Revenue to prove with the help of positive and complete evidence that the goods were in fact removed clandestinely by the assessee. In the case of R.A. Casting Pvt. Ltd. (Supra), it has been held by the Tribunal that the order confirming duty demand solely based on electricity consumption is not sustainable inasmuch as 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 . It has also been held that no tax can be levied on the basis of estimation and that the fact of manufacture is to be proved beyond doubt. Further, it is a settled principle of law that clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidence, which in the present case has not been provided or referred to by the Department.

8. In the light of above discussions, we hold that the demand of duty is not sustainable on merits and accordingly, the impugned order is set aside. Since the demand itself is not sustainable, the question of imposition of penalty on the appellant company and on its Director does not arise and the same are also set aside. Thus, the appeal is allowed in favour of the appellant.

[Pronounced in the open Court on _27.01.2017_)

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita