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

Date of Hearing: 5.12.2016
Date of Pronouncement: 15.3.2017

Appeal No. E/2287 & 2292/2006-Ex.(DB)

M/s Prakash Industries Ltd. — Appellant
Shri N.K. Gupta, V.P.

Vs.

CCE, Raipur — Respondent

Appearance

Shri K.K. Anand, Advocate - for the appellant
Shri Surbhi Singh, Advocate
Shri Rohit Chaudhary, Advocate
Ms. Preeti Khiwani, Advocate

Shri R.K. Manjhi, D.R. - for the respondent

Appeal No. E/3704/2006-Ex.(DB)

(Arising out of common Order-in-Original No. 38/COMMR (ADJ)/RPR/2006 dated 31.3.2006 passed by the Commissioner (Adj.), Customs & Central Excise, Raipur)

CCE, Raipur — Appellant

Vs.

M/s Prakash Industries Ltd. — Respondent
Shri N.K. Gupta, V.P.

Appearance

Shri R.K. Manjhi, D.R. - for the appellant

Shri K.K. Anand, Advocate - for the respondent
Shri Surbhi Singh, Advocate
Shri Rohit Chaudhary, Advocate
Ms. Preeti Khiwani, Advocate

CORAM: **Hon'ble Mr. Justice (Dr.) Satish Chandra, President**
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Final Order No. 52332-52334/2017

Per Ashok K. Arya :

M/s Prakash Industries Ltd. and Shri N.K. Gupta, Vice President are in appeal against the Order-in-Original No. 38/2006 dated 31.3.2006 passed by Commissioner (Adjudication), Raipur whereunder demand of Rs.1,51,44,426/- along with interest and by imposing equivalent penalty has been confirmed against the assessee-appellant. A penalty of Rs.50 lakhs also has been imposed on the assessee-appellant viz. M/s Prakash Industries Ltd., Champa under Rule 173Q/Rule 25 of Central Excise Rules. The impugned order has also confiscated the land, building, plant and machinery of assessee-appellant, M/s Prakash Industries Ltd., Champa and has given option to redeem the same on payment of redemption fine of Rs.25 lakhs. The impugned order further imposes penalty of Rs. 5 lakhs on the other appellant. Shri N.K. Gupta, Vice President (M/s Prakash Industries Ltd.), Delhi.

2. Revenue (CCE, Raipur) has also filed cross appeal (No. 3704/2006) against the same impugned order in original No. 38/2006 dated 31.3.2006 passed by Commissioner (Adjudication), Central Excise, Raipur.

3. The appellant viz. M/s Prakash Industries Ltd. (Appeal No. 2287/2006) and Shri N.K. Gupta, Vice President (Appeal No. 2292/2006) have been represented by ld. Advocates, Shri K.K. Anand, Ms. Surbhi Sinha, Shri Rohit Chaudhary and Ms. Preeti Khiwani and Revenue has been represented by ld. DR, Shri R.K. Manjhi.

(Appeal No. 2287/2006 (by M/s Prakash Industries):

4. The brief facts are that the appellant M/s Prakash Industries Ltd. (Appellant No.1) are engaged in manufacture of MS billets, Bloom, Ingots, Sponge Iron etc. falling under Chapter 72 of Central Excise Tariff. They claim to sell their finished goods to various entities manufacturing rerolled products. Revenue received the intelligence that the appellant assessee No. 1 were evading duty of Central Excise by clandestine removal of finished goods under cover of parallel invoices and without debiting duty shown on such invoices. The officers of DGCEI (Directorate General of Central Excise Intelligence) made searches at various places including at the premises of transport companies, M/s Kamal Transport Company, Champa and M/s Bajrang Transport Co. Champa and premises of their dealers related to the appellant assessee on 30.4.2002, 2.5.2002 and 3.5.2002.

4.1 The Revenue issued show cause notice (SCN) dated 18.10.2002/21.11.2002, to the appellant assessee as well as to other entity of the assessee namely M/s PIL located at Gogaon, Raipur and also to Shri Bal Krishan Gupta and Shri Naresh Kumar Gupta both Vice Presidents in PIL. In case of the appellant assessee M/s PIL, Champa, show cause notice proposed as under:

(i) Recovery of Central Excise duty amounting to Rs.11,46,10,423/- under Proviso to Section 11A(1) of the Central

Excise Act, 1944 and appropriation of already debited amount of Rs.1,87,75,566/- against this demand;

(ii) Imposition of penalty under Rule 173Q of the Central Excise Rules, 1944 read with Rule 25 of Central Excise Rules, 2001/2002 for contravention of various provisions of Central Excise Rules, 1944.

(iii) Imposition of penalty under Section 11AC of the Central Excise Act, 1944.

(iv) Recovery of interest under Section 11AB of the Central Excise Act, 1944.

(v) Confiscation of land, building, plant and machinery under Rule 173Q of the Central Excise Rules, 1944 read with Rule 25 of the Central Excise Rules, 2002.

4.2 In case of the appellant No. 2 viz. Shri N.K. Gupta, the Show Cause Notice proposed imposition of penalty under Rule 209A of Central Excise Rules, 1944 read with Rule 26 of Central Excise Rules, 2001/2002.

4.3 The Commissioner in the impugned order inter alia confirmed the demand of duty amounting to Rs.1,51,44,426/- along with interest. However, the Commissioner dropped the demand of

Rs.9,94,65,997/- which was based on Bilty Nakal Registers of transporters namely M/s Kamal Transport and M/s Bajrang Transport.

4.4 The appellant viz. M/s PIL and Shri N.K. Gupta's main prayers are for quashing the duty demand and waiving penalties on them and waiving redemption fine and for quashing the order ordering confiscation of related land, building, plant and machinery of the appellant assessee.

5. The Revenue's cross Appeal No. (E/3704/2006) against the same original order mainly prays that the demand of Rs.9,94,65,997/- on account of clearance of 156 MTS of goods which is based on Bilty Nakal Registers along with the corresponding penalty be confirmed. Revenue in their cross appeal also prays that penalty be also imposed on Shri B.K. Gupta, Vice President of M/s PIL, Raipur.

6. On behalf of appellants, ld. Counsel at the strength of written submissions inter alia submits that:-

(i) Duty is mainly based on oral statements which have been retracted.

(ii) Commissioner dropped duty demand of Rs.9,94,65,997/- and did not accept the veracity of various statements;

the same principle would apply even in cases, where Commissioner confirmed the duty demand.

(iii) Duty of Rs.79,57,994/- relating to 262 parallel invoices provided by some source/informer cannot be relied on unless this source is revealed. These documents are in the form of photo copies and have no evidentiary value or of little evidentiary value.

(iv) Commissioner confirmed duty demand on the ground that the appellant voluntarily paid duty on 262 invoices; there is no legal provision cited in support of this finding.

(v) Duty of Rs.4,95,738/- was demanded on alleged short quantity, which was found short on eye estimation basis and stock was not actually weighed.

(vi) There is no evidence on record that the assessee actually cleared 325.783 MT of MS Ingots and Blooms and if yes to whom.

(vii) Commissioner has imposed separate penalty of Rs.50 lakhs on the appellant assessee under Rule 173Q of Central Excise Rules, 1944 / Rule 25 of Central Excise Rules. There is no justification for imposing separate penalty of Rs.50 lakhs. Assessee cannot be visited with a penalty twice for the same alleged offence.

(viii) There is no provision for seizure and confiscation of land, building, plant and machinery under Rule 25 of Central Excise Rules.

(ix) Penalty of Rs. 5 lakhs imposed on Shri N.K. Gupta, other appellant under Rule 25 of Central Excise Rules, 2002 is erroneous. None of the statements of Shri N.K. Gupta are of inculpatory nature.

6.1 Similarly, Ld. Advocates for the appellant assessee who are the respondent in the case of appeal (No. 3704/2006) filed by Revenue, based on the written submissions inter alia submit as under:

(i) The Department in their appeal have not effectively rebutted or controverted the substantial material findings of the Commissioner.

(ii) The department is placing reliance on inculpatory statements of Shri S.N. Jha and Shri S.K. Bhadoria; the said statements of Shri Bhadoria and others were recorded under threat and duress. Many witnesses during cross examination had resiled from their original statements. These averments of the witnesses have been accepted while dropping the demand. Revenue has not challenged the averment of the witnesses made in their irrespective cross examination.

7. Having carefully considered the facts on record and the submissions of both the sides, it appears that Commissioner (Adj.) rightly confirmed the demand of Central Excise duty amounting to Rs.1,51,44,426/- along with interest and with imposition of equivalent penalty. The impugned order discusses in detail the evidences of confirmation of the demand. Here, the demand of Rs.79,57,994/- is mainly based on the evidence of 262 parallel invoices. These invoices are further supported by the evidence in the form of transport documents and weighment slips. These invoice evidences were provided by the concerned informer of the Directorate General of Central Excise Intelligence who made the searches of the related premises of the appellants. The appellants challenge that photo copies cannot be made admissible so the evidence has no substance / force. But facts remains that there are other evidences on record to substantiate the charge of removal of the goods on the parallel 262 invoices, where the duty of Central Excise was not paid by the appellant assessee. The Commissioner in the impugned order has given the finding that there is no indication of any manipulation on 262 invoices; these are authentic documents (invoices). These 262 invoices have been found to be issued by the appellant – assessee and later on, they removed the same from regular record and did not discharge the duty of Central Excise on these invoices. The

impugned order confirms that the AGM Shri S.N. Jha working with the assessee company identified the signatures of the persons who prepared invoices, in his statement. It has also been noted in impugned order that the assessee had put mark $; this mark $ was put as product code, where no duty was paid by the assessee. The adjudicating authority has mentioned that putting the product code as mark $ is a modus operandi deployed by the company for evading Central Excise duty. The impugned order also makes a mention that on this account, the assessee made the voluntary payment of the duty. The assessee's contention that 'there is no sufficient evidence', has no basis when the names of the consignee and vehicles numbers are available in the said invoices. The impugned order though makes a mention that the Revenue has not caused investigation at the end of consignee or the truck owner/driver yet it concludes that balance of convenience is in favour of the department. Considering the above evidences and the discussions, we agree with the findings given in the impugned order in this regard. Hence, the impugned order pertaining to the duty demand of Rs.79,57,994/- is hereby sustained along with the reasons mentioned therein. This ground is rejected.

8. Next grievance of the appellant is that there has been confirmation of demand of duty of Rs.60,45,267/- on account of

short accountal of production of 3811.46 MTs of MS Ingots and 120.320 MTs of Runner and Riser in the daily stock account of the assessee during the period of 11.4.2002 to 28.4.2002. The department's case is based on actual production reports recovered during search of the assessee –appellant, when the same were compared with the production recorded in RG-1 register. The assessee appellant' s argument is that they record the production in RG-1 register, after quality control test. The assessee-appellant has failed to submit any evidence to support this argument of theirs. It is evident that assessee recorded their production in production reports and it is not mentioned anywhere that said production was to be subjected firstly for quality tests before its entry in RG-I Register. And thus there is discrepancy found between the production shown in production reports and production shown in RG-I Register.

8.1 Further, it has been mentioned in the impugned order that in case of Ingots and Bloom, the quality of goods is tested by taking sample from liquid metal before the stage of casting. The facts state that the assessee-appellant showed the production of 5775.41 MTs of ingots and 215.87 MTs of Runner and Riser in production report, whereas in the RG-I register production shown is 1963.95 and 955.55 MTs respectively only during the relevant period. The impugned order notes (in its para 5.5) that difference between the production as per production report and the daily stock (in RG-I record) is 66%, which is not attributable to rejection on account of quality tests especially when the production reports have no indication of any quality problem during the period. The assessee has also not produced any documentary evidence indicating rejection on account of quality. The assessee' s contention that shortage is on account of quality test, therefore, is not acceptable and has been rightly rejected by the adjudicating authority. The above facts have also been admitted in the statement of Shri S.N. Jha, working with the appellant assessee as AGM. The statement of Shri S.N. Jha also makes a mention that the production in RG-1 register recorded was recorded less as per the directions of Shri Ashok Sharma, who has also been working with the assessee company in the capacity of AGM (Accounts). Revenue found that the quantity which was not entered in RG-I register though was found entered in production reports, was not available in the factory premises of the assessee during the verification of the stock on 30.4.2002. It is also on record that in this regard, the appellant assessee debited an amount of Rs.59,69,401/- voluntarily. The impugned order observes that when the production records are maintained by the appellant assessee themselves, they cannot challenge the correctness of their own documents. Consequently, we agree with the findings given in the impugned order in this regard and sustain the demand of duty of Rs. 60,45,267/- along with interest confirmed and equivalent amount of penalty imposed in this regard on the appellant assessee by the impugned order. The impugned order to this effect is sustained along with the reasons mentioned therein. This ground is rejected.

9. Next grievance of the appellant is that there is demand of Rs.6,45,427/- which has been confirmed/based on 11 lorry receipts of different transporters and the despatch register, recovered from the office of Shri R.K. Bhadoria, AGM (Logistics). AGM, Shri R.K. Bhadoria himself on record admits removal of the said goods from the factory against the said entries without payment of duty. Though, during cross examination, Shri Bhadoria denied that the said goods were cleared against those entries. The impugned order has discussed that the documents viz. LR, (Lorry Receipts), dispatch registers etc, were fully signed by the issuing authority. The dispatch register contains the details of the quantity of goods, names of the transporter, vehicle number; and it also contains the tick mark showing the clearance was over. The impugned order has arrived at the finding that though during the cross examination Shri Bhadoria denied the clearance on those goods from the factory, his denial is not correct considering the documentary evidence recovered from

him and the assessee voluntarily debited the due duty on 30.4.2002.

9.1 After hearing rival submission and on perusal of record, it appears that the contents of dispatch register, recovered lorry receipts, statement of Shri R.K. Bhadoria irrefutably supports the Revenue's stand that the subject goods were cleared without payment of Central Excise duty of Rs.6,45,427/-. The assessee debited the said duty on 30.4.2002 voluntarily.

9.2 In the light of above discussions, there is no scope to interfere with the impugned order in this regard. Consequently, the confirmation of this demand of duty of Rs.6,45,427/- along with interest and imposition of equivalent penalty on the assessee is hereby sustained.

10. Next grievance of the appellant is that by the impugned order duty demand of Rs.4,95,738/- on account of shortage of 325.783 MT of MS Ingots and Blooms in the stock of the assessee appellant in comparison with the stock maintained in the daily stock account as on 30..4.2002 was confirmed.

10.1 The assessee appellant's argument is that the stock was ascertained on eye estimation basis and there was no actual weighment. From the record, it is evident that there has been physical accounting of the Blooms and Ingots with proper multiplication with the average weight of such Bloom and Ingots, which was recorded in the *Panchnama* dated 30.4.2002. In the impugned order, it is mentioned that this is the practice followed in the steel industry and was accepted by the assessee. The impugned order makes a mention of CESTAT decision in the case of ***CCE Vs. Nagpal Steels (P) Ltd.*** – 1995 (79) ELT 463 (T), where it was mentioned that such physical counting and ascertainment of the stock of MS Ingots and Blooms cannot be rejected. Hence, the duty demand is sustainable. By following the ratio (supra), we are of the view that there is no scope to disagree with the findings given in the impugned order.

10.2 When there is no scope to interfere with the impugned order in this regard, the demand of Central Excise duty of Rs.4,95,738/- along with interest and imposition of equivalent penalty confirmed by the impugned order is hereby sustained.

11. The appellant assessee also challenges the penalty of Rs. 50 lakhs imposed on them under Rule 173Q of Central Excise Rules 1994/Rule 25 of Central Excise Rules, 2001/2002.

Considering the fact that the impugned order has confirmed total duty demand of Rs.1,51,44,426/- and mandatory penalty equivalent to the duty demand of Rs.1,51,44,426/- has been imposed on the assessee appellant under Section 11AC of Central Excise Act, we are of the view that additional penalty amount of Rs.50 lakhs (which is about one third of the duty amount confirmed) imposed on the assessee appellant is on higher side.

11.1 It will not be reasonable to further punish the assessee by imposing a high penalty of Rs.50 lakhs, when mandatory penalty to the tune of over rupees one and half crores (precisely Rs.1,51,44,426/-) has already been imposed. Therefore, considering totality of facts and circumstances, we reduce the said penalty of Rs.50 lakhs to 10% of the duty evaded which comes to Rs.15,14,422/- (10% of confirmed duty demand of Rs.1,51,44,426/-) and the same would be payable accordingly by the appellant – assessee.

12. The appellant – assessee also agitated against the confiscation of land, building plant and machinery used in connection with the manufacture, production, storage and removal or disposal of subject goods. When the assessee has been found to have evaded huge amount of Central Excise duty amounting to Rs.1,51,44,226/- and after considering the totality

of the facts and circumstances on record, there is no scope to interfere with the impugned order confiscating the land, plant, building and machinery of the assessee used in connection with the manufacture, production, storage and removal or disposal of the subject excisable goods, therefore, same is sustained.

12.1 However, considering the fact that assessee has already been imposed mandatory penalty of Rs.1,51,44,426/- and additional penalty of Rs.15,14,442/- (supra), and by taking a lenient view, the redemption fine of Rs.25 lakhs imposed by the impugned order for redeeming the said items is reduced to Rs.6.25 lakhs, which is 25% of the earlier redemption fine of Rs.25 lakhs.

Appeal No. E/2292/2006 (by Shri N.K. Gupta, Vice President):

13. In this appeal, Shri N.K. Gupta, Vice President has challenged the penalty of Rs. 5 lakhs imposed on him. On his behalf, it was pleaded that he is a salary paid employee and does not have any independent existence of the assessee manufacturer and is not independently responsible for the conduct of assessee's business. But facts make clear that the appellant Shri N.K. Gupta has been involved on the marketing as well as issued necessary directions for dispatch of the goods (without payment of duty of Central Excise) to the AGM Shri Bhadoria in the capacity of Vice

President, the position, he was holding in the assessee company. It has also been on record that Shri N.K. Gupta was concerned with the transportation, removal and selling of excisable goods, which were liable to confiscation as the same were cleared without payment of duty. The impugned order supports imposition of above penalty of Shri Gupta citing the decision of the Tribunal in the case of ***Yogesh Sood Vs. CCE, Indore -*** 2001 (129) ELT 674 (Tri.-Del.). However, considering the fact that Shri Gupta has been a salaried employee though holds the position of Vice president in the assessee company Prakash Industries Ltd. (PIL), by taking a lenient view, we reduce the penalty of Rs. 5 lakhs imposed on him to Rs. One lakh only.

Appeal No. E/3704/2006 (by Revenue - CCE, Raipur);

14. Revenue is also in appeal against the same Order-in-Original No. 38/2006 dated 31.3.2006. The ld. AR for the Revenue, based on appeal memorandum mainly contends that the impugned order has erred in dropping the demand of Rs.9,94,65,997/- on 67,170,156 MTs of final goods cleared without payment of duty on the basis of *bilties* recovered from the premises of various transporters. The ld. Counsel for the Department submits that the respondent assessee, M/s PIL evaded Central Excise duty and it has been admitted by AGM of PIL and the case is also based on *Bilty Nakal Register*.

14.1 Revenue also contends that the penalties imposed are not commensurate with the level of duty evasion confirmed.

15. On behalf of the respondents, ld. Advocate during the hearing, in addition to the submissions made for their appeals Nos. 2287 & 2292, submit that the department in their appeal did not effectively rebut and controvert of the findings of the Commissioner given in the impugned order. *Bilty Nakal Register* recovered from third party itself is not an evidence but only a source of suspicion.

16. It may be mentioned that the Tribunal's decision in the case of ***Gulabchand Silk Mills Pvt. Ltd. Vs. CCE*** - 2005 (184) ELT 263 and Hon'ble Supreme Court's decision in the case of ***Collector Vs. D. Bhoormull*** – 1983 (13) ELT 1546 (SC) needs to be referred to. The CESTAT in the decision ***Gulabchand*** (supra) observes that clandestine activity at best can be established only by circumstantial evidence. The Hon'ble Supreme Court in the case of ***D. Bhoormull*** (supra) has observed that the department is not required to prove its case with mathematical precision; the case is required to be established with such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. After careful consideration of the facts of the

case and submissions of both sides, we are of the view that in the light of above observations the evidence in the form of *Bilty Nakal Register* needs proper examination afresh by the Adjudicating authority. The contents of such *Bility Registers,* which were recovered from the transport company and when they are related to the goods manufactured and cleared by the respondent assessee, need proper examination and more so when there are statements available on record of the concerned persons viz. Shri R.K. Bhadoria, AGM (Logistics) and Shri S.N. Jha, AGM (Excise) of the assessee company. These statements give credence to the contents of the said *Bilty Register*. These aspects were not examined in the impugned order. When it is so then in the interest of justice, we are of the view that the same need to be examined in depth specially when there are transporter's documents along with confessional statements of the concerned persons, the adjudicating authority is required to examine the same de novo in the light of above discussion with reference to the charges levelled against the respondent in the Show Cause Notice issued to them.

17. In the light of the above discussion, the impugned order is modified to above effect and matter is remanded to the original adjudicating authority to decide the issues de novo in the light of above discussions but by giving fresh opportunity of personal

hearing and submission of documents to both sides. Thus, appeal filed by the Department is allowed by way of remand.

18. In the result, Appeal No. 2287/2006 (M/s Prakash Industries); and Appeal No. 2292/2006 (Shri N.K. Gupta) are partly allowed as stated above and Appeal No. 3704/2006 (by Deptt.) is allowed by way of remand.

(Pronounced in Court on 15.3.2017)

(Justice Dr. Satish Chandra) (Ashok K. Arya)
President Member (Technical)

RM