

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

Appeal No. E/2559/2011-EX(SM)

[Arising out of Order-in-Original No. COMM/RPR/CEX/34/2011 dated 29.07.2011, by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Raipur].

M/s. MSP Steel & Power Ltd.

....Applicants

Vs.

C.C.E. Raipur

....Respondent

Appearance:

Shri A.K. Prasad, Advocate for the Appellant
Shri R.K. Mishra, DR for the Respondent

CORAM:

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

Date of Hearing: 09.02.2017

Date of Pronouncement: 15.03.2017

FINAL ORDER NO. 52424/2017-EX(SM)

Per Archana Wadhwa:

After hearing both the sides duly represented by Shri A.K. Prasad, Advocate for the Appellant and Shri R.K. Mishra, DR for the Respondent, I find that the appellants are engaged in the manufacture of sponge iron, MS Billets and TMT Bars. The sponge iron is manufactured out of iron ore, coal and dolomite. The sponge iron is partly sold, as such, and partly used in the factory for the manufacture of MS Billets. The MS Billets, in turn, are also partly sold, as such, and partly used in the factory in the manufacture of TMT Bars. The TMT Bars are sold to a number of parties.

2. The local Central Excise officers visited the factory and office premises of the appellants on 17.02.2009 and 18.02.2009. They seized some records and also conducted stock taking of final products. Statements of Shri Sandeep Agrawal, Deputy General Manager (Commercial), were recorded on 17.02.2009 and 18.02.2009. Statement of Shri Anand Tiwari, Deputy Manager (Process Division- Sponge Iron) was also recorded on 18.02.2009.

3. On the basis of the seized records, the investigations made and the statements recorded the proceedings were initiated against the appellant proposing the confirmation of demands to the extent of Rs.44,90,994/- under various heads. The show cause notice culminated into the impugned order passed by the Commissioner confirming the demand as proposed as also imposing penalties. The said order of the Commissioner is impugned before the Tribunal.

4. The various heads under which duty stands confirmed along with appellant's defense submission are as under:

i) Duty of Rs. 59,175/- in respect of 21.530 MT of TMT bars valued at Rs.5,74,510/- found short during the stock taking on 18.02.2009 .

On this it is submitted that the RG-1 indicated stock of 1296.212 MTs of TMT bars whereas the stock taking showed balance of 1274.628 MTs resulting shortage of 21.530 MTs (which is 1.66% of the recorded stock). This difference has been admitted by the appellants, but has been attributed to different methods adopted while recording stocks in the RG-1 (on sectional weight basis) and at the time of clearance (on actual weighment basis). This has

been explained by Shri Sandeep Agrawal in his statement dated 18.02.2009. Shri Agrawal has also stated that the shortage had accumulated over a period of time. The annual production of TMT Bars during the relevant period was 80,000 lakh MTs, which comes to 6667 MT per month. Hence, the shortage of 21.530 MTs is a mere 0.32% of the total quantity handled in a month. This is way below the permissible tolerance of 1% as per Table-1 of the Second Schedule to the Standards of Weight and Measures (Packaged Commodities) Rules, 1997. Hence, these are not actual shortages but difference noticed because of weighment errors. No duty can be demanded for such differences as held by the CESTAT in the case of **Commissioner of Central Excise, Allahabad vs IOC Ltd. – 2014 (300) ELT 153 (Tri-Del)**, which has been upheld by the **Allahabad High Court as reported in 2014 (308) ELT A121(All)**

ii) Demand of Rs.11,30,541/- in respect of 230 MTs of MS Billets valued at Rs.79,15,950/- being the difference between the quantity recorded on some seized computer printouts and that recorded in RG-1 for the month of August, 2008 .

In this context it is submitted that there is no corroboration of the contents of the said computerized loose sheets – from which computer it was generated, where were the original entries of which these were printouts, they did not carry any persons' signature, etc. A computer printout is not a primary evidence, since it carries no signature and is prone to easy manipulation.

Hence, Section 36B of the Central Excise Act, 1944, has allowed computer printouts to be used as evidence, but with strict conditions. The conditions, inter-alia, provide that the printout should be produced by a computer during the period over which the computer was used regularly to store or process information for the purpose of any activity regularly carried on over that period by the person who was in lawful control over the use of the computer. The condition also provides that during the said period there was regularly supplied to the computer in the ordinary course of said activities information of a kind contained in the statement or of the kind from which the information so contained is derived and that the information should have been supplied to the computer in the course of the said activities [Section 36B(2) refers]. That is why section 36B(4) makes it mandatory for production of a certificate by a person occupying a responsible official position listing out the above precautions. No such certificate has been produced in the instant case.

In this context, it is submitted that the requirements of Section 36B cannot be diluted. In the case of *Anvar P.V. vs P.K. Basheer* [MANU/SC/0834/2014- para 22 refers] the electronic evidence was rejected simply on this ground. The Supreme Court decision refers to requirements under section 65B of the Evidence Act, which is *pari-materia* Section 36B of the Central Excise Act, 1944.

Similar views have been expressed by the CESTAT in the case of **Ambica Organics reported in 2016(334)ELT97(Tri-Ahmd)**

which has been upheld by the **Gujarat High Court as reported in 2016 (334) E.L.T. A67 (Guj.)].**

Further, none of the two officers whose statements were recorded, were confronted with these documents.

On the contrary the appellants were maintaining 'Log sheets' and 'Billet Registers' pertaining to the manufacture of MS Billets. The entries in the Billet Register were rounded off to the nearest integer and formed the basis of entries in the RG-1 Register.

The 'Log sheets' and 'Billet registers' were also seized by the departmental officers but were not relied upon in the show cause notice. There were, therefore, no discrepancies. Hence, no demand can be raised on this account also.

(iii) Demand of Rs. 7,14,661 in respect of 176.490 MTs of TMT Bars valued at Rs.54,14,833/-, being the difference between dispatches shown in Record No: 61 seized from the appellants premises and the RG-1 Register, during specific dates. Initially in the show cause notice this demand was for Rs.18,04,643/- in respect of 425.990 MTs of TMT Bars (valued at Rs.1,34,26,060/-).

In this context, it is submitted that the appellants were maintaining the RG-1 register for TMT Bars under three separate heads, namely; i) Ordinary grade, ii) High grade and iii) Mis-rolled grade. In the show cause notice, the department has considered dispatches of 'ordinary grade' and 'high grade' TMT bars only. If one records the dispatch details under all the three heads on 6 specific

dates the figures have wrongly been recorded in Annexure-I to the show cause notice.

It can thus be seen that the total dispatch as per RG-1 register for the 6 dates comes to 1218.650 MTs whereas the quantity of dispatches shown in the Record No 61 for these dates comes to a lesser quantity of 1116.140 MTs, i.e less by 102.510 Mts . Total number of days for which the Commissioner has held there were discrepancies is 13. For the remaining 7 days the excess recorded in Record 61 comes to 98.77 MTs. Thus, overall, the RG-I had recorded an excess of 3.74 MTs (102.510-98.77). In other words, the appellants had paid duty in respect of 3.74 MTs of TMT bars, more than that recorded in Record No: 61. Hence, the demand on this account is unsustainable.

(iv) Demand of Rs.1,15,657/- in respect of 43.660 MTs of TMT bars valued at Rs.11,12,886/-, being the quantity used in the factory in civil works for various extension projects, which were not covered by notification No: 67/95-CE dated 16.03.1995.

In this context, it is submitted that the said quantity of TMT bars were utilized in the factory for various fabrication works. The quantity utilized for different works were provided to the Commissioner and is mentioned in para 2.3.2 of the Appeal.

These are all capital goods before their assimilation in the civil structure. E.g. 'Storage Tanks' are specifically covered in the definition of 'capital goods' under Rule 2(a) (A) (vii) of the Cenvat Credit Rules, 2004. Further, pipes, fitting and structures for boiler

systems are also eligible for Cenvat Credit under this definition (Circular No: 964/07/2012-CX., dated 2-4-2012).

Also see **KCP Ltd vs CCE, Guntur- 2009(237)ELT500(Tri-Bang) approved in 2010(250)ELT326(Kar). CCE, Tiruchirapalli vs India Cements Ltd -2012(285)ELT341(Mad), CCE, Jaipur vs Rajasthan Spinning & Weaving Mills Ltd - 2010(255)ELT481(SC).**

In view of the above, no amount can be demanded against the quantity of 43.660 MT of TMT bars captively consumed in the factory.

(v) Demand of Rs.24,70,960/- relating to 1291.950 MTs of Sponge iron valued at Rs.,1,86,74,345/-, being the quantity clandestinely cleared. This figure has been arrived at by the department on the basis of 55% recovery of sponge iron from Iron-ore. In this context it is submitted that production cannot be presumed on the basis of mathematical calculations. The recovery percentage will depend upon the quality (Iron content) of the iron ore. The Constitution Bench of the Supreme Court in the case of **Oudh Sugar Mills Ltd. v/s Union of India – 1978 (2) ELT (J172) (SC)** has held that allegation of clandestine production and removal cannot be based only on calculations of raw materials used in production. A similar issue came before the CESTAT, Mumbai, in the case of **Swati Polyester v/s CCE Surat-1, reported in 2005 (192) ELT 985 (Tri-Mum)** and it was held that clandestine production cannot be alleged on the basis of theoretical calculations. This decision was

upheld by the **Gujarat High Court as reported in 2015 (321) ELT 423 (Guj)**. SLP filed against this was dismissed by the Supreme Court as reported in **2015 (321) ELT A217 (SC)**.

In any case, the difference in figures recorded in various documents cannot necessarily lead to the conclusion that corresponding quantities were clandestinely manufactured and cleared. To establish a case of clandestine manufacture there must be some positive evidence in the form of unaccounted procurement of raw materials, excess consumption of electricity, identification of buyers of clandestinely manufactured goods, identification of transporters transporting such goods to buyers, receipt of unaccounted cash against sales of such goods etc. Neither was any investigation done by the department on these aspects nor any evidence produced supporting any case of clandestine manufacture and clearance.

5. Ld. DR appearing for the Revenue reiterated the reasoning adopted by the Adjudicating Authority for confirmation of demand and submits that the discrepancies pointed out by the Revenue lead to the invertible effect of manufacture and removal of the appellant's final product without payment of duty.

6. After appreciating the submissions made by both the sides, I find that the duty of Rs.59,175/- stands confirmed in respect of shortages detected during the course of verification of the appellants stock at the time of visit of the officers. Such shortages are to the tune of around 0.32 % of the total quantity. The appellants have attributed the same to the accumulated losses over

the period of time as also to the fact that whereas the stock taking was undertaken on the basis of sectional weight clearances are effected on the basis of actual weighment.

I find that apart from the said shortages there is no other evidence on record indicating that the short found goods stands removed by the assessee in the clandestine manner. The case laws relied upon by the appellant is to the effect that no duty can be confirmed on the basis of such shortages. As such by following the same, I set aside the confirmation of the said demand.

7. Demand of Rs.1,13,541 is based upon recovery of loose computerized sheets. As rightly contested by the Ld. Advocate such loose computer sheets cannot be formed the basis for arriving at the findings of the clandestine removal in the absence of the fulfillment of conditions of section 36 B(4) of the Central Excise Act. The various decisions relied upon by the Ld. Advocate are properly applicable to the facts of the present case. As such I hold that the confirmation of the said demand is not justified. The same is accordingly set aside.

8. Further, demand of Rs.7,14,661/- is based upon the difference between the appellants profit records and the RGI registers. Apart from the fact that the appellant have been able to explain such discrepancies properly, I also note that there is no evidence worth reliance to show that the appellants have manufactured the said quantity of 176 MT of TMT bars and has removed the same clandestinely. No identification of the suppliers of the raw materials, buyers of the final product and transporters

etc stand done by the revenue. It is well settled law that the allegation of clandestine removal are required to be established by production of sufficient and cogent evidence, which will inspire the confidence in the Revenues allegation. In the absence of any such evidence collected by the Revenue, the findings of the clandestine removal and consequent confirmation of demand cannot be upheld. Accordingly, I set aside the demand of Rs.7,14,661/-.

9. Further, the demand of Rs. 24,70,960/- stands confirmed on the basis of arithmetical calculations and based upon the recovery percentage of sponge, iron ore from iron ore. Such confirmation on the basis of assumptions and presumptions cannot be upheld in the absence of any evidence to the contrary. No justifiable reasons stand advanced by the revenue for confirmation of the said demand. The same is also set aside. As regards demand on duty of Rs. 1,15,657/- in respect of TMT bars, I find that the appellant had taken a categorical stand before the authorities below that the same was used for fabrication of capital goods in which case the credit would be available. Otherwise also, I find that the Hon'ble High Court in the case of **Mundra Ports & Special Economic Zones Ltd. Vs. CCE & CUS-2015-TIOL-1288-HC-AMD-ST** has disapproved the larger bench decision of the Tribunal in the case of **Vandana Global Ltd. Vs. CCE Raipur-2010 (253) ELT 440 (Tri-LB)**. The said facts require factual clarification for which purpose I remand the matter to the lower authorities.

10. In a nutshell the confirmation of the clandestine removal are set aside along with setting aside of penalties and the matter of availment of credit is remanded.

11. Appeal is dispose of in above terms.

[Pronounced in the open Court on 15.03.2017]

(Archana Wadhwa)
Member (Judicial)

Bhanu