CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 10.04.2017
Date of pronouncement: 11.05.2017

Excise Appeal Nos. 2153 -2154 2012

(Arising out of order-in-original No. 36/2012 dated 19/04/2012 passed by the Commissioner of Customs (Appeals), New Delhi)

M/s Rathi TMT Saria Pvt. Limited Appellant
Srivats Rathi, Director

Vs.

CCE, Jaipur Respondent

Appearance:

Sh. Krishna Kant, Advocate for the assessee
Sh. R. K. Mishra, AR for the Revenue

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order Nos. **53199 -53200/ 2017**

Per: **V. Padmanabhan**:

These appeals have been filed by the assessee as well as by Sh. Srivats Rathi, Director of the unit and are against the Order-in-Original No. 36/2012 dated 19/04/2012. The appellant-assessee is engaged in the manufacture of iron and steel products. On 21st of July 2008, the Central Excise officers visited the factory of the assessee and carried out search operations. During the course of examination of records maintained by the assessee, apart from invoice books which are in the form of statutory documents, two books of parallel invoices bearing the same serial numbers as that of genuine invoices were recovered indicating clandestine removal of finished goods. By comparison of these parallel invoices with the corresponding genuine invoices, the revenue officers came to the conclusion that under seven parallel invoices, yet total quantity of 67.230 mt. of finished goods have been cleared by the assessee clandestinely without payment of Central excise duty amounting to Rs. 3,10,090/-.

2. In addition to the above parallel invoices, revenue officers also recovered GR books. It was observed on scrutiny of these records that the details of clearances of goods given in these GRs do not match with the details found in corresponding excise invoices which showed that finished goods were removed clandestinely against these GRs without being entered in statutory records with intent to evade payment of duty. On the basis of these GRs, revenue came to the conclusion that goods weighing totally 142.81 MT were removed clandestinely leading to evasion of Central excise duty amounting to Rs. 8,34,175.

3. They also carried out stocktaking of the raw materials as well as finished products in stock. Stortage of raw materials to the extent of 2.775 MT was noticed as well as shortage in stock of finished goods to the extent of 450 MT The duty liability on the raw materials on which cenvat credit had been taken was as Rs. 14,005/- and the duty involved in the finished products found short was to the extent of Rs. 26,21,361.

4. On scrutiny of RG-23A register, it was noticed that as on 26th of October 2007, the balance of credit should have been Rs.1,12,08,677/- but the same has been shown as Rs. 1,62,08,677/-. Hence, the revenue concluded that credit of Rs. 50 lakh has been availed and utilised fraudulently.

5. During the course of investigation, statements of various concerned persons of the assessee were recorded.

i) Shri Mahendra Kumar Kabra, Director in his statement dated 21.7.2008 admitted the following:

a) Parallel invoices were being prepared by Sh. Kartar Singh. No excise duty was paid for the goods cleared under these invoices with the duty liability of Rs. 3,10,090/-.

b) Admitted the shortage in the stock of raw materials to the extent of 2.775 MT and finished products to the extent of 450MT.

c) He agreed that the quantity of goods and the invoice details shown in the GRs do not tally with the statutory records. He further admitted that these GRs have been used for clandestine removal of goods on parallel invoices with intention to evade payment of duty.

d) He also admitted the fraudulent availment of cenvat credit amounting to Rs. 50 lakh and that the same was within his knowledge. Since they did not have balance of Cenvat Credit, they committed the fraud.

ii) Shri Nagendra Dutt Sharma, Excise Clerk, admitted in his statement dated 21.7.2008 that no excise duty has been paid against the goods covered by seven parallel invoices recovered by the officers. In his further statement dated 21.7.2008, he admitted that on the directions of the owners, he has debited Rs. 50 lakh in the Cenvat Credit account on the date 18.7.2008 with back date by destroying the original page 35 and replacing it, with a view to cover up their fraudulent availment of cenvat credit.

iii) Shrivats Rathi, Director failed to appear before the Officers by ignoring six summons. After his anticipatory bail application was rejected by the Hon'be District Judge, Jaipur he approached the Hon'be Supreme Court by filing SLP. As per the directions of the Apex Court, he appeared before the investigating officers and in his statements dated 1.8.2009 and 20.8.2009, confirmed all the statements given by other senior functionaries of the assessee company. He admitted the clearance of goods clandestinely accompanied by the GRs and parallel invoices as also the shortages of raw materials and finished products. He also admitted fraudulent availment of Cenvat Credit amounting to Rs. 50 lakh.

6. On conclusion of investigation, show cause notice dated 21.12.2010 was issued as follows:

(i) Central Excise duty amounting to Rs. 14,005/- on raw material found short to the extent of 2.775 MT.

(ii) Central Excise duty amounting to Rs. 26,21,361/- on short found stock of finished goods of 450 MT alleged to have been cleared clandestinely.

(iii) Central Excise duty amounting to Rs. 3,10,090/- on 142.81 MT of finished goods clandestinely cleared with the help of parallel invoices.

(iv) Central Excise duty amounting to Rs. 8,34,175/- on 210.04 MT of finished goods clandestinely cleared with the help of GRs.

(v) Demand of Rs. 50 lakhs of fraudulently availed cenvat credit with the proposal to appropriate the said amount already deposited alongwith interest of Rs. 5,16,438/-.

7. After the due process of law, vide the impugned order, the adjudicating authority confirmed all the above proposals. He also imposed a penalty of Rs. 25 lakhs on Sh. Srivats Rathi, Director as well as penalties on other employees of the appellant.

8. In the present appeals the impugned order has been challenged by the appellant-assessee as well as Sh. Srivats Rathi, Director. No appeal has been filed by the other three employees of the assessee-company.

9. With the above background, we have heard Sh. Krishna Kant, ld. Advocate for the appellant and Sh. R. K. Mishra, ld. AR for the Revenue.

10. Ld. Counsel for the appellant took us in detail through the impugned order and the grounds of appeal and various case laws. He emphasised the following grounds:

(i) The shortage in the finished products as well as raw materials which has been recorded at the time of the search on 21.07.2008 has not been arrived at properly. The departmental officers completed the search proceedings in a period of five to six hrs. and no attempt was made to physically weigh the stock of finished goods as well as raw materials. Consequently, he submitted that the shortage is hypothetical and has been done on estimates and hence no duty can be demanded, inasmuch as there is no evidence that the alleged shortage was cleared without payment of duty.

(ii) Duty demand has been raised on the basis of the allegation that goods have been clandestinely cleared under seven parallel invoices. Likewise allegation has been made that goods covered by certain GR forms recovered have also been cleared clandestinely. However, such duty demands are liable to be set-aside since Revenue has not brought on record any corroborative evidence to show that goods have indeed been removed under such documents. No verification has been done either with the buyers or with the transporters who might have transported the goods.

(iii) Regarding the alleged fraudulent availment of cenvat credit of Rs.50 lakhs, he submitted that it was a genuine clerical mistake which lead to availing of excess credit in the month of October, 2007. He specifically pointed out that even during the departmental audit of the factory in December 2007, no such excess credit was noticed by the department. He also submitted that on the issue of wrongly availed credit of Rs. 50 lakhs, a separate proceedings stand initiated in which the Commissioner (Appeals) vide his order-in-appeal dated 17.02.2012, has allowed the recredit of Rs. 50 lakhs paid by the appellant in cash through R-6 challan dated 11.08.2008. He also relied on the following case laws:

(i) R. A. Castings Pvt. Ltd. vs. CCE, Meerut-I
2009 (237) ELT 674 (Tri. Del.)

(ii) Jndal Nickel & Alloys Ltd. vs. CCE, Delhi
2012 (279) ELT 134 (Tri Del.)

(iii) Shree Electromelts Ltd. CCE, Bhavnagar
2011 (272) ELT 94 (Tri. Ahmd.)

(iv) Satpushp Steels (P) Ltd. vs. CCE, Jaipur
2006 (196) ELT 105 (Tri. Del.)

11. The appeals filed by the assessee as well as the Director Sh. Srivats Rathi, Director are being decided through this order since both are arising out of the same impugned order-in-original.

12. At the outset, we consider the demands of duty raised on the shortages found at the time of search of the factory on 21.07.2008, in the raw materials as well as finished products. Such demands have been strongly opposed by the appellants with the argument that the stock taking has been done on the basis of eye estimation and not on the basis of actual weighment. On going through the records, we find that the stock taking has been duly recorded in the relevant

panchnama and it is on record that the stock taking was conducted in the presence of responsible persons representing the assessee. Both the persons representing the assessee have agreed to the result of the stock verification. Shri Umesh Khutenta, one of the witnesses of the stock verification, has been cross-examined before the adjudicating authority and he has stated the procedure adopted for stock taking. According to the witnesses, the standard weight bundles were counted and multiplied with the specific weight and loose items were weighed. This procedure, to our minds, appears entirely reasonable and cannot be faulted with at this stage specially since there has been no murmur of protest against such procedure any time before. It is also seen from record that Sh. Sanjay Mandal, authorised person of the assessee who witnessed the stock taking, Sh. Nagendra Dutt Sharma, Excise Clerk, Sh. Mahendra Kumar Kabra, Director have also, in separate statements, have concurred with the stock taking. Sh. Srivats Rathi, Director have also agreed to such shortages. In view of the above, we find no reason to interfere with such demands.

13. Central Excise duty to the extent of about Rs. 3.1 lakh has been demanded on the basis of parallel invoices and Rs. 8.34 lakh on the basis of GRs by alleging that goods covered under these documents, which were recovered during search, have been clandestinely cleared. The main ground of challenge from the side of the assessee is that the department has not produced any corroborative evidence for the allegation of clandestine clearance and that no verification has been carried out at the end of the buyers or transporters.

After recovery of the above documents, during investigation, the departmental officers have confronted these documents with various employees of the assessee company. Sh. Nagendra Dutt Sharma, Excise Clerk has identified the author of these documents as Sh. Kartar Singh. Sh. Kartar Singh, Shri Tiwari, Sh. Mahendra Kumar Kabra, Director as well as Sh. Srivats Rathi, Director have independently, in their respective statements, have admitted that goods covered by all these documents were cleared without accounting the same in the statutory records and without payment of Central Excise duty. It is further on record that none of the statements have ever been rectracted. In view of the fact that the factum of clandestine clearance has been admitted by all concerned including Sh. Srivats Rathi, Director, we find no reason to interfere with the demand of Central Excise duty based on these records. It is well established that what stands admitted need not be proved by revenue.

14. Next we turn to alleged fraudulent availment of cenvat credit of Rs. 50 lakhs. It is noteworthy that at the time of search proceedings on 21.07.2008, the RG-23A Part-II was not available prior to 10.10.2007. On a perusal of the relevant register, it was noticed by the departmental officers that the balance of credit which should have been Rs. 1,12,08,677/- has been shown as Rs.1,62,08,677/- i.e. an excess credit of Rs. 50 lakhs has been availed and subsequently utilised. The RG-23A register was in the custody of Sh. Mahendra Kumar Kabra, Director at the tune of search. He admitted in his statement dated 21.07.2008 that on the directions of the owners of the company, he has debited an amount of Rs. 50 lakhs vide entry No. 569 dated 18.07.2008. This was admitted to have been done with back date as per direction of Sh. Srivats Rathi, Director. He further admitted that for making the entry with back date, page No. 35 of the RG-23A register was destroyed and page No. 36 was made as 35 and debit entry of Rs. 50 lakhs was made. Later the amount of Rs. 50 lakhs was deposited in

cash as per the directions of the department on 11.08.2008 alongwith interest of Rs.5,16,438/-.

15. From the records of the case as above, it is evident that the credit of Rs. 50 lakhs on 27.10.2007 was taken fraudulently without any supporting invoices for receipt of inputs/ capital goods. The fraud has been compounded by the attempt to fabricate a debit entry for a like amount. The fraud also stands admitted by Sh. Nagendra Dutt Sharma, Excise Clerk. Sh. Mahendra Kumar Kabra, Director as also Sh. Srivats Rathi, Director. Consequently, we find no reason to interfere with the impugned order on this point also.

16. As discussed in the above paragraphs, we find no justification to take a different view from that of the adjudicating authority.

17. In view of the above, impugned order is upheld and the appeals are rejected.

(pronounced on 11.05.2017).

(Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

Pant