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

COURT-II

Date of hearing/decision: 30.05.2017

Appeal No. E/799/2010- EX[SM]
[Arising out of the Order-in-Appeal No. 318/CE/DLH/09 dated 31/12/2009, passed by the Commissioner, Central Excise (Appeals), Delhi-II

M/s Tirupati Industries … Appellant

Vs.

CCE, Delhi-II … Respondent

Appearance:

Present Shri Kamaljeet Singh, Advocate for the appellant
Present Shri G.R.Singh, AR for the respondent

Coram: Hon'ble Mr.Ashok K. Arya, (Technical Member)

FINAL ORDER No. 53634/2017

Per Ashok K. Arya :

1. The appellant namely *M/s Tirupati Industries* has filed this appeal against Order in Appeal No. 318/2009 dated 31/12/2009 whereunder inter alia recovery of Rs.15 lakhs has been confirmed as redemption fine. Further, the impugned Order in Appeal has increased redemption fine in case of confiscation of 2025 kilograms of Copper Rods from Rs. 50,000/- to Rs. 2 lakhs and penalty of Rs. 50,000 imposed under Rule 25 of Central Excise Rules, 2002 has also been increased to Rs. 10 lakhs.

2. The brief facts are that:

i. Central Excise officers intercepted a tempo during preventive checks, on 19/12/2007 carrying copper wire rods. During checking of documents carried with the tempo, 2025 kilogram of copper valued at Rs 6,48,000/- carried in the said tempo was found without any valid transport document, and, therefore, was placed under seizure.

ii. Thereafter, officers visited the factory premises of the appellant and found that 26949.200 kilograms of Copper Rods (final product of the assessee appellant) valued at Rs. 86,23,744/- was in excess of the last recorded balance. The Excess finished product was placed under seizure.

iii. 29,192 kilogram of Copper Ingots (raw material for the assessee) valued at Rs. 91.954,80/- was found short of the last recorded balance.

iv. The revenue issued the show cause notice dated 5/6/2008, to the appellant, which was adjudicated by the Joint Commissioner vide Order in Original no. 8/2008-09 dated 25/09/2008, which vacated the seizure of excess finished goods as clandestine removal could not be proved against the appellant. The excess finished goods found in the tempo/ transport vehicle weighing 2025 kilogram valued at Rs. 6,48,000/- was confiscated with an option of release on payment of redemption fine of Rs. 15,000/-. Tempo was also seized with an option to redeem the tempo on payment of Rs. 5000/- as redemption fine.

v. The Order in Original dropped the demand of duty of Rs. 15,15,415/- as there was no documentary evidence to prove the charge of clandestine removal. Penalty of Rs. 50,000/- was imposed on the appellant under Rule 25 of Central Excise Act Rules, 2002 read with Section 11 AC of Central Excise Act, 1944. A further penalty of Rs.50,000/- was also imposed on the appellant for not maintaining proper records under Rule 25 of Central Excise Rules, 2002. A Penalty of Rs. 5,000/- was imposed on the tempo owner under Rule 26 of Central Excise Rules, 2002.

vi. The Department filed an appeal against Order in Original before Commissioner (Appeals), who passed Order in Appeal No. 318/2009 dated 31/12/2011 where inter alia it increased original redemption fine and also imposed additional redemption fine of Rs. 15 lakhs as mentioned earlier.

vii. Now, the appellant is in appeal against the said impugned order in appeal.

3. With the background of above facts both the sides represented by the Ld Counsels, Shri Kamaljeet Singh for the appellant and Shri G.R. Singh for the Revenue have been heard.

4. After having carefully considered the facts of the case and the submissions of both the sides, it appears that the impugned Order in Appeal has ignored the fact that on the day of the visit to the factory the shortage of raw material was recorded along with the excess of finished goods. The appellant has pleaded that when the fact of shortage and excess is considered together it is evident that the raw material found short had actually been converted into finished goods, which was wrongly recorded by the Department as excess finished goods. It has been pleaded by the appellant that the only lapse on their part is non-recording of the finished goods in the Central Excise record i.e. RG-1 register. The appellant has given explanation for non-recording of finished goods in the RG-1 register that on 18/12/2007 their accountant was on weekly off and on 19/12/2007 their accountant was on leave. In this regard the original adjudicating authority in para 37 of his order has observed as under.

> **37** As per show cause notice inputs /raw material was removed as such or removed clandestinely. According to Rule 3(5) of Cenvat credit Rules 2004 goods are required to cleared invoice only. I find nothing on record which shows that the goods are removed as such. Where are the documentary evidences i.e., who is the purchaser of inputs, what is the mode of transport of goods, where are the sale proceeds; all these evidences are not on record. Lack of evidence stops me to conclude that goods were removed as such. In the existence of such circumstances I have no hesitation to say that the party has not contravened the provisions of Rule 3(5), Rule 9, Rule 9(5), Rule 9(6) of Cenvat Credit Rules 2004.

4.1. The Ld. AR for the Revenue has cited Hon'ble Madhya Pradesh High Court decision in case *of Ratlam Wire Pvt. Ltd. Vs CESTAT, New Delhi , 2004(174*) *E.L.T.154 (MP*) and Tribunal's decision in case of *CCE, Delhi Vs Ganpati Rolling Pvt. Ltd. 2014 (303) ELT 240 (Tri-Del.)* , saying that when finished goods have not been recorded in RG-1 register and when shortage of raw material has been accepted by the appellant assessee the excess goods found in the factory premises are liable for payment of duty and therefore Order in Appeal deserves to be sustained.

4.2. On the other hand, Ld Advocate for the appellant cited the Tribunal's decision in case of *Arya Fibers Pvt. Ltd Vs CCE Allahabad* 2014 (311) ELT (Tri-Allahabad) saying that there is no tangible evidence of clandestine manufacture and clearance by the appellant and the facts on record do not indicate any inferences to that effect.

4.3. When the goods are lying in the factory itself the Revenue has treated them as excess mainly on account of non recording of said goods in RG-1 register. Thus, the lapse on the part of the appellant is only of non-recording of goods in RG-I register and it is not the case of clandestine removal of goods. The Revenue's assumption is that raw material has been removed as such because there was shortage of raw material. Here again, the revenue has not given any evidence where the goods went, how they were removed. When it is a simple arithmetic calculation; the raw material which the Revenue has noted as shortage has actually been converted into finished goods, the Department chooses to make a case of removal of raw material as such as well as makes the allegation against the appellant of clandestine removal of the finished goods, found in excess. On the other hand Revenue mentions that the goods are in excess mainly on account of their non- recording in the RG-I register. When the facts are as mentioned and discussed above, one cannot agree with the findings given by the impugned Order in Appeal. The case laws cited by the Department are not applicable to the present facts.

5. Considering the discussions and the findings made above, the impugned order is set aside and the appeal allowed with consequential relief, if any, to the appellant.

[Order dictated and Pronounced in the open court]

(Ashok K. Arya)

Member (Technical)

RS