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

COURT NO. III

DATE OF HEARING : 19/06/2017.
DATE OF DECISION : 19/06/2017.

Excise Appeal No. 57377 of 2013

[Arising out of the Order-in-Original No. Commissioner/RPR/26/ CEX/2013 dated 31/01/2013 passed by The Commissioner, Customs & Central Excise, Raipur.]

M/s Baldev Alloys Pvt. Ltd. Appellant

Versus

CCE, Raipur Respondent

Appearance

Shri Bipin Garg, Advocate – for the appellant.

Shri R.K. Manjhi, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 54108/2017 Dated : 19/06/2017

Per. B. Ravichandran :-

The appeal is against order dated 31/01/2013 of Commissioner of Central Excise, Raipur. The appellants are engaged in the manufacture of Sponge Iron liable to Central Excise duty. During the course of audit of the books of accounts of the appellant, the officers noticed that for the period April

2004 to June 2005, the consumption of electricity by the appellant had shown abnormal variation from 54 units to 552 units per M.T. Considering 70 to 80 units as standard norms for manufacture of 1 M.T. of Sponge Irion, the Revenue calculated total production of Sponge Iron, on the basis of maximum limit of consumption of 100 units per M.T. Accordingly Revenue proceeded to demand and recover Central Excise duty alleging unaccounted manufacture and clearance of Sponge Iron. The appellants filed their reply. The Original Authority decided the case and held that he appellants have to pay Rs. 3,93,24,835/- on account of such unaccounted clearance. Penalty of equivalent amount was also imposed under Section 11AC of Central Excise Act, 1944.

2. The learned Counsel contesting the findings, stated that the only basis on which demand has been issued is variation in electricity consumption as examined by the audit officers. The show cause notice dated 22/07/2009 calculated the short payment of duty by taking 100 units of power consumption per M.T. of Sponge Irion. He submitted that various reasons for wide variation of power consumption has been submitted by the appellant. The Original Authority confirmed the demand on the ground that on an earlier case booked by the officers of Central Excise Intelligence, the appellants approached the Settlement Commission and accordingly it can be inferred that the appellants indulged in clandestine removal of excisable goods. The learned Counsel submitted that in the case before the Settlement

Commission the demand was not based on calculation of electricity consumption, but on other evidence like private documents etc. Regarding demand of Rs. 8,89,000/- for the period 2007-2008 the case is pending before the Tribunal and the same relates to bunch of cases booked by the Department against large number of manufacturers. The facts of the said case are relating to one dealer by name M/s Kailash Traders. Based on the records recovered from such traders and some transporters proceedings were initiated against large number of manufacturers of Ingots, Sponge Iron etc.

3. The learned Counsel submitted that neither show cause notice nor the original order gave the basis of calculation of short levy and any corroborative evidence regarding the alleged unaccounted clearance and manufacture of excisable goods.

4. The learned AR submitted that the show cause notice is based on the standard consumption of electricity for manufacture of Sponge Iron. While he admitted that the basis of such standard is not explained in the show cause notice, he reiterated that on the basis of wide variation in electricity consumption such reasonable interference can be made regarding unaccounted manufacture and clearance of excisable goods.

5. We have heard both the sides and perused the appeal records. The show cause notice was issued after an audit of the accounts of the appellant. The sole basis of demand is given in para 3 of the said notice. It is mentioned that the norms of

electricity consumption per M.T. should be 70-80 units. No basis or reason with background or technical analysis has been given regarding the norms of electricity usage. Even if the said norms are taken, it is not clear how the Revenue has calculated the differential duty based on a limit of 100 units per MT. We note neither the norms of 70-80 units nor the maximum limit of 100 units has any factual/technical basis. The show cause notice further added that the appellants had a case of short payment against them which they settled before the Settlement Commission by accepting the said non-payment with interest. We note that the case before the Settlement Commission is not based on power consumption and in any case that relates to the period not covered by the present proceedings. Further, reference was made to a case of short levy of Rs. 8,87,000/- during the year 2007-2008, we note that was part of large number of cases booked against various manufacturers based on records recovered from M/s Kailash Traders and transporters. We find that inference based on these two cases, to confirm a huge demand, only on summary calculation of electricity consumption is not legally sustainable.

6. We note that the show cause notice as well as the Original Authority relied on the decision of Hon'ble Supreme Court in **Triveni Ruber and Plastics vs. CCE, Cochin** reported in **1994 (73) E.L.T. 7 (S.C.)**. The Hon'ble Supreme Court was dealing with the provisions of the then Rule 173E of Central Excise Rules, 1944 which talks about fixing of quantum of normal production

by the proper officer. In the present situation, there is no fixation of normal production by any proper officer under the prevalent rules. We also note that the said decision of the Apex court was also examined by this Tribunal in **R.A. Castings Pvt. Ltd. vs. CCE, Meerut – I** reported in **2009 (237) E.L.T. 674 (Tri. – Del.)**. It was held that wide variation of consumption of electricity have been reported for the manufacture of 1 M.T. of Steel Ingots. In the absence of technical examination and experiment in the factories of the appellant, norms fixed for demanding Central Excise duty alleging short payment is not legally sustainable. In para 23 of the said decision, the Tribunal observed that it has constantly taken a view that wherever electricity consumption alone is adopted as a basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside.

7. We also note that the Original Authority more than once mentioned in the impugned order, that the appellants failed to prove that the variation in electricity consumption is due to factors which are normal in industry. Here, we note that in case of short levy due to unaccounted clearances, the burden on the Revenue is to prove such allegation with positive evidence. It is relevant to note that the appellants strongly pleaded that their size of their operation has not been duly considered while examining the power consumption norms. Such norms, if at all, considered by Revenue is based on bigger units of above 300 M.T. per day, whereas the appellants have only capacity of

around 50 M.T. per day. The scale of operation is not duly considered by the Original Authority.

8. Having examined the contents of the show cause notice, impugned order and the grounds of appeal, we find that a demand now confirmed by the Original Authority solely based on the purported excess consumption of electricity, without any corroborative evidence cannot be upheld. There is no corroboration of any sort. No investigation has been conducted by Revenue. When audit of accounts were conducted, the officers made certain calculation of possible normal consumption of power. Based on purported excess consumption, the whole case has been made. There is no legal sanction for such course of action. The impugned order is set aside and the appeal is allowed.

(Order dictated and pronounced in open court.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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