IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH, NEW DELHI

Date of Hearing:12.06.2017
Date of Decision:19.07.2017

Excise Appeals Nos.672 and 673/2010-EX(DB)

[Arising out of common Order-in-Appeal No.47/2009(C.E.) Commissioner dated 23.12.2009 passed by the Commissioner, Central Excise & Customs, Jaipur-I]

M/s. Barijoriwala Rolling Mills Pvt. Ltd.
Shri Lakhan Goyal, Director — Appellants

Vs.

CCE, Jaipur-I — Respondent

Appearance:
Rep. by Shri B. Garg, Advocate for the appellant.
Rep. by Shri H.C. Saini, DR for the respondent/Department.

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Fi nal Order Nos.55288-55289/2017

Per B. Ravichandran:

These two appeals are against common impugned order dated 23.12.2009 of Commissioner of Central Excise, Jaipur-I. The main appeal is by M/s.Barijoriwala Rolling Mills Pvt.Ltd., Jaipur. The second appeal is by Shri Lakhan Goel, Director of main appellant. The main appellants are engaged in the manufacture of M.S. rolled products like bars, angles, flats falling under Tariff Heading 7214 of Central Excise Tariff, liable to duty. The raw material for the manufacture of these items are M.S. Ingots. The central excise officers conducted certain verifications in October, 2005 in the premises of M/s. Nirmal Inductomelt Pvt. Ltd., who was one of the suppliers of ingots to the main appellant. The record recovered from M/s.Nirmal showed that 54.56 MT of MS Ingots were sold to main appellant, during the period 2.8.2005 to 3.10.2005. The record maintained by the main appellant had shown receipt of only 18.07 M.T. during the said period. The remaining 36.49 MT of MS ingots was unaccounted. The Revenue conducted further follow up investigations and thereafter, proceedings were initiated against the appellants.

2. On adjudication of case, the Original Authority held that the main appellant suppressed production of dutiable items and indulged in clandestine removal without payment of duty. He confirmed central excise duty demand of Rs.2,79,34,347 and imposed equal amount of penalty in terms of Section 11 AC of the Central Excise Act, 1944. He further imposed a penalty of Rs.20 lakhs on Shri Lakhan Goel, Director of the main appellant, under Rule 26 of Central Excise Rules, 2002.

3. Ld. Counsel for the appellants submitted that the whole case against the appellant was on the basis of two points-

(a) There is unaccounted receipt and usage of 36.49 MTs of M.S. ingots from M/s.Nirmal Inductomelt; and

(b) By considering the average power consumption of 102.09 units per M.T. of finished goods, it was held that there is huge unaccounted production of M.S. items cleared without payment of duty.

4. Ld. Counsel submitted that there is no verification or evidence to support the allegation of clandestine manufacture and clearance by the main appellant. The whole case is based on presumption and estimation, without any factual or legal support. Based on certain investigations carried out with M/s.Nirmal Inductomelt (P) Ltd. , manufacturer of M.S. Ingots, Revenue initiated action against various manufacturers of M.S. products. The whole demand (except for alleged unaccounted use of 36.49 MTs of M.S.Ingots) is on the basis of estimated average

consumption of electricity for manufacture of one M.T. of M.S. items. Here also, the Revenue adopted the electricity calculation of another unit viz. M/s.Shree Sharma Steel Rolling Mills Pvt. Ltd., Jaipur. Even the basis of arriving at such average, electricity consumption is neither scientific nor technical proven. The Original Authority did not examine the basic fact that consumption of electricity widely varies from unit to unit, based on various criteria like age of the machine, capacity and quality of raw material and variety of final products manufactured. Ld. Counsel submitted that the Revenue registered cases against various manufacturer, similarly situated, based on common investigation and on identical set of facts. Many of these cases have reached the Tribunal level and the demands were set aside. In fact, the very same adjudicating authority dropped the demand made against M/s. Shiv Prasad Mills Pvt. Ltd. vide his order dated 31.12.2012. He categorically held that though electricity consumption is vital factor and indicative of production but in the absence of legal authority, the law does not permit to raise the demand exclusively on the basis of electricity consumption. Such consumption alone is not sufficient to raise the demand though it can act as corroborative evidence. He further held that the electricity consumption of 102.09 per M.T. taken from another unit is not a uniform standard that can be applied to assessee, as no technical verification or inspection was carried out in the assessee's factory. The Original Authority dropped the demand stating that there is no evidence to establish clandestine manufacture or clearance. The Revenue preferred an appeal against this order. The Tribunal vide Final Order No.51555 of 2015 dated 10.04.2015 dismissed the appeal by Revenue.The ld.Counsel also referred to the Final Order No.50905-50910 of 2015 dated 19.03.2015 dealing with similar set of facts and demands based on common investigations.

5. Ld.AR reiterated the findings of the Original Authority. He submitted that there is a wide variation in the power consumption during the impugned period, which was not explained satisfactorily, by the appellant. Power is one of the main resource in the manufacturing activity of M.S. Items and is a good indicator of quantum of production. He supported the findings of the Original Authority.

6. We have heard both the sides and perused the appeal records.

7. In the present case, duty demand is confirmed on two main basis. The first one is on the basis of a small quantity of 36.49 MTs of M.S. ingots shown to have been cleared by M/s.Nirmal Inductomelt Pvt. Ltd. to the main appellant and not shown in the accounts of the main appellant. The second reason, which is the main basis of confirmation of demands is estimated production by the main appellant based on average power consumption, as arrived at in another unit manufacturing M.S. items. First of all, we note that the discrepancy in the receipt of raw materials and M.S. ingots was alleged on the basis of purported records maintained by M/s.Nirmal Inductomelt Pvt. Ltd. There is no other corroborative evidence for unaccounted receipt of such materials and use of material in further manufacture by the main appellant. The substantial question is with reference to calculation of unaccounted manufacture based on power consumption. The comparison has been made between the main appellant and M/s.Shree Sharma Steel Rolling Mills Pvt. Ltd., Jaipur (SSRM). We note that these two units are not comparable in their operation. The main appellant submitted that SSSRM is an automatic mill having production of about 120 MTs per day, whereas the main appellant is structural mill operated normally with a production of about 12 to 15 MTs a day. The power load connection to SSSRM is 1500 KVA whereas the main appellant is having load connection of 500 KVA. There are many other substantial distinction between the

main appellant and SSSRM. Even otherwise, we note that no examination or technical test has been conducted in the main appellant's unit, to arrive at the correctness of power consumption and also to get additional corroborative evidence with reference to possible unaccounted manufacture and clearance of dutiable items. We note that almost identical set of facts were dealt with by the very same adjudicating authority in the case of M/s.Shiv Prasad Mills Pvt. Ltd., Jaipur. In the said case also, the demand arose based on the common investigation. The Original Authority held as below:-

> 54. Now I discuss the main question i.e. whether the norms of electric consumption of 102.09 unit per metric ton arrived at in case of a third party i.e. M/s Shree Sharma Steel Rolling Mill, Jaipur can be applied uniformly in case of other assessees and whether central excise duty can be demanded on the of basis of electricity consumption alone. I may mention that forthcoming discussion is made in the background of discussion in the preceding paras of the allegation of clandestine procurement of raw material as unsustainable. This part of my discussion is related to whether electric consumption norms of 102.09 units per MT for rolled products made basis for demand is sacrosanct authentic and can be adopted as standard norm for ascertaining the production of units engaged in manufacture of rolled products. As already mentioned the norm of electric consumption of 102.09 units per MT of rolled products has been taken on the basis of investigation carried out in case of M/s. Shree Sharma Steel Rolling Mills Pvt. Ltd. Jaipur. In that case 102.09 MT units per MT was arrived at on the basis of electricity consumption for the months of July 2005 to August 2005 i.e. only two months and actual production taken as a sum of production shown in their daily production account and suppressed production as per their private records recovered during search. I observe from the submission made in their written reply that National Institute of Secondary Steel Technology, established by Ministry of Steel, Govt. of India conducted a study and submitted a technical report on performance, energy consumption and quality of re-rolling mills, where in electricity consumption was arrived at 215 units per MT. Therefore when independent study report that too done by a body established by government of India is available, I do not find any basis to reject the same and to give more credence to data arrived at in case of a third party and that too based on short period of two months, without conducting any actual experiment/verification to sustain allegation of clandestine removal of goods. In this connection the Hon'ble Supreme Court in the case of Reliance Cellulose Products Ltd. Vs CCE Hyderabad -reported at 1997(93)ELT 246(S.C)-has held that test report of Chemical Examiner and Chief Chemist of the Government, unless demonstrated to be erroneous, cannot be lightly brushed aside on the basis of opinion of some private persons .
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> 55. Further from the documents submitted by one of the noticee in similar matter, I observe that throughout the country the electric consumption per MT of rolled products in rolling mills are different and assessment was not done on the basis of electric consumption. Some places it was reported to as high as 700 units PMT and no SCN was issued to such units. Further, Commercial Taxation Department of Rajasthan under an optional compounded levy scheme assessed the sales tax on the basis of electric consumption of 180 units per MT for rolled products. In the scheme notified as "composition scheme for re-rolled product of mild steel-2005" the Rajasthan Sales Tax department fixed power consumption norms of 180 units for large scale/semi-automatic unit, 225 units for medium scale units and 275 units for small scale unit. Thus it is accepted position that the electricity consumption varies from one unit to another depending upon various factors which include fluctuation in electricity voltage, inefficiency in production process on account of poor efficiency of labour etc. There is, therefore, no universal and uniformly acceptable standard of electricity consumption per MT of rolled products, which can be adopted for determining the actual production and excise duty liability although it is true that electricity consumption is a very vital factor. However, there is no dispute that the electricity consumption depends on several factors, like fluctuations, quality of raw materials consumed and also the type and age of the machine (mill) etc. Even the CBEC has also not laid any guidelines on the line of power consumption in rolling mills which can be made basis for assessment. In case of Ranadey Macronutrients Vs Collector of Central Excise -1996(87) E.L.T. 19(S.C), Hon'ble Supreme

...t has held that consistency and discipline are of far greater importance than the winning or losing of court proceedings.

56. As discussed above the consumption of electricity in case of M/s. Shree Sharma Steel Rolling Mills Pvt. Ltd. Jaipur has been taken as standard norm for determining the actual production in case of assessee. In that case 102.09 MT units per MT was arrived at on the basis of electric consumption for the months of July 2005 to August 2005 by adding production shown in their daily production account and suppressed production as per their private records recovered during search. However, no experiments had been conducted by the department in their factory for devising the consumption norms of electricity for producing One MT of MS rolled products Angels etc. when there was allegation of some unaccounted for raw material for a particular period. It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation. Estimation of production fluctuates widely depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods which are leviable to excise duty have been actually manufactured. Unfortunately, no positive evidence has been placed on record in the impugned show cause notice to that effect. Though its common knowledge that steel rolling mills do evade duty of excise yet high consumption of electricity by itself cannot be the ground to infer that they were engaged in suppression of production of MS rolled products. The reasons for high consumption of electricity in the case of their factory have not at all been studied and analyzed by the Revenue independently. Instead, the norm of 102.09 units for MS rolled products fixed as per private records of other units as per impugned Show Cause Notice has been blindly applied to the noticee's case to work out the excess production. This approach is flawed and does not have sanctity of law. It has also not been explained in the impugned Show Cause Notice as to how average figures of 102.09 units of consumption of electricity for production of MS rolled products has been arrived at. An exercise to work out the consumption of electricity per tonne of rolled products for a particular period would have been a far more realistic and acceptable norm of electric consumption in case of assessee's unit rather than importing per MT consumption of electricity by third party. Therefore when whole demand is based on arithmetical calculation, without having any evidence of clandestine removal of goods, the arithmetic related to assessee's own unit would be a better method to arrive at pure arithmetic results. Therefore I am not inclined to accept that the electricity consumption would be the same in two different units. In view of above I am not inclined to accept that norm of electric consumption of 102.09 units per MT of rolled products is a standard norm and can be applied in the case of other assessees. This basis is therefore just a presumption and cannot sustain. I may add that in the capacity of adjudicating authority I have to remain within the limits of Show Cause Notice and any fresh attempt to investigate the matter to arrive at actual/reasonable electricity consumption would tantamount going beyond the Show Cause Notice.

57. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis without having tangible evidence of clandestine manufacture and clearance of goods. No doubt excess consumption of electricity raises a doubt or suspicion with regard to the quantum of production. However mere suspicion cannot lead to the demand. Unless there is solid evidence of clearance and purchase (buyer's end) of the alleged clandestine removals the demand cannot sustain. As already mentioned the electricity consumption varies from one unit to another therefore, no universal and uniformly acceptable standard of electricity consumption per MT of rolled products can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed, with no other supporting record, evidence or document to justify the allegations. The Hon'ble CESTAT in the case of R.A.Castings Ltd Vs CCE Merrut reported at 2009(237)E.L.T 674(Tri. Del) has

comprehensively dealt with the issue of central excise duty demand on the basis of electric consumption on the report of a professor of IIT, Kanpur in respect of induction furnace and held that demand based on theoretical calculations is not sustainable. It was also held that high consumption of electricity by itself not a ground to infer suppression of production and electricity consumption cannot be the only factor for determination of liability. It was further held that clandestine removal not sustainable merely based on technical opinion. The said judgment was upheld by Hon'ble high Court of Allahabad and department's SLP against High Court order was dismissed by Hon'ble Supreme court in its order dated 31.1.2011. Relevant Para of the said judgment are reproduced below:

20.1 From the perusal of these reports, we find that wide variations in the consumption of electricity have been reported for the manufacture of one MT of steel ingots. This renders the norm of 1046 units adopted by the Revenue as arbitrary. Why not adopt the norm of 1800 KWH/T or 1427 KWH/T or 650 to 820 units/MT or 851 units/MT as per various reports referred to above or why not adopt some figure between 555 to 1046 units as norm as per Dr. Batra's report?

It is observed that in the case of RA Casting, the party had shown/booked huge profits to the tune of crores of rupees through 'share trading' & 'sales commission' in their books of accounts and it was further observed by the Department that the party did not undertake any genuine transaction with regard to any share trading as shown by them in their financial statements and in fact, had procured fictitious entries of income/profit after providing cash to such persons who provided fictitious entries, to balance losses of their balance sheets which appeared to be coming up into their books of accounts on account of loading of all manufacturing expenses inclusive of actual 'electricity charges' incurred on the quantum of actual production of M.S. Ingots, though they accounted for less quantity of production of M.S. Ingots in their production records. Even this nature of evidence was rejected by Hon'ble Tribunal and as already mentioned order of Tribunal was upheld by Hon'ble High Court of Allahabad in its order dated 9.9.2010 and SLP of the department was dismissed by Hon'ble Supreme Court vide order dated 31.1.2011.

58. There is a plethora of orders in which the charge of excess production on the basis of power consumption and its clandestine removals has not been found sustainable. Some of the case laws are as given below:

(i) Pure Enterprises (P) Ltd. v. CCE, Rajkot - 1999 (111) E.L.T. 407 (Tri.)
(ii) Kapadia Dyeing Bleaching and Finishing Works v. CCE, Surat 2000 (124) ELT 821 (T)
(iii) A. Arti Leathers (P) Ltd. v. CCE & C, Ahmedabad - 2001 (136) E.L.T. 1255 (T)
(iv) Parshuram Cement Ltd. v. CCE, Lucknow - 2003 (160) E.L.T. 213 (Tri.-Del.)
(v) Mukesh Dye Works v. CCE, Mumbai-VI - 2006 (196) E.L.T. 237 (Tri.-Mum.)
(vi) Hans Castings Pvt. Ltd. v. CCE, Kanpur - 1998 (102) E.L.T. 139 (T)
(vii) M/s. Padmanabh Dyeing and Finishing Works v. CCE, Vadodara - 1997 (90) E.L.T. 343 (T)
(viii) M/s. Madhu Products v. CCE, Hyderabad - 1999 (111) E.L.T. 197 (T).

The Revenue contested the above findings by filing appeal before the Tribunal. The Tribunal vide Final Order dated 10.04.2015 upheld the above findings. The observation of the Tribunal, which is relevant to the facts of the present case is as below:-

"Coming to the first piece of evidence - the private ledger book of M/s.NIPL which contain the details relating to supply of MS Ingots to the respondent unit during the period August, 05 to October, 05, it is seen that other than the entries in the private ledger book of M/s.NIPL and the statement of the concerned person of NIPL, there is no evidence in support of the departments allegation that during the above mentioned period, the respondent received 60.46 MT of MS Ingots from NIPL without any invoices. It is well settled law that on the basis of records recovered from a third party, the allegation of duty evasion cannot be made against an assessee unless cross examination of the persons from whom possession the records had been recovered, has been allowed, which has not been done in this case. Moreover, just because, M/s.NIPL had filed application before the settlement commission and had admitted certain quantum of duty evasion, it cannot be treated as an admission of receipt of unaccounted MS ingots by the respondent, and in this regard, we are supported by the decision of the larger bench of the Tribunal in the case of **Bosch Chassis Systems India Ltd. Vs. CCE, Delhi-III-2008 (232) ELT 622 (Tri.-LB).** Therefore, merely on the basis of entries in the ledger book recovered from M/s.NIPL which indicated the supply of certain quantity of MS Ingots to the respondent during August,05 to October, 05, it cannot be concluded that the respondent were indulging in duty evasion by under reporting the production of rolled products. Moreover, on the basis of entries in the private ledger book of M/s.NIPL at the most at the most duty could be demanded only on rolled product manufactured out of 60.46 MT of MS Ingots by treating the ledger entries of M/s.NIPL as correct. But the department has not demanded duty on this basis. The department has made its case on the basis that the respondent by showing inflated power consumption of 231.59 units per MT while their actual power consumption should be 102.09 units per MT have under reported their production of rolled products. This power consumption ratio has been adopted from M/s.SSSRM and the same has been applied in the case of respondents unit without conducting any experiment. There is absolutely no justification for adopting power consumption norm of M/s.SSSRM to the unit of the respondent as while the rolling mills of M/s.SSSRM is automatic rolling mills, the respondents rolling mill is manual. Moreover, no experiment has been conducted by the department to ascertain as to whether the rolling mills of the respondent is comparable with the rolling mills of M/s.SSSRM in terms of technology and production. Besides this, we also find that that National Institute of Secondary Steel Technology, established by the Ministry of Steel, Govt.of India conducted a study and submitted a technical report on performance and energy consumption of re-rolling mills, where electricity consumption was arrived at 215 units per MT and Government of Rajasthan in the notification issued under compounded levy scheme for charging sales tax from rolling mills has mentioned power consumption of the medium size rolling mill as 225 units per MT. In view of this, there is absolutely no justification for adopting power consumption norm of 102.09 units per MT of M/s.SSSRM in respect of the respondent. Ld.DR has cited the judgement of the Apex Court in the case of **Triveni Rubber & Plastics vs. CCE-1994 (73) ELT 7 (SC)** wherein the apex court held that where the accounts have been found to be fabricated and untrue, the figures of raw materials utilized or the particulars of labour employed may not be available, the demand arrived at by assessing normal production on the basis of electricity consumed, cannot be faulted. In our view, this judgement is with regard to Rule 173E of the erstwhile Central Excise Rules, 1944, and as such, the same is not applicable to the facts of this case. Rule 173E provided for determination of normal production by a manufacturing unit and that could be adopted as basis for allegation of duty evasion, in case his actual production drastically varied from the normal production. But in this case, no experiment has been conducted by the department, in respect of the respondents unit to determine their actual power consumption. Before adopting power consumption ratio of M/s.SSSRM and applying it to the respondent's unit absolutely no study has been conducted to establish as to whether the rolling mill of the respondent is comparable with the rolling mill of M/s.SSSRM."

9. We also note that in another bunch of appeals arising out of common investigation, the Tribunal vide final order dated 19.03.2015 in the case of M/s.

R.M. Brother Pvt. Ltd. and others held that merely on the basis of power consumption of the appellant unit, allegation of unaccounted production of M.S. ingots and its clandestine removal could not be sustainable. The Tribunal held that power consumption for production of 1 M.T. of M.S. ingots would depend upon various factors like age of the machinery, technology used, type of furnace, power supply pattern, type of raw materials used etc. It was held that the only reliable method would be to conduct actual experiment in the concerned unit. We note that in this case, though, the Tribunal was dealing with M.S. ingots, the ratio is with reference to demand based on purported excess power consumption.

10. In view of the above discussion and analysis, the ratio adopted in the similar cases by the Tribunal, we find no merit in the impugned order and accordingly, set aside the same. The appeals are allowed.

[Order pronounced on 19.07.2017.]

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

Ckp.