IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R. K. Puram, New Delhi-110066.

Date of Hearing: 01.11.2017

Date of Decision: 10.11.2017

Appeal No. E/3366/2006-SM and E/40 and 42/2007-SM

(Arising out of Order-in-Appeal No. 84,85&86/RPR-II/2006 dated 24/07/2006 passed by the Commissioner (Appeals),Customs & Excise, New Delhi.)

CCE Raipur — Appellant

Vs.

NIBI Steels Ltd. and vice versa — Respondent

Appearance

Shri G.R. Singh, DR - for the appellant

None - for the respondent

CORAM :
Hon'ble Mr. M.V. Ravindran, Member(Judicial)

Final Order No. 57828-57830/2017

Per M.V. Ravindran:

1. By this Order, the following appeals are disposed of:-

(a) Appeal number E/3366/2006 filed by NIBI Steel Ltd.
(b) Appeal number E/40 & 42/2007 filed by revenue.

2. Since the appeals are against the same impugned order they are being disposed of by a common order.

3. None appeared on behalf of M/S NIBI Steel Ltd., despite notice.

4. Heard the learned DR and perused the records.

5. The issue that falls for consideration in the appeal of M/S. NIBI Steel Ltd. is whether the First Appellate Authority was correct in confirming the demands raised by the show cause notice along with interest and consequent penalties or otherwise; in the appeal filed by revenue whether the First Appellate Authority was correct in dropping the demands raised by the Lower Authority or otherwise.

6. Learned Departmental Representative brings to my notice the findings recorded by the First Appellate Authority while dropping the demands. It is his submission that the First Appellate Authority has erred in doing so, when there are statements of the Directors and loose sheets which were recovered from the factory premises of the said M/S NIBI Steel Ltd.; the entries made in the said chits were confirmed by the Directors, there being no challenge to the weighment method adopted by the officers, it has to be held that there is corroboration of clandestine removals by the transporter's statement.

7. It is a case of the M/S NIBI Steel Ltd. that the First Appellate Authority has overlooked the fact that there are no conclusive evidences in support of finding clandestine clearances, that the weighment of the stock is an estimated one, as the director had indicated that there is a difficulty to carry out complete weighment of the stock; estimating the weight for the purpose of charge of clandestine removals is incorrect; confirmation of the demands based upon the estimated shortage is incorrect and the

adjudication order is also illegal as the show cause notice is issued by the Commissioner and adjudication is done by the Additional Commissioner. It is the submission in the grounds of appeal that there is no corroboration of the charge of clandestine removals hence, the impugned order is to be set aside to the extent challenged by NIBI Steel Ltd.

8. I Have considered the submissions made by the learned DR and find that the First Appellate Authority has confirmed the demands against M/S NIBI Steel Ltd. by recording a detailed findings in Paragraph No. 8,9 and 10. These findings clearly indicate that the appellant had no explanation to offer for the excess goods found as also shortage of the goods. The challenge put up by the said M/S. NIBI Steel Ltd., in the grounds of appeals is not controverting the detailed reasoning recorded by the First Appellate Authority in the impugned order at Paragraphs No. 8,9,10 and 11. In view of this I find that the appeal filed by the M/S. NIBI Steel Ltd. is devoid of merits and needs to the rejected.

9. As regards the appeals filed by the revenue, the First Appellate Authority has recorded detailed reasoning for setting aside the demands and as also penalties on the individual, after considering the evidence on records. The said findings are recorded at Paragraph No. 12,13 and 15 which are reproduced:-

> *"Para 12-Duty of Rs. 15,33,453/- has been demanded from the appellants on the basis of entries indicated in the weighment register of the Dharamkanta. The lower authority has held that the appellants had in their own truck bearing No. MP 24C 1534 removed the goods clandestinely to the extent of quantities indicated in the weighment register of the Dharamkanta. Firstly, it is observed that the appellants got the electricity connection on 28.5.2001 and started production in June 2001. Therefore the demand for the period April and May 2001*

is clearly unwarranted as being without any basis. Secondly, the weighment register does not show any description of the goods not the person who had got the goods weighed. Nor does it show any consignee. In this context it is observed that in order to come to a conclusion that such quantities were goods which were manufactured and clandestinely removed by the appellants, the Department should have investigated the matter to find out as to who the consignees were, what quantities and description of goods were supplied in the trucks to them and payments received in this regard. That the goods weighed in the truck were actually the goods manufactured and removed would recquire necessary corroboration of the statement of the driver of the truck, which has not been done. In addition to this, matter should have been made investigated regarding the manufacture of goods through electricity consumed, quantity of raw material consumed, labour charges paid etc. It is seen that none of these has been done.

Thus to arrive at a conclusion of clandestine removal, merely on the basis of insufficient details of weighment made of goods in the truck to others. This is evident from the fact that even during April and May 2001, the truck was weighed at the same weighbridge. Thus it cannot be ruled out even during the months June 2001 to November 2001, weighments made at weigh bridge were of goods belonging to somebody as even then the truck had been given on hire. Thus, for providing clandestine removal, even on the basis of preponderance of probabilities, affirmative and cogent evidence has to be adduced- Tribunal decisions in Emmtex Synthetics vs CCE [2003(151)ELT 170 (Tri)], Esvee polymers(supra) and Jagatpal Premchand vs CCE [2004 (178) ELT 792 (Tri)], to mention only a few, though the list in inexhaustive. Hence the demand cannot be confirmed without any corroboration. In this context, the appellants during the course of hearing also brought to my notice the order passed by the Commissioner, Central Excise, Raipur in order-in- original No. 31/Commr(Adj)/Rpr/2006, dated 8.3.2006 in respect of their sister unit, namely, M/s. Durga Engineering and Foundry Works, Bhilai. There also the demand was on identical basis resting on the weighment made and register entries of M/s. Rukhmani Dharamkanta. The Commissioner has rightly dropped the proceedings against that appellants on ground of insufficient evidence. The position is identical here. Therefore, I hold that merely on account of insufficient evidence the liability to excise duty for reason of suppression of facts and clandestine removal of goods cannot be pinned on the appellants. Thus the demand on this account is unsustainable.

<u>Para 13</u>- A demand of Rs.3,96,857/- has been confirmed on the ground that the appellants have shown lesser quantities of goods in the invoices while the weighment of goods at the weigh bridge indicate greater quantities. In this context, the appellants stressed on para 4.8 of the order-in-original No.31/Commr(Adj.)/Rpr/2006, dated 8.3.2006 of the Commissioner, Central Excise, Raipur in the case of M/s. Durga Engineering and Foundry Works, bhilai, where the appellants emphasized that-

"The said allegation has been contested by the party on the grounds that many times, the buyers have been using the same truck for loading their goods from more than one factory, therefore, the weight of the goods mentioned in the weighment register against the same truck cannot be considered to have been removed from the factory premises of the party no.1. I find that demand has been raised on the grounds that a single vehicle has been weighed more than once on the weigh bridge. In this context, I have examined the contentions of the party that some times as per recquirement of the customers, different description of the goods are loaded in a single truck from different factories and accordingly, the weighment of the vehicle is also done. Practically, I agree with the party because

in case a customer desires more than one variety of the goods, then it is not possible for a manufacturer to supply all varieties if not manufactured by him. In that case, the customer will definitely search for another manufacturer who is engaged in the manufacture of goods desired by him and accordingly, the vehicle will move to the second manufacturer for loading of the weighment of the same vehicle it cannot be concluded that the party no. I has issued invoice for a lesser quantity of the goods. Further, the investigators have also not adduced any substantive evidence like receipt of excess quantity of goods by the consignee as the details of consignee was available in the invoice, receipt of payment for more quantity of the goods by the party from the buyers."

In this context I observe that the demand of Rs. 3,96,857/- is based on the entries made in the weighment register of the same Dharamanta. Here too I observe that the evidence adduced is insufficient to pin the liability for reason that excess quantities were removed as stated in the weighment register. As observed above, the same vehicles do collect goods of different description from different factories and weighment would then be of goods of other persons as well. This possibility cannot be ruled out. Further, I observe that the corroboration of which I have dealt extensively in the previous paragraph is lacking here. There are no statements of the vehicle owner/drivers, receipt of excess raw material and manufacture therefrom, labour charges, payments for these etc. Thus without any corroboration and without any investigation to collect the needed evidence for the degree of proof on the basis of preponderance of probabilities, the liability cannot be pinned on the appellants. Therefore, this demand of Rs. 3,96,857/- is set aside.

Para 15- It is also seen that penalties of Rs. 5,00,000/- each are imposed on Shri Vijay Bahadur Yadav and Shri Naveen Kumar Yadav. The lower authority has in the adjudication order not brought facts which would indicate individual role of these persons for imposing separate penalties on these two appellants. These two appellants have acted as Directors of the company and therefore once penalty is imposed on the company there is no warrant for imposition of separate penalties on them. This has been so held by the Tribunal in the case of Jaypee Industries vs. CCE [2004(168) ELT 316] and Sarpin Pharmacal vs CCE [2004(167)ELT 472] and also in a large number of cases. Therefore, these separate penalties of Rs. 5,00,000/- each are set aside."

It can be seen from the above reproduced finding that the evidences which revenue wants to rely upon are considered in detail and on an correct appreciation, a conclusion has been arrived. I concur with the said findings. In view of foregoing, I find the appeals filed by the Revenue are devoid of merits.

10. However, I find that the appeals of the Revenue are also on the point of imposition of equivalent amount of penalty on the confirmed

demands of the duty (on M/S. NIBI Steels) on the goods which have been held as removed clandestinely, is correct. I find that in Paragraph No. 14, the First Appellate Authority has imposed a penalty as Rs. 50,000/- under section 11 AC, despite holding that there is clandestine removal of goods, and that duty liability therein is Rs. 2,28,451/-. It is settled law that once there are findings of clandestine removal and confirmation of the demand of the duty is on said findings, (which is upheld by Tribunal in this order in paragraph No. 8), equivalent amount of penalty needs to be imposed under section 11 AC of the Central Excise Act 1944. In pursuance of the said provision, penalty imposed on M/S NIBI Steel Ltd. is enhanced to Rs. 2,28,451/- from Rs. 50,000/-.

11. All the three appeals stands disposed of as indicated herein above.

(Order pronounced on 10/11/2017 in open court)

(M.V.Ravindran)
Member (Judicial)

Shraddha