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

Date of hearing: 08.11.2017
Date of pronouncement: 22.12.2017

Excise Appeal No. 1032 of 2010
(Arising out of order-in-original No. COMMISSIOINER/RPR/5/2010 dated 27.01.2010 passed by the Commissioner of Central Excise, Raipur).

M/s Shri Ambika Ispat (India) Pvt. Ltd. Appellant

Vs.

CCE, Raipur Respondent

Appearance:

Ms. Mehek Gupta, Advocate for the appellant
Sh S. K. Bansal, AR for the respondent

Coram:

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

Final Order No. 58554/2017

Per: **V. Padmanabhan**:

The present appeal is filed against the order-in-original No. COMMISSIOINER/RPR/5/2010 dated 27.01.2010 passed by the Commissioner of Central Excise, Raipur.

2. The appellants are manufacturers of Sponge Iron chargeable to Central Excise duty under sub-heading No. 72031000 of the Central Excise Tariff Act, 1985 from Iron Ore. They have installed a coal based kiln with production capacity of 100 M.T. per day of Sponge Iron. On receipt of intelligence that the appellant are engaged in the evasion of duty by under reporting the production of excisable goods and clandestine removal of goods without payment of duty, the jurisdictional Central Excise officers visited their factory

premises on 04.09.2008 and conducted various checks. The officers withdrew certain documents relating to manufacture of Sponge Iron, called ‘production log registers’, in which the details of feeding of raw materials – Iron Ore, coal etc. had been recorded, in addition to other operating parameters like temperature and pressure inside the kiln. Inquiry was made with Sh. Girish Chandra Giri, Production Manager, present at that time and his statement was recorded wherein he stated that production log registers contain the details of the quantities of raw materials fed into the kiln for manufacture of Sponge Iron and also other parameters like temperature and pressure of air inside the kiln and that in their factory, the productivity of Sponge Iron of the coal based kiln is within the range of 57% to 61% of the Sponge Ore fed into the kiln. From the scrutiny of the log registers, the officers determined the total quantity of the Iron Ore fed into the kiln during the period from 21.4.2008 to 27.08.2008 and on the basis that the productivity of the kiln is 61% of the Iron Ore fed into the kiln, they worked out the approximate quantity of Sponge Iron manufactured which came to 7829 M.T. against which the production recorded in the RG-I Register and books of accounts was 6236.290 MT. It, thus, appeared that production of 2031.421 MT of Sponge Iron valued at Rs. 4,59,10,724/- and involving duty of Rs. 66,20,326/- had not been recorded and the same had been cleared clandestinely without payment of duty.

2.1 The officers in the course of search of the factory also, found some other documents including a file marked “File No. 1” and resumed the same for further scrutiny. The File No. 1 contained transporter’s bills, consignment receipts and weighment slips issued by the consignees showing receipt of Sponge Iron despatched from the appellant’s factory and also some records maintained in loose sheets showing despatch of the Sponge Iron to various customers. In respect of a number of despatches of Sponge Iron to various customers, as evidenced by the transporter's bills or consignment receipts issued by the consignees or weighment slips issued by the consignees, there were no central excise invoices issued by the appellants, indicating that those consignments had been cleared without payment of duty and without the issue of central excise invoices. Inquiry was made with the customers to whom such consignments had been sent without issue of central excise invoices and those customers, while confirming that such consignments without invoices had been despatched by the appellant to them, claimed that the consignments not accompanied by the invoices, were not accepted by them and returned. But there was no evidence of return of such consignments to the appellant's factory. 998.89 M.T. of Sponge Iron valued at Rs. 2,15,02,185/- and involving duty of Rs. 31,00,615/- appeared to have been cleared without payment of duty and without issue of central excise invoices during February, 2008 to August, 2008 period.

2.2 In view of the above, a show cause notice dated 31.03.2009 was issued to the appellants for –

(a) recovery of Central Excise duty amounting to Rs. 66,63,261/- along with interest on it at the applicable rate under proviso to Section 11A(1) of the Central Excise Act, 1944 read with Section 11 AB ibid in respect of clandestine removal of 2031.421 M.T. of sponge iron, alleged to have been made without payment of duty and without payment of duty and without issue of invoices during the period from 21.04.2008 to 27.08.2008;

(b) recovery of duty of Rs. 31,00,615/- under proviso to Section 11A(1) of the Central Excise Act along with interest on it at the applicable rate under Section AB ibid in respect of clandestine removal of 998.890 M.T. of Sponge Iron during the period from February, 2008 to August, 2008; and

(c) imposition of penalty on the appellant under Section 11AC of the Central Excise Act, 1944 and also under Rule 25(1) of the Central Excise Rules, 2002 for contravention of the provisions of Rule 4, 6, 8, 10, 11 of the Central Excise Rules.

2.3 The above show cause notice was adjudicated by the Commissioner of Central Excise, Raipur vide order-in-original No COMMR/RPR/5/2001 dated 28.01.2010 by which-

(a) duty demand of Rs. 62,80,176/- was confirmed alongwith interest on this duty under proviso to section 11A(1) of the Central Excise Act, 1944 read with Section 11AB ibid on 1866.933 M.T.s of Sponge Iron held to have been cleared clandestinely without payment of duty during April, 2008 – August, 2008 period and 77 MTs of Sponge Iron cleared during Feb. 2008 to 15.3.2008 period and

(b) penalty of equal amount was imposed on the appellant under Section 11AC of the Central Excise Act, 1944.

(c) The Commissioner dropped the demand on the remaining quantity of Sponge Iron alleged to have been cleared clandestinely during April, 2008 – august, 2008 period, as this quantity was held to be included in 1866.933 MTs of Sponge Iron.

2.4 The present appeal has been filed against the above mentioned order of the Commissioner confirming duty demand of Rs. 62,80,176/- and imposing penalty of the same amount.

3. Heard Ms. Mehak Gupta, ld. Advocate for the appellant submitted written arguments. It is pleaded that at the time of visit of the officers to the factory on 04.09.2008, though the stock of finished goods. i.e. Sponge Iron has been checked, no discrepancy were found; that the Department's case is based mainly on the quantity of Iron Ore fed into the kiln, as determined from the entries in the production log registers and the assumption that the Sponge Iron yield of the plant is uniform @ 61%; it is on this basis only that the production during the period of dispute has been determined and it has been alleged that production of 1866.933 MTs of Sponge Iron has not been recorded in the RG-I Register and has been removed clandestinely; that allegation of clandestine removal based on estimation of quantity of Iron Ore fed into the kiln during a particular period and assumption regarding the quantity of Iron Ore consumed based on the readings regarding the feeding rate recorded in the production log registers would not be correct; that similarly the assumption that the Sponge Iron yield is uniform @ 61% is also erroneous, as it can vary from 57% to 61%; that the Hon'ble Supreme Court in the case of ***Oudh Sugar Mills Ltd. vs. Union of India -1962 (03) LCX0001***, where the Department's allegation of unaccounted production and clandestine removal of sugar against the assessee was based on the quantity of sugarcane juice processed and the assumption that yield of sugar from the cane juice is 10.11%, was set aside by Hon'ble Supreme Court observing that merely on the basis of average yield of sugar cane from cane juice, the allegation of unaccounted production of sugar

and clandestine removal is not sustainable; that the ratio of the Supreme Court in the case of Oudh Sugar Mills (supra) is squarely applicable to the facts of this case; that there were no removals of sponge iron without issue of any invoice and in the cases, where due to mistake, the consignments of sponge iron had been despatched to the customers without invoices, as confirmed by the customers themselves, the same had been returned; that though the appellant have pleaded before the Commissioner that estimation regarding the quantity of Iron Ore fed into the kiln on the basis of periodical readings regarding feeding rate recorded in the production log register is not correct, but the Commissioner did not give any finding on this plea. Hence, the Commissioner's order is not sustainable.

4. Cross examination of Sh. Sunil Aggarwal, Proprietor of M/s Sunil Roadlines, Sh. G.C. Giri, Production Manager and Sh. Arindam Dutta, GM M/s Shree Consultants Pvt. Ltd. whose testimony had been relied upon in the show cause notice was denied by the Adjudicating Authority in total defiance of provisions of Section 9D of the Central Excise Act, 1944 and in defiance of now settled position as culled out from the following case law:

i. 2016 (337) ELT A204 (SC) Belgium Glass & Ceramics Pvt. Ltd. vs. Commissioner

ii. 2015 (324) ELT 641 (SC) Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II

iii 2002 (143) ELT 21 (SC) M/s Laxman Exports Ltd. vs. CCE

iv. 2016 (336) ELT 15 (Del.) HIM Logistics Pvt. Ltd. vs. Principal Commissioner of Customs

v. 2016-TIOL-1238-HC-P&H-CX: M/s Ambika International vs. Union of India.

vi. 2015 (315) ELT 145 (Tri. Del) Agrawal Round Rolling Mills Ltd. vs. CCE&ST, Raipur.

vii. 2004 (173) ELT 80 (Tri. Del.) M.H. Textiles Ltd. vs. CCE, Faridabad.

The appellant had categorically stated therein that the submissions made by them are interim and sought an opportunity to make final submissions after cross-examination.

Thus, the principles of natural justice have been violated by denying cross-examination of-

a) Sh. G.C. Giri, Production Manager.

b) Sh. Sunil Agarwal, Prop. M/s Sunil Roadlines

c) Sh. Arindam Dutta, General Manager- Shri Consultants

5. Sh. S. K. Bansal, ld. AR pleaded that the production of Sponge Iron has been correctly estimated and the same is much higher than the production recorded in the RG-I Register; that for estimating the production of Sponge Iron, the officers had determined the quantity of Iron Ore fed into the kiln on the basis of readings regarding the feeding rate taken by the appellant’s workers from time to time, as recorded in the production log registers and thus the quantity of Iron Ore fed has been correctly determined; that since as per the appellant’s admission that the Sponge Iron yield of the Plant is 61%, the quantity of Sponge Iron has been correctly estimated; that Sh. Girish Chandra Giri, Manager (Production) of the appellant in his statement dated 04.09.2008 under Section 14 of the Central Excise Act, 1944 has stated that the process log registers of Iron Ore are maintained for recording the quantities of raw materials including the Iron Ore fed into the kiln for manufacture of Sponge Iron; that the feeding rates of raw materials recorded in the log registers signify the quantity of raw materials (in MTs) fed into the kiln in one hour,

from which Sponge Iron is manufactured, that the feeding rate into the kiln is checked at regular intervals and the readings are recorded in the log registers; that production of Sponge Iron is a continuous process and the same is quantified and recorded on the basis of the quantity of Iron Ore consumed; that the productivity of the Sponge Iron in their coal based kiln is 57% to 61% of the quantity of Iron Ore fed into the kiln; that Sh. Sunil Agarwal, Manager (Accounts) in his statement dt. 04.09.2008 had also explained by illustration the calculation of Sponge Iron Ore production from the quantity of Iron Ore fed and the estimation of Sponge Iron production has been done by the officers by following this method only; that Sh. Sunil Agarwal in his statement dt. 04.09.2008 has also confirmed that the production log registers are maintained for estimating the quantity of Iron Ore and raw materials fed into the kiln and determining the quantity of Sponge Iron produced; that on scrutiny of transporter's bills, consignment receipt notes issued regarding the receipts of consignment of Sponge Iron despatched by the appellant, weighment slips issued by the consignees showing the receipt of the Sponge Iron and the records maintained in loose sheets, it is seen that, in respect a number of despatches of Sponge Iron to various customers, there were no central excise invoices issued by the appellant and those despatches were not recorded in the RG-I register; that the despatches of the consignments of Sponge Iron without the issue of invoice has been confirmed by the various customers – Sh. Ajay Kumar Gupta, Director of M/s Sairam Steels (Pvt.) Ltd. and Sh. Arindam Dutta, General Manager, M/s Shri Consultants, Raigarh; that though they, while confirming the receipt of consignments of Sponge Iron without invoices, have claimed that consignments were not accepted by them and returned, as the same were not accompanied by invoices, there is no record in the appellant's factory that these consignments had been received back by them and thus, the customers' claim that the consignments received without invoices had been returned by them is not acceptable; that no explanation has been given by the appellant regarding the huge difference between the quantity of production of Sponge Iron actually recorded by them in their RG-1 register and the quantity of Sponge Iron expected to the produced on the basis of the quantity of the Iron Ore consumed by them; that this discrepancy coupled with a large number of clearances of consignments without invoices indicate large scale of evasion of duty by under reporting the production and clandestine removal.

6. Heard both sides and perused of record.

7. We find that during the course of search proceedings, at the appellant's factory, the department has recovered various documents related to the manufacture of sponge iron i.e. production log register in which the details of feeding of raw material had been recorded. We find that there is no dispute about the fact that such records are recovered from the factory as well as the contents. On the basis of such production log register, the adjudicating authority has determined the total quantum of raw materials which have been used in the manufacture of sponge iron. On the basis of the statements recorded from Production Manager of the appellant, it has been inferred that the normal yield of sponge iron in the manufacturing process is in the range of 57% to 61% of the ore fed into the kiln. Taking the yield to be 61%, the Revenue has estimated the production and demanded duty on the same after deducting the quantity already accounted.

8. It has been argued on behalf of the appellant that the yield can vary and taking the same to be 61% can only lead to a theoretical determination of the quantum of production. In this regard, we are of the view that the quantum of sponge iron produced can be estimated on the basis of yield. However, the production incharge has indicated a range from 57% to 61% for such yield.

9. During the course of search of the factory, the department has recovered several documents such as transporters bills, consignment receipt, weighment slips etc. showing receipt of sponge iron despatched from the appellant's factory as well as records in loose sheets showing the despatch of the finished product to various customers. In some of these cases Central Excise invoices were found to have been issued but in many other cases no Central Excise invoices have been issued indicating, that a large number of consignments have been cleared without payment of duty. On the basis of these incriminating documents recovered by the Department, it is evident that large scale evasion of duty has been done by the appellant.

10. We find that the principal ground on which the appellant has challenged the impugned order is that the adjudicating authority has relied on the statements of several persons without extending an opportunity to the appellant of cross-examining them. They have relied on several case laws and argued that in terms of the provisions of Section 9D of the Central Excise Act, 1944, before the statements of any persons are used by Revenue to establish a case, these witnesses will have to be examined during the course of the quasi-judicial proceedings and an opportunity for cross-examination is required to be extended to the assessee. Since the adjudicating authority has failed to do so,

it has been argued that the impugned order has been passed in violation of the principles of natural justice.

11. The applicability of the provisions of section 9D of the Central Excise Act, 1944 in adjudication proceedings before departmental authority was examined by the Hon'ble Punjab and Haryana High Court in the case ***G Tech Industries [2016 339 ELT 209 (P&H)]*** in which the Hon'ble High Court observed as under

> ***"4.*** *In view of the fact that the case of the petitioner is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*
>
> ***"9D. Relevancy of statements under certain circumstances.*** *- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
>
> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*
>
> *(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*
>
> *(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."*

5. *A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.*

6. *Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.&K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.) = 2011 (22) S.T.R. 225 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.*

7. *There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.*

8. *As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a Gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).*

9. *The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority* *relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.*

12. Similar views have also been expressed by the Hon'ble Delhi High Court in the following cases:

1. ***Flevel International vs. CCE***
   [2016 (332) ELT 416 (Del)]

2. ***Him Logistics Pvt. Ltd. vs. PCC***
   [2016 (336) ELT 15 (Del)]

13. This Tribunal has also followed these decisions in several cases consistently.

14. Keeping in view the observations of the Hon'ble High Courts, we are of the view that the impugned order needs to be set aside and matter remanded to the adjudicating authority. For satisfying the requirements prescribed in Section 9D ibid, an opportunity for examination and cross examination of witnesses may be extended through an effective hearing to all connected parties. Additional evidence may also be admitted as per law.

15. During the denovo proceedings, the adjudicating authority is directed to recomputed the total quantum of production after arriving at the correct yield. For this purpose, he is directed to reappraise the evidence including the result of the examination and cross-examination of the concerned persons.

16. In view of the above discussions, we set aside the impugned order and remand the matter to the adjudicating authority for passing denovo orders as above, but by providing of proper opportunity of hearing.

17. In the result, appeal is allowed by way of remand.

(Pronounced on 22.12.2017).

Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

Pant