

Ex. Appeal Nos. 51825 & 52038 of 2015

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

Date of hearing: 15.01.2018

Date of pronouncement: 05.03.2018

Ex. Appeal Nos. 51825 & 52038 of 2015

(Arising out of Order-in-Original No. RPR/EXCUS/000/COM/03-04/2015 dated 29.01.2015 passed by the Commissioner, Customs & Central Excise, Raipur).

M/s G.P. Ispat Pvt. Limited Appellant
Gurpreet Singh Chandok

Vs.

CCE&ST, Raipur Respondent

Appearance:

Sh. Krishnamohan K. Menon & Sh. Bhishm Ahluwalia, Advocates for the
appellant

Sh. H. C. Saini, AR for the Respondent

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President

Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order Nos. 51825 – 52038/2015

Per: **V. Padmanabhan**:

The present appeals have been filed against the Order-in-Original No. RPR/EXCUS/000/COM/03-04/2015 dated 29.01.2015 passed by the Commissioner, Customs & Central Excise, Raipur.

2. The appellant is engaged in the manufacture of iron and steel products – M.S. Ingot and TMT Bars falling under Chapter 72 of the Central Excise Tariff Act, 1985. The appellant manufactures M.S. Ingot out of sponge iron and further use such ingots in rolling mill to manufacture TMT Bars with

brand “Buland”. In addition, they are also engaged in receiving M.S. Ingots from SAIL to convert the same into TMT bars with brand “SAIL”.

3. The impugned order is the culmination of two different investigations undertaken for different periods. The impugned order has disposed of show cause notices dated 28.03.2013 as well as 30.06.2014.

4. During the period 05.06.2012 to 12.06.2012, Central Excise Officers visited the appellant’s factory and carried out a thorough verification of the stock of inputs as well as finished goods in the factory of the appellant. During this period, the production and clearances in the factory continued but were thoroughly supervised by the Central Excise Officers. In the initial stock taking held on 05.06.2012, the panchnama recorded that against total stock of 10703.714 MT of TMT bars, the total physical stock was 9648.139 MTs, leading to a shortage of 1055.575 MT. The duty involved in such shortage detected was paid by the appellant soon thereafter. After continuing the stock verification on 11.06.12 and after recording the statement of various connected officials of the appellant, the department in the show cause notice dated 28.03.2013 alleged that there was a shortage of “Buland” brand TMT bars to the extent of 9076.766 MT. It was further alleged that this quantity of finished products were cleared clandestinely without payment of duty. Accordingly, Central Excise duty amounting to Rs. 4,36,13,406/- was demanded which came to be confirmed and upheld in the impugned order.

5. The second investigation was commenced on 20.03.2013 by physical stock verification at the appellant factory by the Central Excise Officers

alongwith officers of Central Bureau of Investigation. The verification concluded that various quantities of finished products were found short involving total Central Excise duty of Rs. 47,47,339/-. Further, a letter pad was recovered during the course of search which indicated clearances of various quantity of scrap without payment of duty during the period 13.12.2012 to 18.03.2013, totally to the extent of 170.930 MT. The duty liability on such scrap was quantified at Rs. 2,90,398/-. Vide show cause notice dated 30.06.2015 allegations of clandestine clearances of the goods found short were made and Central Excise duty involved therein was demanded. The duty involved to the extent of Rs. 50,37,737/- was confirmed in the impugned order pertaining to this show cause notice. Aggrieved by the impugned order, the present appeals have been filed.

6. With the above background, we heard Sh. K. Krishnamohan Menon, Id. Advocate and Shri H. C. Saini, Id. AR for the Revenue.

7. The arguments made by the Id. Counsel for the appellant are summarised below:

With reference to Show Cause Notice dated. 28.03.2013 he submitted as follows-

- (i) The panchnama drawn on 05.06.2012 that against total stock of 10703.714 MT of TMT bars, the total physical stock was 9648.139 MTs, leading to a shortage of 1055.575 MT. The duty involved in such shortage detected was paid by the appellant soon thereafter. However, he submitted that department has alleged a huge shortage of 9076.766 MT, even though for the period 05.06.2012

to 11.06.2012, the entire clearance activities were under the supervision and control of the departmental officers. He submitted that the conclusion of the adjudicating authority about the shortage is totally contrary to the panchnama dated 05.06.2012. Further, he also submitted that the stock verification was also not conducted on the basis of actual weighment but on the basis of estimates.

- (ii) With reference to show cause notice dated 30.06.2014, he submitted that the stock shortage ascertained during verification has been explained by the Director in his various statements as arising out of high burning loss. It is his submission that burning loss varies from 15% to 20% in respect of M.S. Ingot whereas in respect of TMT bars which is 3% to 5%. The huge shortage detected has been explained by the Director as accumulated burning loss.
- (iii) Simply on account of shortage of various goods, it cannot be alleged that such goods have been clandestinely cleared. The department has not carried out any corroborative investigations on aspects such as the power used, procurement of raw materials etc. In the absence of such investigation, such huge amount of demand cannot be sustained. He also relied on various case laws.

8. Ld. AR appearing for the Revenue justified the impugned order. He submitted that the stock verification, in respect of both the investigations have been conducted in the presence of the representative of the appellant who has expressed satisfaction in the method adopted for such verification.

In the absence of satisfactory explanation for the shortage, the appellant will be liable to pay the excise duty on such finished products found short.

9. We have heard both sides and perused the appeal record.

10. Both investigations leading to the issue of show cause notices by the department is in the form of stock verification vis-a-vis the stock recorded in statutory books. During the course of first verification carried out in June, 2012, the stock taking has continued for the period 5th to 11th June, 2012 during which the factory was virtually under the control of the departmental officers who monitored any goods coming in and any goods cleared out. Ld. Counsel for the appellant has drawn our attention to the panchanama dated 05.06.2012 in which it has been recorded that a stock of 9648.139 MT of TMT bars was found as against the stock as per RG-I of 10703.714 MT. As against this, in para 2.5 of the show cause notice dated 28.03.2013, we find that entirely different figures have been adopted for the stock position on 05.06.2012. We are unable to comprehend the basis for arriving at the shortage of 9076.766 MT on which Central Excise duty has been demanded.

11. During the course of investigation conducted in June, 2012 as well as in March, 2013, only the stock verification has been carried out by the Department. No attempt has been made to corroborate such figures of shortage with other factors such as consumption of power, procurement of raw materials and identifying possible buyers and transporters of such goods. Without any corroborative evidence, it is difficult to sustain the allegation of clandestine clearance.

12. With reference to the demand raised in show cause notice dated 30.06.2014, it has been submitted by the appellant that such shortages have arisen over a period of time on account of accumulated burning losses. It is claimed that on account of such burning losses the physical stock may not match with the book stock. Such averment has been made by Sh. Gurpreet Singh Chandok, Director in his various statements. It is further claimed that the burning losses are higher in respect of manufacture of ingot even in the range of 15% to 20%. Burning loss invariably happens but we note that such a serious claim by the Director was not further investigated by the Revenue authorities. Even in the impugned order the same has not been discussed by the adjudicating authority.

13. Only a small demand of Rs. 2.9 lakh is based on certain details found in a letter pad recovered from the factory during the search in March, 2013. Even in respect of this piece of documentary evidence, no further investigation has been undertaken by the Revenue. It is pertinent to record that details of the buyers in such cases were found in the letter paid which could have been investigated but the same has not been done.

14. It is clearly well settled that allegation of clandestine removal of finished goods cannot be sustained only on the basis of mere shortage. In this regard, we reproduce below the observation of the Punjab & Haryana High Court in the case of ***CCE&ST, Ludhiana vs. Anand Founders & Engineers – 2016 (331) ELT 340 (P&H)***.

“6. The Commissioner (Appeals) set aside the findings of the clandestine removal of the goods recorded by the adjudicating authority by holding that the assessee’s record which were admittedly

lying in the adjoining sister concern M/s Adhunik Industrial Corporation were not scrutinised. Further, it was held that the assessee had clarified the stock position vide letter dated 9.8.2008 which was rejected summarily as an after-thought without making the verifications. Shri Kamal Kant in his statement has admitted only shortages and not the fact of clandestine removal and there was no evidence to show the clandestine activities as no further investigation was conducted to establish the identity of the buyers or the suppliers of the raw materials. The adjudicating authority had mentioned that the production was recorded by weight but in the sale invoices, the goods were sold by numbers without indicating the weight of the finished goods but nothing was provide that how the stock position was verified regarding sale invoices which only showed numbers without giving their weight. Accordingly, the Commissioner (Appeals) extending the benefit of doubt to the assessee had set aside the order passed by the adjudicating authority. The aforesaid findings of the Commissioner (Appeals) were affirmed by the Tribunal by observing that there was no other evidence on record to prove the clandestine activities of the assessee as the Revenue has not conducted further investigations to establish the identity of the buyers of the suppliers of the raw materials or the transporters. Further, it was held by the Tribunal that mere shortages detected at the time of visit of the officers cannot ipso facto lead to the allegations and findings of clandestine removal. The relevant findings recorded by the Tribunal read thus:-

The Revenue has “7. Again reiterated the same stand that as shortages detected at the time of visit of the officers, which has to be held that the respondents had cleared their final product in a clandestine manner. Admittedly, there is no other evidence on record so as to relate to the clandestine activities of the assessee. The Commissioner (Appeals) has rightly relied upon the various decisions of the Tribunal including the decision in the case of Jai Timber Company v. CCE&C, Bhopal [2009 (234) ELT 457 (Tri. All)] and has rightly concluded that mere shortages detected at the time of visit of the officers cannot ipso facto lead to the allegations and findings of clandestine removal.”

7. No illegality of perversity could be pointed out in the aforesaid findings of fact recorded by the Commissioner (Appeals) as well as the Tribunal which may warrant interference by this Court. Accordingly, no substantial question of law arises in this appeal”.

15. In the case of **Continental Cement Company vs. Union of India** - **2014 (309) ELT 411 (All.)** the Hon’ble Allahabad High Court has held that clandestine removal is a serious charge which is required to be proved by

Revenue by tangible and sufficient evidence. The Hon'ble High Court observed as follows-

“12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects:

- (i) To find out the excess production details*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realisation of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/ buyers*
- (vi) To find out the excess power consumptions.*

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.

14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so called buyers, namely M/s Singhal Cement Agency, M/s Praveen Cement Agency; and M/s Taj Traders are based on memory alone and their statements were not supported by any documentary evidence / proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts cannot be ruled out.

15. In view of the above, we are of the opinion that when there is no extra consumption of electricity, purchase of raw materials and transportation payment, then manufacturing of extra goods is not possible. No purchase of raw material outside the books have been proved.

16. In the light of the above discussions and considering the totality of the case, we are satisfied that no case is made out for extra so called clandestine sale of the Portland Cement to the said parties. We are satisfied that the first appellate authority has rightly deleted the addition and cancel the penalties. Hence we hereby set aside the

impugned order passed by the Tribunal and restore the order passed by the first appellate authority alongwith the reasons mentioned herein”.

16. By following the decisions of various Hon’ble High Courts, we are lead to the conclusion that in the case of the appellant, the demand of Central Excise duty cannot be upheld, since the allegation of clandestine removal has been made only on the basis of alleged shortages noticed during stock verification. In the absence of any investigation corroborating the allegation of clearance, we have no option but to set aside the impugned order and allow the appeals.

(Pronounced on 05.03.2018).

(Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

Pant

