CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Bench - SMB
Court – I

Appeal Nos. E/904-905/2012

(Arising out of Order-in-Original No. 01/2012-CE-HYD-III-ADJN-COMMNR dt. 17.01.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-III)

M/s Singareni Steels Pvt. Ltd.,
M/s Kinnera Steels Pvt. Ltd., **…..Appellant(s)**

Vs.

Commissioner of Central Excise, Customs
& Service Tax, Hyderabad –III **…..Respondent(s)**

Appearance
Shri R. Muralidhar for the Appellant.
Ms. B.V. Siva Naga Kumari, Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Date of Hearing: 03/05/2018
Date of Decision: 09/07/2018

FINAL ORDER No. A/30693-30694/2018

[Order per: M.V. Ravindran]

These two appeals are directed against Order-in-Original No. 01/2012- CE- HYD-III- ADJN-Commnr dated 17.01.2012. Since both the appeals are directed against the very same Order-in-Original and being disposed of by a common order.

2. The relevant facts that arise for considerations are M/s Singareni Steels Pvt. Ltd., (SSPL) are manufacturers of MS Ingots, Runners and Risers falling under Chapter Sub-Heading No. 9206.90 of the Central Excise Tariff 1985. M/s Kinnera Steels Pvt. Ltd., (KSPL) are manufacturers of M.S. Bars and Rods falling under Chapter Sub-Heading 7214.90 of the tariff and is situated adjacent to SSPL. The Departmental Officers visited the premises of SSPL and KSPL on 07.03.1992 and checked the stock of goods and relevant records. It was noticed that SSPL maintained private records showing production in terms of number of heats as well as particulars of consumption of electricity; maintained a note book of induction furnace for production of ingots; comparing the statutory production register, RG-1 and official heat register with the private records, it was observed that SSPL had not recorded production of 2335.253 MTS of MS ingots during the period 19.03.1988 to 30.04.1989; similarly for the period 01.05.1989 to 31.03.1990, there was an excess unaccounted production of 1761.291 MTS both worked out to be unaccounted production of 4096.544 MTS. Coming to an attentive conclusion that SSPL was liable to duty on this production, show cause notice was issued to them. On further investigation a note book bearing the title “Ingots Movement from SSPL to KSPL” was recovered from SSPL which was further allegedly date wise removal of ingots from 03.04.1990 to 03.03.1992, 58 weighment slips contained in a file recovered from SSPL pertaining to the period 02.12.1991 to 05.03.1992 were recovered and tallied with the RG-1,

with ingots register movement. It appeared that during the period, SSPL had removed 16,383.530 MTS of ingots whereas the statutory records of SSPL showed removal of 12,133.287 MTS, there was a suppression of removal of 4250.243 MTS of ingots on which duty liability was not discharged. It was also noticed that the stock account of raw materials of MS Scrap when compared to the statutory Form-IV register was also indicate the clandestine activity under taken by SSPL. The Show Cause Notice was issued for this reason to SSPL. The said show cause notice was adjudicated by the Commissioner as an Adjudicating Authority and demands were confirmed to the extent to Rs. 46,09,799/- and penalty was imposed on SSPL under the erstwhile Rule 173Q of Central Excise Rules, and imposed penalty on KSPL under provisions of Rule, 209A of the Central Excise Rules, 1944. The Order-in-Original dated 29.01.1998 was contested before the Tribunal and this Tribunal by Final Order dated 21.11.2003 remanded the matter back to the Adjudicating Authority to reconsidered the issue afresh. The Adjudicating Authority in *denovo* adjudication proceedings dropped the proposals in the show cause notice holding that capacity of the furnace installed in SSPL could not have produced the goods for demands raised. Revenue was aggrieved by the said Order-in-Original and preferred an appeal before the Tribunal in appeal No. E/224/2006. The said appeal was disposed of by the Bench vide Final Order dated 15.09.2010 wherein, the matter was remitted back to the lower authorities to reconsider the issue afresh with some guidelines. The

Adjudicating Authority, in the impugned order in these appeals had in *denovo* proceedings has again confirmed the demands raised. Hence these appeals.

3. Learned Counsel appearing for the appellants after taking the Bench through the entire set of facts submits that there is nothing to support, that there could be a case for clandestine manufacture/clearance, except statements of appellants Director, General Manager were recorded and few documents were recovered from SSPL and KSPL premises. Show cause notice was issued by invoking extended period which is incorrect as the said show cause notice is issued after more than 6 to 12 months of having correct of the so called documentary evidences. It is the submission that in respect of alleged clearances from SSPL factory, the Lower Authority has not followed the direction of the Tribunal. After drawing my attention to the decision of the Tribunal dated 17.01.2012, he submits that the Tribunal had specifically directed that the authority should ascertain the capacity of furnace of SSPL as per the capacity claimed by the manufacturers, of such furnace and also consider the determination of production capacity by the Commissioner of Central Excise, Hyderabad-III in pursuance to Induction Furnace Annual Capacity (Determination) Rules,1997 as also the A.P. Productivity Councils assessment of production capacity of the appellant. It is his submission that despite such clear direction by the Tribunal the Adjudicating Authority merely relied upon the figures mentioned in the

heat register and held that production capacity of the furnace of the appellant is 3.38 MTS per heat. It is his submission that these findings are not in accordance with the direction of the Tribunal hence the production capacity needs to be determined 2.10 MTS if that is considered, there is no clandestine/ manufacturer of clearances. It is his submission that the Adjudicating Authority has relied upon the statement of director of SSPL who had stated that there was production of 3.5 MTS per heat for the same furnace, but ignored the fact that Shri N. Krishna Rao, had retracted in said statement in reply to the show cause notice. It is his further submission that Adjudicating Authority has relied upon a statement of one of the officers of the appellant who had stated that manipulation to crucible can be made to achieve higher production and the heat registers both private and officials were showing the higher production at an average of 3.5 to 3.8 MTS per heat. He would submit that the Adjudicating Authority has simply held against the appellant on this has there is nothing on record, to show that there was feasible to enhance the capacity by manipulation of crucible of the furnace. He would submit that the Adjudicating Authority has erred in finding fault with the appellant inasmuch that he had relied upon a circular which has directed all the ingot manufacturing units to install a weighbridge within a factory premises; which is an incorrect finding as KSPL to adjacent to appellants the weighbridge was nearest and all the production was recorded correctly. It is his further submission that the Adjudicating Authority has also relied upon the electricity consumption to hold that there was clandestine manufacturer and clearances which is again an incorrect finding as the electrical consumption cannot be a based for holding that there has been clandestine manufacturer. It is his further submission that the Adjudicating Authority has not considered the most important submission of the appellant's Counsel that there is no excess procurement of raw materials or any payments received in cash from purchases or paid in cash to sellers of the raw material that the consumption of electricity would be for manufacture of MS Ingots, Runners and Risers and demand is confirmed that entire production is assumed to be of MS ingots; that the private heat register and statutory heat register differ in quantum as ingots includes risers and runners. It is his submission theoretical yield worked out of MS ingots from the scrap which has been considered is totally incorrect as it is an industry norm the based on the scrap which is used for manufacturing of one ton of MS ingots would consume only 80% of the melting scrap. He submits that the impugned order be set aside and the appeal be allowed. It is his further submission that the penalty imposed on KSPL is under Rule 209(A) of the Erstwhile Central Excise Rules, 1944 which is not applicable in the case in hand for KSPL and there is nothing on record, that KSPL has indulged in an activity of clandestine receiving of the goods.

4. Learned Departmental Representative, on the other hand, submits that on the day of visited by the officials on 07.03.1992, they

detected suppressed production of 8354.317 MTS of Steel ingots out of which 4250.243 MTS were clandestinely cleared from SSPL to KSPL. It is her further submission that SSPL suppressed the production from March, 1988 to March, 1992 and is proved by the statement given by the Director N. Krishna Rao, electricity consumption register and private heat register. It is her submission that as per appellant's official record, SSPL was producing 3.3 MTS of MS ingots for heat and private heat records indicates production was up to 3.976 to 4. 035 MTS per heat. It is the submission that the claim of 3.2 Tons in his defense and the reliance placed by the appellant on the production capacity worked out by the competent authorities in the year 1997 cannot be applied to be correct when their documents to indicate that the production capacity was more than 2.1 MTS per heat. It is her further submission that procedure prescribed by Department by Trade Notice dated 16.04.1987 for production and clearances of MS ingots is not followed by the appellant. It is her further submission that appellants were required to maintain the record separately of risers, runners etc., and install weighbridge within the premises. It is her submission that clearances which are affected by SSPL to KSPL are proved by the same registers as maintained by SSPL and also ingots movement registers. It is her submission that both the units are located next to each other and has only wire fence segregating and SSPL as well as KSPL is headed by same chairman and the offices are located in the same building. It is her submission KSPL is not under excise control as they are availing exemption under Notification being manufacturers of M.S. bars and rods from ingots, it is her submission that the Order-in-Original is correct in confirming the demands raised beyond the limitation period as ingots were clandestinely produced and cleared. It is her further submission that penalty on appellant KSPL as per Rule 209(A) of Erstwhile 1944 is imposable as they were receiving the clandestinely cleared goods from SSPL. As regards the validity of electricity consumption register to prove suppressed production of steel ingots, she submits that the decision of Apex Court in the case of *M/s. R.A. Castings Pvt. Ltd.,* [2011 (269) ELT A108 (SC)] is distinguishable and is not relevant to the facts of this case. It is her submission that the electricity consumption and the heat register in the case in hand are different as it is recording the consumption of electricity, as heats and ingots produced by suppressed production records. It is her submission that in view of this the impugned order be upheld.

5. I have considered the submissions made by both sides and perused the records.

6. On perusal of records, I find that the entire case of the Revenue in confirming the demands raised on SSPL and imposing penalty on KSPL is on the allegation that SSPL had clandestinely manufactured and cleared MS ingots from the melting scrap and KSPL are also liable for imposition of penalty. To come to such a conclusion, the Adjudicating Authority, in the impugned order has

given findings holding that the heat register, private heat register and ingots movement register indicate that there was excess production which was suppressed from the statutory records.

7. On careful consideration of submissions made by both sides, I find that the entire case of the Revenue will stand or fall only if it is concluded whether appellant SSPL has recorded the correct production of MS ingots or otherwise.

8. I find that this is the third round of litigation before the Tribunal on the very same issue. In the first round of litigation, the Adjudicating Authority confirmed the same demands raised against SSPL and imposed penalties, also on KSPL. When the matter was heard by the Division Bench and by Final Order dated 21.11.2003 remanded the matter back by recording as under:

> *"**5**. We have carefully considered the points raised by both sides. We find that in this case, the duty has been demanded from M/s. SSPL on the ground that they have suppressed the actual production and cleared the goods clandestinely without payment of duty. The Commissioner, in his adjudication order has based his findings on the private register recovered from M/s. SSPL showing the number of heats during the period from 1-5-89 to 29-2-92 as recorded in their register namely log book of induction furnace register and private heat register which tallied with each other and statement dtd. 7-3-92 of Shri N. Krishna Rao, Director of M/s. SSPL admitting that the registers were maintained at M/s. SSPL by their staff and that they contained particulars relating to number of heats, number of ingots manufactured. He also confirmed the demand of Rs. 27,34,645/- on the basis of ingot movement register from M/s. SSPL to M/s. KSPL. We find that on one hand the Commissioner has found excess production of 4096.544 MTs of M.S. Ingots from the heat register, electricity consumption register and log book of induction furnace and on the other hand, he also found clandestine clearances of about 4257.773 MTs of M.S. Ingots for the period from 3-4-90 to 5-3-92. We find that if the production determined from heat register, log book of induction furnace register and electricity consumption register is determined, then in addition to that, production of additional ingots cleared to M/s. KSPL have not been explained. We also find that the capacity of production of the furnace as per manufacturers*

> *invoice dtd. 23-3-87 is 2.1 MTs and this very capacity was determined by the Commissioner of Central Excise, Hyderabad-III under Induction Furnace Annual Capacity (Determination) Rules, 1997 under his letter No. IV/16/92/97-CX., dated 1-10-97. Therefore, there is force in the plea of the appellant that when the capacity of the induction furnace is 2.1 MTs as shown by the manufacturer of furnace in 1987 and the same has been accepted by the Commissioner as on 1-10-97, then how the appellants can produce excess quantity which is not accounted for and which is said to have been cleared clandestinely.*
>
> ***6.*** *Therefore, we are of the opinion that the matter needs re-examination especially in the light of production capacity of the factory and other related documents. Accordingly, the order of the Commissioner is set aside and the matter is remanded back to the Commissioner for re-determining the clandestine production, if any, and its clearance based on the evidence and re-adjudicate the case."*

The Adjudicating Authority in the remand proceedings after following the direction of the Tribunal, came to a conclusion that the clandestine manufacture is not evidenced as claimed by Revenue and based upon the declaration furnished by the manufacturers of the furnace; doubting the evidences of the Revenue, the Adjudicating Authority had dropped the proceedings initiated by the show cause notice. Aggrieved by such an order, Revenue preferred an appeal before the Tribunal in Central Excise appeal No. 224/2006. The said appeal was heard and by Final Order No. 1185 dated 15.09.2010, the Division Bench remanded the matter back to the Adjudicating Authority giving some direction in paragraph No. 7.2 for examining certain relevant issues as to the production capacity, which could vital to the core issue as to whether SSPL had clandestinely manufactured and cleared MS ingots during the period in question.

9. I find that the Division Bench of this Tribunal in Final Order dated 15.09.2010, was deciding the appeal filed by the

Revenue against the Adjudicating Authority's order of dropping the demands raised and on the question of capacity to produce the MS ingots more than the capacity as claimed by the appellants herein, the Bench recorded the following categorical findings.

> "***7.2.*** *The capacity of the furnace of SSPL as per the invoices of the manufacturer of the furnace was 2.1 MT per heat. There is no evidence on record that the assessee had altered the parameters of the furnace to enhance its capacity. The assessee had only indicated that it was feasible to enhance the capacity by manipulation of crucible of the furnace. There is no evidence or finding to the effect that SSPL had carried out such an alteration. The Commissioner of Central Excise, Hyderabad-III had determined the capacity of the induction furnace at 2.1 MTs under the Induction Furnace Annual Capacity (Determination) Rules, 1997 vide his letter No. IV/16/92/97-CX dated 01.10.1997. Though the capacity determined under the above rules is a notional figure with reference to the dimensions/parameters of the furnace, we cannot hold that the actual production would be so wide off the capacity determined under the rules. The show cause notice does not suggest this possibility as a practical one. Moreover, the A.P. Productivity Council had assessed production capacity of the assessee at 2.1 MTs. The appeal argues that this certificate of the Council has to be ignored as the Council was not aware of the clandestine production of goods by SSPL during the material period. We are not able to appreciate this logic. The capacity of the furnace is certified with reference to reliable parameters, such as dimension. This assessment cannot be influenced by the knowledge as to the alleged clandestine production and clearance engaged in by the assessee."*

10. On specific query from the Bench, as to whether the Revenue has preferred an appeal against above reproduced findings of the Division Bench, it was informed by both sides, they are not aware of the same. In the absence of any appeal against such findings, it has to be held that the production capacity of the appellant SSPL has to be considered as 2.1 MTs per heat, and has attained finality. The Tribunal's Final Order dated 15.09.2010 remanded the matter back to the Adjudicating Authority to reconsider this relevant issue and come to a conclusion. The Adjudicating Authority in the impugned order religiously records that matter has been remanded

back twice by the Tribunal and still on the question of the capacity of induction furnace to produce more than 2.1 MT per heat, remained unaddressed by any contrary evidence in the adjudication order. The Adjudicating Authority was specifically directed to consider the relevant evidence, which includes the production capacity certified by the manufacturer of induction furnace and A.P. Productivity Council, the Adjudicating Authority in paragraph No. 11.1 of the impugned order has not lead any contrary evidence to hold that production of M.S. ingots could be more. The entire findings of the Adjudicating Authority are only on the records of both private and official showing the production of MS ingots per heat in the range of 3.5 to 3.8 MTs. In my view, the findings recorded by the Division Bench in Final Order dated 15.09.2010 as to the production capacity of appellant SSPL of the furnace installed, has reached finality as recorded herein above. Since these findings have attained finality, the Adjudicating Authority could not have without filing an appeal and adducing contrary evidence gone beyond the findings recorded by the Tribunal. In the absence of so, in the adjudication order, the Lower Authority should have followed the order of the Tribunal and considered the production capacity of the appellant SSPL as indicated in the Final Order dated 15.09.2010.

11. On this point itself, it has to be held that the allegation of the Revenue that appellant SSPL had clandestinely manufactured excess production and removed the same without payment of duty

falls flat. In view of the findings of the Division Bench order dated 15.09.2010, I find that lower authorities have erred in coming to a conclusion there was excess production and clearances clandestinely from SSPL. The entire demand needs to be set aside and I do so.

12. Since the entire demand of SSPL stands set aside, the question of interest and penalty on SSPL does not arise, as also the question of imposing penalty of KSPL also does not arise.

13. Since the lower authorities have not been able to bring on anything record that the appellant SSPL's production capacity is more than 2.1 MTs despite giving two chances. I find that nothing survive in the show cause notice raised by the Revenue. As I have disposed of the issue on merits on the capacity of production are not evidenced as claimed in the show cause notice, I refrain from recording any findings on other points raised by both sides during the arguments.

14. In the peculiar facts and circumstances of this case, I find that the impugned order is unsustainable and liable to be set aside and I do so. The impugned order is set aside and appeals stands allowed.

(Order pronounced 09.07.2018 in open court)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….