CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court – I

Excise Appeal No. 363 of 2011
(Arising out of OIO No. 05/2010-Adjn (Commr) CE dt.19.11.2010 passed by Commissioner of Central Excise & Customs, Hyderabad-IV)

Mahavir Ispat Pvt Ltd
48/1, Kattedan,
Hyderabad, Telangana – 500 077 **......Appellant**

VERSUS

Commissioner of Central Tax
Hyderabad - IV
Posnett Bhawan, Tilak Road,
Ramkoti, Hyderabad – 500 001 **......Respondent**

and
Excise Appeal No. 364 of 2011
(Arising out of OIO No. 05/2010-Adjn (Commr) CE dt.19.11.2010 passed by Commissioner of Central Excise & Customs, Hyderabad-IV)

Ram Prasad, Managing Director
Mahavir Ispat Pvt Ltd **......Appellant**
48/1, Kattedan,
Hyderabad, Telangana – 500 077

VERSUS

Commissioner of Central Tax
Hyderabad - IV
Posnett Bhawan, Tilak Road,
Ramkoti, Hyderabad – 500 001 **......Respondent**

Appearance
Shri B.V. Kumar, Advocate for the Appellants.
Shri A.V.L.N. Chary, AR for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30400-30401/2023

Date of Hearing: 18.07.2023
Date of Decision: 28.11.2023

[Order per: ANIL CHOUDHARY]

The Appellant – Mahavir Ispat Pvt Ltd (MIPL) are engaged in manufacture of MS ingots which are dutiable falling under CTH No. 7206 1990 of the First schedule to CETA 1985.

2. The departmental officers visited the factory premises of the Appellant on 27/03/2008 and pursuant thereto, SCN dated 29/04/2009 was issued inter alia alleging that the Appellant have contravened the provisions of Rule 9(5) of CCR

2004, in as much as, they have failed to maintain proper records of receipt, issue and consumption of raw materials/inputs required for manufacture of the finished goods, being MS ingots and MS fabrication. It further appeared that Appellant have not maintained records on daily basis and further assessed/paid the duty on the excisable goods selectively, removed by them with intent to evade payment of duty. It further appeared that during the period 2004 – 05 till 2007 – 08, the Appellant have availed Cenvat credit fraudulently. Further appeared that during the period 2006 – 07 and 2007 to 08, Appellant have suppressed production and have clandestinely removed MS ingots involving duty of ₹ 5,59,663/- and ₹ 12,02,348/- respectively. It further appeared that Mr. Ram Prasad, Director of the company, who looked after the production, purchase, sales and related financial matters, is liable to penal action. It is also alleged that during the time of visit to the factory by the officers, records relating to receipt, consumption and stock of inputs and finished goods were not made available. Revenue had resumed the records available in the factory during search under panchnama.

3. In response to summons, Appellant had produced records like balance sheets, electricity bills for the period 2006 – 07 and 2007 – 08 and ledgers maintained in 'modi script'. They had stated that they were not maintaining form-4 register. The Appellant unit is located in a compound belonging to Shri Shiva spinning Mills Private Ltd, a part of which was given to the Appellant and the remaining area were given to few other small-scale units - producing HDPE drums, PP bags, laminate boards etc. There were also some godowns in the said compound. The common incoming power supply was of 33 kVA and one common meter was installed. The Department engaged one, Mr. Ravi Kumar, Engineer of the power distribution company – APCPDCL, who went round the unit and reported that the Appellants were drawing 175 kVA power. Verification of the common electricity bills (received from the Supdt. Engineer, Hyderabad), revealed that Shri Shiva Spinning Mills were drawing power from APCPDCL as well as from some private parties. The details were recorded under panchnama dated 18/07/2008.

4. As per the published technical literature on use of sponge iron (input), the proportion of sponge iron in the induction furnace charge mix was determined by the balance between the cost saved because of low price of sponge iron and extra cost incurred due to higher power consumption, lower yield, etc., associated with high percentage of sponge iron in the induction furnace steelmaking. Optimum charge mix using sponge iron was that of 55%

to 60%. Though in some States where scrap was easily available, the ratio can vary between scrap to sponge iron, ranging as high as 85% to 90%.

5. On the basis of such theoretical study, the Department to arrive at the approximate yield from a mixture of such diverse grades of sponge iron and its charge mix with pig iron/scrap, appeared to be difficult. However, taking into consideration the power consumption during the period 2006 – 07 and 2007 – 08, pro rata yield from low-grade sponge iron has been derived to arrive at the expected yield based on the consumption of power and charge mix. It was alleged that there was excess production, and consequently, there was clandestine removal of the finished goods during the period 2006 – 07 (duty ₹ 5,59,663/-) and in 2007 – 08 (duty ₹ 12,02,348/-) totaling ₹ 17,72,001/-.

6. The next allegation on the Appellant – during the period 2004-05 have shown purchase of 318.08 MT of finished products like MS Angles/ bars/ coils/ beams/ plates/ channels etc., and availed Cenvat credit amounting to ₹ 9,50,374/- which appeared to be inadmissible, since these have been used in the fabrication of capital goods and not used in the manufacture of dutiable ingots.

7. During the period 2005 – 06, Appellant have utilized raw material weighing 9677.268 MT of sponge iron of different grades, 3870.098 MT of pig iron, 460.94 MT of PCM jam, 33 MT of scrap, 196.775 MT of ingots and 5.77 MT of MS rods, total weight being 14243.851 MT. With the closing balance of 537 MT, production during the year was 8248.94 MT of ingots plus dust sale was shown at 4563.21 MT. On this basis, it was alleged that Appellant have shown bogus sale of dust to cover the clandestine removal of inputs. Further, Appellant have availed Cenvat credit of Rs. 33,26,464/-, in violation of Rule 2(k) read with Rule 9(5) of CCR 2004. Further, Appellant have also availed Cenvat credit of ₹ 3,83,721/- on MS rods and MS ingots, which are not the inputs for manufacture of MS ingots.

8. It further appeared that during the year 2006-07, Appellant have purchased 1726.90 MT of pig iron and PCM jam/scrap, 3856 MT of sponge iron of grade A & B and sponge iron fines, iron lumps. Further, Appellant purchased 143.64 MT of MS Angles/ channels/ coils/ sheets/plates etc., which appeared to be not their inputs and hence, they appeared to have wrongly taken Cenvat credit of ₹ 4,84,410/-.

9. It is further alleged that they have suppressed production of 200.50 MT of ingots, arrived at on the basis of estimated production, taking into account power consumption. During the period 2007-08, it appeared that Appellant have purchased 3066.965 MT of pig iron and 8145.965 MT of sponge iron of different grades. Further, they have purchased 373.544 MT of MS plates/bars/angles etc., and also cleared 5.4 MT of fabricated material and have not shown any scrap. The Cenvat credit on the same was calculated at ₹ 11,61,519/-. Further on the basis of electrical consumption, estimated production was calculated, on which basis, it was alleged that Appellant have suppressed production of 346.93 MT on which duty comes to Rs. 12,02,348/- alleged to be clandestinely removed.

10. During investigation the statement of Mr. Ram Prasad, the director, was recorded on 23/12/2008, who, inter alia, stated that they were operating only one furnace of 4 MT capacity. Initially, they had a furnace of 2 MT capacity, before the year 2004 and later on, it was increased to 4 MT capacity. That on an average, they get 5 heats per day and they are not maintaining any heat register. That roughly, 10,000 units of power was consumed per heat. The power was being shared by MIPL and other companies situated within the compound, and they were paying the proportionate amount relating to their consumption. It was further stated that during the process of heating of the charged scrap in the furnace, the metal in the furnace assumes liquid form and some impurities float on the surface which are removed. The impurity in lump form is called slag and when it floats in the dust form, the same is called as dust. In the balance sheet for the period 2005 – 06, the dust was shown as thrown out along with slag in the tractor/ trailer outside the factory for dumping in pits in the nearby areas. The average power consumption during the years 2003-04 to 2005-06 was 2400 units, per MT of production.

11. From analysis of data in the balance sheet for the period 2004–05 to 2007-08, it appeared that there is great variation in production parameters including the power consumption per unit of production of ingots. The basic raw materials required for manufacture of MS ingots are sponge iron, pig iron and/or scrap. Sponge iron was <u>also used in plants</u> using coal-based technology and gas-based technology. The percentage of usage of charge mix was maximum 30% in the case of gas based sponge iron, and it may be as high as 80% in case of coal-based sponge iron. The yeild was also higher by 2% in case of gas-based sponge iron. It further appeared that the yield from use of sponge iron would be around 67%. It further appeared that, in the facts of the present

case, there was a mix of different grades of sponge iron of B & C and iron ore fines. It appeared difficult to rely on the industry standard. Therefore, to arrive at the approximate yield from a mix of such diverse grades of sponge iron and/or charge mix with pig iron/scrap, the revenue considered the power consumption as parameter. Pro rata yield from low-grade sponge iron was derived to arrive at the expected yield of power consumption based on charge mix. The SCN was adjudicated on contest by the learned Commissioner who was pleased to confirm the demand as follows:

(i) Demand for irregular Cenvat credit ₹ 63,16,176/- including cess taken and utilized during the period 2004-05 to 2007-08.

(ii) Demand of ₹ 17,62,011/- or (Rs.5,59,663/- + Rs.12,02,348/-) payable on finished goods alleged to be removed without payment of duty during the period 2006–07 and 2007–08 along with interest. Further equal penalty was imposed of ₹ 63,16,176/- under Rule 15 of CCR and ₹ 17,62,011/- under section 11 AC of the Central Excise Act.

(iii) Penalty was also imposed on Mr. Ram Prasad, Director of Appellant, Rs. 20 lakhs under Rule 26 of CER, 2002.

12. Being aggrieved, the Appellants are before this Tribunal, both the Appellant company and its Managing Director.

13. The learned counsel for Appellants, inter alia, urges that the following are the issues for determination before this Tribunal:

a) Whether the learned Commissioner was correct in coming to the conclusion that the Appellants were not maintaining records relating to the purchase of inputs including the raw materials required for the manufacture of steel ingots, though they were maintaining such records, duly supported by purchase invoices.

b) Whether the learned Commissioner was correct in determining the production theoretically based on the production process, as downloaded from technical books/websites on the basis of different ratios of raw materials, such as, pig iron, sponge iron of different grades like B, C and fines, iron and steel scrap required for a "charge" to produce steel, and arrive at the conclusion that the difference in the quantity of steel ingots that should have been produced as determined by him and the quantity as recorded in the RG-1 register have been cleared clandestinely or the inputs have been cleared clandestinely by the Appellant.

c) Whether the learned Commissioner was correct in determining the production based on the consumption of power as recorded in the

Balance Sheets during the impugned period, viz., 2004-05, 2005-06, 2006-07 and 2007-08 to arrive at the conclusion that excess quantity of steel ingots have been produced as determined by him and the quantity as recorded in the RG-1 register have been cleared clandestinely or the inputs have been cleared clandestinely by the Appellants.

d) Based on assumptions and presumptions whether the demand for duty and imposition of penalty on the Appellants is sustainable in law.

14. So far the allegation of non-maintenance of statutory records is concerned, learned Counsel, inter alia, urges that Board vide CBEC circular No. 536/32/2000–CX dated 30/6/2000 have dispensed with the maintenance of statutory records by the manufacturers with effect from 01/07/2000. The following records have been done away with viz., RG-1, EP–4, RG-23A part 1 and 2. In spite of all this, the Appellant have maintained proper records. Therefore the said allegation is bad and not sustainable.

15. So far as the engagement of Mr. Ravi Kumar, an employee of the power disruption company – APCPDCL, to ascertain power consumption of different units located within the same premises of Shri Shiva Spinning Mills, and on the basis of such report submitted, as well as on an analysis of manufacturing process of MS ingots with respect to quality/grade of the materials used, the production of ingots by the Appellant have been estimated by the revenue after taking into account the industry standards. Such exercise has been held to be bad in law by the Hon'ble High Courts and confirmed by the Apex Court in the case of RA Castings [2011 (269) ELT A108 (SC)], [2009 (237) ELT 674 (Tri-Delhi)].

16. Further urges, without serving a copy of such report (by Mr. Ravi Kumar) to the Appellant, reliance on such report obtained behind the back of the Appellant is bad in law. On this score alone, the demand raised and confirmed is fit to be set aside. The learned Commissioner in the impugned order have mentioned that power consumption depends upon factors like – quality of raw material, that is grade of sponge iron, proportionate use of pig iron, type of scrap used, age/capacity and efficiency of the furnace, constant supply of power, breakdown/idle time, labour problems etc. However, none of these factors have been taken into consideration, while determining the estimated production during the period under dispute. Admittedly, no test production was done by Revenue in the premises of the Appellant to ascertain the approximate yield. There is no corroborative evidence on record to establish the standard

power consumption for the induction furnace of the Appellant. Based on such theoretical estimation of production, the demand raised is fit to be set aside.

17. It is further pointed out that, on the date of visit of the officers to the factory on 27/3/08, no excess stock of finished goods or excess stock of raw materials was found. No stock taking was conducted on the said date. Further, the whole allegation is made on assumption and presumption, without finding any material evidence against the Appellant. No evidence of clandestine removal has been found by the department. There is not a single statement of any buyer of ingots or raw materials, alleged to have been removed clandestinely. No incriminating documents were found or recovered during investigation and search nor any unexplained extra cash was found.

18. Further urges that it is well settled law that in every case of alleged clandestine removal, the onus is on the Revenue to prove the allegation with positive and concrete evidence. Reliance is placed on the following rulings:

a) Pan Parag India Ltd vs CCE, Kanpur [2013 (291) ELT 81 (Tri-Del)]
b) CCE, Meerut vs RA Castings P Ltd [2012 (26) STR 262 (All.)]
c) Southern Ispat Ltd vs CCE, Calicut [2009 (248) ELT 270 (Tri-Bang.)]
d) Ghodavat Pan Masala vs CCE, Pune [2004 (175) ELT (Tri-Mum)]

19. Further urges that learned Commissioner have demanded tax by disallowing Cenvat credit of Rs.9,50,374/- for the period 2004-05, Rs.4,95,098/- for the period 2006-07 and Rs.11,61,519/- for the period 2007-08, on the ground that Appellant have availed credit on finished products like angles, bars, coils, beams, plates, channels, etc., used as inputs or for fabrication of capital goods. It is also alleged that such items are not suitable for use in the manufacture of finished goods – MS Ingots.

20. Learned Counsel urges that these goods were not used as raw material in the manufacture of ingots, but were used in the manufacture of capital goods/accessories which are further used in the factory of production. For example, angles, beams and channels were used in the fabrication of EOT Crane, which is used for material handling including for movement of MS ingots from the moulds to the storage yard. Similarly, plates and coils were used as inputs in the maintenance of the induction furnace installed within the factory. These plates and coils are cut to size and used as parts of the furnace by welding the same to the furnace, which gets damaged/ eroded due to constant use. If such periodical repair and maintenance is not done, then there will be risk of the furnace leaking/ breaking at the point where it is damaged. It is

necessary to periodically (almost every month) change the surface of the furnace by welding new plates and coils to the furnace lining. Similarly, MS bars are required to stir the molten steel constantly and in the process the bars gets melted and become part of the molten steel and are thus consumed in the manufacture of finished goods.

21. Further urges that in the Impugned Order an amount of Rs.3,83,721/- has been demanded for the year 2005-06, on the ground that the Appellant had used relatively high quantity of scrap and pig iron and less quantity of sponge iron to save on power consumption. Further, it was alleged that the charge mix of sponge iron, pig iron and scrap will determine the final recovery of the ingots. Since the Appellant have not maintained any accounts of the wastage, in their records and in the ER-1 return filed, it has been concluded that the inputs have been cleared clandestinely and to cover the removal of inputs they have shown the sale of 'dust' and therefore, Cenvat credit of Rs.3,83,721/- has been demanded on presumption.

22. Appellant further reiterates that the demand for Cenvat Credit amounting to Rs.63,16,176/- (clandestine removal of inputs – Rs.33,26,464/- & credit on ineligible inputs – Rs.29,89,712/-) and the demand on account of clandestine removal of finished goods amounting to Rs.17,62,001/-, is not sustainable in law.

23. With prejudice to the above submissions, the Appellant urges that the SCN is also barred by limitation as much as they have been submitting monthly ER-1 returns to the Range Officer, regularly along with 57 AE statements. Therefore, the allegation that the Appellant have suppressed information from the Department is contrary to the facts.

24. Opposing the Appeals, learned AR for Revenue relies on the Impugned Order. He further urges that Appellant have not maintained proper records as appeared at the time of inspection. Further, they have maintained accounts in regional language (modi script). Further, they have not maintained Form-IV register (raw materials). Further, gate register shows that they have received bazaar scrap but entry of such bazaar scrap was not found recorded during inspection. Hence it appears that they have received and used clandestinely. Appellant has not satisfactorily explained the consumption of MS angles, bars, channels, etc., with regard to taking of Cenvat credit. As per Rule 22 of Central Excise Rules, every assessee is required to maintain proper records of production and produce the same on inspection. Further, Appellant have not

maintained heat register. At the time of visit, locally procured scrap was found available but no records were maintained for purchase of such scrap.

25. Having considered the rival contentions, we find that admittedly, Appellants have maintained sufficient records of their transactions, production, etc. They have furnished regular returns and other prescribed forms which have not been found to be untrue or wrong. We further find that the demand raised for alleged clandestine production and clearance of finished goods and raw materials is vague and not based on any proper prescribed norms. Further such demand is hit by the ruling of Hon'ble Supreme Court in the case of RA Castings Pvt Ltd (supra).

26. So far the disallowance of Cenvat credit totalling Rs.61,90,180/- is concerned, we find that the items in question, viz., MS angles, bars, coils, beams, plates, channels, etc., have admittedly been used in the factory of production. We also find that part of these inputs have been used in the fabrication of EOT Crane, which is used for material handling inside the factory. We further find that some of the items like MS bars, which are required to stir the molten steel during production, get melted and become part of the molten steel in the furnace and thus, gets consumed in the manufacture of finished goods. Further, inputs like new plates and coils have been used in repair of the furnace lining, which has to be done periodically. Thus, we hold that the Appellants have rightly taken Cenvat credit and the disallowance of credit is bad during the period under dispute.

27. In view of our observations and findings, we allow these Appeals and set aside the Impugned Order. All penalties are also set aside.

28. Thus, Appeals are allowed with consequential benefits, in accordance with law.

(Pronounced in the Open Court on 28.11.2023)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

Veda