CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EAST REGIONAL BENCH : KOLKATA

Appeal No.: E/71213-71216/2013, CO-76824-76827/2014

(Arising out of Order-in-Appeal No.50-53/Pat/C.Ex./Appeal/2013 dated 19.02.2013 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Patna)

Commr.of Central Excise & Service Tax, Patna
…APPELLANT(S)

VERSUS

M/s. Carbon Resources Pvt. Ltd.

…RESPONDENT(S)

APPEARANCE

Sri S.Guha, AC(AR) for the appellants/applicants.

Sri Ravi Raghavan, Advocate & Ms. S.Mundra, CA for the respondents.

CORAM:

SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

DATE OF HEARING/ Decision: 15.03.2018

FINAL ORDER NO.:FO/75841-844/2018

Per SHRI P.K.CHOUDHARY

1. Briefly stated the facts of the case are that the assessee is engaged in the manufacture of Calcined Petroleum Coke (CPC) classifiable under Chapter 27 of the Central Excise Tariff Act. They received Raw Petroleum Coke (RPC) from M/s. IOC Limited, Barauni and used the same for manufacture of dutiable finished goods CPC. On examination of ER-1 Returns, it is found that as per ratio of conversion of IPC to CPC, the Assessee should have manufactured higher quantity of CPC. Show Cause Notices were issued alleging clandestine removal of the goods, on the basis of ratio of conversion

of RPC to CPC. The Adjudicating authority confirmed the demand of duty along with interest and imposed penalties. By the impugned Order the Commissioner (Appeals) set aside the impugned Orders except Appeal No. XAP-47 against Order in Original No. 04/MP/ADC/2012 dated 25.01.2012, where the duty of Rs.31,129.00 was confirmed on the ground of wrong calculation, which is not disputed by the assessee. Hence, the Revenue filed these appeals. The Assessee also filed cross objections.

2. Heard both sides and perused the appeal records.

3. The Learned DR for the Revenue submitted that the Commissioner (Appeals) had ignored input/output ration norm in manufacturing of CPC from RPC. It is further submitted that the Assessee have not given any explanation in respect of higher consumption of RPC. He has also referred the Case Laws.

4. I find that the demand of duty was confirmed on the basis of clandestine removal of goods associated on higher consumption of RPC. The entire demand was made on Input and Output norm of 1.3:1 basis. The Commissioner (Appeals) had set aside the demand as there is clear lack of evidence. According to Revenue, the Assessee failed to produce any evidence to substantiate that the goods were not cleared clandestinely. The relevant portion of the findings of the Commissioner (Appeals) is reproduced below :

> *"(iv) The contention of the Appellant is that the department has not produced any cogent or positive evidence to prove that they have clandestinely cleared the goods without payment of duty. It was also submitted that they filed revised returns as the earlier returns were wrong being prepared by their newly*

appointed staff. I find that the proceedings were initiated on the basis of input-output norms of 1.3:1 vide the relevant Show Cause Notice however no basis or grounds to justify such ratio is mentioned anywhere. The only reason given by Ld. Adjudicator is that the appellant has accepted this ratio; however, the appellant has been disputing the same right from the beginning. There is no evidence to prove that this ratio was accepted by the Appellant. I also find that no where the Show Cause Notice states about the correct or incorrect Returns filed by the Appellant. It is only the submissions of the Appellant that their new staff mentioned some wrong figures in the periodical returns which were later rectified by them. However, the impugned order nowhere specifies the types or details of such mistakes in earlier returns. Rather, Ld. Adjudicator Shifted the onus of proving the clandestine removal from Department to Appellant by reasoning that Appellant did not produce any corroborative evidences like Electricity records, raw material consumption to prove that the figures given in the returns are correct. It is settled that onus lies on the one who alleges. It is department which has to prove its case. It is also settled that without cogent and positive evidences, the charges like clandestine removal cannot be fastened. As a matter of fact, there is clear lack of such evidences, hence demand is not justified. Hon'ble Tribunal in case of Resha Wires Ltd. vs. CCE, Bangalore-2006(202) ELT 332 held that for the lack of corroborative evidences like electricity consumed, purchase of excess raw-material, demand on the basis of packing slips cannot be upheld & this case law is squarely applicable here.

v) However, as far as appeal No.XAP-47 against Order-in-Original No.04/MP/ADC/2012 dated 25.01.2012 is concerned, there is additional ground of confirmation of demand of Rs.31,129/- only on the ground of wrong calculation of duty which has not been disputed by the Appellant at any stage; hence same is recoverable alongwith interest only."

5. It is well settled that the burden of proof on the charge of clandestine removal of goods lies with the Revenue. It cannot be discharged in a casual manner. In the present case, I find that the charge of clandestine removal is raised on the basis of the E.R-I Returns. For the Input/Output ratio, no enquiry was conducted. The Tribunal in the case of Hindustan Coca cola Beverages Pvt Ltd Vs. CCE & ST, Patna observed that the charge of clandestine removal of goods cannot be substantive only on a single parameter i.e. Input Output ratio. The relevant portion of the said decision is reproduced below :

> *"**5.** We have carefully considered the submissions made by both sides and perused the records. Undisputedly, the demand has been raised for the period from January, 2008 to December, 2008 while relying upon the input output ratio for 1999-2000 and there is no dispute that the demand has been raised only on the basis of input output ratio. The Hon'ble High Court of Bombay in the case of Hindustan Coca Cola Beverages Pvt. Ltd. (cited supra) has held as under :*
>
> *"2. In so far as the present appeal is concerned, the Tribunal in the matter of burden of proof relied on the judgments of the Supreme Court in Oudh Sugar Mills Ltd. v. Union of India (1978) E.L.T. (J172) (S.C.) to hold that allegations of clandestine production and removal based on calculations of raw material fed into the process or on working of the machinery as noticed during test inspection cannot be upheld in the absence of any tangible evidence on record. The Supreme Court specifically noted that the average production cannot be made the basis for issuance of show-cause notice. In the instant case, it has come on record that the respondents themselves had fixed norms of production for their units. The Tribunal also considered in its common order in the case of Pepsico India Holdings Ltd. v. Commissioner of Central Excise, Mumbai-II, 2000 (177) E.L.T. 659. The question that we are called upon to answer is whether question (A) as formulated considering the judgment in Oudh Sugar Mills Ltd. (supra) arises from the order. In the instant case, though statements were recorded they were in respect of the norms which the respondents had set for itself. The Tribunal recorded a finding that the appellants herein had based the purported evasion of duty on shortfall in production and this was not permissible. We cannot find fault with the findings recorded by the Tribunal on that count*

3. In so far as question (B) is concerned, in our opinion, Bhoormal's case [1983 (13) E.L.T. 1546] (S.C.) would not be applicable. The test to be satisfied is in terms of Oudh Sugar Mills (supra). The second question therefore, would not arise."

In the instant case also, the demand is based only on a single parameter i.e. input output ratio. Further the input output ratio of the year 1999-2000, has been adopted for working out the demand for the period January, 2008 to December, 2008. We also find that the show cause cum demand notices raised for the earlier and subsequent period to the present demand, have also been set aside. In these circumstances, we do not find that the impugned Order-in-Original is sustainable. Therefore, the same is set aside and the appeal is allowed."

6. In the case of M/s. ShillongIspat and Rolling Mills Vs. Commissioner of Central Excise and Service Tax, Shillong 2017 – TIOL 529 CESTAT KOL held as under :

"4.4. We also observe that the charges of clandestine removal are serious charges and in the absence of any evidence of removal/seizure of finished goods, it cannot be held a justifiable ground for confirmation of the act of clandestine production and removal. We also find that there was no proper stock taking and there is no evidence showing the manufacture of the goods and their clearances without payment of duty. Clandestine removal being a positive act, the burden of proving the same is on the Revenue and cannot be discharged on the basis of conjectures and assumptions. The appellant is also the beneficiary of the North East exemption vide Notification No.32/99-CE and it defies logic as to why appellant will indulge in clandestine manufacture and removal when they are entitiled to cash refund of the duty paid through PLA.

4.5. In view of the above observations and settled proposition of law, there is nothing on record to indicate that the appellant assessee had infact manufactured the final products out of the inputs on the basis of input-output ratio. As such, in the light of various decisions relied upon by the goods, the impugned order *is not sustainable. Accordingly, appeal filed by the appellant is allowed with consequential relief, if any."*

7. In view of the above discussions, I do not find any reason to interfere with the Order of the Commissioner (Appeals). Accordingly, the appeal filed by the revenue is dismissed. Cross Objections get disposed of.

(Operative Portion of the order already pronounced in the open Court)

S/d.

(P.K. CHOUDHARY)
JUDICIAL MEMBER

ss