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

Ex.Appeal Nos.76065,76066/15

(Arising out of Orders-in-Appeal Nos.06-07/CE/BBSR I/2015 dated 28.08.2015 passed by the Commissioner (Appeals) of Central Excise, Customs, S.Tax, BBSR)

M/s Mahesh Ferrous Pvt. Ltd.
Shri Madan Mohan Nayak, M.D.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Service Tax & Central Excise, BBSR I

Respondent (s)

Appearance:

Shri S. N. Mahapatra, Consultant for the Appellant (s)
Shri D. Halder, Asstt. Commr. (A.R.) for the Respondent (s)

CORAM:

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

Date of Hearing : 02.04.2018
Date of Pronouncement : 22.05.2018

ORDER NO. FO/A/76119-76120/2018

Per Shri P. K. Choudhary :

The present appeal is filed by the Appellant against the Order-in-Appeal No.06-07/CE/BBSR I/2015 dated 28.08.2015 passed by the Commissioner (Appeals) of Central Excise, Customs, S.Tax, BBSR.

2. Briefly stated the facts of the case are that M/s Mahesh Ferrous Pvt. Ltd. is engaged in the manufacture of M.S. Ingots classifiable under chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. On 30.01.2010 officers from Directorate General of Central Excise Intelligence, Rourkela Regional Unit and Jamshedpur Regional Unit visited the factory premises of the appellant and office-cum-residence of Sri. Madan Mohan Nayak, Managing Director of the

appellant company. The officers conducted scrutiny of the records and verified documents for the period from 01.04.2007 to 30.04.2007. The DGCEI units found that the appellant company had clandestinely cleared goods in order to evade payment of duty and also found irregularities in the records being maintained by the appellant company and the managing director. Accordingly, a show cause notice dt. 27.07.2011 was issued proposing demand of Central Excise duty of Rs. 25,79,096/- along with interest and penalty. On 04.02.2010, the Superintendent, DGCEI, Rourkela Regional Unit recorded the statement of the managing director as per Section 14 of the Central Excise Act, 1944. The adjudicating authority confirmed the demand of duty of Rs. 25,79,096/- along with interest and imposed penalty of equal amount of duty. A penalty of Rs. 26,00,000/- was also imposed upon the Managing Director, the appellant No. 2 herein. On appeal, the Commissioner (Appeals) upheld the adjudication order. Hence the present appeals before the Tribunal.

3. Heard both sides and perused the appeal records.

4. The ld. Counsel for the appellant submitted that as per the certificates of the furnace manufacturer and the Orissa State Pollution Control Board, the annual installed capacity of the plant was 15600 MT, which is 1300MT per month, whereas the production recorded for the month of April 2007 was just 1200MT. Therefore, the contention of the department that the appellant did not have the capacity to produce goods which allegedly were found in excess was ill-founded. He

submitted that the Revenue had failed to prove the allegation of clandestine removal made on the appellant. He further relied upon the judgment of the Tribunal in the case of Gurpreet Rubber Industries reported as 1996 (82) ELT 347 (Tribunal), which had held that a demand could not sustain solely on the basis of a private diary without considering production capacity, purchase and utilisation of raw material, labour employed, etc. He also relied upon the judgment of the Tribunal in the case of CCE, Patna v. Universal Polythelene Industries reported as 2001 (130) ELT 228 (Tri.-Kol).

5. The ld. A.R. for the Revenue reiterated the findings of the lower authorities.

6. On perusal of records, I find that the irregularity in maintaining record of stock has not been disputed by the appellant. The appellant had stated before the adjudicating authority that the alleged excess production of 827MT of MS Ingots was nothing but the accumulated production of preceding months which were not accounted for properly. However, the appellant has failed to produce any evidence to support their statement. I note that it had been observed by the adjudicating authority that the bank transactions, as indicated by the bank statement, had recorded the purchase of raw material and sale of finished goods, however, the transactions could not be verified against the relevant statutory register due to the negligence on the part of the appellant in not maintaining proper records, which contravenes the provisions under Rule 10 of the Central Excise Rules, 2002.

7. I find that the judgment of the Tribunal in the case of Shalu Dyeing & Printing Mills v. Commr. Of Cus & Excise, Surat reported as 2003 (152) ELT 352 (Tri.-Mumbai) is squarely applicable to the instant case. The relevant portion of the judgment is reproduced:

> *"Normally some test should be adopted for judging the case but where a clandestine removal has been charged against the assessee, one has to see the preponderance of probabilities and not proved beyond reasonable doubt. Why should there be any private records maintained in the factory? The fact that a private record has come into existence in the factory goes to show that the owner of the property or the person in whose possession the factory is there, ought to have explained the existence of the same as he is in possession of the property. The burden is on him to show that. When that is the point, I cannot agree with the very attractive argument made by the learned counsel, Mr. Mayur Shroff. It is true that both paragraphs i.e. the conclusion drawn at paragraph 38.10.1 and paragraph 38.9 may appear to be at loggerheads. To my mind it is not so. Whenever there is a charge of clandestine removal, it is impossible for the department to prove beyond reasonable doubt and with mathematical precision. The perpetrator of the misdemeanour is the only person who knows the various sins of actions and commissions. It is not possible for the third person like the department to find out the various misdeeds of the manufacturer. The adjudicating authority has confirmed the duty on the basis of synchronisation of the private records with the statutory records. What more evidence is required! According to him the burden shifts to the manufacturer to prove the existence of private records. I am therefore unable to agree with the argument made by the learned counsel for the appellant."*

8. I note that the judgment in the case of Universal Polythelene Industries (supra) had observed that the assessee had justified the

inflated figures in the records for the purpose of loan, etc. and to project a rosy picture of the company. I find that this judgment is not applicable to the instant case.

9. I find the submissions of the appellant unpersuasive, and therefore, the demand of duty along with interest against the appellant company is sustainable. Since, Rs. 20,00,000/- has already been paid by the appellant company and has been appropriated by the adjudication order, the appellant company is liable to pay the balance amount of Rs. 5,79,096/- and the applicable interest. Accordingly, I hold that the appellant company is also liable to pay penalty as per Rule 25 of the Rules read with Section 11AC of the Act.

10. Regarding imposition of penalty on Appellant No. 2, I find that it has been stated that he had no knowledge of the alleged irregularity. In any event, the appellant No. 2 had deposited the duty *suo moto* during the investigation. I find that imposition of penalty under Rule 26 of the Central Excise Rules, 2002, requires fulfilment of certain conditions. Rule 26 of the Rules reads as:

> *(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.*
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> *(2) Any person, who issues -*
>
> *(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or*

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater".

11. In the instant case, the Revenue has failed to establish, beyond reasonable doubt, that the appellant No. 2 has contravened any of the provisions under Rule 26 of the Rules. Therefore, imposition of penalty on Appellant No. 2 under Rule 26 of the Rules is not justified.

12. In view of the above discussion, the appeals filed by the appellants are disposed of on the above terms.

(Pronounced in the open Court on 22.05.2018)

Sd/

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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