**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, EASTERN ZONAL BENCH: KOLKATA**

**Ex.Appeal Nos.649/12,70503/13,75059,75213/15**

(Arising out of Orders-in-Original Nos/Order-in-Appeal Nos.06/ADJ/Commr./DIB/12 dated 20.07.2012, 86/DIB/CE(A)/GHY/14 dated 25.09.2014, 10/ADJ/CE/Commr./DIB/13 dt.19.02.2013, 04/ADJ/CE/Commr./DIB/14 dt.05.12.2014 all passed by Commr. of Central Excise & S.Tax, Dibrugarh & CCEx., & S.Tax (Appeals), Guwahati)

M/s Assam Petrochemicals Ltd.

Applicant (s)/Appellant (s)

**Vs.**

CCEx. & Service Tax, Dibrugarh

Respondent (s)

**Appearance**:

Shri Bipin Kumar, C.A. & Shri Manob Borthakur, Manager (Finance) for the Appellant (s)
Shri S.Mukhopadhyay, Supdt. (AR) for the Revenue

**Ex.Appeal No.77018/17 & CO/77670/18**

(Arising out of Order-in-Appeal No.56/DIB/CE(A)/GHY/17 dated 31.08.2017 passed by the Commissioner of Central Excise (Appeals), Guwahati)

CCEx. & Service Tax, Dibrugarh

Applicant (s)/Appellant (s)

**Vs.**

M/s Assam Petrochemicals Ltd.

Respondent (s)

**Appearance**:

Shri S.Mukhopadhyay, Supdt. (AR) for the Revenue
Shri Bipin Kumar, C.A. & Shri Manob Borthakur, Manager (Finance) for the Respondent (s)

**CORAM:**

**HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)**

Date of Hearing : 20.12.2018
Date of Decision : 20.12.2018

ORDER NO……………………………………………

**Per Bench :FO/A/77172-77176/2018**

All these five appeals totally covering the period from March, 2009 to August, 2015, are being taken up for disposal through this common order. Four appeals are filed by assessee and the fifth one is by Revenue.

2. The brief facts in dispute are summarized below :

(i) The assessee is a Public Sector Undertaking engaged in the manufacture of various petroleum products. The main products are Methanol as well as Formaldehyde. The assessee has procured Natural Gas from other Public Sector Undertakings, particularly, M/s Oil India Ltd. through pipeline for use in the manufacture. During the course of Audit by the Departmental Officers in 2011, they noticed that approximately 970 Standard Cubic Meter (SCUM) of Natural Gas was being used by the assessee for an output of 1000 MT of Methanol. The above norms were kept in view by Departmental Officers at the time of scrutiny of the records of the appellants regarding accounting of inputs as well as final products. It was noticed that the quantum of Methanol manufactured and accounted, was lesser than the quantum, which would have arisen by using the above norms. The Departmental

Officers formed an opinion that the assessee has failed to account the entire quantity of final product manufactured. It was alleged that the difference in quantity of Methanol actually accounted in the Books and what would have arisen on the basis of calculation adopting the above norms, would have been cleared clandestinely without payment of duty and without accounting in the Books. Consequently, show-cause notice was issued initially for the period March, 2009 to January, 2011 alleging suppression of production. In addition, the quantity of Methanol accounted was considered and by back calculation, the quantity of inputs used was worked out. It was alleged that the quantity of inputs over and above the theoretically calculated quantity required for the manufacture of accounted quantity of Methanol, was never utilized by the assessee. Hence, the cenvat credits for this portion of inputs were proposed to be reversed.

(ii) Revenue issued show-cause notices on the above lines for the subsequent periods upto October, 2015. The Adjudicating Authority upheld the proposal in the show-cause notice for the period upto October, 2013. Further, for the period November, 2013 to August, 2015, the issue was decided in favour of the assessee by the Commissioner (Appeals).

(iii) The orders of the Departmental Authorities ordering payment of duty, are challenged by the assessee and the order of the Commissioner (Appeals) dropping the said demands, have been challenged by the Revenue.

(iv) All the appeals are taken up for decision, since the issue is common.

3. The appellant is represented by Shri Bipin Kumar, ld.C.A. assisted by Shri Manob Borthakur, Manager (Finance) of the Appellant Company and Revenue is represented by Shri S.Mukhopadhyay, ld.D.R..

4. The ld.C.A. submitted that the demands are totally un-justified and advanced the following arguments :

(i) The input i.e. Natural Gas, is supplied by M/s Oil India Ltd. directly to pipeline. The entire gas receipts are accounted and utilized in the factory. It was submitted that the Natural Gas receipts are not only used as feed stock in the manufacture of Methanol, but was also being used for certain other allied activities, which included -

(a) Used as fuel in the boiler for production of steam, which is further used for generation of electricity for use in the factory ;

(b) A portion of Natural Gas is also used in the Proforma Section of the cracker plant for manufacture of Methanol.

(ii) It was also pointed out that the total quantity of Natural Gas used will also depend upon the actual calorific value of gas, which may vary from time to time.

(iii) In view of varying factors outlined above, the quantity of gas consumed in the factory is often much more than the norms adopted by the Revenue as 970 Standard Cubic Meter (SCUM) for manufacture of 1000 MT of Methanol. Taking into account the various other uses in addition to use as feed stock, the total consumption is of the order of 1190 Standard Cubic Meter (SCUM).

(iv) The norms of 970 Standard Cubic Meter (SCUM) for 1000 MT of Methanol can, at best cover, the use of Methanol as Feed Stock.

(v) It was further submitted that the demands have been worked out mechanically on the basis of the mathematical formula ignoring various factors concerning the actual consumption of Natural Gas.

(vi) Revenue has not brought anything on record to allege that such alleged extra manufactured quantity of Methanol have been clandestinely cleared.

(vii) They have also relied on the following case laws :

(a) CCE Vs. Dai Ichi Karkaria Ltd. : AIR 1999 SC 32384

(b) Chandan Tobacco Company Vs. CCE, Vapi : 2011 (270) ELT 87 ;

(c) M/s Oudh Sugar Mills Ltd. Vs. UOI : 1978 (2) ELT (J172) (SC) ;

(d) R.A.Castings Pvt. Ltd. : 2011 (269) ELT 337. Further upheld by the Hon'ble Supreme Court as reported in 2011 (269) ELT A 108 (SC).

5. The ld.D.R.justified the demand of duty. He submitted that the demand has been upheld by the authorities below for the earlier period. He emphasized the fact that the norms adopted by the Revenue i.e. 970 Standard Cubic Meter (SCUM) for 1000 MT of Methanol has been provided by the assessee himself. By adopting the

norms as above, it is evident that the assessee has failed to account the entire quantity of Methanol manufactured by use of Natural Gas received as input. Hence, he submitted that the demand made on the basis of the input/output norms declared and accepted by the assessee may be upheld.

6. We have heard both sides and perused the appeal records.

7. The assessee has received Natural Gas through pipelines as input for use in the factory. The Natural Gas has been used as Feed Stock in the manufacture of Methanol. The Departmental Officers, during the course of Audit, concluded that the quantity of 970 Standard Cubic Meter of Natural Gas, will be required for manufacture of 1000 MT of Methanol. This norm appears to have been accepted by the assessee also. Projection of the quantity of Methanol, which would have been manufactured by making use of Natural Gas on the basis of the above norms, was done by the Revenue and difference between the quantity projected and the quantity accounted was alleged to have been cleared clandestinely. This charge has been resisted by the assessee. It is submitted that the input output ratio of 970 Standard Cubic Meter for 1000 MT of Methanol can, at best, be considered as the quantity of Natural Gas used as Feed Stock in the manufacture of Methanol. It has been further been submitted that the Natural Gas received is also being used for other purposes within the factory, particularly, for use as fuel for boiler as well as feed stock in the Cracker plant. No doubt, such use of Natural Gas is legitimate within the factory. However, the total consumption of Natural Gas in the

manufacture of Methanol, which will be different from the norms of production arrived at by taking into account the use only as Feed Stock.

8. It has further been pointed out that the calorific value of Natural Gas is also variable. Since such calorific value may change from day to day, the total consumption of the Natural Gas may vary for the manufacture of unit quantity of Methanol.

9. All these factors when considered, lead to the conclusion that the input output ratio adopted can, at best, cover use of Natural Gas Feed Stock .970 Standard Cubic Meter of gas for 1000 MT of Methanol cannot be considered as a fixed norm, but can, at best, be considered as a guideline or indicator. It cannot be the basis to allege clandestine clearance of the additional quantity.

10. The allegation of clandestine clearance has to be supported by tangible evidence of clearance of the alleged additional quantity. Such allegation cannot be made simply on the basis of arithmetical projection based on a mathematical formula. This view finds support in the case of R.A.Castings Pvt. Ltd. (supra). In this case, the total quantum of steel ingots manufactured by the assessee was projected on the basis of a Technical Report of study carried out by a Prefessor of IIT, Kanpur, but the CESTAT while examining the appeal against such demand, observed that the allegation of clandestine clearance cannot be sustained only on the basis of such Technical Report.

11. The above Tribunal's decision was affirmed by the Hon'ble Allahabad High Court and Revenue's Appeal was dismissed by the

Hon'ble Supreme Court. The relevant portions of the Tribunal's decision in the case of R.A.Castings Pvt. Ltd. Vs. CCEx., Meerut I reported in 2009 (237) ELT 674 (Tri.-Del.) is reported below :

> "***20.2*** *We note that no experiments have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing one MT of steel ingots. It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation. In this case, there is added problem. Estimation of production fluctuates widely depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are leviable to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture of the steel ingots is proved to the hilt by authentic, reliable and credible evidence, duty cannot be demanded on the basis of hypothesis and theoretical calculations, without taking into consideration the ground realities of the functioning of the factories. High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots. The reasons for high consumption of electricity in the case of the appellants' factories have not at all been studied and analysed by the Revenue independently. Instead, the norm of 1046 units fixed as per Dr. Batra's report has been blindly applied to the appellants' cases to work out the excess production. This approach is flawed and does not have sanctity.*
>
> *21……………………………..*

***22.*** *The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to :*

*(i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;*

*(ii) Utilization of such raw material for clandestine manufacture of finished goods;*

*(iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;*

*(iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;*

*(v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.*

*In the instant case, no such evidences to the above effect have been brought on record.*

***22.1*** *For want of evidence relating to the above points, clandestine removal cannot be sustained merely on the basis of the technical opinion report of Mr. Batra. ......."*

12. In view of the above observations, demand for duty as well as proposal for recovery of cenvat credit cannot be sustained and the impugned orders upholding such view are set aside. Consequently, the appeals filed by the assessee are allowed and the appeal filed by the Revenue is rejected. Cross Objection also gets disposed off.

(Dictated and pronounced in the open court.)

| | |
|---|---|
| Sd/ | Sd/ |
| **(P.K.Choudhary)** | **(V.Padmanabhan)** |
| **Member (Judicial)** | **Member (Technical)** |

mm