

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

Excise Appeal No. 78654/2018

(Arising out of Order-in-Appeal No.76/KOL-III/2018 dated-27/06/2018 passed by the Commissioner of CGST & Central Excise (Appeals-I), Kolkata)

M/s. Rama Ferro Alloys & Finance Pvt. Ltd.

Applicant (s)/Appellant (s)

Versus

Commr. of CGST & C. Ex., Kolkata North
Commissionerate

Respondent (s)

Appearance:

Sri T.K. Roy, Consultant & Sri K.S. Roy, Consultant for the Appellant (s)

Shri A.K. Biswas, Supdt. (A.R.) for the Respondent (s)

CORAM:

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

Date of Hearing/Decision :- 27.12.2018

ORDER No. : FO/77341/2018

PER SHRI P.K. CHOUDHARY

Briefly stated the facts of the case are that the appellant is engaged in the manufacture of various items such as Ferro Manganese, Ferro Silicon, Ferro Chrome etc. classifiable under Chapter 72, 75, 76 and 26 of the first Schedule of the Central Excise Tariff Act, 1985. Consequent upon verification of stock of finished as well as raw materials of cenvatable inputs at the appellant's manufacturing premises situated at Mouza-Khamar, P.O. – Rajarhat Bishnupur, Kolkata-700135, District-North 24-Parganas, West

Bengal by a team of Central Excise Officers of Anti-evasion Wing, Kolkata-III Commissionerate alleged to have detected shortage of stock. A Show Cause Notice dated 1/02/2007 was issued. In reply to the Show Cause Notice, the appellants inter alia stated that there was no physical stock verification as no weighment was enclosed to the notice. The entire allegation of shortage was fictitious. It was also stated that value of stock taken was arbitrary. The Adjudicating Authority vide Order-in-Original dated-12/12/2007 confirmed the demand of Rs.1,06,266.00 plus interest of Rs.11,484/-and since the entire demand was paid from their RG 23-A Part-II, E/SL No.187 dated-28.03.2006, the same was appropriated. He also imposed a penalty of equal amount of Rs. 1,06,266.00 under Section 11AC of the Central Excise Act, 1944 read with the Section 35F of the Central Excise Rules, 2002. On appeal before the Lower Appellate Authority, the Ld. Commr. (Appeals) vide Order-in-Appeal dated 5/3/2010 allowed the assessee's appeal by setting aside the show cause notice and the Order-in-Original. Department filed appeal before the Tribunal. Tribunal vide order No.A-496/Kol/2010 dated-09.08.2010 allowed the Department's appeal by setting aside the Order-in-Appeal and remanded the matter to the Commissioner (Appeal) to decide afresh after taking into consideration the facts on record. The Id. Commissioner (Appeal) vide the impugned order upheld the Order-in-Original dated 12/12/2007 and disposed the appeal before him. The assessee has preferred the present appeal before the Tribunal. Now this is the second round of litigation before the Tribunal.

2. Ld. Counsel appearing on behalf of the appellant/assessee reiterated the grounds of appeal and also earlier order of the Ld. Commissioner (Appeal) dated-5/3/2010.

3. Ld. D.R. supported the impugned order and stated that non-availability of finished goods and the cenvatable inputs/raw materials has to be satisfactorily explained by the appellant which they have failed to do. The

physical shortage supported by the statement of Shri Ranjit Pal, Manager of the appellant company makes it a clear case of clandestine clearance.

4. Heard both sides and perused the appeal record.

5. I find that the case mainly rests on alleged shortage of finished products as well as cenvatable raw materials. Difference in the quantity of final products have been estimated viz. (i) Ferro Molybdenum- 98 Kgs. (ii) Ferro Vanadium-102 Kgs. (iii) L.C. Ferro Chrome-987 Kgs. (iv) M.C. Ferro Manganese-2536 Kgs. (hereinafter the final products will be collectively referred to as the said finished goods). The collective value of the finished goods is Rs.2,70,928/- and the Central Excise Duty on this account comes to Rs.43,348/-and education cess of Rs.867/-. The duty estimated on the cenvatable inputs viz. (i) Aluminium Ingot-2250 Kgs. (ii) Ferro Silicon-886 Kgs. (hereinafter the cenvatable inputs will be collectively referred to as the said inputs). The value collectively taken is Rs.4,65,010/- and the Central Excise duty on this account comes to Rs.74,402/- and education cess of Rs.1,488/-. It is a fact that the Panchnama is very brief and does not contain detail of how the weighment was carried out especially considering the weighment on physical verification was arrived at upto a kilogram level. The whole case has been built up on such shortage. Statement of Shri Ranjit Pal was also recorded on the very same day of stock verification only to the fact that such shortages stand admitted by him. There is no such admission in that statement that the goods found short stands removed by them without payment of duty. There is no other corroboration regarding clandestine manufacture or clearance or transportation of goods or receipt of sale proceeds. While such clandestine activities need not be proved stage by stage with precision, it is necessary to have a clear pre-ponderance of probability which will shift the burden to the assessee to defend their case against non-payment of duty. Here, the very basis of shortage is doubted and as such any admission of such shortage is of no relevance in the absence of any corroboration of cogent evidences. Further, I find that the lower appellate authority has observed in the impugned order that the statement of the Manager was never retracted and held that the admitted fact need not be proved again. It is not clear as to what type of fact has been admitted. Even if Shri Ranjit Gupta, Manager of the appellant company

has accepted the manner of stock taking and admitted shortage and also to arrive at the physical stock up to kilogram level without explaining how the measurement was made, creates serious lacuna and also seriously affect the very basis of the Revenue's allegation.

6. I find that the Tribunal in the case of Raj Ratan Industries Ltd. Vs. Commissioner-2013 (292) ELT 623 (Tri.-Del.) held that the allegation of clandestine removal in such type of cases are to be established by production of concrete and tangible evidences. In that case also, the appellant after admitting the stock taking agreed to pay the excise duty. Later on, it was found that the stock taking was not done on actual basis.

7 In view of the above discussion and the decision of the Tribunal cited (supra), I find that there is virtually no evidence on record to establish the fact of clandestine removal, onus for which lies upon the Revenue. As such, the impugned order is set aside and the order-in-Appeal No. 27/Kol-III/10 dated-05.03.2010 is upheld.

8. The appeal filed by the appellant is allowed with consequential relief.

(Operative part of the order already pronounced in the Court)

Sd/-

P.K. CHOUDHARY
(JUDICIAL MEMBER)

k.b/-