IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH- COURT NO. 2

Ex. Appeal No. 140 of 2007

(Arising out of Order-in-Original No. 31/Commissioner/Bol/06 dated 20.11.2006 passed by the Commissioner of Central Excise, Bolpur)

Steel Authority of India Limited,
Durgapur Steel Plant,
Durgapur.

….Appellant (s)

VERSUS

Commissioner of Central Excise,
Bolpur,
West Bengal

….Respondent (s)

Appearance:
Dr. Samir Chalraborty, Sr. Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)
Shri A. Roy, (Suptd.) A. R. for the Respondent(s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: - 24.06.2019

Date of Pronouncement:13.08.2019

Order No.…FO/A/75999/2019

PER Shri P.K. Choudhary :

1. The present de novo proceeding is pursuant to the judgment and order dated February 20, 2019, passed by the Hon'ble High Court at Calcutta passed in appeal preferred by the Commissioner of Central Excise, Bolpur Commissionerate against the Final Order No. 76142/2018 dated March 13, 2018. The Hon'ble High Court has remanded the matter for fresh consideration by the Tribunal upon setting aside the order dated March 13, 2018.

2. The instant appeal has been preferred by the appellant against the Order-in-Original No. 31/Commer/Bol/06 dated November 20, 2006 passed by the Commissioner of Central Excise, Bolpur, whereby the Commissioner has confirmed a duty demand of Rs. 1,61,10,218/- against the appellant under Rule 223A of the erstwhile Central Excise Rules, 1944 (hereinafter referred to as the "said Rules"). The Commissioner has also imposed a penalty of Rs. 2000/- upon the appellant under Rule 223A of the said Rules.

3. The facts in brief of the instant case are as under:-

(a) The appellant is an integrated steel plant situated at Durgapur, West Bengal, manufacturing iron and steel products which are classified under various sub-headings of Chapters 72 and 73 of the First Schedule to the Central Excise Tariff Act, 1985.

(b) Show cause notices dated January 30, 1991 and March 31, 1992 were issued by the Superintendent of Central Excise, DSP Range-I proposing demands of duty as per Rule 223A of the said Rules on shortage found as contained in the Annual Shortage and Surplus Report, arrived on stock verification carried out by the appellant's cost Accounts Section during the material periods, which were duly intimated to the jurisdictional Central Excise authority by the appellant.

(c) The said show cause notice resulted in the impugned order passed by the Commissioner of Central Excise, Bolpur Commissionerate, confirming a central excise duty demand of Rs. 1,61,10,218/- under Rule 223A of the said Rules. Penalty of Rs. 2000/- was also imposed upon the appellant under Rule 223A of the said Rules. Being aggrieved thereby the appellant has preferred the instant appeal.

4. We have heard Dr. Samir Chakraborty, Sr. Advocate for the appellant and Mr. A. Roy, A.R. for the Reveneue.

5. The appellant contends as under:-

(i) Since the stock verification was not carried out by or in presence of the Proper Officer, the requirement of Rule 223A of the said Rules was not satisfied and, hence, the impugned order passed is ultra vires Rule 223A of the said Rules and, therefore, the impugned order is without jurisdiction and bad in law. In support of this contention the appellant has relied upon the decision of this Bench of the Tribunal in **Rourkela Steel Plant** Vs. **Collector of Central Excise**, **2001(138) ELT 732 (T-Kol)** and of the coordinate Bench of the Tribunal at Bangalore in Steel Authority of India Limited Vs. CCE, Mysore, being Final Order No. 1945/2005 dated October 04, 2005 passed in E/55/2003.

(ii) In any event, the shortage/excess in the Annual Shortage and Surplus Report having been determined on notional basis, i.e. production figures are calculated on estimated basis on sectional measurement (sectional weight x length x production of pieces) and consumption in the subsequent processes also being based on similar sectional measurement whereas the discharge figures of goods from the factory being on actual weighment basis, there is bound to be difference arising because of the different yardstick being adopted and hence, no allegation or finding of shortage of stock and consequent removal of the goods without payment of duty can be arrived at by comparison between the two. In support of this contention reliance has been placed upon the following decisions:-

(a) Order dated October 04, 2005 of the South Zonal Bench of the Tribunal, Bangalore in Appeal No. E/55/2003 (supra);

(b) **Rashtrya Ispat Nigam Limited** Vs. **Commissioner of Customs & C.Ex., 2009(235)ELT 248(T)**

(c) **Micro Forge (I) Pvt. Ltd.** Vs. **CCE, Rajkot, 2004(169) ELT 151(T).**

(iii) Further, the percentage of shortage found during stock verification in the instant case by the appellant is within the limits prescribed by CBEC Circular No. 52/79-CX-C dated October 26, 1979, except in one case where there is a marginal excess of point 0.25% and findings to the contrary of the Commissioner in the impugned order is erroneous. In support of this contention the appellant has relied upon reconciliation charts prepared as per the Annual Stock Taking reports for the years 1988-89, 1989-90 and 1990-91, the periods involved. It was also contended that in case of pig iron for the year 1988-89 the shortage found was 2.25% as against the allowed limit of condonation of 2%, a negligible fractional excess shortage and moreover, from the impugned order itself it would be seen that the demand for alleged shortage of 2982 MT of pig iron for the period 1988-89 had already been raised in a different proceedings. Therefore, no demand of alleged shortage in respect of pig iron for the year 1988-89 can arise or survive in the instant proceeding. Further, consequent to the directions of the Hon'ble High Court, he has submitted reconciliation statements, separately for the financial year 1988-1989, 1989-1990-1991 to gether with the stock taking reports for the said period. On the basis of which, he demonstrated the stock shortage within the permissible limit of 2% prescribed by the Board's circular No. 52/79 CX-6 dated 26.10.1979.

6. On behalf of the Revenue, besides reiterating the findings of the Commissioner in the impugned order, it has been submitted that the Commissioner had, on correct appreciation of the materials on record, arrived at the correctness of the shortage figures reflected in the show cause notices and had, following and applying

correctly the Board’s circular dated October 26, 1979, arrived at the shortage figures and consequent central excise demand, which is sustainable. It was also contended that since the appellant itself had submitted the annual stock taking figures there was no infirmity in the Revenue considering the same and initiating proceeding under Rule 223A of the said Rules since the appellant had not paid the central excise duty on the goods found short as per such Annual Shortage and Surplus Report of the appellant itself.

7.1. Proceedings under Rule 223A for shortage of goods is to be based on stock taking in the factory “in the presence of the proper officer”. The said rule makes it explicit that the involvement of the “proper officer” for applicability of the said provision and for initiation of any proceeding for recovery of any duty short paid found on the basis of the said stock taking carried out in the presence of the “proper officer” is an absolute requirement. The materials on record herein undisputedly evidence that there was no involvement of the “proper officer” in the subject annual stock taking carried out on its own by the appellant. The “proper officer”, as required under Rule 223A of the said Rules, having not ascertained the stock nor being involved with the said annual stock taking by the appellant, the provisions of Rule 223A is inapplicable. Consequently, the proceedings initiated by the two show cause notices under Rule 223A of the said Rules were held without the condition precedent therefor being satisfied. There is thus no stock taking under Rule 223A of the said Rules. Hence, the impugned order and the duty demand confirmed thereby under Rule 223A are also sustainable since the stock taking cannot be held to be under Rule 223A of the said Rules.

7.2. It is also found that there is no denial of the fact that the stocks were ascertained by the appellant on the basis of sectional measurement basis and not on actual weighment basis, but, however, the clearances were effected upon actual weighment basis. In such cases there is bound to be difference in weighments. A case of shortage or excess of stock and/or clandestine removal thereof without payment of duty is not established in such a situation.

7.3 An identical issue arose in the case of the appellant's own unit at Bhadravathi, Mysore, decided by the coordinate Bench of the Tribunal at Bangalore, being <u>Appeal No. E/55/2003 (Steel Authority of India Limited</u> Vs. <u>CCE,) on October 04, 2005</u>. The similarity of the facts between the instant case and the said case decided by the Bangalore Bench of the Tribunal is evident from the following:-

Sl. No.	**Instant Appeal**	**Bangalore Bench Order**
1.	Demand has been issued under Rule 223A of CER'44	Demand has been issued under Rule 223A of CER'44
2.	There is no allegation of clandestine removal of goods.	There is no allegation that the appellant had removed goods in clandestine manner.
3.	Stock taking was done by the appellant themselves, without any association of departmental officers. Therefore, stock taking cannot be said to have been conducted in terms of Rule 223A.	Stock taking was done by the appellant. Hence, stock taking cannot be said to have been conducted in terms of Rule 223A.
4.	Shortage/excess in the annual shortages and surplus report is not actual but notional. The production is recorded on estimation i.e. through sectional measurement	Shortage arrived at based on estimates. RG-1 is based on estimated production and not based on actual weighment. Physical stock is also based on estimation of weight on the basis of volumetric

	basis whereas the dispatch is on actual weighment basis (R.R. Weight). Closing stock is also ascertained on estimation.	estimate and conversion to theoretic weight based on sectional weight.

7.4. The relevant portion of the of the order of the Tribunal in Appeal No. E/55/2003 is reproduced below:-

" ….5. We have gone through the records of the case carefully. The demand has been issued under Rule 223A covering a period of 13 years from 31.3.1998 to 31.3.2001. The Revenue has issued the show cause notice on the belief that Section 11A is not applicable for demands made under Rule 223A. The Department's view is not correct in terms of the judicial pronouncements cited by the appellants. There is no allegation that the appellants have removed goods in clandestine manner. Moreover, the stock taking was done by the appellants themselves. The departmental officers only associated with the same. Hence, the stock taking cannot be said to have been conducted in terms 223A of the Central Excise Rules. In any case the shortage arrived at is based on estimates. The estimate cannot be said to be very accurate as it has got its own limitations. It should also be appreciated that there are practical problems in steel plants. In the manner of accounting of their production. The CBEC Circular No. 52/79 Cx. 6 dated 26.10.1979 has also laid down certain guidelines with regard to condonation of losses observed during annual stock taking. The appellants' submission that the excess/ shortage noticed was only marginal should have been given in due consideration. The Tribunal in the case of M/s. Micro Forge Pvt. Ltd. Vs. CCE Rajkot reported in [2004 (169) ELT 251 (Tri) has held that when the stock position is arrived at on the basis of estimation, the allegation of shortage of stock and consequent that removal of the goods cannot be sustained. A plethora of case law held that provisions of section 11A would apply in making demands of duty on balance found

during stock taking. The appellants based many reasons for discrepancies between the RG-1 and physical stock. For example, the RG-1 is only based on estimated production and not based on actual weighment Physical stock is also based on estimation of weight on the basis of volumetric estimate and conversion of theoretic weight based on sectional weight. A comparison between two estimation is inherently inaccurate Lesses like cutting, grinding and milling, scale loss after heat treatment and straightening, reprocessing after Inspection at various stage of manufacture are not recorded in RG-1. Rejections are not recorded while accounting for quantity produced or issued in the terms of sections and ingots. Shortage is inflated due to errors in taking crening balance as on 1.4.1998 and physical stock on 31.3.2001. Considering the practical difficulties, in estimating the actual stock and in view of the submissions made by the appellants we find that the demand of duty made by adjudicating authority cannot be sustained. Therefore, we allow the appeals with consequent relief."

7.5 In the case of **Rourkela Steel Plant (SAIL)** Vs. **Commissioner C.Ex., Bhubaneswar,** 2001 (137) ELT 566 (T-Kol), this Bench of the Tribunal, in the case of another sister unit of the appellant, has also held that based upon the difference shown in the figures in the annual financial accounts entered according to sectional weight and RGI register showing dispatch figurers on Railway Receipt weighment basis, a case of clandestine manufacture and removal cannot be sustained.

7.6 Reference may also be made to the decisions of **Rashtrya Ispat Nigam Limited** Vs. **Commissioner of Customs & C.Ex., 2009(235)ELT 248(T),** which has also held that since different basis were adopted for estimating production, consumption and stock taking and clearances discrepancy between stock taking figures and production figures does not lead to the conclusion that the difference has been removed clandestinely.

8. We have also perused the reconciliation statements submitted by the Ld. Sr. Advocate for the period in dispute which has not been objected by the Ld. D. R. On the basis of the same we are satisfied with the reasoning given by the Ld. Sr. Advocate with regard to the shortage in stock, which clearly shows that the same is well within the permissible limit prescribed by the CBEC. Moreover, it is not the case of the Department where any clandestine removal has been alleged to hold that the alleged shortage in stock is removed without payment of duty.

9. We, therefore, find that the above issues are fully covered by the above decisions of the Tribunal which have attained finality, the Revenue having accepted them. Respectfully following the principles laid down in the said decisions which, as discussed above, are applicable to the instant case also, we are of the view that the impugned order cannot be sustained and it is accordingly set aside. The appeal filed by the appellant is allowed.

(Pronounced in the open court on.13.08.2019.)

Sd/-
(P. V. Subba Rao)
Member(Technical)

Sd/-
(P.K. Choudhary)
Member(Judicial)

T. K.