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

Excise Appeal No.642 of 2006

(Arising out of Order-in-Original No.18/Commr./Bol/2006 dated 23.08.2006 passed by Commissioner of Central Excise, Bolpur)

M/s SAIL
Durgapur Steel Plant,
Durgapur, West Bengal

Applicant

VERSUS

CCEx., Bolpur
Adjudication Cell, BIAN, Bolpur, Birghum,
West Bengal-731204

Respondent

Appearance:

Dr.Samir Chakraborty, Sr.Advocate & Shri Abhijit Biswas, Advocate for the Appellant
Shri K.Chowdhury, A.R. for the Respondent

CORAM:

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER
HON'BLE SHRI P. DINESHA, JUDICIAL MEMBER

FINAL ORDER NO.76174/2019

DATE OF HEARING : 27.08.2019
DATE OF PRONOUNCEMENT : 29.08.2019

PER P.ANJANI KUMAR :

The appellants, M/s SAIL, Durgapur, are engaged in the manufacture of iron and steel products in their factory. They manufacture oxygen gas in their factory. They consume oxygen in the manufacture of iron and steel products, availing exemption contained under Notification No.67/95-CE dated 16.03.1995. They also clear a part of the oxygen manufactured to others on payment of duty. The appellant prepared Annual Statistics Report. On the basis of Annual Statistics Report for the year, 2001-2002, it was seen that they have consumed oxygen of 80660.124 Cu. Mtr. ; whereas in their RT-12

Returns, they have shown consumption of 1,38,780.948 Cu. Mtr.. Revenue contended that the difference in the quantity is clandestinely removed without payment of duty. A show-cause notice dated 15.04.2004 was issued and was adjudicated by the Learned Commissioner of Central Excise, Bolpur vide Order dated 23.02.2006 confirming a duty of Rs.2,40,66,670/- along with equal penalty. The appellants are in appeal against this order.

2. The Learned Counsel appearing on behalf of the appellants, submits that the Annual Statistics Reports have been prepared since 1960 and have been submitted to the Department regularly ; at no point of time, there were any discrepancy ; the discrepancy in only one year could be due to some mistakes and only on the basis of discrepancy, it cannot be alleged that there has been clandestinely removed goods and the appellant cannot be asked to pay duty on the same. In this regard, the Learned Counsel for the appellants, relies on the following case laws:

(i) J.K.Corporation Ltd. Vs. CCEx. & Cus. : 2007 (210) ELT 501 (Ori.) ;
(ii) CCEx. & S.Tax. Vs. Mittal Pigment Pvt. Ltd.: 2018 (16) GSTL 41 (Raj.) ;
(iii) CCEx. & S. Tax Vs. Auto Gollon Indus. Pvt. Ltd.. : 2018 (360) ELT 29 (All) ;
(iv) Rourkela Steel Plant (SAIL) Vs. CCEx : 2001 (137) ELT 566 (T-Kol.) ;
(v) Uniworth Textiles Ltd. Vs. CCEx. : 2013 (288) ELT 161 (SC) ;
(vi) Grand Ashok Vs. CCEx. : 2019 (365) ELT 828 (T) ;
(vii) Visakhapatnam Port Trust Vs. CC, CCEx & S.Tax. : 2019 (27) GSTL 244 (T) ;
(viii) Simplex Infrastructures Ltd. Vs. CST : 2016 (42) STR 634 (Cal.).

He submits that the Hon'ble High Court of Rajasthan in the case of Mittal Pigment Pvt. Ltd. (supra), has decided an identical case in favour of the appellant holding that in the absence of corroborative evidence in the form of documentary evidences like, dispatch details, receipt of materials, transportation details of the goods, sale proceeds, details of additional consumption of electricity etc., adduced by the Department, demand on discrepancy of figures will not stand. Therefore, the charge of clandestine removal, which is a serious charge, cannot be leveled against the appellant. He also submitted that the issue is barred by limitation as the show-cause notice was issued in 2004 on the basis of Annual Statistics Reports for the year 2001-2002 submitted to the Department in 2002 itself.

3. The Learned A.R. for the Department reiterates the findings pf OIO and submits that the Hon'ble High Court of Punjab & Haryana in the case of CCE, Delhi III Vs. Martin & Harris Laboratories Ltd. reported in 2010 (260) ELT 31 (P & H), held that huge differential figures between returns and balance sheets, can be a reason for confirmation of duty, more so, when the appellants failed to give satisfactory explanation. He submits that the appeal may be dismissed.

4. Per contra, the Learned Counsel for the appellant, in his rejoinder, submits that the case of Martin & Harris Laboratories Ltd. (supra) has not attained finality and has been only remanded to the Tribunal back for consideration; whereas the judgment of the Hon'ble High Court of Rajasthan, is the latest one and the ratio of the same may be considered. He also submitted that the jurisdictional High Court of Odisha in the case of J.K. Corporation Ltd. (supra) has also decided the similar issue in favour of the appellant.

5. Heard both sides and perused the records of the case.

6. We find that the alleged discrepancy is due to Page No.369 of the Annual Statistics Reports (annexed at page 27 of the Appeal Paper Books) puts the consumption figure of oxygen gas as 80660.124 Cu.Mtr., whereas one more sheet of the same Account Books annexed at page 26 of the appeal, puts the same as 1,11,796.522 Cu. Mtr.. These figures have been allegedly used by the Department to foist the case of the clandestine removal against the appellants. We find that the Department contends that RT-12 Returns showing the consumption of 1, 38,780.948 Cu Mtr and therefore, the difference of 58120.823 Cu. Mtr. is not utilized for captive consumption, but has been cleared clandestinely without payment of duty. We find that no statements have been recorded and no further investigation has been done. The Learned Commissioner has simply proceeded by brushing aside the submission made by the appellants. We find that the appellants submitted that at Page 429 of the Annual Report, it cannot be seen in isolation and at other pages i. e 369 & 197 also show the consumption of oxygen gas internally. The Learned Commissioner has not given any reasoning for not considering the statistics reflected in other pages and has concluded that the appellants have not shown any reasons as to why such figures were shown in Page 429 of the Annual Statistics Reports. We find that no other effort has been made by the Department to find as to what has happened to the balance quantity, if at all, there was a discrepancy. No statements were recorded and no proof of any clandestine removal, transportation of the same and financial transaction in that regard are put forth. Understandably, clandestine removal is a serious charge. Without prima-facie, establishing the fact that there has been a clandestine removal (if not with an arithmetical precision), such an allegation, will not survive. It is seen that not even a statement of the person, who managed the production/consumption of oxygen or the person who has maintained the statistical report, has been recorded by the Revenue. Without such bare a minimum enquiry, the charge of clandestine removal, cannot be sustained. We find that the case laws submitted by the appellants, particularly, the judgments of the Hon'ble High Court of Rajasthan and jurisdictional High Court of Odisha, are in the appellants' favour. Therefore, we do not find any merit in the allegation in the show cause notice and hold that the same are not sustained. Moreover, the issue pertains to 2001-2002. The Annual Book of Statistics was given to the authorities in 2002 itself. The Revenue does not deny this fact and therefore, issuing the show-cause notice, after two years, is not tenable. The appellant, being a Public Sector Undertaking, no *mens rea* can be attributed as no particular independent officer of the appellant is going to be benefited by such act of suppression and concealment of figures. Courts and Tribunal have given such a ruling in umpteen number of cases. It is the not the case of the Department that Annual Book of Statistics has been recovered during any search or investigation. The Book has been routinely given by the appellant to the Department over the years. Therefore, department can not allege suppression of facts etc to invoke extended period of limitation. We find, therefore, that the impugned order is also hit by limitation. We find, in view of the above, that the demand is not sustained either on merits or on limitation. Therefore, penalty imposed is also not sustainable.

7. In the result, the impugned order is set aside and the appeal is allowed with consequential relief to the appellant, if any.

(Pronounced in the open court on 29.08.2019)

Sd/-

(P. Anjani Kumar)
Member (Technical)

Sd/-

(P. Dinesha)
Member (Judicial)

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