

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76900 of 2018

(Arising out of Order-in-Appeal No.35/CE/RKL-GST/2018 dated 23 February 2018 passed by Commr.(Appeals) of GST, CX & Customs, Bhubaneswar.)

M/s. Western Bitumen Industries Pvt.Ltd.

(Kanghati, Jayantpur, Dist. Sambalpur,
Odisha-786112)

...Appellant

VERSUS

Commissioner, CGST, C.Ex. & Customs, Bhubaneswar

.....Respondent

(Central Revenue Building, Rajaswa Vihar,
Bhubaneswar-7, Odisha)

APPEARANCE

Mr.Rajeev Agarwal (C.A.) for the Appellant (s)
Shri K.Choudhary, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 76198/2019

DATE OF HEARING : 29 July 2019
DATE OF DECISION : 13 September 2019

P.K.CHOUDHARY :

The instant appeal has been filed by the Appellant challenging the Order-in-Appeal dated 23.02.2018 passed by the Ld. Commissioner (Appeals), CGST & Central Excise, Bhubaneswar, whereby he upheld the Order-in-Original dated 30.03.2017 confirming the demand of duty of Rs.29,38,183/- alongwith equivalent penalty under Rule 25 of Central Excise Rules, 2002 and applicable interest under section 11A of the Central Excise Act, 1944.

2. The Appellant is engaged in the business of manufacture of coal tar pitch, naphthalene, etc. On 28.02.2010 at around 11:00 AM, an incident of fire took place at the Appellant's factory at Khenghati, Sambalpur during the process of distillation. Due to the said fire, certain finished goods, raw material and machinery got destroyed. The Appellant intimated the jurisdictional authorities about the fire incident pursuant to which several correspondences took place, followed by the visit of the Central Excise officers to the factory premises. A Show Cause Notice dated 03.03.2011 was issued to the Appellant alleging that finished goods worth Rs.2,03,75,747/- had been cleared without recording such clearance in their Daily Stock Register and therefore, without payment of Central Excise Duty of Rs.29,38,183/-. The Appellant vide letters dated 04.04.2011 and 28.07.2011 submitted its reply in defence to the said notice. The Asstt. Commissioner, Sambalpur, adjudicated the said notice vide Order-in-Original dated 30.03.2017 whereby he confirmed the duty demand with interest and penalty holding that goods had been clandestinely removed. On appeal, the Ld. Commissioner (Appeals), Bhubaneswar upheld the Adjudication Order. Hence, the present appeal before this Tribunal.

3. The sequence of events leading to the present appeal is as under:

Date	Event
28.02.2010	Accident of fire took place in the factory
01.03.2010	The Appellant intimated the department about the fire accident in the factory and applied for remission of duty before the Deputy Commissioner with a copy to the Superintendent, Sambalpur Range, and the Commissioner, Bhubaneswar, along with request for physical verification.
11.03.2010	Physical verification undertaken by the Superintendent, Central Excise (Prev.), Sambalpur (SBP) and the

	Superintendent, Central Excise, SBP range
12.03.2010	Appellant requested the Deputy Commissioner, SBP, for granting the permission to restart the production with the necessary repairing/replacement. Copy of the stock statement certified by Chartered Accountant was submitted along with the letter.
23.03.2010	Referring to the above letters dated 01.03.2010 and 12.03.2010 submitted by the Appellant, the Superintendent, SBP Range, requisitioned certain documents with regard to the fire accident and asked for arranging for scattered goods for physical verification.
25.03.2010	
03.04.2010	Letter submitted by the Appellant to the Department requesting them for physical verification of the scattered goods
23.06.2010	Certificate of Fire incident issued by the Office of the Fire Department was submitted to the department.
28.06.2010	Appellant submitted several documents as desired by department for claiming the remission of duty on goods lost by fire.
06.10.2010	The Superintendent, Central Excise, intimated the Appellant vide letter no. GL-3(1) EA-200/SBPR/2010 dated 06.10.2010 that their remission application is under active consideration at Head Quarters Bhubaneswar.
29.11.2010	Appellant once again requested for early issuance of remission certificate. It stated that for want of clearance from department's end, they are unable to make adjustment entry in the books/RG-1 Register for

	loss of stock by fire
22.12.2010	The Superintendent of Central Excise undertook physical verification of the stock of raw materials and finished goods (said visit also referred in the Appellant's letter dated 23.12.2010) Appellant further submitted several documents vide their letter dated 22.12.2010 referring the visit undertaken by the Departmental officers.
10.01.2011	Stock was verified by the Superintendent, Central Excise, who also ascertained the weight of salvage and after verification of correct weightage allowed the Appellant to dispose the same on payment of Central Excise duty. A letter dated 10.01.2011 was also issued by the Superintendent, SBP Range.
13.01.2011	The salvaged goods weighing 87.825MT were sold on payment of Central Excise duty of Rs. 12,664 and the same had been declared in the ER-1 Return.
03.03.2011	The Superintendent, Central Excise, recommended for remission certificate vide letter vide C. No. V(27)15/Adjn/B-II/06/2011/3745A to Asst. Commissioner, Central Excise.
08.03.2011	Show Cause Notice (SCN) vide C. no. V(27)15/Adjn/B-II/06/2011/3745-47A dated 03.03.2011 received by the Appellant
17.03.2011	Appellant intimated the Superintendent, SBP Range, that stock lost on fire is being deducted from DSA register.

30.03.2017	Order-in-Original passed by the Adjudicating Authority
23.02.2018	Order-in-Appeal passed by the Commissioner (Appeals), Bhubaneswar

4. The Ld. CA took this Tribunal through all the above correspondences, as enclosed in the Memorandum of Appeal. He stated that the impugned demand had been raised without proper consideration of facts on record which has neither been disputed by the Adjudicating authority nor the Appellate authority. He emphasized that when goods are destroyed in a fire accident against which application for remission is pending for consideration before the authorities, confirmation of duty demand on the said goods on the allegation of clandestine removal is not only premature but also harsh and against the Principles of Natural Justice. He also submitted that when there is no dispute regarding loss of goods due to a fire incident, no demand could be raised. He relied upon the decision of this Tribunal in *Sam Exports v. CCE, Delhi-II* [2016 (337) ELT 146 (Tri-Del.)], wherein it was observed that Central Excise Duty liability cannot be fastened on goods destroyed in fire.

He further submitted that the allegation of clandestine removal is entirely based on assumptions and presumptions inasmuch as the documents evidencing the occurrence of fire are on record. The charge of clandestine removal is not supported by any evidence to substantiate the allegation that the goods were removed without payment of duty. He stated that the duty demand has been raised based on the assessable value (of goods destroyed in fire) as per the intimation by the Appellant to the Department. Accordingly, he prayed that the duty demand along with interest and penalty be set aside.

5. The Ld. DR appearing for the Revenue reiterated the findings in the impugned order and further stated that the Appellant did not

produce the remission certificate to claim waiver of duty payable on the finished goods lost in fire. He submitted that since the Show Cause Notice had been issued well within the period of limitation, the duty demand is required to be enforced as the same is legally payable in absence of remission certificate.

6. Heard both sides and perused the appeal records.

7. In the impugned Show Cause Notice (SCN), I find that the reasons assigned for proposing the duty demand werethe shortage of goods found during physical verification on 10.01.2011 and that the details of such goods were not reflected in the ER-1 returns filed during the impugned period from 28.02.2010 to 10.01.2011. I find that the said physical verification was carried out as per the request of the Appellant to verify the destroyed goods and grant permission to restart production.

8. In the Adjudication order, no finding has been given by the Asstt. Commissioner about the various correspondences exchanged between the Appellant and the Department though the table containing sequence of events were duly submitted by the Appellant in the SCN reply dated 28.07.2016 which is on record. None of the correspondences reflects that the Department had any suspicion regarding the destruction of goods in the fire incident. The only finding givenby the Asstt. Commissioner in the Adjudication order is that the Appellant could not furnish the remission certificate to claim waiver from payment of duty. He further observed that his office was not competent to decide the issue of remission of duty. Having noted that the Appellant had furnished the Fire Certificate issued by the concerned Fire Department and other relevant documents, he yet doubted the occurrence of fire without disputing the veracity of the Fire Certificate issued by the fire department and other documents submitted by the Appellant. More surprisingly, he observed that it could not be ascertained if the goods were actually destroyed in fire as significant amount of time had elapsed and no remission certificate

had been produced by the Appellant. In any case, mere fact of non-submission of remission certificate is not sufficient to draw an adverse inference to level the allegation of clandestine removal.

9. The Appellant submits that it had made all possible efforts to obtain the remission certificate. Moreover, it was also confirmed by the Central Excise Department vide letter dated 06.10.2010 that the request for remission certificate was under active consideration by the Department.

In view of the above, I find that the Appellant could not be made to suffer for the inaction on the part of the Departmental authorities. Since there is no evidence on record to show that the prayer for remission was rejected, the only conclusion that can be drawn is that the instant demand is wholly pre-mature which cannot survive in the eyes of the law.

Further, I find that the findings of Asstt. Commissioner and the Ld. Commissioner (Appeals) are contradictory. The Ld. Commissioner (Appeals) in para 5.2 of his order has clearly observed that there is no doubt that the fire accident occurred in the factory of appellant on 28.02.2010 whereas, the Ld. Asst Commissioner in his adjudication order doubted the occurrence of fire. This shows that the authorities below have acted in a complete lackadaisical manner.

Lastly, it is now well accepted that the charge of clandestine clearance is a serious charge for which the department has to show positive evidences against the assessee corroborating various factors like unaccounted procurement of raw material and labour, sale of finished goods in cash, etc. In the instant proceedings, there is no evidence regarding recording of statements of buyer or transporter, recovery of cash towards sale proceeds of goods clandestinely cleared, interception of vehicles carrying the alleged goods by the department. In absence of the aforementioned evidence, I find that the allegation of clandestine removal levelled against the Appellant cannot sustain. Further, I agree with the submissions made by the Appellant that the

very assessable value and the duty involvement that have been considered in the proceedings is based on the submissions made by the Appellant itself at the time of intimation made by them to the department for the occurrence of fire, duly supported by the CA certificate, stock statement and the chartered engineer's certificate. Moreover, the very period in dispute for which the allegation of clandestine removal has been made is during the period from 28.2.2010 (i.e. the date of fire informed by the assessee) to 10.01.2011 (i.e. the date of physical stock verification on which day letter was issued by Superintendent allowing to dispose the salvage goods on payment of duty).

In view of the above discussion, the Impugned Order is set aside and the appeal filed by the Appellant is allowed.

(Order pronounced in the open court on 13.09.2019.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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