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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.78328 of 2018

(Arising out of Order-in-AppealNo.205/RAN/2018 dated02.05.2018 passed by Commissioner, Goods & Service Tax And Central Excise(Appeal), Ranchi.)

M/s.Bharat Alloys Private Limited
(54/4D, Hazra Road, Kolkata-700019.)

...Appellant

VERSUS

Commissioner of CGST & Central Excise Commissionerate, Ranchi

.....Respondent

(Grand Emerald, Kadru-Argora Road, Ranchi-834002.)

APPEARANCE

Shri H.K.Pandey, Advocate for the Appellant (s)

Shri T.Mondal, Authorized Representative for the Respondent (s)

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

HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75364/2020

DATE OF HEARING : 14 January 2020
DATE OF DECISION : 11 June 2020

P.K.CHOUDHARY :

The Appellant assessee is a manufacturer of Iron & Steel Ingot. On 12.03.2008, simultaneous search was conducted by DGCEI at his factory and that of M/s Salasar Steels and M/s DokaniaGalvanising works. On stock taking conducted by the visiting team of officers, the stock of finished goods found was 53.114 MT against a balance of 454.235 MT as on 06.03.2008. Production and clearance figures during the intervening period were not taken into account. Certain documents were also recovered and seized for further inquiry. Statements of Shri Sanjay Kumar Rajgarhia, Director of the company as well as those of other staff members of the company were recorded. On the basis of the statements so recorded and the private documents seized during the search operation, Show Cause-Cum-Demand Notice Dated 30.03.2011was issued by the Additional Director General, DGCEI, Kolkata Zonal Unit, demanding Cenvat Duty of Rs.73,84,218.00 (including H.Ed. Cess and SHE cess) on the excisable goods allegedly manufactured and clandestinely removed by them during the period from March, 2007 to March, 2008 along with interest and proposing imposition of penalty on the assesse company as well as upon the Director. The Adjudicating Authorityconfirmed the demand of Rs.73, 84,218.00 along with interest and imposed penalty of equivalent amount under Section 11AC of the Central Excise Act, 1944. A furtherpenalty of Rs.73,84,218/- was also imposed upon the Director Shri Sanjay Kumar Rajgarhia under Rule 26 of the Central Excise Rules, 2002.

2. The assessee preferred appeal against the Order-in-Original before the Commissioner (Appeals). However, the Lower Appellate Authority upheld the Order-in- Original finding that the entire case is based upon the following documents / evidences allegedly found at the factory premises of the appellant company-:

(i) Copies of computer generated documents having details of incoming materials received in BAPL which are tallying with their statutory documents.

(ii) Document having details of payment received by the staff of BAPL.

(iii) Documents having date wise details of incoming and outgoing materials of BAPL along with vehicle No., name of the party, description of the material, in/out, gross/Tare and net weight.

(iv) Details of heat wise charging of materials and production of M.S.ingot for the day i.e. on 12.03.2008.

(v) Loose documents maintained by staff of BAPL namely Shri Pradeep Kumar Trivedi having details of expenditure viz. transportation charges paid to the driver of truck carrying goods in/ out , petty expenditure etc. with the summary of expenditure cash /cheque/journal voucher , weighment slips,money receipts etc.

(vi) Weighment slip book having weighment details of raw materials received in and dispatched and contains Truck No. date,description of goods ,Gross weight and net weight maintained by staff of BAPL namely Shri Ashish kumar Sinha.

(vii) Hand written document maintained by the Security Supervisor of BAPL namely Shri Upendra Narayan Jha containing date wise Truck No., weight of raw materials /finished goods, description of goods,name of the party and the declaration whether raw materials has been received or finished goods have been dispatched.

(viii) Statement dated 12.03.2008 of Shri Upendra Narayan Jha , Security Supervisor of BAPL.

(ix) Statement dated 20.10.2008 of Shri Ashish Kumar Sinha , weigh bridge staff of BAPL.

(X) Statement dated 12.03.2008 of Shri Pradeep Kumar Trivedi ,staff of BAPL.

(xi) Statement dated 12.03.2008, 18.12.2008 & 19.12.2008 of Shri Sanjay Kumar Rajgarhia ,Director of BAPL.

(xii) Details of electricity consumption submitted by DVC .

3. Being aggrieved with the Order-in-Appeal, the present appeal has been filed by the Appellant.

4. Assailing the impugned Order-in-Appeal, the learned Advocate appearing for the Appellant submitted that the order is passed without considering the submissions made by the Appellant at various stages of proceedings. Pointing out to the fact that though the issue emerged out of a simultaneous search operation of many manufacturing units, the notice against the Appellant was issued after a long gap of 3 years, that too after the demand confirmed against another manufacturer M/s Salasar Steel – whose premises was searched along with that of the appellant on the same date- was dropped by the Commissioner (Appeals) vide order dated 23.03.2011 with a remark "notice should have been served upon BAPL". That reliance has been placed on retracted and uncorroborated Statements of Shri Sanjay Kumar Rajgarhia, Director and other staff members without examination/cross-examination of the witnesses and identification of the writer of those loose sheets of papers. He placed reliance on the judgmentsof Hon'ble High Court of Calcutta in the case of Raj Kumar Damanias reported 2010(257) ELT 37 and Hon'ble High Court of Gujarat judgment in Shivam Synthetics [2010(258) ELT 30].

5. It is the case of the appellants that the Department, in course of the search, found some handwritten note book/slips from the weigh bridge inside the factory but the authors/writers could not be identified. Assuming that those papers contained details of incoming and outgoing goods, it was upon the investigation to verify from the other end but no inquiry/investigation was caused at transporter/

consignee/consignor's end. Stock taking as on date was taken on average basis without taking into consideration the runners and risers, defective ingots and ingots scattered over sand beds for cooling. Actual weight was not taken as there is nothing in the search list to show the methodology adopted for weighment. So far as recording of statement is concerned, there was good number of officers participating in the search. The Director and staff members were put under constant pressure and coerced to write down as per their dictation. Subsequent statements were recorded in the DGCEI office at odd hours after constant humiliation and mental pressure. It is not a fact that the Director, at any point of time, admitted to have removed any excisable goods without payment of central excise duty. The post-dated cheque was given by the Director on the assurance from the search party that it would be adjusted against future liability, if any.

6. Learned Advocate further submitted that Cross examination of concerned witnesses was not allowed by the Adjudicating Authority in violation of the principles of natural justice. The persons whose statements have been relied upon were not examined during the process of adjudication also. Section 9D of the Central Excise Act, 1944 - statement recorded during investigation requires ratification by the Adjudicating Authority asobserved in 2018(362) ELT 961(Chhattisgarh), Hi Tech Abrasives Ltd v CCE Raipur on appeal from 2017(346) ELT 606 (Tr).

7. The learned Advocate vehemently argued that the revenue has tried to establish the clandestine removal by assumption simpliciter that the unauthenticated documents –whose writer(s) have not been identified- containing certain vehicle numbers and names of the alleged suppliers/receivers without causing any investigation/ inquiry at the supplier/receiver end, with the owner/drivers of the vehicle/ transporter. The allegation/observation of suppression of production and clandestine removal is a serious allegation and it has to be established by the investigation by affirmative and cogent evidence,

which was absence in the Order –in-Original except relying upon such documents and entries there in, which has been disputed by the Appellant herein. He relied upon the decision of the Tribunal in the case of Sober plastic Pvt. Ltd. v. CCE [2002(139) E.L.T 562 (T)], wherein it has been held that demand based on weighment slips, slips recovered from Dharamkanta etc. relied upon for raising demand not verified with reference to transactions is not sustainable. This settled law is applicable to the facts of the Appellant since demand has been confirmed without verifying with reference to transactions. Reliance has also been placed on the decision of the Tribunal in the case of CCE v. supreme Fire Works factory [2004 (163) E.L.T 510(Tri.) which dealt with the allegation of clandestine manufacture and removal and observed that mere suspicion cannot take the place of proof. Proof and evidence of purchase of raw materials, sale of final goods clandestinely is necessary. The allegation is not sustainable in absence of evidences.

8. Learned Authorized Representative appearing for the Revenue reiterated findings of the Lower Authorities and justifies the Orders passed by the Lower Authorities.

9. We have heard both sides and perused the appeal records, statements recorded during proceedings and judgments cited.

10. We find that the investigation against the Appellant assessee was initiated on the basis of certain intelligence that a few manufacturers of Iron and steel were involved in clandestine removal of excisable products. Simultaneous search was conducted at the assessees's manufacturing premises besides others and certain documents were seized. Statements of the Director and other staff members were also recorded. It was alleged that though the documents available in the computer tallied with the figures reflected in the statutory records, hand written documents/papers seized during the search contained figures of unreported production and removal

without payment of excise duty. Bills for electric consumption are also produced as evidence for alleged excess production. The case of theRevenue is that the private records contain details of consignee/consignor's name, vehicle number, weight of the goods and also quantity of goods manufactured in the factory.

11. Per contra, Appellant's submission is that the writers of the loose sheets of paper have not been identified, statements produced as evidence have been recorded under coercion and duress, final figure of finished goods have been truly recorded in the computer and duty have been duly paid on the finished goods on removal .

12. We find that the entries in the loose sheet might have created doubt in the minds of the Revenue, but it could not have been taken as a piece of evidence by itself. It would, at best, only create suspicion to further investigate the matter. Other evidence regarding procurement of raw material, manufacture of goods by engaging labour, usage of electricity, dispatch and transport of final goods, destination of final goods and receipt of sale proceeds etc, could have probably substantiated the allegation even if not proved with arithmetical accuracy. No such evidence has been produced by the revenue. In such circumstances we are not inclined hold that the clandestine removal is proved, if not beyond doubt. The allegation/observation of suppression of production and clandestine removal is a serious allegation and it has to be established by the investigation by affirmative and cogent evidence, which is absent in the Order –in-original except relying upon such documents and entries there in, which has been disputed by the Appellant. The Tribunal in the case of Sober plastic Pvt. Ltd. v. CCE (supra) has held that demand based on weighment slips, slips recovered from Dharamkanta etc. relied upon for raising demand not verified with reference to transactions is not sustainable. This settled law is applicable to the case of the Appellant since demand has been confirmed without

verifying with reference to transactions. In the case of CCE v. supreme Fire Works factory (supra) the Tribunal dealt with the allegation of clandestine manufacture and removal and observed that mere suspicion cannot take place of proof. Proof and evidence of purchase of raw materials, sale of final goods clandestinely is necessary. The allegation is not sustainable in absence of evidences. The ratio of these decisions is applicable to the facts of the present case. Since the department has not adduced evidence to establish suppression of production, evidence of excess receipt of raw materials and clandestine removal of the goods with reference to any enquiry made with the buyers, supplier of the raw materials, confessional statement of transporters about transport of goods etc. the demand is not sustainable.

13. In view of the above discussions, the impugned Order upholding Order-in- Original cannot be sustained and accordingly set aside. The Appeal filed by the Appellant is allowed with consequential relief, if any.

(Order pronounced in the open Court on 11 June 2020.)

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

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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