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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.79477 of 2018

(Arising out of Order-in-Appeal No.281-282/HWH/CE/2018-19 dated 11.09.2018 passed by Commissioner of CGST & Central Excise(Appeals), Kolkata-II.)

M/s. Mankasia Steel Private Limited
(Jalan Industrial Park, N.H.-6, Dhulagori, Sankrail, Howrah-711302.)
...Appellant

VERSUS

Commissioner of CGST & CX, Howrah Commissionerate
.....Respondent
(Customs House, 15/1, Strand Road, Kolkata-700001.)

APPEARANCE

Shri Sourav Bagaria & Shri Indranil Banerjee, both Advocates for the Appellant (s)
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75248/2021

DATE OF HEARING : 24 February 2021
DATE OF DECISION : 12 May 2021

P.K.CHOUDHARY :

The present appeal has been filed by the Company, M/s. Manaksia Steel Pvt Ltd, against Order-in-Appeal dated 11.09.2018 passed by the learned Commissioner (Appeals), Kolkata – II, in the appeal filed by the Company against Order-in-Original dated 21.12.2017 passed by the learned Asst. Commissioner, Sankrail Division. The learned Commissioner (Appeals) vide the impugned order has upheld the duty demand of Rs.35,98,637/- along with interest, for the period October 2013 to March 2014, however, he has set aside the penalty amount imposed by the lower authority equivalent to the duty amount under u/s 11AC of the Central Excise Act, 1944.

2. Pursuant to the search operations undertaken by the officers of DGCEI at appellant's premises, Show Cause Notice dated 08.07.2015 was issued to raise demand of central excise duty on the charge of clandestine removal on the basis of certain loose documents and print outs, weighment slips, etc.. In adjudication, the demand of duty and penalty as proposed in the notice was confirmed by the lower authority vide Order dated 21.12.2017 against which, it preferred an appeal. The learned Commissioner (Appeals) vide the impugned order has made a detailed observation to hold that the charge of clandestine clearance of excisable goods has been made on assumptions inasmuch as no positive evidence could be adduced by the Revenue. Based on the said observation, he set aside the penalty amount but confirmed the duty demand against which the appellant is in appeal before the Tribunal.

3. Shri Sourav Bagaria and Shri Indranil Banerjee, learned Advocates appeared for the appellant whereas, Sri S. S. Chattopadhyay, learned Authorized Representative appeared for the Revenue.

4. The learned Advocates appearing for the appellant submitted that since the very charge of clandestine clearance of goods have been held to be not sustainable, the confirmation of duty demand in the first appeal is illegal. He also submitted that the learned Commissioner (Appeals) vide the impugned order has made a detailed observation to hold that the charge of clandestine clearance of excisable goods have been made on assumptions and presumptions without any positive evidence based on which penalty amount has been set aside. He further submitted that the learned Commissioner has not given any basis to uphold the duty demand when the very charge of clandestine clearance has been held by him to be not proper. He accordingly prayed that duty demand be also set aside.

5. The learned Authorized Representative appearing for the Revenue reiterated the findings of the lower authority and prayed that the appeal filed by the appellant Company be rejected being devoid of any merit.

6. Heard both sides through video conferencing and perused the appeal records.

On perusal of the impugned order, I find that the learned Commissioner in para No. 10 has observed as below:-

"In the present matter, I observe that the Department has not adduced any corroborative evidence to support the charge of clandestine manufacture and removal of goods. The lower authority has drawn inferences from the recovery of the said documents and shortage found during joint physical stock verification but without any independent material and since the said documents had been recovered from the factory and the office of said M/s Manaksia Steel Pvt. Ltd., those were related to M S Round only. <u>The presumption made by the lower authority is not supported by any independent material on record except the above said statements, but, the said statements were required to be corroborated from the buyers, transporters as also from the raw material suppliers."</u>

Further, detailed observations have been made in paragraphs 13 to 15 to support the above observations by the learned Commissioner(Appeals).

7. Taking note of the Hon'ble Supreme Court's decision in the case of Amrit Foods vs. CCE [2005 (190) ELT 433 (SC)], the learned Commissioner(Appeals) has made the following observation while setting aside the penalty in para 22:-

"I find that penalty was proposed to be imposed under Section 11AC of the said Act read with Rule 25 of the said Rules in the impugned notice. Therefore, I find that specific charge of penal provision was not mentioned in the impugned notice and the provisions of rule 25 of the

said Rules and section 11AC of the said Act were incorporated simultaneously in the instant notice well as the O-I-O. Therefore, in view of the above decisions, penalty imposed under is not sustainable."

While upholding the duty demand, without any basis, the following observation has been made in para 25:-

"Although, the appellant no. 1, had paid Rs. 40,00,000/- against the demand as discussed above and the lower authority ordered for appropriation of Rs. 40,00,000/- already paid by the appellant no. 1 towards liability of duty and interest, which needs no interference, in view of the above discussion. But, in view of the above decisions of the Supreme Court, High Courts and the Tribunal and in the absence of any single concrete positive and tangible evidence of clandestine removal by way of suppression of facts by the appellant no. 1 with the intent to evade duty, I find that the lower authority's order for imposition of penalty of Rs. 35,98,637/- against the appellant no. 1 under Section 11AC of the said Act is not sustainable."

8. On perusal of the entire order carefully, I do not find any observation to justify upholding the duty demand, as has been claimed to have made by the learned Commissioner. Since a detailed observation has been made in the impugned order to hold that the charge of clandestine manufacture and clearance is not supported by any positive evidence and is merely based on assumption and presumption, which has not been rebutted, I do not find any reason to uphold the duty demand.

Hence, the demand of duty and interest are set aside and the appeal is allowed with consequential relief as per law.

(Order pronounced in the open court on 12 May 2021.)

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

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