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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76504 of 2017

(Arising out of Order-in-Original No.01/CCE/CEX/RKL/2017-18 dated 26.04.2017 passed by Commissioner, Central Excise, Customs & Service Tax, Rourkela.)

M/s. Ambica Iron & Steel Private Limited
(At: Beldihi, P.O.:Kalunga, Dist: Sundergarh, Odisha, Pin-770031.)

...Appellant

VERSUS

Commissioner of Central Excise, Customs & Service Tax, Rourkela

.....Respondent

(KK-42, Civil Township, Rourkela-769004.)

APPEARANCE

Shri Kartick Kurmy, 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 RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75859/2021

DATE OF HEARING : 27 August 2021
DATE OF DECISION : 21 December 2021

P.K. CHOUDHARY :

The instant Appeal has been filed by the assessee M/s.Ambica Iron & Steel Private Limited (hereinafter referred to as the Appellant) against the Order-in-Original dated 26.04.2017 passed by the learned Commissioner, Central Excise, Customs & Service Tax, Rourkela Commissionerate confirming the demand of Central Excise duty of Rs.4,70,51,370/- along with interest and imposition of equal amount of penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 24 of the Central Excise Rules, 2002.

2. Briefly stated the facts of the case are that the Appellant is engaged in the manufacture of rolled products i.e. MS Angles, MS

Channels, MS Plates, MS Rods etc. classifiable under Chapter 72 of the Central Excise Tariff Act on which Central Excise duty is being paid. In the process manufacture, some quantity of MS Scraps (Melting Scrap) is also generated as bi-product. The Appellant used Mild Steel Ingots (MS Ingots) as raw material for manufacture of rolled products. On the basis of investigation carried out by the Department, the Show Cause Notice (SCN) dated 02.06.2016 was issued wherein it was alleged that the Appellant had resorted to clandestine production and removal of finished goods without payment of Central Excise duty. The learned Commissioner adjudicated the Show Cause Notice vide the impugned order dated 26.04.2017, wherein he compared the kacha chithas with raw material procurement register and observed that the raw of 14198.34 MT was unaccounted during the period from 01.07.2015 to 30.11.2015. Further, he observed that raw material of 258.14 MT has been wrongly entered as finished goods and hence it is required to be included in the raw material quantity of 14198.34 MT thus making the total unaccounted raw material quantity to be 14456.48 MT. It is the contention of the learned Commissioner that finished products of 13884.84 MT have been cleared clandestinely and the appellant is liable to pay Central Excise duty to the tune of Rs.4,61,54,173/- on the said clearance quantity. Further, he has observed that quantity of 380.39 MT of melting scrap cleared is liable to duty and the Appellant is required to pay Rs.8,97,197/- on such quantity of melting scrap. Based on the said observations, the learned Commissioner has concluded that the excess clearance of 13884.84 MT of finished goods showing in the Kachha Chithas leads to an unmistakable conclusion that the Appellant has resorted to suppression of production and clandestine removal of their finished goods by utilizing 14456.48 MT of unaccounted raw material. Being aggrieved, the Appellant has preferred the present Appeal before the Tribunal.

3. Shri Kartick Kurmy, learned Advocate appearing on behalf of the Appellant submits that by the impugned order, the learned Commissioner has held that the Appellant has purportedly clandestinely

manufactured and removed excisable final products without payment of duty. The learned Commissioner has further confiscated Indian currency of Rs.1,69,04,700/- under Section 121 of the Customs Act, 1962 as made applicable to Central Excise Act, 1944, which was seized on the day of search treating it purportedly related to clandestine clearance during the period from July 2015 to November 2015 and dated 07.12.2015. On dated 08.12.2015, the officers of Rourkela Commissionerates carried out simultaneous search operations at –

(i) The Factory premises, (Panchnama at Page 448 Vol-II);

(ii) Registered Office Rourkela, (Panchnama at Page 449 Vol-II)

(iii) Residential Premises of Shri Akhil Gupta, Director

(iv) Residence of Shri Sanjay Bansal, Director, (Panchnama at Page 450 Vol-II).

4. The learned Advocate for the Appellant made detailed arguments and also submitted a written submission. He submitted that the so called Kacha Chithas was never seized from the residence of the Director, or factory or office. Further, the learned Advocate submitted that the Director had filed an Affidavit wherein he has stated that he was not present during the search at his residence. The Director had also stated that the said Kacha Chithas does not belong to them. Further, in the three Panchnamas drawn at the residence of the Director, factory and office, there is absolutely no whisper of any such “Kachha Chithas”. Further, the said Panchnamas are also not annexed to the Show Cause Notice.

5. The learned Advocate for the Appellant further submitted that the maker of the Kacha Chithas was never examined to ascertain the purpose for which it was maintained. Further, the Department failed to examine on whose instructions and for whom the said Kacha Chithas are maintained. He relied on the following judgements:-

- Hi-Tech Abrasives Pvt.Ltd. Vs. CCE [2008(362)E.L.T. 961 (Chh.)]
- CCE Vs. Vishnu & Co. Pvt.Ltd. [2016 (332) E.L.T. 773(Del.)]

6. The learned Advocate for the Appellant submitted that neither the description, nor place of recovery nor the page count nor the maker of so called “Kacha Chitha” is matching or known. Hence it is not safe to rely on such vague material to uphold serious charges of clandestine removal and no reliance can be placed on it. He relied upon the following judicial pronouncements:-

- Hunsur Plywood Works Pvt.Ltd. Vs.CCE
  [2006 (201) ELT 239 (Tri.Bang)]
- Premier Glass Industries Vs. CCE
  [2000 (123) ELT 703 (Tri.)]
- Kuber Tobacco Products Ltd. Vs. Commissioner
  [2015 (317) ELT A159 (S.C.)]

7. The learned Advocate for the Appellant submitted that there is no corroborative tangible evidence in support of charge of clandestine production and removal and the demand is raised solely on the basis of private records. Further, he submitted that mere matching of the entries in the so called Kachha Chitha with the excise invoice may give rise to doubt but no demand can be confirmed on the basis of doubt. The said charge is a serious charge and has to be proven with tangible, affirmative, cogent and unimpeachable evidence based on independent inquiry which is completely missing in the instant case. He relied on the following judgements in support of his submissions:-

- Arya Fibres Pvt.Ltd. Vs.CCE
  [2014 (311) E.L.T. 529 (Tri.Ahmd.)]
- T.G.L. Poshak Corpporation Vs. CCE
  [2002 (140) E.L.T. 187 (Tri.-Che)]
- K. Rajagopal Vs. CCE
  [2002 (142) E.L.T. 128 (Tri.-Che.)]
- Continental Cement Co. Vs. UOI
  [2014 (309) E.L.T. 411 (All.)]
- Balashri Metals Pvt.Ltd. Vs. UOI
  [2017 (345) E.L.T. 187 (Jhr.)]
- CCE Vs. Mittal Pigment Pvt.Ltd.
  [2018 (16) GSTL 41 (Raj.)]
- CCE Vs. Arsh Casting Pvt.Ltd.
  [2010 (252) E.L.T. 191 (HP)]
- Flevel International Vs. CCE
  [2016 (332) E.L.T. 416 (Del.)]

8. The learned Advocate for the Appellant also stated that there was no excess/shortage of raw material/finished goods detected on the day of search. The shortage of 848.120 MT of finished goods has arisen due to faulty method of stock taking i.e. eye estimation basis. There is no weighment slip of the stock taken. Hence the charge of clandestine removal of finished goods is wholly illegal and the demand of duty is clearly not sustainable. He relied upon the decision of *CIT Vs. M/s. Balajee Wires Pvt.Ltd. [2008 (304) ITR 393)* and *Haribhagat Agarwalla Vs. State of Orissa [(1982) 51 STC (Ori)].*

9. He further submitted that in the course of investigation, the Appellant had involuntarily deposited Rs.2.00 Crores under protest at the insistence of the investigating officers. He also stated that the Director, in his statement, has stated that the cash relates to sale of consumable/assets and also relates to other parties.

10. He further submitted that confiscation of Indian currency of Rs.1,69,04,700/- is wholly illegal, arbitrary and without authority of law. He relied upon the decision of *K.P. Basheer Vs. cc [1999 (109) E.L.T. 247 (Tri.-LB)].*

11. On the contrary, the learned Authorized Representative for the Revenue justified the findings of the learned Commissioner and submitted that the demand has rightly been made and that the Appeal be rejected being devoid of any merit.

12. Heard both sides through video conferencing and perused the Appeal records as also the Paper Books Vol-I & Vol-II.

13. We find that the issue of 'question of fact' to be decided in this case is whether the Appellant has clandestinely removed the goods on which the duty demand has been made.

14. The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to (i) Receipt of raw material inside the factory premises, and non-accounted thereof in the statutory records; (ii) Utilization of such raw material for clandestine manufacture of finished goods; (iii) Manufacture of finished goods with reference to installed capacity,

consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products; (iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate recorts, transporters' documents, such as L.R.s, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees; (v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal. Whereas, in the instant case, no such clinching or corroborative evidences to the above effect have been brought on record.

15. In the instant case, the entire case of the Revenue is based on the Kaccha Chithas seized from the residence of the Director. The manner in which the said Kaccha Chithas is seized has been strongly agitated by the Appellant. We find that the said Kaccha Chithas/documents should have been seized in the presence of the Director. There is considerable force in the contention of the Appellant that the Kacha Chithas relied upon by the Revenue cannot be a basis to uphold the serious charge of clandestine clearance. It is settled legal position that charge of clandestine clearance is a serious charge and the onus to prove the same is on the Revenue by adducing concrete and cogent evidence. In the absence of corroborative evidence, the issue of fact i.e. in the present case "the charge of clandestine clearance" cannot be leveled against the assessee.

16. We find that in the entire proceedings, no evidence, much less corroborative evidence, has been adduced to show that input goods hae been procured to manufacture goods for clandestine clearance. No efforts have been made by the investigating agencies to establish the existence of any unaccounted manufacturing activity in the form of unaccounted raw material, shortage of stock, shortage of raw material/finished goods, excess consumption of electricity, unaccounted labour payments, interrogation of buyers/transporters or any

incriminating record/document to suggest any flow back of cash etc.. The Revenue authorities in this case have failed to discharge the burden of proving the serious charge of clandestine clearance or undervaluation with cogent and clinching evidence. It has been consistently held that no demand of clandestine manufacture and clearance can be confirmed purely on assumptions and presumptions and the same is required to be proved by the Revenue by direct, affirmative and incontrovertible evidence, as has been held in the following cases:-

- Bihar Fopundary & Castings Ltd. Vs. CCE, Ranchi
  [2019 (8) TMI 527 –CESTAT Kolkata] – Para 18
- Continental Cement Company Vs. Union of India
  [2014 (309) E.L.T. 411 (All)] – Para 12
- Balashree Metals Pvt.Ltd. Vs. UOI
  [2017 (345) ELT 187 (Jhar.)] – Para 5 vi
- CCE, Meerut-I Vs. R.A. Castings Pvt.Ltd.
  [2012 (26) S.T.R. 262 (All.)]
- Popular Paints and Chemicals Vs. CCE & Customs, Raipur
  [2018 (8) TMI 473 (Tri.-Delhi) – Para 17

17. We further find that the Revenue had neither disclosed any material nor described the method of stock taking to counter the case. We are unable to accept the contention of the Revenue without any basis, such as, the details of the weighment slip, counting slip etc., as the case may be. It cannot be on the basis of eye estimation or otherwise.

18. The learned Commissioner has asserted in the impugned order that the demand based on the Kacha Chithas and the statement of Director is sustainable and that no further corroboration was required in view of the clinching nature of the oral and documentary evidence establishing clandestine production and removal of finished goods at para 17.2 of the Order-in-Original is clearly contrary to the judicial precedents cited supra.

19. We further find that the contention of the learned Commissioner in the impugned Order-in-Original that it is neither feasible nor desirable to cause enquiry at all possible points concerning the clearances at Para 17.5 of the impugned order itself clarifies that the

demand has been raised solely on the basis of assumptions and presumption and no corroborative evidence was brought out by the Revenue except the so called Kacha Chithas and statement of Director.

20. We are of the view that the learned Commissioner made a fundamental error by making assumptions only just to confirm the demand on the allegation of clandestine clearance. It is a well settled position of law that serious allegation cannot be made merely on assumptions and presumptions and in the absence of detailed supporting evidence, the charge of clandestine removal cannot be upheld.

21. In view of the above discussions, the impugned order cannot be sustained and accordingly the same is set aside. The Appeal is allowed with consequential relief as per law.

(Order pronounced in the open court on 21 December 2021.)

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

Sd/

(RAJU)
MEMBER (TECHNICAL)

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