

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

**Excise Appeal No. 78452 of 2018**

(Arising out of Order-in-Appeal No.65/SLG-ST/2018-19 dated 29/05/2018 passed by Commissioner, Siliguri Appeals.)

**M/s. Promising Exports Ltd**

(Village-Manpur, Block-Sumbuk, Dist-South Sikkim, Sikkim,  
Pin-737128)

**Appellant**

*VERSUS*

**Commissioner of CGST & Central Excise, Siliguri  
Commissionerate**

(C. R. Building, Hakimpara, Haren Mukherjee Road, Siliguri, West Bengal-734001)

**Respondent**

**APPEARANCE :**

Mr. Sanjay Bhowmik, Advocate for the Appellant

Mr. S. S. Chattopadhyay, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)**

**FINAL ORDER NO.76020/2023**

Date of Hearing : 07 July 2023

Date of Decision : 07 July 2023

**PER R. MURALIDHAR**

The Appellant is a manufacturer of Copper Enamelled Wire falling under CET 85441110. An audit was conducted for the period April 2008 to March, 2013. The Audit Team compared the ER-1 Returns and the electricity consumed during the period under consideration. The audit team raised a demand of Rs.5,70,431/-. Thereafter, the Range/Division took up the investigation and recorded the statements of the Authorized Signatory of the Unit and obtained copies of ER-1 Returns and Electricity Bills. After this, a Show Cause Notice was issued demanding Excise duty of Rs.5,70,431/-. After due process, the lower Authorities confirmed the demand. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Advocate appearing on behalf of the Appellant submits that the Appellant has submitted all the details to the audit team and the Range/Division officials including the copies of their ER-1

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Returns and the Electricity Bills. He draws attention to the statement recorded by Shri Rajesh Kumar Singh, Authorized Signatory. This person, on 03/06/2015 has stated that the factory was closed in December 2013. He also has stated that the discrepancy of high electricity bill as pointed out by the audit was owing to minimum slab criterion of the electricity Department. In his second statement, dated 10/06/2015, he has reiterated the same details and has submitted that during several months no production was taken up in their factory premises.

3. The Learned Advocate submits that the entire case has been built up on the assumption and presumption without any corroborative evidence. The Audit Team has taken production on the basis of electricity consumption @ 0.6 Kg per unit to arrive at a hypothetical figure of manufactured quantity. For using this formula, the Department has not stated on what basis this formula has been adopted and who has approved such formula to be adopted. It can be seen from the records that the Appellants have been regularly filing their ER-1 Return during the entire period 2008 to 2013, showing the details of manufactured quantity and cleared quantity along with Excise Duty details. Further, he submits that out of the entire period of 2008 to 2013, the audit has arbitrarily picked up only the eight months with NIL as the manufactured quantity to allege that the manufactured quantities were not accounted by the Appellant. For coming to this conclusion, the Department has not adduced any corroborative evidence whatsoever other than the electricity consumption details. The formula adopted by them and recording of two statements from the Authorized Signatory. In the Statements, there is no mention or confession about any excess quantity being manufactured or cleared without payment of Duty. The Department has clearly failed to prove that any clandestine clearance has happened. No corroborative evidence has been brought in towards purchase, manufacture and alleged clearance of about 25,000 Kgs of

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Copper Wire in the course of these eight months. He relies on the following case laws:-

(i) Union Enterprises Vs Union of India-2014 (306) E.L.T. 216 (Cal.)

(ii) Sukh Sagar Metals (P) Ltd. Vs. Union of India-2020 (372)E.L.T. 801 (Jhar.)

4. Accordingly he prays that the Appeal may be allowed.
5. The Learned AR reiterates the findings of the lower authorities.
6. Heard both sides and perused the documents and considered the submissions.
7. It is seen that the Show Cause Notice has been issued on the basis of the audit observations and the statements recorded by the Authorized Signatory. The audit has perused the records during the period April 2008 to March 2013. They have selectively taken up the case of only eight months pertaining to 2010, 2011, 2012 and 2013. Since the Appellant has shown production as Nil, the Audit has gone by the electricity consumption during that month to allege that the goods were manufactured clandestinely and they were cleared without payment of Excise Duty. For arriving at the production figure, they have taken the electricity consumption as @ 0.6 Kgs per unit. They have not mentioned as to from where this formula was gathered. There is nothing to indicate that the Appellant has given this as the figure for the normal production in other months. Therefore, there is no basis to adopt this formula to arrive at the alleged clandestine production. The Electricity Bill cannot be exactly co-related with the monthly production in the factory. Apart from this, I observe from ER-1 Returns that the quantities manufactured in other months have been cleared in the months where the production is shown as Nil. The Audit has failed to take note that the stock can always be sold in the next month. Further, the entire consumption of Electricity unit will not directly result in the finished products. The product will be at several stages as initial product, semi finished product, finished product etc. All these facts have been ignored in their over enthusiasm by Audit to fasten the case on

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the Appellant. From the Recorded statements, it is seen that the Authorized Signatory has stated the facts and is not any form of any confessional recording about any clandestine manufacture or clearances. He has explained the way of Electricity Bills are generated and the same are consumed in the factory.

8. After going through these factual details it emerges that the only base on which the demand has been confirmed, is on account of the electricity consumption without any corroborative evidence whatsoever in any form.

9. In the case of **Union Enterprises Vs Union of India cited supra**, the Hon'ble Kolkata High Court has considered the Allahabad High Court's decision in the case of R. A. Casting on similar issue and has noted as under:-

*14. The order of the Tribunal rendered in R.A. Casting was assailed before the Allahabad High Court while dismissing the proceeding it is held :*

*"3. Being aggrieved by the impugned orders, the respondents filed appeals before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. The Tribunal observed that it is settled principle of law that the electricity consumption cannot be the only factor or basis for determining the duty liability, that too on imaginary basis, especially when Rules 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. The Tribunal further observed that no experiment have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing on MT of steel ingots. Tribunal also observed that the electricity consumption*

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*varies from one heat to another and from one date to another and even from one heat to another within the same date. Therefore, no universal and uniformly acceptable standard of electricity consumption can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. The Tribunal has also considered the report of Dr. Batra, which has been relied upon for making the allegations that there was higher electricity consumption. It appears that Dr. Batra in his report has observed that for the production of 1 MT of steel ingots, 1046 units electricity required.* [Emphasis supplied]

**15.** *The Apex Court declined to interfere with the said order as the special writ petition challenging the order of the Allahabad High Court was dismissed [[2011 \(269\) E.L.T. A108](#) (S.C.)]. Therefore, mere excess consumption of electricity without any corroborative evidence relating to the purchase of the raw material, conversion of the raw material into a final products and clearance from the manufacturing unit to the respective buyers are produced does not raise presumption of evading the duty. This has been a consistent view of the Tribunal based upon the said R.A. Casting (supra) in dispensing the pre-deposit condition unless the\_CESTAT at Delhi in M/s. Amrit Versha Ispat v. CCE, Meerut-I took a different view. The said order was assailed before the Delhi High Court in W.P (C) No. 8141 of 2008 by order dated 19th November, 2008. The Division Bench of the Delhi High Court set aside the order of the Tribunal and directed reconsideration in the light of the ratio laid down in R.A. Castings Pvt. Ltd. (supra). [Emphasis supplied]*

10. In the case of Sukh Sagar Metals (P) Ltd Vs Union of India cited supra, the Hon'ble Jharkhand High Court has held as under:-

**5.***Having heard Counsels for both the sides and looking to the facts and circumstances of the case, we, hereby, quash and set aside the*

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Order-in-Original, dated 27-2-2015/13-3-2015 (Annexure-3 to the memo of this writ petition) mainly for the following facts and reasons :

(i) Show cause notice was given by the respondents on 7-2-2014 for the period running from January, 2009 to September, 2013 mainly on the ground that there is unrealistic electricity consumption, high cost of production vis-à-vis income from sale, unrealistically low amount of expenditure towards salary of employees and though manufacturing activity incurs losses, still the petitioner unit continues and profit is shown in the books of account from non-core activities by manipulating books of account. On this ground, the show cause notice has been given by the Commissioner, Central Excise and Service Tax, Jamshedpur.

(iii) Counsel appearing for the petitioner has relied upon several decisions, as stated hereinabove. It ought to be kept in mind by the respondents that the electricity consumption pattern can be a corroborative ground and not a substantive ground at all. Thousands of possibilities cannot be equated with one truth. The grounds, which are referred in the Order-in-Original, are in fact leading the respondents towards the highest probabilities and nothing beyond that to suspect that there is clandestine removal of the finished product by the noticee. Nonetheless, for exact proof of unaccounted manufacturing of finished products and for clandestine removal thereof, more labour was required to be done by the respondents. It has become fashion with the respondents-department to rely upon a document, since 2003 onwards, which is known as report given by Dr. N.K. Batra, so-called Professor of IIT, Kanpur. Petitioner is in possession of an e-mail communicated by IIT as to whether such report has ever been given by IIT, Kanpur, the answer given by IIT, Kanpur in negative (Annexure-4, 4/1 to the memo of this petition).

(v) Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a

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corroborative piece of evidence, but, in absence of substantive proofs like – [Emphasis supplied]

11. As per the factual matrix discussed above, since the Department has relied on the Electricity consumption alone without any corroborative evidence whatsoever, the decision of the Hon'ble High Courts are squarely applicable.

12. Accordingly, I set aside the impugned OIA and allow the Appeal with consequential relief, as per law, if any.

(Dictated and pronounced in the open court.)

Sd/-

**(R. Muralidhar)**  
**Member (Judicial)**

Pooja