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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 78381 of 2018

(Arising out of Order-in-Original No. 85/Central Excise/Pr. Commr/2018 dated 28.03.2018 passed by Commissioner of Central Goods and Service Tax & Central Excise, Ranchi.)

Commr. of CGST & Central Excise, Ranchi
(Central Revenue Building, 5-Main Road, Ranchi-834001)

Appellant

VERSUS

M/s. Steel Authority of India Ltd.,
(Bokaro Steel Plant, Bokaro Steel City, Bokaro, Jharkhand)

Respondent

APPEARANCE :
Mr. P. K. Ghosh & Mr. B. K. Singh, Authorized Representative for the Appellant

Mr. Rahul Tangri & Vasudev A. both Advocate for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.75068/2024

Date of Hearing : 23 January 2024
Date of Decision: 23 January 2024

PER R. MURALIDHAR:

The Respondent is manufacturer of Steel products. They have captive iron mines. The Iron Ore from these mines are used for manufacture of their finished goods. Towards the iron ore produced and consumed, the Appellant is required to file ER 6 Return on a monthly basis. At the end of the year, they have to file an Annual Report under ER-4 showing the actual consumption. On the ground that the consumption shown in the ER-4 Return was higher than the consumption shown in the Monthly ER-6 Returns, the Department worked out the likely production of steel articles towards differential iron ore consumption and issued Show Cause Notice demanding duty of Rs. 82,68,81,301/-. The Adjudicating Authority after going through the factual details and statutory provisions dropped the demand. Being aggrieved, the Revenue has filed the present Appeal before the Tribunal.

2. The Learned AR reiterates the allegation contained in the Show Cause Notice and submits that the Adjudicating Authority has not considered the factual details properly while giving his conclusions and has dropped the demands erroneously. He reiterates the grounds taken in the appeal filed by the Revenue and submits that the present appeal may be allowed.

3. The Learned Counsel appearing for the Respondent submits that based on the volumetric weight, the monthly consumption of iron ore is worked out by them, which is recorded by them in the monthly ER-6 Returns. At the end of the year, they get the entire stock verified by their Auditors and based on the actual figure, they show the consumption in the Annual ER-4 Return. He submits that the very fact that they have correctly reflected the consumption after the audit conducted by their statutory Auditors in the ER-4 Return shows that there was no suppression on their part and clarifies their bonafides. Further he submits that the likely manufacture of steel articles have been hypothetically worked out by the Department by directly taking the differential quantity of consumption between ER-4 figures and ER 6 figures. He submits that such assumptions and presumptions cannot be used for fastening the duty liability. No evidence whatsoever has been produced towards movement of such a large quantity of Steel items nor any evidence has been produced towards cash receipt for such assumed sales. Therefore, he submits that the Department's Appeal is required to be rejected on merits.

4. Apart from this, he also submits that the Department has not come out with any corroborative evidence that the goods in question were manufactured and were cleared clandestinely to any third party. Finally, he submits that being a reputed Public Sector Undertaking working under Ministry of Steels, even hypothetically it cannot be assumed that such huge quantity of 1,48,942 MT of saleable steel could have been manufactured and sold by them clandestinely.

5. He also relies on the detailed findings of given by the Adjudicating authority and prays that the Revenue's Appeal may be dismissed on merits.

6. He further submits that the CERA Audit took place in the month of November-December 2009 and this issue was raised for which the Respondent had filed their reply clarifying their stand on the issue. After this, no action was taken for the next more than three years. The Show Cause Notice was issued on 09/05/2013 by invoking extended period provisions. He submits that as a reputed Public Sector Undertaking, the Respondent has nothing to gain by indulging in any activities amounting to suppression for evading any Excise Duty payment. Further as all the details were available with audit team by November-December 2009, the Department was bound to issue the Show Cause Notice within one year from the date of such knowledge. In view of these, he submits that the allegations in the Show Cause Notice do not survive on account of limitation. Therefore, he submits that even on this account, the Revenue's Appeal is required to be dismissed.

7. Heard both sides and perused the Appeal papers and submissions made by both sides.

8. We find that the allegation proceeds on the assumption that the differential consumption between ER-4 and ER-6 Returns has resulted in manufacturer of 1,48,942 MT of consumable steel, which has not been accounted for by the Appellant. No corroborative evidence whatsoever has been produced by the Revenue to fortify this allegation.

9. On going through the OIO, it is seen that the Adjudicating Authority has given the findings which reproduced as under;-

> *12. The second allegation in the show cause notice is that noticee showed in ER-6 return consumption of 60,43,036 MT of Iron Ore for production of hot metal during 2008-09. But on scrutiny of their Annual Report (ER-4) it was found that the said noticee had actually consumed 62,76,279 MT of Iron ore during the above period <u>which lead to suppression of consumption of iron ore by 2,33,243 MT and consequently suppression of production of 1,48,942 MT of saleable steel. This resulted in evasion of central excise duty amounting to Rs. 82,68,81,301/-.</u>*
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> *13. The noticee has submitted that until physical stock taking, the consumption of raw material is shown on volumetric basis during the financial year which is reflected in the ER-6 returns and the consumption is finalized on physical stock taking which is stated in the ER-4 return and there is no suppression of production. <u>Assumption in the SCN that the entire quantity of iron ore indicated in the ER-6/ ER-4 returns was used only for the manufacture of steel is incorrect as the iron ore is also used as a substitute for scrap and as a coolant at the steel making stage in the steel making shops.</u> There is also some loss on account of handling of the iron ore at different points of handling inside the plant and certain invisible loss due to moisture etc. They have also submitted that they produce 1 MT of "hot metal" from 1.566 MT of iron ore and not saleable steel as mistakenly construed by the Department in the SCN. The iron ore is first converted into hot metal and thereafter the hot metal is converted into steel. Quantum of iron ore required for producing saleable steel depends on a number of factors including Fe content in the iron ore.*
>
> *14. <u>I observe that the show cause notice, while alleging higher quantity of production of steel, has not adduced any further evidence, direct or</u>*

circumstantial to support the Department's contention. There is no further evidence on record to establish the alleged suppressed production and clearance. As such, the notice lacks support of any evidence which would be conducive to form the view that there was indeed higher quantity of production of the goods than it has been shown on the records.

15. In the case of Icy Cold Commercial Enterprises Vs CCE [1994 (69) ELT 337 (CESTAT)], it has been held that " Clandestine removal is a positive act and the burden to prove the same is on department. Demand based on presumption and conjectures have to set aside." Charge of clandestine removal being a serious charge, it is required to be proved beyond doubt on the basis of affirmative evidence. Demand should be based on solid evidence and not on inferences" – CCE vs Shree Narottam Udyog 2003 (158) ELT 40 (CESTAT). Same view has been taken in the Utkal Galvanisers v CCE 2003 (158) ELT 42 (CESTAT), IOC Ltd V CCE 2003 (158) ELT 49 (CESTAT SMB), Durga Trading vs. CCE [2002 (148) ELT 967 (CESTAT)]. Clandestine removal is a serious charge against the manufacturer which is required to be discharged by revenue by production of sufficient and tangible evidence. Standard of proof has to be on the basis of absolute proof and not on the basis of preponderance of probabilities- CCE vs. Universal Polythelen Industries 2001 (130) ELT 228=42 RLT 532 (CEGAT).

16. Further, as per the 2009 (246) ELT 276 (Tri. Del.), "The demand was raised based on alleged use of the raw material in excess of input-output ratio. Commissioner (Appeals) has allowed the appeal of the party with the following observation; ' 7. In this connection, it is observed that the charges of clandestine removal is a serious and it must be proved with substantive evidence. Merely because, as noticee changes ratio of tobacco in the biris he cannot be said to have been indulged in clandestine removal of biris. Some other substantive evidence showing excess manufacture of biris, and removal of the same has to be adduced to establish the charge of clandestine removal..."

17. Further, as per SAIL v. CCE 2006 (200) ELT 229 (CESTAT)

> *"In any case, the shortage arrived at is based on estimates. The estimate cannot be said to be very accurate, as it has got its own limitations. It should also be appreciated that there are practical*

problems in steel plants in the matter of accounting of their production. The CBEC Circular No. 52/79 Cx.6, dated 26-10-1979 has also laid down certain guidelines with regard to condonation of losses observed during annual stock taking. The appellants' submission that the excess/shortage noticed was only marginal should have been given its due consideration. The Tribunal in the case of M/s. Micro Forge (I) Pvt. Ltd. v. CCE, Rajkot reported in 2004 (169) E.L.T. 251 (T) has held that when the stock position is arrived at on the basis of estimation, the allegation of shortage of stock and consequent illicit removal of finished goods cannot be sustained. A plethora of case laws hold that provisions of Section 11A would apply in making demands of duty on deficiencies found during stock taking. The appellants based many reasons for discrepancies between the RG-1 and the physical stock. For example, the RG-1 is only based on estimated production and not based on actual weighment. Physical stock is also based on estimation of weight on the basis of volumetric estimate and conversion to theoretic weight based on sectional weight. A comparison between two estimation is inherently inaccurate. Losses like cutting, grinding and milling, scale loss after heat treatment and straightening, reprocessing after inspection at various stage of manufacture are not recorded in RG-1. Rejections are not recorded while accounting for quantity produced or issued in the form of sections and ingots. Shortage is inflated due to errors in taking opening balance as on 1-4-1998 and physical stock on 31-3-2001. Considering the practical difficulties, in estimating the actual stock and in view of the submissions made by the appellants, we find that the demand of duty made by the adjudicating authority cannot be sustained. Therefore, we allow the appeal with consequential relief."

18. In view of above discussion and decisions of various higher courts, demand of central excise duty amounting to Rs. 82,68,81,301/- is not sustainable.

[Emphasis supplied]

10. We do not find any reason to interfere with such detailed findings. Accordingly, we dismiss the Appeal filed by the Revenue on merits.

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11. Coming to the issue of limitation raised by the Respondent, we find that neither have they filed any appeal against the impugned OIO on this specific issue nor have they filed any Cross Objection against the Appeal filed by the Revenue on the issue of time bar. Therefore, we are not inclined to go into this issue.

12. The Revenue's Appeal is dismissed on merits.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja