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

<u>REGIONAL BENCH - COURT NO.2</u>

Excise Appeal No.75437 of 2016

(Arising out of Order-in-Original No.38/COMMR/DGP/DGP-III/15 dated 30.12.2015 passed by Commissioner, Central Excise, Service Tax & Customs, Durgapur.)

M/s. Sumangal Ispat Pvt.Ltd.
(Hetadoba (Dasibandh), P.O.-Ichhapur (via-Kamalpur), Durgapur-713204.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Durgapur

.....Respondent

(Commissioner of CGST & CX, Bolpur Commissionerate
Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

WITH

Excise Appeal No.75438 of 2016

(Arising out of Order-in-Original No.38/COMMR/DGP/DGP-III/15 dated 30.12.2015 passed by Commissioner, Central Excise, Service Tax & Customs, Durgapur.)

Shri Santosh Kumar, Director
M/s. Sumangal Ispat Pvt.Ltd.
(Hetadoba (Dasibandh), P.O.-Ichhapur (via-Kamalpur), Durgapur-713204.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Durgapur

.....Respondent

(Commissioner of CGST & CX, Bolpur Commissionerate
Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

AND

Excise Appeal No.75439 of 2016

(Arising out of Order-in-Original No.38/COMMR/DGP/DGP-III/15 dated 30.12.2015 passed by Commissioner, Central Excise, Service Tax & Customs, Durgapur.)

Shri Goutam Ghosh, Authorized Signatory
M/s. Sumangal Ispat Pvt.Ltd.
(Hetadoba (Dasibandh), P.O.-Ichhapur (via-Kamalpur), Durgapur-713204.)
...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Durgapur
.....Respondent
(Commissioner of CGST & CX, Bolpur Commissionerate
Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

APPEARANCE

Shri Rishu Raju & Shri Abhishek Tibrewal, both Advocates for the Appellant (s)

Shri B.K.Singh, Authorized Repersentative for the Revenue

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

FINAL ORDER NO. 77207-77209/2024

DATE OF HEARING : 04.10.2024
DATE OF DECISION : Oct. 24, 2024

Per : RAJEEV TANDON :

The appellants have filed the impugned appeal assailing the Order-in-Original No. 38/COMMR/DGP/DGP-III/15 dated 30.12.2015 whereby the appellants have been saddled with central excise duty of Rs.2,83,106/- in respect of finished goods found short and held as clandestinely removed without payment of duty. The order further seeks reversal of Cenvat Credit amounting to Rs.2,68,58,853/- in respect of inputs alleged to have been clandestinely removed without actual utilization in the manufacture of finished goods. The order further seeks to recover interest on the aforesaid amount of duty confirmed as well as the Cenvat Credit availed besides imposing personal penalties on the appellants herein.

2. Briefly stated the facts of the case are that the officers of the department during the course of their visit to the factory on 05.10.2012 and upon stock-taking of the inventory of the finished goods as well as the raw materials found certain shortages vis-à-vis the recorded stocks of the finished goods and the inputs. The findings of the joint physical stock verification undertaken are tabled hereunder :

Stock verification in respect of finished goods.

[Qnty . in MT]

Sl. No.	Description of finished goods	Quantity found physically as on 05/10/2012	Stock as per DSA as on 05/10/2012	Difference (Shortage)
01	M S Ingot	53.242	124.820	(-) 71.578

Stock verification in respect of raw materials.

[Qnty . in MT]

Sl. No.	Description of inputs	Quantity found physically as on 05/10/2012	Stock as per Raw materials register (RG-1)	Difference (Shortage)
01	Pig Iron	38.210	1288.773	(-) 1250.563
02	Scrap (M.S + C I Scrap)	32.130	6602.442	(-) 6570.312
02	Sponge Iron	210.640	1918.210	(-) 1707.570

3. Considering the shortages noticed the department initiated its investigations into the matter that culminated in the issuance of the Show Cause Notice dated 18.09.2013.

4. The Ld.Counsel for the appellant has submitted that during the course of the various statements recorded including that of the Director, it was informed to the department that the shortages were on account of reduced quantum of burning losses as accounted and indicated by them in their records. He submitted that the appellant had almost just then installed their plant of 7 MT capacity for production of inputs and had by then not even organized their process flow, practices and procedures. In this regard he drew our attention to certificate issued by state of West Bengal regarding commencement of production on 27.03.2012. He further submitted that at that point in time they had no weighing system in place for weighment of raw materials and purchased raw materials were continuously fed into the furnace at regular intervals. Being a nascent industrial set up they had on an approximate basis assumed a figure of 10-12% as burning losses in the course of their manufacturing activity, whereas the actual burning loss was in the range of 20-25% as per industry standards. As for the finished goods it was their plea, that the appellant had carried out sectional weighment of goods and on such assumed figures the appellants were preparing their daily stock account and filing their monthly returns. The said practice of assessment and accountal remained in vogue till the time of the visit of the officers.

5. It is noted from records that as on 05.10.2012 the daily stock account recorded a total of 124.820 MTs of finished goods whereas that

available physically as ascertained by the officers during the course of visit was only 53.242 MTs, resulting in shortage of 71.578 MTs of finished goods. It is also apparent from records that the appellant has made payment of excise duty towards such differential quantity at the time of physical verification i.e. even well before the issuance of the show cause notice in the matter. This shortage has been stated to be on account of sectional weighment methodology and in not undertaking actual weighment of finished goods. As for the raw materials the argument of the appellant is that they had accounted for significantly lower amount of burning losses being in the range of 10-12%. They submit that these had been their grounds as stated by the firm's Authorized Representative even on the very day of stock-taking by the officers.

5.1 The Ld.Advocate further submits that pursuant to the visit of the officers, the appellants internally carried out a study on actual value consumption of raw materials along with percentage of burning loss and input output ratio on 21.10.2012 - measuring the actual values of input and output and had also informed the officers of the department to be a witness, to the said experiment, however none from the department did join the said proceedings. Results of the said experiment undertaken have been informed as per Table I below:

Table I

Heat No.	Total Input	Total Output	Burning Loss
01	9530	7380	22.56
02	9680	7420	23.35
03	9720	7450	23.35
04	9520	7360	22.69

6. The ld.advocate therefore submits that going by the said exercise undertaken, it is clear that the ratio of input output is 1.3:1 thereby clearly pointing out significantly higher burning losses of about 20-25%, averaging nearly 23%, as against the assumed assessment and accountal of burning losses in the range of 10-12%.

6.1 The appellant further submits that in order to ascertain the industry norms they undertook an exercise and sought details of such burning losses from other units operating induction furnaces alongwith their installed capacity, the kind of inputs used and the burning loss as was being accounted for and within the knowledge of the department. The appellant undertook such an exercise thus in respect of units MS Ingots manufacturers, manufacturing the same primarily out of MS scrap and sponge iron located within the region and their Commissionerate. The list of replies as received by the appellant from the department under the RTI Act, 2005 are collated as under and are a part of the case records :

Units concerned within the jurisdiction of Deputy Commissioner, Asansol Division

Name & Address of the Manufacturer of M.S. Ingot	No. Of Induction Furnace installed with production capacity per heat	Name of the principal inputs used	Total quantity of Raw materials consumed(including captive if any)(in MT)	Total production	% age of burning loss over raw materials consumed {(5-6)/5}*100
2	3	4	5	6	7
Maa Ulory Ispat Pvt. Ltd. Maheshpur, salanpur, Burdwan	One furnace having capacity of 7MT per heat	Sponge Iron, Scrap,	10508.720 (09-10)	8181.815	22
			13671.825 (10-11)	10888.125	20
			18404.860 (11-12)	15512.700	16
Jagdamba Ispat(P) Ltd., Maheshpur, Salanpur, Burdwan	One furnace having capacity of 7MT per heat	Sponge Iron, Scrap,	18164.110 (09-10)	13460.918	26
			16047.025 (10-11)	11979.670	25
			14474.435 (11-12)	10995.820	24
City Alloys Private Limited Maheshpur, Salanpur, Burdwan	One furnace having capacity of 7MT per heat	Sponge Iron, Scrap	14436.543 (09-10)	10401.375	28
			18841.545 (10-11)	11250.235	40
			19419.025 (11-12)	13864.220	29
Padmawati Metalik Private Limited Maheshpur, Salanpur, Burdwan	Three furnace having capacity of 24MT per heat	Sponge Iron, Scrap	39938.675(09-10)	31878.889	20
			25707.650(10-11)	22687.023	12
			12516.264(11-12)	11165.320	27
M/s Impex Steel Ltd.,At: N akrajoria, P.O. Salanpur, Dist – Burdwan (W.B).	Furnace – 02 Production capacity –	Sponge Iron M.S.Scrap Pig Iron	47993.83(2009-10) , 40792.975(2010-11)	(M.S.Ingot) 34429.51 29136.910	28.26

		per heat - 7.0 MT		34877.72(2011-12)	24661.820	28.3 29.29
	M/s Hira Concast Ltd. At: Nakrajorla, P.O. Salanpur, Dist – Burdwan (W.B).	-DO-	Sponge Iron M.S.Scrap Pig Iron	42150.325 (2009-10) 35347.990 (2010-11) 27142.415 (2011-12)	(M.S.Ingot) 30375.000 25480.150 21265.760	27.93 27.92 21.65
	M/s Chhabra Ispat (P) Ltd. At: Nakrajorla, P.O. Salanpur, Dist – Burdwan (W.B).	Furnace – 02 Production capacity – per heat - 8.0 MT	Sponge Iron M.S.Scrap	41094.895 (2009-10) 32290.533 (2010-11) 39765.330 (2011-12)	(M.S.Billet)32413.800 +(End Cutting)389.24 (M.S.Billet)22325.940 + (End Cutting)377.100 (M.S.Billet)30922.320+(End Cutting)543.98	20.17 29.69 20.87
	M/s BMA Stainless Ltd., Kalyaneshwari, Dist. Burdwan (W.B).	Furnace – 02 Production capacity –per heat -8.0 MT	Sponge Iron Pig Iron .	63848.468(2009-10) 64010.939 (2010-11) 64882.140 (2011-12)	(M.S.Billet) 55852.810 53542.650 47496.260	12.52 16.35 26.79
	M/s vision Sponge Iron Pvt. Ltd. P.O.- Madhukunda, P.S.- Saturi, Dist- Purulia	Not available from ER-1,ER-4 & ER-6	Sponge Iron, Pig Iron & scrap	NIL (2009-10) NIL(2010-11) 16856.73 (2011-12)	NIL (2009-10) NIL(2010-11) 13769.175 (2011-12)	Burning Loss can not be ascertained from the above formula, as waste and scrap are generated during the course of manufacture.
	M/s Shakambhari Isapat & power Ltd, Vill- Madfandih, P.O- Bartoria, Dist- Purulia	Not available from ER-1,ER-4 & ER-6	Sponge Iron, Pig Iron & scrap	13068.51(2009-10) NIL(2010-11) 30947.023 (2011-12)	9324.86(2009-10) NIL(2010-11) 26196.34 (2011-12)	-DO-
	M/s AIC Iron Industries (P) Ltd. P.O.- Saltora, Dist- Purulia.	Not available from ER-1,ER-4 & ER-6	Sponge Iron, Pig Iron, Runer, – riser, scrap & skull scrap	17347.335(2009-10) 33198.49 (2010-11) 38361.3 (2011-12)	13100.24 24626.7 27066.46	-DO-
	M/s Purulia Metal Casting (P) Ltd.	Not available from ER-1,ER-	Sponge Iron,	16862.658 (2009-10)	12667.67	-DO-

	Barakar,Road, Bongabari, Vivekanandanagar, Purulia	4 & ER-6	Scrap, Pig Iron & Mangnese	18133.24 (2010-11) 30808.62 (2011-12)	14374.5 26084.26	
	Hargouri steels(P) Ltd. Bongabari, Dist-Purulia	Not available from ER-1,ER-4 & ER-6	Sponge Iron, MS Scrap, Pig Iron & Silico Mangnese	13799.029(2009-10) 16650.169(2010-11) 13093.79 (201-12)	11535.09 12933.6 8071.08	-DO-
	M/s Mark steels Ltd.Jagannathdihi, P.O.-Murulia, dist- Purulia	Not available from ER-1,ER-4 & ER-6	Sponge Iron, Scrap & Pig Iron	16295 (2009-10) 10405 (2010-11) 12705 (2011-12)	12986 8042 9937	-DO-
	M/s Ispat Damodar (P) Ltd. Vill- NabagramP.O.-Digha, P.S.- Neturia, DSit- Purulia	Not available from ER-1,ER-4 & ER-6	Sponge Iron & Scrap	NIL (2009-10) 54519.76 (2010-11) 66598.04(2011-12)	NIL 33040.08 40697.6	-DO-

Units concerned within the jurisdiction of Deputy Commissioner, Burdwan Division

Sl. No.	Name of the financial year	Name & address of the Manufacturer of M.S.Ingot	No. of Induction furnace installed with production capacity per heat	Name of the principal inputs used	Total quantity of raw materials consumed (including captive if any) (in MT)	Total production (in MT)	%age of Burning loss over raw Materials consumed ((5-6)/5)*100
1	2009-10	M/s. Shyam Sel & Power Ltd.	2 Nos. (3.5MT) & 1 No. (4MT)	Sponge Iron Pig Iron Scrap	36880.560	28894.910	21.65
	2010-11		2 Nos. (3.5MT), 1 No. (4MT) & 1 No. (6MT)		30667.170	24476.190	20.00
	2011-12		2 Nos. (3.5MT), 1 No. (4MT) & 1 No. (5MT)		57118.440	45695.620	20.00
2.	2009-10	M/s. N.N. Ispat Ltd., Dewandighi, Burdwan	Furnace -1No. 7Mt/per heat (for 2009-10 &10-11) Furnace -2 Nos. 7MT/Per heat and 6 Mt /Per heat (for 2011-12)	Sponge Iron Pig Iron Scrap	25119.509	19248.854	23.37
	2010-11				26889.731	19796.470	26.37
	2011-12				47993.375	37143.080	22.60
3.	2009-10	M/s. Mansarovar Ferrous Pvt. Ltd. Dewandighi, Budwan.	Furnace -1No. 7Mt/per heat	Sponge Iron Pig Iron Scrap	8.460 MT Per year	6.720 MT (MS Ingot) & 0.280 MT (runner riser)	17.25
	2010-11				8.460 MT Per year	6.720 MT (MS Ingot) & 0.280 MT (runner riser)	17.25

	2011-12				8.460 [illegible]	6.720 MT (MS ingot) & 0.280 MT (runner riser)	[illegible]
4.	2009-10	M/s. BRGD Ingot Pvt. Ltd., Dewandighi, Burdwan	Furnace -2No. 7Mt/per heat	Sponge Iron Scrap	27980.485	22308.280	20.27
	2010-11				38117.430	31923.746	16.24
	2011-12				48302.312	40852.640	15.42
5.	2009-10	M/s. Burdwan Iron & Steel Co. (P) Ltd., G.T.Road, Saktigarh, Burdwan-713149	Furnace -2No. 7Mt/per heat	M.S. Scrap, Casting of Iron and Sponge Iron	21970.00	19101.00	15.00
	2010-11 (Factory was closed since Aug'10)				6540.00	5682.00	15.00
	2011-12 (Factory was closed since Aug'10)						
6.	2009-10	M/s. Howrah Gases Ltd., Dewandighi, P.O. Mirzapur, Dist.- Burdwan, 713102	02 no. of induction furnace installed which have equal production capacity total production / installed capacity 31800 mt.	Sponge Iron	29145.400	23949.300	17.82
	2010-11				23947.501	18461.200	22.90
	2011-12				8773.100	7099.295	19.07

7. From the aforesaid charts it is evident that the average industry norm for a 7MT plant is largely upwards of 20%, and in some odd cases even goes as high as 40%. While this may not be the thumb rule but the aforesaid statistics definitely lends credence to the argument of the appellant, that they had been reportedly accounting significantly lesser amounts of burning losses. Viewed in the context, that the department, other than physical stock-taking shortages, have no other grounds in support of their premise to establish the charge of clandestine manufacture and clearance, the claim of the appellant cannot be dismissed as a mere hollow argument.

8. The Ld.AR however reiterates the findings of the Commissioner and emphasized that the shortage both of finished goods as well as raw material/inputs have been ascertained and is on record as noted by the

department. He fairly admits that apart from this ground of ascertainment of shortages, the department has not laid its hand on any other evidence in substantiation of its charge in support of their claim for clearance of finished goods/raw materials clandestinely.

9. It is noticed from the records as pointed out by the appellant that they had taken a significantly lower percentage of burning loss while accounting for finished goods/raw material. The fact of non-availability of weighing facilities at the factory premises also is not a disputed argument. It is also observed that the assesse's units were allowed commercial production only at a recent point in time of the visit by the officers, by which time their practices and procedures were said to be not fully in place, as the industry was beset with teething problems.

10. The result of the test as undertaken and referred to above points out the burning losses to be in the range as have been also intimated to the appellant by the department, in respect of similarly placed units in the area. Going by the corpus of as many as nearly two dozen industrial units located in the area, many of whom having similar capacity furnaces and carrying out manufacture of MS ingots, out of the very raw materials like pig iron, sponge iron, MS scrap as have been made use of by the appellant, with sourcing of inputs from common suppliers, the plea of the appellant cannot be simply brushed aside. The appellant have also separately, accounting for total purchase of raw materials and manufactured goods data for the period September 2009 to

September 2012, point out that the difference of 9528.44 MTs, was only towards difference in determination of burning losses. Thus if burning losses were taken as 20-25% instead 10-12%, the alleged shortage of stocks etc. would get neutralized. The following table demonstrates the same :

(September 2009 – September 2012)

Sl.No.	Detail	Data
01	Total production of MS ingot and runner rise	58,593.960 MT
02	Total consumption of raw materials	66,430.974 MT
03	Quantity of burning loss (2-1)	7837.014 MT
04	Percentage of burning loss	11.80
05	Total consumption of raw materials after addition of differential stock	75,959.419 MT
06	Quantity of burning loss (5-1)	17,365.459 MT
07	Percentage of burning loss	22.86

10.1 We also note that the appellant Shri Santosh Kumar, Director has repeatedly maintained in his statement recorded before the authorities at the time of the investigations, that the said difference in physical verification of raw material or inputs was only due to difference in actual burning loss and assumed burning loss. We note from the RTI information as supplied to the appellant by the department that the units located in the area, having production capacity of 7 MT are averaging burning loss of nearly 20-22%.

11. While it is certainly a case in point that shortages in stocks both of finished goods and raw materials were noticed, we are surprised to note that the department other than the mere fact of physical shortages noticed has nothing else up its sleeve to establish the charge

of physical shortages. A charge as grave as clandestine manufacture and clearance cannot be considered lightly, however, it has to be backed by strong concrete and cogent corroborative evidence. In the light of the exercise in ascertaining actual burning losses as carried out by the appellants (to which the department chose not to be a witness) as well as RTI information supplied to them by the department, the appellants have presented reasonable rebuttal and repulsed the department's case. We find no valid reason for assuming the charge of clandestine removal merely on the factum of shortages noticed which have been attributed to lack of weighment facility and therefore the burning losses accounted on the basis of an assumed estimate. The department is required to establish its case with tangible information and data to lend support to the allegation of clandestine removal of raw material/finished goods. While shortages in physical stocks could be a starting point leading to the presumption of clandestine clearance it cannot conclusively establish the same. In the absence of any other valid proposition/evidence and the argument other than physical shortages for which too the appellant has made out meaningful expressions to account for, cannot be sustained. As held in a slew of cases any charge of clandestine production and removal is required to be established by way of sustainable corroborative evidence. In the present case there being nothing on record other than what is stated above, the department's conclusion is merely based on unwarranted assumptions. The Hon'ble apex court in the case of **Oudh Sugar Mills Ltd. v. UOI [1978 (2) E.L.T. 172 (SC)]** had categorically dismissed allegations concerning clandestine production and clearance that were based on mere calculation of raw material fed into the process or on working of the machinery as observed during the course of inspection holding the same as bereft of tangible evidence and based merely on inferences involving unwarranted assumptions that did not have any legal basis for its sustenance.

12. In the case of **AR Shanmughasundaram v. CESTAT, Chennai [2022 (380) ELT 151 (Mad.)]** the Hon'ble High Court had categorically held that where purchase and transportation of alleged clandestine clearance were not established by the department no duty could be demanded. Burden of proof for establishing clandestine production and removal is certainly on the department and is required to be backed by clinching evidence and not mere assumptions. The theory of clandestine evidence cannot be adopted simply on the basis of a weak evidence of a doubtful nature. There is certainly a strong missing link between the shortages noticed by the department and the fixation of the allegation of clandestine activity and revenue evasion. We are of the firm view that the department has not backed its case with sufficient evidence and have failed to discharge the onus cast upon them.

13. There are a series decisions as held by this Tribunal to emphasize that for sustaining a charge of clandestine clearance of finished goods,

there is a strong need for corroborative evidence to uphold and establish the same. Just for records we refer to the following decisions :

(i) Ambica Iron and Steel Pvt.Ltd. vs. Commissioner [2020 (380) ELT 351]
(ii) Super Smelters Ltd. v. Commissioner [2020 (371) ELT 751]
(iii) Jai Balaji Industires Ltd. v. Commissioner [2021 (378) ELT 674]

14. There is no material evidence on record in the present case to corroborate the department's contention with any positive evidence such as by way of consumption of electricity or by way of labour deployed or unrecorded production reclaimed from private accounts or, any other corroborative evidence obtained with regard to sale/purchase, transport vouchers or any such thing to establish their claim. We note that the appellant in support of his stance, from day one, has maintained that the said losses were on account of burning losses not recorded on actual basis, for lack of weighing/measurement devices at their end. The appellants have been able to sufficiently demonstrate by way of exercise attempted by them as well as by way of data as obtained from the department through RTI that they may have indeed taken on record much less accountal of burning losses then actually undergone. The department has completely failed in establishing their charge inasmuch as they could not point out to even a single buyer of having procured the said clandestinely cleared goods or indicate certain cash flows in support of their contention. It is settled law that suspicion howsoever grave cannot replace the test of proof. Having noted that the department has completely failed in establishing and discharging the burden of proof cast upon them, in the order

passed by the lower authority cannot be sustained and is required to be set aside. We therefore allow the appeals filed by the appellants, with consequential relief, if any, as per law.

(Order pronounced in the open court on October 24, 2024.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(RAJEEV TANDON)
MEMBER (TECHNICAL)

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