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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76452 of 2017

(Arising out of Order-in-Original No.DGR-EXCUS-COM-000-028-16-17 dated 01.03.2017 passed by Commissioner of Customs, Central Excise & Service Tax, Durgapur Commissionerate, Durgapur.)

M/s. Jai Balaji Industries Limited (Unit-III)
(Banskopa, Near EPIP, Durgapur-713202.)

...Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Durgapur

.....Respondent

(Satyajit Roy Sarani, City Centre, Durgapur-713206.)

WITH

Excise Appeal No.76453 of 2017

(Arising out of Order-in-Original No.DGR-EXCUS-COM-000-028-16-17 dated 01.03.2017 passed by Commissioner of Customs, Central Excise & Service Tax, Durgapur Commissionerate, Durgapur.)

Shri Aditya Jajodia, Director of
M/s. Jai Balaji Industries Limited (Unit-III)
(Banskopa, Near EPIP, Durgapur-713202.)

...Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Durgapur

.....Respondent

(Satyajit Roy Sarani, City Centre, Durgapur-713206.)

APPEARANCE

Shri A.K.Prasad, Advocate & Shri S.Mohapatra, General Manager(Taxation) for the Appellant (s)
Shri Joydip Chakraborty, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO.75655-75656/2020

DATE OF HEARING : 8 October 2020
DATE OF DECISION : 09 December 2020 .

P.K.CHOUDHARY :

Briefly stated the facts of the case are that the local Central Excise Officers conducted a stock verification at the appellant's factory premises from 11-12-2012 to 15-12-2012 and noticed the following shortages:

S. No:	**Description of Finished goods**	**Quantity found physically**	**Stock as per DSA/ Stock Ledger**	**Difference**
1	2	3	4	5
1.	Ductile Iron Pipes	85859.5 mtrs	146085 mtrs	60225.5 mtrs
2.	Alloy Billets	159.400 MT	1118.574 MT	959.174 MT
3.	Alloy Blooms	12.840 MT	72.95 MT	59.755 MT
4.	Non-alloy Billets	261.00	3111.038 MT	2850.038 MT
5.	Non-alloy blooms	60.040 MT	1530.018 MT	1469.980 MT

2. The department was of the view that finished goods totally valued at Rs. 22,76,79,686/- which were found short during the stock taking, had been clandestinely removed by the Appellants.

3. The department was also of the view that Notification No. 67/95-CE dated 16-03-1995 was not applicable to the Appellants since it applied only to 'inputs' which are captively consumed and not to 'finished goods' as was the case of the appellants.

4. The department issued the show cause notice dated 15-09-2016 demanding Central Excise duty of Rs.2,81,41,208/- along with interest. Penalties were proposed both against the company as well as their Managing Director, Shri Aditya Jajodia.

5. Demand was confirmed against the appellants by the adjudicating authority vide Order-in-Original No. DGR-EXCUS-COM-000-028-16-17 DT. 01-03-2017/02-05-2017. Equivalent penalty was

imposed on the Company and a penalty of Rs. 10 lakhs on Sh. Aditya Jadodia, Director . The appellants are in appeal before us against this Order of the adjudicating authority.

6. Following submissions have been made by the appellants :-

6.1 The department had presumed that the quantity of finished goods which was found short had been clandestinely cleared by the Appellants. It is now established law that clandestine clearance can be proved only on the basis of positive evidence and not on the basis of presumptions and assumptions. There are no inculpatory statements in this case. On the contrary, right from the beginning, logical explanations were given for the shortages, which were only notional or apparent and not real or actual. The following inquiries which are essential to establish a case of clandestine clearance were not conducted, namely,

(i) No panchnama was drawn regarding the shortage detected and as to how the weighment or measurements were done.

(ii) Manufacture of such large quantity of unaccounted finished goods would require receipt of corresponding quantity of unaccounted raw materials. No stock taking was done for raw materials.

(iii) No supplier of unaccounted raw materials was identified.

(iv) Transportation of huge quantity of unaccounted raw materials and unaccounted finished goods would require large number of transport vehicles. No inquiries were conducted to identify such transporters and/or drivers.

(v) No buyer of unaccounted finished goods was identified.

(vi) Purchase of large quantity of unaccounted raw materials and unaccounted finished goods would involve huge amount of cash transactions. No cash trail has been identified by the department.

6.2 The following judgements were cited in this regard:

(i) Super Smelters Limited Vs. Commissioner of Customs, Central Excise and Service Tax, Durgapur- 2020 (371) ELT 751 (Tri-Kol).

(ii) Sakeen Alloys Pvt Ltd vs CCE, Ahmedabad -2013 (296) ELT 392 (Tri-Ahd) upheld by the Gujarat High Court as reported in 2014 (308) ELT 655 (Guj) and also by the Supreme Court as reported in2015 (319) ELT A117(SC),

(iii) Continental Cement Company vs UOI reported in 2014 (309) ELT 411 (All),

(iv) Triveni Engineering & Industries vs CCE, Allahabad reported in 2016 (334) ELT 595 (All),

(v) T.G.L.Poshak Corporation vs CCE, Hyderabad reported in 2002 (140) ELT 187 (Tri-Mad)

6.3 It was submitted by various employees of the Appellant company while recording their statements that no stock taking had been done for a number of years. The Appellant's unit was commissioned 01.04.2008 whereas the sub-unit for production of DI pipes was commissioned on 01-08-2010. The difference noted in the stocks of various items was the accumulated difference over the whole of the production period. If one compares the shortages noticed at the time of stock taking with the quantity produced over the years the percentage difference comes to a miniscule amount as indicated in the table below:

S. No:	**Description of finished goods**	**Quantity found physically in December, 2012**	**Stock as per DSA/ stock ledger**	**Quantity produced from 1.4.2008 to 31.12.2012**	**Quantity found short at the time of stock taking**	**Percentage on the basis of column (4)**	**Percentage on the basis of column (5)**
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	Ductile Iron pipes (D I Pipes)	85859.5 Mtrs	146085 Mtrs	47,57,070.5 Mtrs (from 1.8.2010)	60225.5 Mtrs	41.23	1.27
2.	Alloy	159.400	1118.574	69340.80	959.174	85.75	1.38

	Billets	MT	MT	MT	MT		
3	Alloy Blooms	12.840 MT	72.95 MT	16881.28 MT	59.755 MT	81.91	0.35
4.	Non-Alloy Billets	261.00 MT	3111.038 MT	380168.10 MT	2850.038 MT	91.61	0.75
5.	Non-Alloy Blooms	60.040 MT	1530.018 MT	98819.80 MT	1469.980 MT	96.08	1.49

6.4 Following judgements were cited to establish that shortage noticed during stock taking are to be spread over the period to which the production relates.

(i) Beco Industries Ltd vs CCE, Jamshedpur [2000 (121) ELT 650 (Tribunal)- para 5.4 refers]

(ii) Pacific Granites Ltd vs CCE, Jaipur [2001 (128) ELT 421 (Tri-Del)- para 9 refers].

6.5 Such nominal difference is within the tolerance limit while taking measurements as per Table-1 of the second Schedule to the Standard Weight and Measures (Packaged Commodities) Rules, 1997 [Commissioner of Central Excise, Allahabad vs IOC Ltd. – 2014 (300) ELT 153 (Tri-Del), upheld by the Allahabad High Court as reported in 2014 (308) ELT A121 (All)].

6.6 The department has proceeded on the assumption that the shortages noticed were out of the production of finished goods for the year 2012 itself. In this context attention is invited to para 34 of the impugned Order. Going by the department’s stand the percentage of shortage varies between 81% to 96%, which is absurd .

6.7 Even during the investigation stage Sh. Nunna Murali and Sh. S. Mohapatra, employees, had clarified in their respective statements that the shortage noticed in respect of DI pipes was because of the fact that DI pipes, which get damaged during storing and handling, were remelted in the factory and this was duly reflected in the RG-1/DSA as well as in ER-1 returns. A perusal of Annexure-H of the show cause notice will show that the Appellants had informed the department in June, 2016, itself about the quantity of DI Pipes recycled and that these were reflected in the DI scrap Account and shown in monthly ER-1 returns but were, inadvertently, not reduced in the DI Pipe stock account. Hence, there was no actual shortage in respect of DI Pipes and that it was only an accounting/recording error. These factual submissions have not been countered and denied by the Adjudicating Authority.

6.8 The rejected DI Pipes which were recycled in the factory of the Appellants were eligible for exemption under Notification No. 67/95-CE dated 16-03-1995 as these items had been captively consumed in the manufacture of dutiable finished goods. The Adjudicating Authority has erroneously held that this notification applies only to 'inputs' and not to 'finished goods'. In this regard, attention is invited to the wordings of the above Notification . The word 'input' includes all goods covered in the First Schedule to the Central Excise Tariff Act, 1985, other than light diesel oil, high speed diesel oil and motor spirit. Hence, DI pipes are also 'inputs' as per the said Notification. The learned Adjudicating Authority has confused the definition of 'input' with that appearing in the Cenvat Credit Rules, 2004. Hence, the rejected DI Pipes captively consumed in the factory of the Appellant for further manufacture of DI pipe, were fully exempt from duty under Notification No. 67/95-CE dated 16-03-1995. Hence, no duty could have been demanded on these shortages.

6.9 The learned Commissioner has also held that Notification No. 67/95-CE dated 16-03-1995 is not applicable to the Appellants since the DI Pipes were partially cleared on payment of duty and partially under an exemption Notification without payment of duty, for which the Appellants were required to follow Rule 6 of the Cenvat Credit Rules, which the Appellants had not done. The factual position is that the Appellants clear 70% of the DI Pipes without payment of duty under Sl. No: 7(2) of notification No. 6/2006-CE dated 01.03.2006 as superseded by Sl. No. 233(2) of Notification No. 12/2012-CE dated 17-03-2012, for water supply projects, and the remaining 30% are cleared on payment of duty. Therefore, since the Appellants were using duty paid inputs both in the manufacture of dutiable as well as exempted goods, the Appellants were following Rule 6 [more precisely Rule 6(3A)] of the Cenvat Credit Rules, 2004, by reversing proportionate credit. The Appellants had duly intimated the department vide letter dated 01-08-2010 in this regard. It may be mentioned that production of DI Pipes had commenced only from 01-08-2010. Hence, the contention of the Commissioner in para 33 of his Order that the Appellants were not following Rule 6 of the Cenvat Credit Rules, 2004, is incorrect.

6.10 The observations of the Commissioner in para 33 of his Order that "*after going through the assessee's record I find that notices are being served regularly for non-compliance of Rule 6 of Cenvat Credit Rules, 2004. I also observe that the department has taken a stand where it has been confirmed that they are indeed violating the provisions of the said Rule 6 of the Cenvat Credit Rules, 2004*", are incorrect. In this context, a copy of the Order-in-Original No. 22-28/COMMR/BOL/2018-19 dated 23.08.2018, passed by the same Commissioner is enclosed wherein he has categorically held that the Appellants were properly complying with Rule 6 of the Cenvat Credit Rules, 2004, by proportionately reversing the Cenvat credit on inputs attributable to DI Pipes cleared without payment of duty during the relevant period.

6.11 Shri Aditya Jajodia, being the MD, was not associated with day-to-day functions of the unit. There is no indication of his involvement. Hence, no penalty could be imposed on him.

6.12 The demand is time barred as the show cause notice has been issued on 15.09.2016 for the alleged clearances in 2012. There is no ground for alleging any deliberate mis-statement or suppression of facts to invoke the extended period. At best it is a case of improper maintenance of records and not a case of clandestine clearance. Further, the unit had been subjected to EA-2000 Audit in March 2012 and no discrepancy in records was found.

7. The learned AR reiterated the findings of the adjudication order and submitted that the appellants had not been able to give any satisfactory explanation for the shortages and, therefore, the allegations in the show cause notice have been rightly upheld by the adjudicating authority.

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

9. We find that the charge of clandestine clearance cannot stand as the department has not been able to provide clinching evidence in support of the same. Clandestine clearance is a serious charge and has to be proved with positive evidence which is lacking in this case. The judgments cited by the appellants on this issue, in their favour, support their case. It may be noted that not even one buyer of the clandestinely cleared goods has been identified by the department.

10. At best, therefore, this is simply a case of shortages detected during stock-taking. The next issue to be determined is whether the shortages detected were real or only notional. The appellants have doubted the manner of stock taking itself as it was not done in the presence of any panchas and no panchnama was drawn. There is no mention as to how the weighments of the products were done, individually or by loading on trucks etc.

11. The appellants have been saying right from the investigation stage itself that the shortages were because of minor weighment errors which had accumulated over the years since no stocktaking had been done right from the date of production of those items. The shortage, when compared to the total production over the years, comes to a very nominal percentage as indicated in para 6.3 above. This has not been contested by the department. Such nominal percentage differences are to be expected while weighing, keeping the nature of the products in mind which are not amenable to precise weighment. We are, therefore, of the view that the shortages noticed

are not actual but only notional and, hence, no differential duty is payable.

12. As regards DI pipes, the appellant's consistent stand has been that the shortages were because of damaged pipes which were re-issued for re-melting in the factory itself but inadvertently not reduced from the recorded stock of DI Pipes. These damaged pipes were all recorded in the Daily Stock Account of Scrap and also reflected in the ER-1 returns. Further, since these were captively consumed they were exempt from duty under notification 67/95-CE dated 16.03.1995. The Commissioner's finding that the exemption does not apply to 'finished goods' is legally not sustainable because of the specific definition of 'inputs' in the said notification which covers virtually all excisable goods including the goods manufactured by the appellants.

13. In any case, the whole demand is time-barred as the shortages were noticed in December, 2012, and the show cause notice has been issued on 15.09.2016. We find that there is no ground made out by the department to justify invoking the extended time period.

14. In view of the above discussions, the impugned order is set aside and both the appeals are allowed.

(Order pronounced in the open court on 09.12.2020)

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

Sd/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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