CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Excise Appeal No. 676 of 2009

(Arising out of Order-in-Original No. 08/CEX/2009 dated 27.02.2009 passed by the Commissioner of Central Excise & Customs, Nashik.)

Shri Mithunlal Gupta ....Appellant
Director M/s. Bhavshakti Steelmines Pvt. Ltd.
Plot No. 125, Stice, Musalgaon, Sinnar, Nashik

VERSUS

Commissioner of Central Excise, Nashik ....Respondent
Kendriya Rajaswa Bhavan,
Gadkari Chowk, Nasik- 422 002

WITH

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APPERANCE:

Shri Ashok Kumar Singh, Advocate with
Ms. Mahi Lalka, Advocate for the Appellant

Shri Ajay Kumar, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86053-86054/2019

Date of Hearing: 09.01.2019
Date of Decision: 03.06.2019

PER: DR. SUVENDU KUMAR PATI

Confirmation of duty demand of Rs. 1,40,38,004/- along with interest and equivalent penalty on the appellant Company under Section 11AC of Central Excise Act, 1994 and penalty of Rs. 15,00,000/- on the Director of the Company Shri Muthulal Gupta under Section 26 of Central Excise Rule, 2002 for alleged clandestine removal on the basis of case study analysis is assailed by both the appellants in these two appeals.

2. Factual backdrop of the case is that appellant Company M/s Bhavshakti Steelmines Pvt. Ltd. was engaged in manufacture of 'M.S. Ingots'. Basis intelligence report that appellant was suppressing turnover of the excisable goods i.e. 'M.S. Ingots' to evade tax by clandestinely removing the same, information concerning raw material purchase, daily production, value of clearances, electricity consumption for the period 2003-04 and 2004-05 were obtained, detail was examined with respect to input output ratio *vis-a-vis* electricity consumed on the basis of 'Technical Opinion Report on

Productivity of Induction Furnace', prepared through case study analysis done by one Dr. N.K. Batra, Professor of the Department of Materials & Metallurgical Engineering of the Indian Institute of Technology (IIT), Kanpur in December, 2000 with the co-operation and joint efforts of the respondent-department. In respect of such ingot production, his report indicated that electricity consumption varies between 555 units and 1026 units. Average consumption of electricity by the appellant for such ingots production was calculated to be of 1491.52 units during the period. It was also noticed that on some no production dates, electricity consumption had even exceeded 1500 units during the period under scrutiny. Other factors like raw material consumption and final output ratio were examined and it was found to be in the average of 100:82. Cost of production for both the years were compared with the transaction value shown in the ER-1 return and it was noticed that cost of production was more that transaction value despite no abnormal market situation during the relevant period. Appellant was put to show-cause notice, matter was adjudicated upon by the Commissioner of Central Excise & Customs, Nashik who passed the order referred above which is challenged by the appellant in this appeal.

3. In the memo of appeal and during the course of hearing of appeal, learned Counsel for the appellant Shri Ashok Kumar Singh, with Ms. Mahi Lalka submitted that appellant had been consistently pleading before the authorities justifying the reason of high electricity consumption which, among other factors are attributed to

inefficiency of old induction furnace, quality of raw material, fluctuation in electricity, inferior qualities of furnace, electricity wastage due to load shedding, time lost in handling production process by untrained workers, type of furnace which was single converter whereas Dr. Batra's report was based on double converter furnace, and last but not the list, consumption of supply of electricity for other purpose including its use in the office as well as staff quarters. He further submitted that entire show-cause notice was based on a case study and not on any norms that would provide authenticity to the report and the additional ground on which respondent-department placed its reliance is based on cost of production which is allegedly higher than transaction value and also on the percentage of wastage amounting to 17%-18% during production process is not founded on any fixed parameter since no literature has supported the contention of the department that percentage of loss or wastage during production would be less than 10% and sale or transaction value would never go beyond the cost of production in all circumstances, though he contended that appellant had incurred profit on both those financial years under scrutiny as per Chartered Accountant certificate, which was not considered by the Commissioner. In placing reliance on the decision of *R.A. Castings Pvt. Ltd. Vs. Commissioner of Central Excise, Meerut-I* reported in *[2009 (237) ELT 674 (Tri.-Del.)]* which was confirmed by the Hon'ble Supreme Court and on subsequent decision in the case of *Commissioner of Central Excise, Meerut-I Vs. R.A. Castings Pvt. Ltd. – [2011 (269) ELT 337 (All.)]* and *SRJ Peety Steel Pvt. Ltd. Vs.*

Commissioner of Central Excise, Aurangabad [2015 (327) ELT 737 (Tri. Mum.)], the ratio of which was based on R.A. Castings, he argued that appellant's case being similar to the dispute settled in the above referred judgments, order passed by the Commissioner is required to be set aside.

4. In response to such submissions, learned Authorised Representative for the respondent-department Shri Ajay Kumar, Additional Commissioner while supporting the reasoning and rationality of the order passed by the Commissioner, argued that appellant's director had cited no reason for loss up to 18% during melting/burning and confessed during recording of his statement that they had maintained no record of raw material procurement, heat register, gate register of transportation of finished goods and the certificate from Energy Auditor as well as Chartered Engineer were procured and submitted only on 16.04.2008. Invoice of procurement of furnace was attached to appeal on 02.02.2001 for which those should be regarded as documents generated to defend the case. In placing reliance on case laws reported in *[1994 (73) ELT 7 (SC)], [2001 (130) ELT 404 (SC)], [1983 (13) ELT 1546 (SC)], [2007 (216) ELT 503 (SC)], [2005 (190) ELT 508 (Tri.-Mumbai)],* Learned Authorised Representative for the respondent-department pleaded for confirmation of the order passed by the Commissioner.

5. We have heard from both sides at length and perused the case record. Respondent-department tried to established clandestine removal by the appellant mainly on three grounds;

5.1 First, process loss of ingots production was found, in appellant's case above 18% as recovery worked out as 82.36% and 82.65% in 2003-04 and 2004-05 respectively. Learned Commissioner has observed that **generally** recovery percentage is above 90% even when nature of scrap/raw material used varies but not a single justification is given by him as to from where he got this statistical figures that recovery percentage is generally above 90%. The use of word "generally" itself indicates that the same recovery process is not always above 90% as observed by this Tribunal during disposal of stay petition that Learned Commissioner's observation that wastage cannot go beyond 10% was not based on any literature or export opinion nor anything concerning waste percentage is available in Dr. Batra's report also to make out a case for the department that wastage of 18% shown by the appellant was too high;

5.2 Second point for consideration is that if excess electricity consumption can be the sole parameter to establish clandestine removal. Learned Counsel for the appellant brought it to our notice that appellant had explained during the recording of statements that consumption of electricity was high because the induction furnace was locally made one; frequent power failure in the rural area where the factory was located that resulted in high wastage since processing remained incomplete and product become wastage to which learned Authorised Representative countered by saying that apparently those factors were taken into consideration by Dr. Batra for which lower and upper range of electricity consumption varies between 555 units and 1026 units per MT. However, Appellant had produced Chartered Engineers reports to substantiate that the electricity consumption factors was within the reasonable limit but learned Commissioner had not considered the same. As found from the case record learned Chief Commissioner, while forwarding the report of Dr. Batra to the Commissioner for action at their end, had clearly directed that the officers were to take assistance of independent technical experts on the same which was not done in the instant case and Chartered Engineer report produced by the appellant was also discarded. Section 45 of the Indian Evidence Act permits opinion of experts on points of Foreign Law or on Science or on Arts but such opinion is advisory in nature as rule of prudence requires collaboration of such opinion with other factual evidence, which is found absent in the instant case. As observed in *R.A. Castings Pvt. Ltd.* case cited supra, norm of 1046 units for manufacture of 1 M.T. of steel ingots adopted by department is arbitrary and blind application without any experiment conducted in the factory of the appellant devising power consumption, demand is unsustainable as based on theoretical calculation;

5.3 The third important allegation against the appellant is that sale price of ingots was less than its product price. This allegation was appended to the show-cause notice subsequently by way of addendum. Appellant refuted the allegation on two valid grounds namely that cost of production work out by the department was shown to be wrong by qualified Chartered Accountant in his certificate and both the years in question; sale prices of the finished goods were not only more than cost of production but also appellant had made profit on both the years from M.S. ingots and learned Commissioner had also ignored such certificate of the Chartered Accountant.

6. From perusal of the evidence on record as discussed above and as no experiment had been conducted in the factory of the appellant for arriving at the consumption norm of electricity in the factory of the appellant, it can only be stated that strong suspicion exist against the appellant concerning clandestine removal on the same but the same could not be substantiated. As has been held in the case laws of *R.A. Castings Pvt. Ltd.* cited above, the entire case appears to have been based on assumption presumption and it is a settled principle of law that suspicion howsoever strong cannot take place of proof. Further as has been held in *R.A. Castings Pvt. Ltd.* case, tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are subjected to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture of the steel ingots is proved to the hilt by authentic, reliable and credible evidence, duty cannot be demanded on the basis of hypothesis and theoretical calculations, without taking into

consideration the ground realities of the functioning of the factories. High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots. In carrying forward the judicial precedent the following order is passed.

ORDER

7. Both the appeals are allowed and the order passed by the Commissioner of Central Excise & Customs, Nashik is hereby set aside.

(Order pronounced in the court on 03.06.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

Prasad