CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO.1

Excise Appeal No.598 of 2009

[Arising out of Order-in-Original No.04/CEX/2009, dt.16.02.2009, passed by the Commissioner of Central Excise & Customs, Nasik]

M/s Nasik Strips Pvt. Ltd **......Appellant**
Plot No.13-17 & 28-32, STICE, Musalgaon,
Sinnar, Dist: Nasik

VERSUS

Commissioner of Central Excise, Nasik **......Respondent**
KendriyaRajaswaBhavan,
Gadkari Chowk, Nasik 422 002

WITH

Excise Appeal No.574 of 2009

[Arising out of Order-in-Original No.04/CEX/2009, dt.16.02.2009, passed by the Commissioner of Central Excise & Customs, Nasik]

Shri Kishan Kumar Agarwal, **......Appellant**
Director of M/s Nasik Strips Pvt. Ltd,
Plot No.13-17 & 28-32, STICE, Musalgaon,
Sinnar, Dist: Nasik

VERSUS

Commissioner of Central Excise, Nasik **......Respondent**
KendriyaRajaswaBhavan,
Gadkari Chowk, Nasik 422 002

Appearance:
For Appellant : Shri S.P. Sheth, Advocate
For Respondent : Shri Sanjay Hasija, Supdtt. (A.R.)

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOA/86563-86564/2019

Date of Hearing: 07.02.2019
Date of Decision: 07.02.2019

PER: DR.D.M. MISRA

These appeals are filed against Order-in-Original No.04/CEX/2009, dt.16.02.2009, passed by the Commissioner of Central Excise & Customs, Nasik.

2. Briefly stated the facts of the case are that the Appellants, during the relevant period i.e. 2003-04 to2007-08, engaged in the manufacture of M.S. Ingots falling under CSH 7206.10 of Central Excise Tariff Act, 1985. Alleging that the Appellants had not recorded the correct production and clearance of the finished goods in contrast to the basis of consumption of electricity, show cause notice was issued to the Appellant for recovery of duty of Rs.74,15,196/- short paid along with interest and penalty. On adjudication, the demand was confirmed by the learned Commissioner along with interest and penalty; personal penalty of Rs.10.00 lakhs was imposed on Shri Kishan Kumar Agarwal, Director under Rule 26 of Central Excise Rules, 2002. Hence, the present appeals.

3. At the outset, the learned Advocate Shri S.P. Sheth for the Appellants has submitted that only on the basis of technical opinion/ report of Dr.N.K. Batra of IIT Kanpur, the Department has

considered that to manufacture 1.00 MT of Ingots the consumptionof electricity is 1026 units; accordingly hypothetically calculated the quantity of ingots ought to have been manufactured during the said period by the Appellant. Thereafter, deducting the quantity actually manufactured Ingots as recorded in RG-1 register, differential quantity was calculated and it is alleged that the said quantity of Ingots were manufactured and cleared clandestinely without recording in statutory records and without payment of duty. He has submitted that the Department has ignored the circular issued by the Director General (Audit) dt.28.02.2003, wherein the report of Dr.N.K. Batra has been though mentioned but it is advised/instructed to the field formation to examine other parameters and corroborative evidences relating to the procurement of additional raw materials for manufacture of un-recorded production, movement of raw material and finished goods and documents/records relating to unrecorded production etc. Instead of initiating enquiry and carrying out further investigation, the Department simply adopted the Dr.N.K. Batra’s report and on the basis of actual quantum of electricity consumed, arrived at the quantity of ingots that would have been manufactured and cleared without payment of duty. It is his contention that in absence of corroborative evidences and necessary test/experiment conducted about the working of the furnace in their factory vis-à-vis consumption of electricity and production of Ingots, simply on Dr.N.K. Batra’s report, demand cannot be sustained. He has submitted that the issue has been considered at length by Hon’ble Jharkhand High Court in the case of Balashri Metals Pvt. Ltd Vs UoI –

2017 (345) ELT 187 (Jhar.), Om Shanti Steel & Castings Pvt. Ltd Vs UoI – 2017 (347) ELT 441 (Jhar.), Maihar Alloys Pvt. Ltd Vs UoI – 2016 SCC OnLineJhar 2793 and this Tribunal in the caseSRJ Petty Steel Pvt. Ltd Vs CCE Aurangabad – 2015 (3270 ELT 737 (Tri-Mumbai).

4. The learned A.R. for the Revenue reiterates the findings of the learned Commissioner.

5. We have carefully gone through the submissions advanced by both sides and perused the records. The short issue in the present appeal for determination is whether during the relevant period the appellant had manufactured and cleared 2678.743 MTs ingots without payment of duty. It is not in dispute that the quantity of ingots manufactured and cleared without payment of duty has been determined solely on the basis of technical report/opinion of Dr.N.K.Batra. The said issue need not detain us any longer as the issue of demand of duty based on electric consumption, taking note of Dr.N.K. Batra's report, is no more *res integra*being considered and settled by Hon'ble Jharkhand High Court in the case of Balashri Metals Pvt. Ltd and later followed in Om Shanti Steel & Castings Pvt. Ltd., and Maihar Alloys Pvt. Ltd.'s case (supra). In the said judgment it is observed that merely on the basis of Dr.N.K. Batra's report, demand of duty alleging clandestine manufacture and clearance cannot be sustained, as it is calculated taking only on the basis of consumption of electricity without examination of further corroborative evidences like procurement of raw material, movement of finished goods, etc. This Tribunal, also analyzing the

issue in similar circumstancesfollowing the principle of law laid down by this Tribunal in R.A. Castings Pvt. Ltd Vs CCE Meerut-I – 2009 (237) ELT 674 (Tri-Del)., in the case of SRJ Petty Steel Pvt. Ltd. Vs CCE Aurangabad – 2015 (3270 ELT 737 (Tri-Mumbai), by majority, while allowing the appeal,had observed that only on the basis of electricity consumption, demand cannot be confirmed against the Appellant. Therefore, following the aforesaid precedent, we do not find merit in the impugned order confirming the demand only on the basis of electricity consumption, without even conducting any test/experiment on the actual consumption of electricity vis-à-vis the production of ingots over a period of time to apply Dr.N.K.Batra's report. Therefore, the demand of duty is unsustainable in law.

6. In the result, the impugned order is set aside and the appeals are allowed.

(Operative part of the order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Bahalkar