IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

EXCISE APPEAL NO.823/2011

(Arising out of Order-in-Original No. 108/2010-11/C dated 15.02.2011 passed by the Commissioner of Central Excise (Appeals), Nagpur)

M/s. Omco Steel Pvt. Ltd. **.....Appellant**
Plot no. A-2/2, MIDC Indl. Area,
Kalmeshwar, Nagpur 441 501

Vs.

Commissioner of Customs & Central Excise, Nagpur **.....Respondent**
Telangkhedi Road, Civil Lines,
Post box no. 81, Nagpur 440 001

WITH

EXCISE APPEAL NO.824/2011

(Arising out of Order-in-Original No. 108/2010-11/C dated 15.02.2011 passed by the Commissioner of Central Excise (Appeals), Nagpur)

Shri Om Prakash Mundra **.....Appellant**
Managing Director
M/s. Omco Steel Pvt. Ltd.
Plot no. A-2/2, MIDC Indl. Area,
Kalmeshwar, Nagpur 441 501

Vs.

Commissioner of Customs & Central Excise, Nagpur **.....Respondent**
Telangkhedi Road, Civil Lines,
Post box no. 81, Nagpur 440 001

Appearance

Shri Rajesh Ostwal, Advocate for the appellant

Shri A.S. Parab, AC (AR) for the respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

ORDER NO. A/87322-87323/2019

Date of hearing : 17.06.2019
Date of decision : 17.06.2019

Per : **Shri P Anjani Kumar**

Briefly stated the facts of the case are that the appellants, M/s OMCO Steel Pvt Ltd, are engaged in manufacture of steel ingots using raw materials such as sponge iron, pig iron and iron and steel scrap etc; however, sponge iron constitutes 80-85% of the raw material. On the basis of some investigation conducted against M/s. Shree Sidhabali Ispat Ltd. (SSIL), Revenue contended that the appellants received sponge iron, cleared clandestinely by M/s SSIL and have suppressed the production of ingots to the tune of 7061.413 MT during the period 18.03.2005 to 17.12.2009. The Department also relied upon the electricity consumption of the appellants; DG Audit letter dated 28.02.2006; article by Shri R.P. Varshney and the technical report of Dr. N.K. Batra of IIT Kanpur; minor shortage of stock of raw materials and alleged non-maintenance of records. SCN dated 20.04.2010 was issued seeking to recover duty of Rs.2, 19, 25,425 under proviso to Section 11A along with interest and penalty. SCN also seeks to impose penalty on Shri Omprakash Mundra, Managing Director. CCE Nagpur vide OIO dated 15.02.2011 confirmed the duty of Rs.2,19,25,425/- along with equal penalty u/s 11AC of CEA 44 and u/r 25 of CER 2002 along with penalty of Rs.5000/- u/r 15A while imposing penalty of Rs.21,00,000/- on Shri Omprakash Mundra. Hence, this appeal was filed.

2. Learned Counsel for the appellants Shri Gajendra Jain submits that the department has considered electricity consumption of 1026 units per MT as per DG Audits letter dated 28.02.2006; the said letter fixes consumption norms on the basis of technical opinion report of Dr. N.K. Batra of IIT Kanpur and report of Shri R.P. Varshney, Executive Director of All India Induction Furnaces Association; electricity consumption per heat depends on several factors such as nature of scrap, efficiency of labour, condition of the furnace, characteristics of the final material etc. and no uniform criteria can be fixed; said reports have been assailed by various judicial forum; department has not carried out any experiment in the factory premises to arrive at average electricity consumption. Hon'ble Jharkhand High Court, in the case of Stan Commodities Pvt Ltd. V. CCE 2017 (11) TMI 1770 – Jhar, held that Dr Batra's report cannot be relied upon. Shri Varshney himself vide letters dated 18.03.2008 and 25.04.2008 clarified that his article prepared in 1989-90 was in respect of concast steel making and not for induction furnaces; the contents of article written by him in the year 1989-90 is outdated and needs to be updated and power consumption for one MT of steel could be 1000-1800 units. Taking into account all the factors of consumption of electricity, i.e. for production of ingots and auxiliary loads electric consumption in their factory comes to 899.11 per MT, which is much less than the figure of 1026 per MT arrived by the department. Tribunal in the case of RA Castings Ltd. V. CCE 2009 (237) ELT 614 (Tribunal) and CCE v. Venus Alloys Pvt Ltd. 2016 (337) ELT 561 (T) has held that 35% of reduction needs to be given to auxiliary load while arriving at electricity consumption. Ld. Counsel also submits that Dr. Batra's report was not appreciated in the following cases:

i) RA Castings Pvt. Ltd. (Supra)
ii) SRJ Peety Steel Pvt. Ltd. V. CCE 2015 (327) ELT 737 (T)
iii) Balshri Metals Pvt. Ltd. V. UOI 2017 (345) ELT 187 (Jhar)

3. Learned counsel for the appellants further submits that Reliance placed on the power consumption recorded in Form G-7 is misplaced; on examination of Form G-7 obtained from MESB, the department alleged that there were days during the period 16.10.2009 to 17.11.2009 when there has been substantial consumption of electricity, however the production shown was comparatively low and on 17.10.2009 it was NIL; chart of electricity consumption compiled on the basis of G-7 forms suffers from an inherent error in as much as the 24 hrs. cycle of electricity readings taken on 9.00 hrs. on a particular day and ends at the conclusion of the ongoing heat around that time on the next day or latest at 9.00 hrs.; if the entries in the G-7 forms are interpreted in the above perspective, the correct picture that would emerge; days where there has been consumption of electricity and raw material issue, there is production of ingots and the average consumption of electricity is in the range of 1060 to 1118 Units per MT; therefore, no negative inference can be drawn from perusal of G-7 form. National Institute of Secondary Steel Technology (NISST), Mandi, Gobindgarh in its independent survey report June-July 2006, gave its finding, inter alia, that “considering all practical operating parameters and conditions, and conditions, about 1427 KWH/T of power could be required to product 1 MT of pencil ingots; on account of wide variations no bench marking of electricity consumption can be done as such. According to the report of Joint Plant Committee constituted by Govt. of India in 2004 titled “Survey of Electric Furnace Industries in India”, the power consumption required to produce 1 MT of ingots from scrap is 1800 units/MT.

4. Learned counsel also submits allegation of clandestine removal of ingots cannot be made against the appellants on the basis of Non accountal of runners and risers; Non submission of ER-5 & ER-6 return for various types of raw materials and non-maintenance of heat wise register; excess cost of primary inputs and loss from the manufacturing business and excess burning loses. Department alleges that they have not correctly recorded the production of runners and risers; same is recorded on the basis of a fixed ratio; RG1 records indicate that the quantity of runners and risers actually varies from 3% - 4%; In the steel making process, runners and risers arise on a continuous basis and there can be no accurate recording of these intermediate stages; Shri Manmohan Mudra has also stated the same in his statement.

4.1. The reliance on non-submission of ER-5 and ER4 returns for various raw materials is also misplaced; the same cannot be the basis to allege suppression of production; Shri Manmohan Mudra in his statement dated 29.03.2010 categorically stated that it is not possible to maintain heat wise register.

4.2. The department alleges that they have manipulated the expenses and accounts in order to suppress the production of ingots and clandestine removal thereof; Central excise are not authority to determine the correctness of financial transactions which have been verified audited and accepted by Income Tax. The department has taken the value of expenditure towards electricity as given in the power bills; the department has not adjusted the power consumed in production of auxiliary equipment while calculating cost of production of Ingots; once this actual amount is taken into consideration, the percentage of electricity expenses in the total Assessable value of Clearance reduces substantially; conclusion of the department is based on the presumption that no manufacturing business can run with losses; many big companies both in private as well as public sector have continuously been running in losses; if the business is closed, the losses will be more difficult to recover the investment made in plant and machinery. Therefore, the department's conclusion and loss-making units cannot operate until they go for clandestine activities is perverse.

4.3. The department relied upon the variation in the burning loss from 10% to 16.40%; comparative chart of percentage of burning loss, as reflected in the balance sheet in burning loss was less than 10% or marginal higher except in the year 2005-06 when the same was 16.40% which was due to the reason that in the first year of production the appellants were not conversant with the factors such as combination of charge mix and use of good quality sponge iron, resulted in the higher burning loss; appellants submit that 10% burning loss is permissible on the basis of the guidelines issued by the Ministry of Steel and was held in Ram Steel Rolling & Forging Mills Vs CCE – 2006 (204) ELT 87 (T).

4.4. The department heavily relied upon the case of M/s Shree Sidhabali Ispat Ltd. (SSIL); however, said case is decided in favour of SSIL 2017 (357) ELT 724(T), wherein the Hon'ble CESTAT has held that notice relying on LRs of transporter to claim that non-duty paid goods were transported but testimony of consignees of consignees not brought on record; statement of supervisor of transporter who prepared daily account book register of transporter relied on not recorded; even in respect of statements which were recorded, there seems to have been no follow up on the leads provided; shortage of raw materials and finished goods during stock taking in factory alleged on basis of theoretical calculation of weight rather than actual physical weighment; documents obtained from Octroi neither recovered under Panchanama nor any letter or document on record evidencing it had supplied/furnished by Octroi Authorities brought on record; demands based on documents seized not from Assessee's premises but from premises of third parties. Tribunal in the case of Kamboj Ispat P. Ltd., & Shri Chatar Singh Vs. CCE – 2016 (1) TMI CESTAT Mumbai, which was a result of same investigation in to M/s SSIL, held that the allegation of procurement of non-duty paid sponge iron does not hold correct when the personnel of the appellants has confronted with the statement of M/s. SSIL that they have not received the goods.

4.5. Learned counsel also submits that the burden of proof in the case of clandestine removal is on the department and it cannot be discharged on the basis of suspicions and surmises; manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences; the evidence that was available to the department in the case of *RA Castings* 2009 (237) ELT 674 (T) (supra) was also the similar to the present case and in that case CESTAT has negated the departments stand and the same was upheld by the High Court and Supreme Court.

4.6. Counsel submits that the third party's records cannot form the basis of clandestine removal unless corroborated by independent evidence. He relies upon

(i). Kothari Synthetic Industries Vs CCE – 2002 (141) ELT 558(T)
(ii). Rama Shyama Papers Ltd Vs CCE – 2004 (168) ELT 494 (T)
(iii). Ram Steel Rolling & Forging Mills Vs CCE 2006(204) ELT 87 (T)

4.7. Learned Counsel submits that the show cause notice has been issued on 20.4.2010 demanding duty for the period from 18.3.2005 to 17.12.2009 extended period of limitation is not invocable; entire impugned Order-in-

Original is liable to be set aside and thus, no penalty is imposable on Shri Omprakash Mundra.

5. Learned AR for the department submits that the case of the department is very strong and is supported by various types of evidence like shortage of final products, non-maintenance of records of raw material, electricity consumption, manipulation of accounts, statements of independent transporters and evidence found with the suppliers of raw material. Ld. AR submits that this being a case of clandestine removal, cannot be proved with arithmetical precision but needs to be proved to a reasonable extent; such burden has been discharged by the department. LD. AR relies upon the following cases:

(i). CC v. D. Bhoormull 1983 (13) ELT 1546 (SC)
(ii). Bhanabhai Khalpabhai Vs CC 994 (71) ELT 3 (SC)
(iii). Triveni Rubber and Plastics Vs CC Cochin 1994 (73) ELT 7 (SC)
(iv). Sai Chemicals Pvt Ltd Vs CC Raipur 2010 (257) ELT 457 (Tri-Del)
(v). Gulabchand Silk Mills Pvt Ltd Vs CCE Hyderabad II 2005 (184) ELT 263 (Tri-Bang)
(vi). Siemens Ltd Vs CCE Calcutta I 1994 (70) ELT 305 (T)
(vii). CCE, Surat Vs Umiya Chem Inds. 2005 (185) ELT 410 (T-Mum)

6. Ld. Counsel for the appellants countering the submissions of the ld. AR states that the so called evidence cited by the department is nothing but a figment of imagination; a difference of 2 MT in a total stock of 600 MT of material lying in the factory is not conclusive evidence; it can be attributed to weighment differences also; regarding the transporters (Aishwarya Road lines, Chandrapur) records found at the premises of vice president of Shree Siddhabali, he submits that though the proprietor of Aishwarya Roadlines stated that the material was sent to the various premises as contained in the LRs, the department did not confirm the same from Shree Siddhabali themselves; Shri Manmohan Mudra in his statement dated

08.07.2009 has categorically stated that the quantities mentioned in the lorry receipts of M/s Aishwarya Road lines are not reflected in the appellant's records as the raw material has not been received in their factory; the department did not further probe the matter. The Ld. Counsel submits that though some octroi records were submitted the same were not obtained under letter and were not authenticated and thereby have no evidentiary value. Ld. Counsel further submits that regarding the certificate of Shri Batra and Shri Varshney submissions have already been given.

7. Heard both sides and perused the records of the case. The crux of the case is to decide whether the department could successfully establish the charge of clandestine procurement of sponge iron and consequent clandestine manufacture and clearance of ingots. The brief facts of the case are discussed elaborately above and therefore we refrain from repeating the same. The evidence of the department is in the form of the following :

(i) Records seized from the transporters of M/s. SSIL and the statements of the transporters :

(ii) Dr. Batra's report
(iii) A small discrepancy in the stock account.
(iv) Consumption pattern of power
(v) Alleged non maintenance of records
(vi) Costing of the product.

8. Coming to the evidence in the form of documents like L/R from the transporter. We find that though Revenue alleged that the appellants have procured thousands of tons of sponged iron clandestinely from M/s. SSIL we find that the same is not corroborated at the appellants side. On being asked, the Director of the Appellants Shri Manmohan Mundra has stated

that the sponged iron was not recorded in their records as it was not received at their factory. Other than the statements no further investigation appears to have been done by the Revenue. The receipt, used and subsequent sale of ingots is not proved by documentary evidence. No proof of payments made by the Appellants to M/s. SSIL have been placed on records. The only records placed is a miniscule difference shortage in the stock of finished goods that too found on estimation. We find that the same is not acceptable. As submitted by the Appellants, this bench in the case of M/s. Sidhabali Steel Industries (supra), has not accepted the evidence to alleged clandestine removal by M/s. SSIL. This bench also in the case of Kamboj Ispat Pvt. Ltd have also held that the allegation of procurement of non duty paid sponged iron does not hold correct when the personnel of M/s. Kamboj Ispat Pvt. Ltd. (supra) Have stated that they have not received any goods from M/s. SSIL. Therefore, in this case also we don't find any reason to accept the contention of Revenue.

9. Another evidence put forth by the Revenue is the report of Dr. Batra. We find that Hon'ble High Court of Jharkhand in the case of Stan Commodities Pvt. Ltd (supra) held that clandestine removal cannot be alleged only on the basis of such report. We find that the Tribunal has followed the principal in a number of cases. We also find that Shri Varshney himself while letter dated 18.03.2008 has clarified that the contents of the articles written by him in the year 1989-90 was outdated and needed to be updated; the report was for Concast Steel making and not for induction furnace. Therefore on this account also Revenue's argument falls apart.

10. Coming to the other evidences like non maintenance of records for runners and risers; written submitted to MSEB and costing based on various elements we find that the same are half

baked and no meaningful investigation has been conducted to establish anything convincingly and as such the allegation cannot be based on such evidence. We find that the allegation of clandestine removal is a serious charge. Though not in a mathematical position, the same needs to be proved by evidencing procurement of raw material, use of raw material in the manufacture of final product, use of other raw material, production of final product, sale and transport of final product and receipt of consideration for the same. We find that this Tribunal has elaborated the same in the case of R.A. Castings Pvt. Ltd. (supra). We find that none of the elements as above has been conclusively established. Therefore, we find that the allegations do not survive.

11. In view of the above, both the appeals are allowed with consequential relief, if any.

(Order dictated and pronounced in open court)

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

(P. Anjani Kumar)
Member (Technical)

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