

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Excise Appeal No. 986 of 2009

(Arising out of Order-in-Original No. 06/2009/C dated 15.05.2009 passed by Commissioner of Central Excise, Nagpur)

.....Appellant

Orange City Alloys Pvt. Ltd.

Khasara No.40/2, Village Bhilgaon,
Kamptee Road, Nagpur.

VERSUS

**Commissioner of Central Excise,
Nagpur**

Telangkhedi Road, Civil Lines, Post Box No.81,
Nagpur-440001

..Respondent

WITH

Excise Appeal No. 1787 of 2010

(Arising out of Order-in-Original No. 40/2010/C dated 10.06.2010 passed by Commissioner of Central Excise, Nagpur)

Orange City Alloys Pvt. Ltd.

Khasara No.40/2, Village Bhilgaon,
Kamptee Road, Nagpur.

.....Appellant

VERSUS

**Commissioner of Central Excise,
Nagpur**

Telangkhedi Road, Civil Lines, Post Box No.81,
Nagpur-440001

..Respondent

WITH

Excise Appeal No. 948 of 2009

(Arising out of Order-in-Original No. 06/2009/C dated 01.06.2009 passed by Commissioner of Central Excise, Nagpur)

M/s Malkiatsingh Jagatsingh Saggu

18, Akal Garh, Sidarth Nagar, Kamptrr Road,
Nagpur-440026

.....Appellant

VERSUS

**Commissioner of Central Excise,
Nagpur**

Telangkhedi Road, Civil Lines, Post Box No.81,
Nagpur-440001

..Respondent

WITH

Excise Appeal No. 985 of 2009

(Arising out of Order-in-Original No. 06/2009/C dated 15.05.2009 passed by Commissioner of Central Excise, Nagpur)

Bharatbhai B. Doshi

Khasara No.40/2, Village Bhilgaon,
Kamptee Road, Nagpur.

.....Appellant

VERSUS

**Commissioner of Central Excise,
Nagpur**

Telangkhedi Road, Civil Lines, Post Box No.81,
Nagpur-440001

..Respondent

WITH

Excise Appeal No. 1786 of 2010

(Arising out of Order-in-Original No. 40/2010/C dated 10.06.2010 passed by Commissioner of Central Excise, Nagpur)

Bharatbhai B. Doshi

Khasara No.40/2, Village Bhilgaon,
Kamptee Road, Nagpur.

.....Appellant

VERSUS

**Commissioner of Central Excise,
Nagpur**

Telangkhedi Road, Civil Lines, Post Box No.81,
Nagpur-440001

..Respondent

Appearance:

Shri Malkiyat Singh Saggu a/w Shri Rajesh Ostwal, Advocate for the
Appellant

Shri Sanjay Hasija, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOS. A/85314-85318/2022

Date of Hearing: 07.10.2021

Date of Decision: 06.04.2022

PER : S.K. MOHANTY

Brief facts of the case, leading to these appeals are as under:

1.1 M/S Orange City Alloys Pvt. Ltd. (for short, referred to as the "appellant No.1"), having their factory at Khasara No 40/2, Village-Bhilgaon, Kamptee Road, Nagpur are engaged in the manufacture of MS Ingots, falling under Chapter sub-heading No. 72061090 of the schedule to Central Excise Tariff Act, 1985. Such goods are manufactured by using electric induction furnaces. The main raw materials for manufacture of MS Ingots are Sponge Iron, Iron & Steel scrap, Pig Iron and Ferro Alloys etc. The appellant No.1 are also availing Cenvat Credit of duty paid on inputs in terms of Cenvat Credit Rules, 2004 as amended. They had purchased Induction furnace of 8 MT capacity from M/s. Megatherm Electronic, Pvt. Ltd., Kolkata (for short, referred to as "M/s Megatherm") in the year 2001, which is in use by them since then. They use electricity supplied by Maharashtra State Electricity Board. The raw materials are charged in the crucible of induction furnace to convert the same into molten mass, which is poured in the moulds to obtain ingots/runners/risers and the said process is termed as one heat.

1.2 Up to the period 30.06.2005, the above factory was owned by M/s. Saggu Castings Pvt. Ltd.(for short, referred to as the "appellant No.2"), which was subsequently taken over by the appellant No.1. Shri Malkiatsingh Jagatsingh Saggu (for short, referred to as the "appellant No.3") was the former Director of M/s. Saggu Castings Pvt. Ltd. Shri Bharatbhai B. Doshi (for short, referred to as the "appellant No. 4") is the Director of the appellant No.1 company and also the partner in other manufacturing and trading companies.

1.3 In this case, the Department had gathered information that the appellant No.1 was evading the payment of Central Excise duty through suppression of production (showing less production than actual) in their statutory records and clearing the same without payment of Central Excise duty. Information was also gathered that in many cases, the material transported to and from the appellant No.1 was weighed at M/s. A. B. C. Weighbridge, situated near Lamba Petrol Pump, Kamptee road, Village Bhilgaon, Nagpur and that the said weighbridge have issued weightment slips

for the excisable materials belonging to the appellant No.1. Therefore, the Central Excise officers made simultaneous visits to the factory premises of appellant No.1 and premises of M/s. A. B. C. Weighbridge, Nagpur on 25.10.2005. During visit, the officers resumed certain records under withdrawal memo and Panchnama both dated 25.10.2005 drawn at respective premises for further verification. On 24.03.2006, the officers of department conducted two heats in the factory of the appellant No.1, which showed the electricity consumption of 1008 units per MT and 1058 units per MT. The officers also recorded the statement dated 18.03.2008 from the appellants No.3 & 4. During the course of investigation, the officers also taken note of the letters dated 07.10.2005, 20.10.2005 & 24.10.2005 addressed by the appellants to M/s. Megatherm Electronics Pvt. Ltd. Kolkata and concluded that the average power consumption for manufacturing steel ingots in the appellant No.1's factory was 900-925 units/MT up to 17.10.2005 and 860 units/MT thereafter. Further, the department had also referred to the technical opinion furnished by Dr. N.K. Batra, Director of IIT, Kanpur to infer that energy requirement of Induction Furnace for manufacture of 1 MT of steel ingots by melting scrap ranges between 555 to 754 KWH and the requirement in case of manufacture by melting sponge iron ranges between 815 to 1046 KWH. The article published by Shri R.P. Varshney, Executive Director, All India Induction Furnace Association, New Delhi was also referred to by the department, wherein it has been shown that the power consumption for manufacture of 1 MT of ingot in the induction furnace is in the range from 650 units to 820 units, depending upon the percentage mix of sponge iron and scrap. Apart from the above evidences, the department had also relied upon the details of truck owners obtained from the Road Transport Authority and the statements recorded from the transporters, who were engaged for transporting the goods belonging to the appellant No.1.

1.4. Upon detailed investigation into the matter, the department had concluded that the appellant No.1 had suppressed the production of ingots and removed the same without payment of Central Excise duty. Accordingly, show cause proceedings were initiated by the department against all the appellants, proposing confirmation of the Central Excise duty demand along with interest and for imposition of penalties. The matter arising out of the show cause notices, were adjudicated vide orders dated

01.06.2009 and 10.06,2010 by the learned Commissioner of Central Excise, Nagpur (for short, referred to as the "impugned orders"), wherein the proposals made against the appellants were confirmed in the following manner:

Appeal No.	E/986/09	E/1787/10	E/985/09	E/1786/10	E/948/09
Party Name	Orange City Alloys Pvt. Ltd.	Orange City Alloys Pvt. Ltd.	Mr. Bharat B. Doshi, Director	Mr. Bharat B. Doshi, Director	Malkiatsingh Jagatsingh Saggi
SCN Date	9.1.2009	7.1.2010	9.1.2009	7.1.2010	7.1.2009
Period	16.12.2003 to 24.11.2008	25.11.2008 to 31.7.2009	16.12.2003 to 24.11.2008	25.11.2008 to 31.7.2009	16.12.2003 to 30.06.2005
Duty Demand	11,51,83,109	74,63,481	NIL	NIL	NIL
Penalty	Rs.11,51,83,109 under Section 11AC of CEA,1985 plus Rs.1,15,18,311 under Rule 25 of CER, 2002	Rs.74,63,481 under Section 11AC of CEA,1985 plus Rs.74,63,481 under Rule 25 of CER, 2002	Rs.95,69,105/- under Rule 26 of CER, 2002.	Rs.74,63,481 under Rule 26 of CER, 2002.	Rs.19,49,160/- under Rule 26 of CER, 2002.
OIO Date	1.6.2009	10.6.2010	1.6.2009	10.6.2010	01.06.2009

1.5. Feeling aggrieved with the impugned orders, the above named appellants have filed these appeals before the Tribunal.

2.1. Learned Advocate appearing for the appellant Nos. 1, 2 & 4 submitted that two continuous heats conducted by the department on 24.03.2006 showed fluctuation of 50 units and hence reliance cannot be placed on the letters dated 17.10.2005, 20.10.2005 and 24.10.2005 addressed by the appellants to M/s. Megatherm (the manufacturer of furnace) to conclude that the appellants were indulged into the clandestine activity of production and clearance of the excisable goods. He further submitted that several factors are involved to ascertain the actual consumption of electricity for manufacture of the resultant final product, which were not considered or analysed by the original authority.

2.2. Learned Advocate further submitted that placing reliance on the technical opinion report of Dr. N. K. Batra, IIT-Kanpur is incorrect inasmuch as such report was furnished by him in his individual capacity, the fact of which had also been acknowledged by the authorities in the said institution. He also submitted that Dr. N.K. Batra had not been cross-examined by the

department in presence of the appellants and thus, such report cannot be relied upon for a conclusion that excess goods were clandestinely manufactured and removed by the appellant, without payment of Central Excise duty. Similarly, with regard to the article published by Shri R.P. Varshney, Learned Advocate submitted that the author vide his letter dated 25.04.2008 had confirmed that the report was prepared in the year 1989-90 for Concast steel making, since the process of steel making through Induction Furnaces was in the initial stages and that for the said reason, the author of the article had confirmed that the opinion furnished was required to be updated and corrected. On the contrary, the learned Advocate has referred to the report prepared by M/s. National Institute of Secondary Steel Technology for the period June-July 2006 wherein, it has been stated that electricity consumption per MT of steel ingot would ideally be ranging between 1427 KWH of power to produce 1 MT of Pencil Ingots.

2.3. With regard to the allegation that the appellants had procured bogus purchase invoices and cleared excisable ingots in the garb of traded goods, Learned Advocate submitted that trading income relates to supply of angles, flats, channels, etc. He further submitted that receipt of the traded goods has actually been acknowledged by the buyer, for which the appellants had received the sale proceeds. Further, Learned Advocate submitted that the findings regarding excess burning loss in the impugned order are without any legal basis inasmuch as 10% burning loss is permissible as per the guidelines issued by the Ministry of Steel. Learned Advocate has also refuted the other charges levelled against the appellants in the SCNs as well as the impugned order.

2.4 Shri Malkiatsingh is the appellant No.3 in this bunch of appeals and appeared in person. He has adopted the stand taken by the other appellants. With regard to imposition of penalty, he submitted that the appellant was the Director of M/s Saggu Castings Pvt. Ltd. (now known as M/s Orange City Alloys Pvt. Ltd.) up to the period 30.06.2005 and thereafter, the control and management of the said company was transferred and taken over by new management. He further submitted that no documentary evidences were submitted by the department to substantiate allegation of clandestine removal, particularly up to the period 30.06.2005. Further, he submitted that the SCN issued by the department does not propose for confiscation of

any excisable goods and thus, penalty under Rule 26 *ibid* is not imposable on the appellant.

2.5 To support the above submissions, learned Advocate has relied upon the following judgments delivered by the judicial forums:

- (i) *R.A. Castings Pvt. Ltd. Vs. CCE – 2009 (237) ELT 674 (T)*
- (ii) *SRJ Peety Steel Pvt. Ltd. Vs. CCE – 2015 (327) ELT 737 (T)*
- (iii) *Balshri Metals Pvt. Ltd. Vs. UOI – 2017 (345) ELT 187 (Jhar.)*
- (iv) *CC C.Ex. Vs. Venus Alloy Pvt. Ltd. – 2016 (337) ELT 561 (T)*
- (v) *Andaman Timber Industries Vs. CCE – 2015 (324) ELT 641 (SC).*
- (vi) *CCE Vs. Shiv Prasad Mills Pvt. Ltd. – 2015 (329) ELT 250 (T)*
- (vii) *CCE Vs. J.J. Re-Rollers – 2017 (348) ELT 99 (T)*
- (viii) *Kamboj Ispat P. Ltd. & Shri Chatar Singh Vs. CCE – 2016 (1) TMI CESTAT Mumbai,*
- (ix) *Nabha Steels Ltd. Vs. CCE – 2016 (344) ELT 561 (T)*
- (x) *Mittal Pigment Pvt. Ltd. Vs. CCE – 2018 (360) ELT 157 (T)-Affirmed by Rajasthan High Court in – 2018 (360) ELT A40 (Raj.) and by Rajasthan High Court in – 2018 (16) GSTL 41 (Raj.)*
- (xi) *CCE Vs. Ramadevi Steels Pvt. Ltd. – 2017 (345) ELT 128 (T)*
- (xii) *CCE & ST Vs. Shridhar Castings Pvt. Ltd. – 2018 (6) TMI 476 – CESTAT Mumbai*
- (xiii) *Meenakshi Re-Rollers Pvt. Ltd., Shri Nikhil Bansal Vs. CCE – 2017 (5) TMI 601 – CESTAT MUMBAI*
- (xiv) *Bhawani Shankar Castings Ltd. Vs. CCE – 2009 (246) ELT 332 (T)*
- (xv) *Southern Ispat Ltd. Vs. CCE – 2009 (248) ELT 270 (T)*
- (xvi) *Saravana Alloys Steels Pvt.Ltd. Vs. CCE – 2011 (274) ELT 248 (T)*

3. On the other hand, the Learned AR appearing for Revenue reiterated the findings recorded in the impugned order. He further submitted that the duty computation aspect have been appropriately dealt with in the impugned orders passed by the Learned adjudicating authority and the same had been done on admitted electricity consumption of 925 Units per MT prior to 20.10.2005 and 860 Units per MT thereafter. The Learned AR has relied upon the following judgments to strengthen the stand of Revenue that there is no infirmity in the impugned order passed by the original authority:

- (i) *Triveni Rubber & Plastics v/s Collector of CEx., Cochin-1994(72)ELT 897(Tribunal)*
- (ii) *Triveni Rubber & Plastics v/s Collector of CEx. Cochin-1994(73)ELT 7(SC)*
- (iii) *Rattan Steel Works v/s CCE, Chennai-2009(236) ELT 152 (Tri-Chennai)*
- (iv) *Nagpal Steels Ltd. v/s Collector, of CEx, Chandigarh-2000(125)ELT 1147(Tribunal)*
- (v) *R.P. Nagpal v/s CCE, Chandigarh- 2002(147)ELT 243 (P&H)*

- (vi) *Melton India v/s Commissioner Trade Tax, UP- 2007-TIOL-14-SC-CT*
- (vii) *Super Tyres Pvt. Ltd. vs CCE, Panchkula- 2009(244)ELT 363 (Tri-Del.)*
- (viii) *Gulabchand Silk Mills Pvt. Ltd. v/s CCE, Hyderabad-11-2005(184)ELT 263 (TriBang.)*
- (ix) *Bajrang Petro Chemicals Pvt. Ltd. v/s CCE, Kanpur- 2015(317)ELT 243(AIL.)*

4. Heard both sides and examined the case records, including the written note of submissions filed by both sides.
5. The issue involved in these appeals primarily relates to demand of Central Excise Duty on the alleged suppressed production arrived at on the basis of electricity consumption in the appellant No.1’s factory.
6. The primary evidences relied upon by the department for initiation of the show proceedings and confirmation of the adjudged demands are indicated herein below:

S. No.	Evidence	Allegation
1	Letters dated 7.10.2005, 20.10.2005 and 24.10.2005 by the appellants to the manufacturer of furnace i.e., “Megatherm”.	The average power consumption for manufacturing steel ingots in the appellants’ factory was 900-925 Units/ MT up to 17.10.2005 and 860 Units/ MT beyond 17.10.2005.
2	Technical opinion report of IIT Kanpur,by Dr. N.K. Batra.	Energy requirement of Induction Furnace for manufacture of 1 MT of Steel ingots by melting scrap ranges between 555 to 754 KWH and the requirement in case of manufacture by melting sponge iron ranges between 815 to 1046 KWH.
3	Article by R.P. Varshney, Executive Director, All India Induction Furnace Association, New Delhi	The power consumption for manufacture of 1 MT tones of ingots for Induction Furnace, has been shown to range from 650 units to 820 units, depending upon the percentage mix of sponge iron and scrap.

7. Based on above evidences, the department had alleged that the electricity units consumed by the appellants ranges between 1314 Units/MT to 1663 Units MT, which is much higher than the electricity consumption mentioned in the aforementioned reports furnished by the expert in the field of metallurgy.
- 7.1 From the documents available in the case files, we find that on 24.3.2006, the department officers had conducted two continuous heats in the furnace installed in the factory of the appellant No.1 and observed that

the power consumption was 1008 Units/ MT and 1058 Units/MT. Such report of the department reflects that there was fluctuation of 50 units in the course of a single day in two consecutive heats. Therefore, it is evident that the fixed norm of 925 Units or 860 Units, as the case may be, adopted by the department did not find support from any authoritative journals and technical write-ups furnished by the expert in the field. Further, it is also evident from the records that above power consumption as reported by the department is matching with the figures reflected by the appellants in their records, meant for scrutiny by the statutory authorities. The law is well settled that consumption of electricity per heat depends upon several factors such as nature and character of scrap, efficiency of the labour, upkeep of furnace, the desired characteristics of the final material, power fluctuation, etc. Therefore, no uniform criteria could be applied to determine the quantity of final product produced on the basis of electricity consumption.

7.2 Further, it is also noticed that the power consumption in the appellant's factory ranges between 1314 Units to 1662 Units is a gross figure which is inclusive of the power consumed by the auxiliary equipment; whereas, power consumption of 925 Units or 860 Units considered for calculation of production was confined only to the power consumed in the furnace. Furthermore, out of the total consumption of electricity, 20% of consumption is meant for ancillary and allied activities relating thereto and on deducting such percentage used for other purpose, the net power consumed by the furnace works out to 1051 Units /1329 Units, which matches the power consumption (i.e., 1008 and 1058 Units) noticed on 24.3.2006 by the department. Therefore, there is no basis to hold that the appellants had resorted to alleged suppression of production and clearance of the final product without payment of excise duty.

7.3 The report of Dr. Batra relied upon by the Learned adjudicating authority in the impugned order has been furnished by him in his individual capacity, which cannot be relied upon in isolation without any supportive evidence that the report prepared by him is applicable for consideration of such parameters for all the manufacturers in the country. Moreover, IIT-Kanpur vide letter dated 1.11.2007 had informed that no technical opinion report of productivity of induction furnace by Dr. N.K. Batra is available on the record of IIT. Further, Dr. Batra could not be cross-examined, due to the fact that he is no more alive. Therefore, we are of the view that the

impugned orders, placing blind reliance on Dr. Batra's report, without further corroboration of facts and records, cannot be sustained for confirmation of the adjudged demands.

7.4 Insofar as the contents of the article written by R. P. Varshney, Executive Director, All India Induction Furnace Association, New Delhi in the year 1989-90 are concerned, Shri. Varshney himself vide his letter dated 18.3.2008 and 25.4.2008 had clarified that the contents of the articles written by him in the year 1989-90 is outdated and needs to be updated. Further, Shri R.P. Varshney also stated that his article prepared in 1989-90 was for Comcast Steel making and not for Induction Furnace and that power consumption for production of one tonne of steel could be 1000 unit to 1800 units per MT. From the contents of above letters, it transpires that Shri Varshney was not very much clear about the requirement of actual power consumption in the type of furnace installed in the appellants' factory. On the contrary, we find that National Institute of Secondary Steel Technology (NISST), Mandi, Gobindgarh (Punjab) in their report prepared in June-July 2006, have stated that electricity consumption per MT of steel ingot for an Induction Furnace has been shown as high as 1760 units. In the said report, it is suggested that average energy consumption in the industry could be about 1427 KWH of power to produce 1 MT of pencil ingots; however higher consumption of electricity is not ruled out by individual units. The report also says that on account of wide variations, no bench marking of electricity consumption can be done as such. Further, it is also noticed that the Joint Plant Committee constituted by Govt. of India have furnished a report in 2004 titled "Survey of Electric Furnace Industries in India", clarifying that the power consumption required to produce 1 MT of ingots from scrap is 1800 units/ MT and the same can go beyond 2000 units/ MT.

7.4 The above evidences prove that there is wide variation in the consumption of electricity for the manufacture of one MT of steel ingots. There is no prescribed fixed ratio between the power consumption and the production of ingots. Therefore, the adoption of consumption norm of electricity by the department at the range of 925 Units/ 860 Units for calculating the so-called unaccounted production, in our considered view is not tenable.

8. Apart from relying upon the above primary evidences, the department had also relied upon the following corroborative evidences to allege that the appellants have cleared the ingots clandestinely, without payment of Central Excise duty:

(i). Income shown from trading activity:

(a). From the scrutiny of the lorry receipts mentioned in the sale and purchase invoices relating to the trading activity of the appellants' Bhilai Branch, it revealed that out of 40 trucks, 4 trucks were not registered with RTA.

(b). As per the details of the truck owners received from the RTA, statement of 10 truck owners were recorded. Out of this, 2 were found to be tipper which are not capable of transportation of items traded and balance 8 truck owners stated that they have not undertaken transportation of MS Angles, channels and plates from the Bhilai branch to the buyers' premises.

(c) The circular trading transactions between two groups i.e. Doshi Group and Rathi Group were carried out to appropriate the income earned from the clearance of alleged suppressed ingots against trading income.

(ii). Other income shown as hire charges : Even though the appellants have shown income from hire charges, however neither of the assets viz. crane, truck, lorry, loaders, etc. were owned by the Company and shown in the balance sheet. As per the department, the said income was apparently declared to accommodate the income out of sale proceeds of clandestinely removed Ingots.

(iii). Burning Loss: The appellants have shown very high burning loss between 8% - 11% to accommodate the alleged unaccounted production of ingots.

(iv). Documents resumed from M/s. ABC Weighbridge:

(a) Some entries in the register resumed from ABC Weighbridge refer to "Hardik", "Saggu" and "Orange". As per the department, such entries relate to the appellants.

(b) Reliance is placed on Statement dated 20.8.2008 of Mr. Bharat Doshi, Director of the appellants, Statement dated 27.10.2005 of Mr. Sahil Sewakram Meshram, authorised person of M/s. ABC Weighbridge, Statement dated 7.11.2005 of Mr. Rajesh Rangrao, owner of Prakash Transporter & Statement dated 8.8.2006 of Mr. Gurmeet Singh, Transporter.

(c) On comparison of such entries with statutory records of the appellants, some entries were found reflected in both

sets of records and some entries in weighment records were not found in the appellants' books.

8.1 We find that the department in this case has linked the trading income with the clearance of alleged suppressed ingots by the appellants. For the said purpose, the adjudicating authority has relied upon the statement of the transporters to hold that the appellants had procured bogus purchase invoices and cleared excisable ingots in the garb of traded goods. In this context, the appellants have contended that the trading income relates to supply of angles, flats, channels, etc. and such trading activities were undertaken at the appellant's Bhilai Unit and not from the appellants' factory. On examination of case records, we also find that the transporters in their statements also stated that they had not transported MS angles, channels, flats etc., from the appellants Bhilai Unit to their buyers. Further, it is not the case of Revenue that the sale proceeds of the traded goods were not received by the appellants from their buyers. Therefore, we are of the view that there is no basis to allege that the amount generated in the above manner had any nexus with the sale of ingots by the appellants. We also find that the appellants had sought cross examination of the transporters to test the veracity of the statements, but such opportunity was denied. Thus, there is gross violation of the principles of natural justice and as such, no negative inference can be drawn from the transporters statement relied upon by the adjudicating authority. In this context, the Hon'ble Supreme Court in the case of **Andaman Timber Industries Vs. CCE – 2015 (324) ELT 641 (S.C.)**, has held that if the testimony of witnesses is discredited, then there is no material available with the department on the basis of which it could justify its action, as the statement of the witnesses is the only basis of issuing the show cause notice.

8.2 The impugned order in this case has held that the trading transactions between two groups i.e. Doshi Group and Rathi Group were carried out to accommodate the income earned out of sale of clandestinely removed MS Ingots. In response, the appellants submitted that Central Excise authorities have no power in law to determine the legality or otherwise of the financial transactions of the appellants and to disregard the profits earned from trading activity, which have been duly verified, accepted and assessed by the income-tax authorities. We are in complete agreement with such contentions of the appellants inasmuch as, there are no statutory

requirements under the Central Excise law to maintain records with regard to the income generated from other sources, concerning trading of goods etc. Since the Income Tax assessment, as asserted by the appellants was completed by the Income Tax authorities, without raising any further demands, the veracity of the transactions made under a different statute cannot be questioned by the Indirect Tax authorities. It is an undisputed fact on record that the authorities, authorised and empowered under the Central Excise statute to look after the affairs of the present appellants, have never verified the aspects of generation of profit on sale of trading goods or otherwise from their counterparts posted in the Income Tax department. Thus, in the absence of proper substantiation of the case by Revenue, we have no hesitation to note that in absence of any plausible evidence to the contrary, there is no other option left with us, but to accept the contentions of the appellants that Revenue had not booked the case in the manner as contemplated in the statute read with the authoritative judicial pronouncements. Therefore, the action on the part of Revenue in disbelieving and disregarding generation of profits from trading transactions and to assume the same to be sale proceeds of ingots clandestinely manufactured and cleared by the appellants, is completely without any basis or jurisdiction. It is a settled principle of law 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.

8.3 The burning loss in this case was less than 10%, except for the year 2005-06, when the same was 11.1% and marginally in the higher side. It is a standard practice in the trade of manufacture of iron and steel that 10% burning loss is usually permissible, owing to the reason of various factors. Considering such practicality, the guidelines issued by the Ministry of Steel has also acknowledged such fact. Therefore, the issue of burning loss cannot be the standalone basis to allege suppression of production.

8.4. Further, the department has concluded that the income shown under the heading 'other income' is not genuine and the same represents the income derived from clandestine clearance of ingots. Under the Income Tax law, it is not necessary that only the income from the assets owned by the company should alone be considered as income in the books of accounts. Rather, income from the assets owned by the Directors also can form part of the income of the company in different circumstances. Therefore, the findings in the impugned order that the particulars of the capital assets namely, cranes, loaders, lorries etc., being not reflected in the balance sheet, the appellants cannot earn income out of such assets is legally not tenable and on that ground alone, the impugned order is liable to be set aside.

8.5. With regard to the submissions made by the appellants that the charges levelled against them, concerning clandestine manufacture and removal of Ingots from the factory premises, we are of the concrete opinion that such charges cannot be sustained, on the basis of statement recorded from the weighbridge owner. Such statements have not been corroborated with any tangible evidence. We find that the appellants had furnished adequate records to prove their genuineness in the transactions, but the original authority has completely brushed aside such submissions. On the contrary, we find that no iota of evidence to such effect was relied upon by the Revenue to substantiate such charge. We find from the available records that the allegation of clandestine removal of ingots cannot be made against the appellants on the basis of some entries figuring in the ABC weighbridge records. In this context, we have perused the replies filed by the appellants before the adjudicating wing, by convincing that there is no discrepancy in the records maintained by the appellant regarding receipt of raw materials and sale of finished product. It is a settled law that the third party's records cannot form the basis of clandestine removal, unless corroborated by independent evidence, which is lacking in these cases. Thus, records recovered from ABC Weighbridge by the department to allege suppressed production and clearance of ingots by the appellants without payment of excise duty, is not sustainable under the law.

9. The law is well settled that to prove clandestine removal, the department has to produce evidence of purchase of additional raw material, sale of clandestinely removed goods, mode of payment, flow back of the fund,

transport report for movement of raw material and finished products etc. However, no discrepancy, whatsoever, has been found in the records of the present appellants relating to raw materials, finished goods, production, clearances, opening and closing stock, work in progress etc. Therefore, the charges levelled against the appellants that the finished goods were clandestinely manufactured and removed by the appellants are without any basis and the impugned orders passed in confirming the adjudged demands are liable to be set aside.

9.1 The issue identical to the present case arose in the case of **R.A. Castings Pvt. Ltd. Vs. CCE – 2009 (237) ELT 674 (Tri.)**, wherein the allegation of clandestine removal of ingots was charged on the basis that (i) the assessee was showing less production in comparison to electricity consumption norms prescribed by IIT report of Dr. Batra; & (ii) the assessee had shown huge profit through 'share trading' & 'sales commission' and that the same represent income earned from clandestine clearance of ingots. In this case, the Tribunal rejected the contention of Revenue by holding that allegation of suppression of production and clearance relying on technical opinion and reports on electricity consumption are arbitrary and thus, demand based on theoretical calculations is not sustainable; that high consumption of electricity by itself not a ground to infer suppression of production; that electricity consumption cannot be the only factor for determination of liability, especially when evidences not produced with respect to receipt and non-accountal of raw materials, manufacture along with overheads, transportation and payments and receipts for alleged suppression of production. The relevant paragraphs in the said order are extracted hereunder:

“22. The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to:

- (i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;*
- (ii) Utilization of such raw material for clandestine manufacture of finished goods;*
- (iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;*
- (iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records,*

transporters' documents, such as LR's, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;

(v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.

.....

27. Since the incriminating statements of the share brokers etc. have been relied upon in the proceedings, it was incumbent upon the Revenue to produce them as well as the investigating officer for cross-examination by the appellants, as was repeatedly requested by them. In the absence of the same, the statements of the share brokers etc. cannot be relied upon. Even if, for the sake of argument, it is accepted that the income shown in the balance sheets is not the income derived from the sources declared by the appellants, there is nothing on record to link it with the so called clandestine removal of the goods and that cannot be made the basis to establish a case of clandestine removal. In any case, the Commissioner has not determined the duty liability on the basis of the profit shown in the balance sheets. He has used this only as corroboration and not the primary basis for determining the quantum of production of steel ingots. Once the main evidence itself is found to be unreliable, such figures of profits etc. in the balance sheets cannot form a basis for rejecting the quantum of production appearing in the records of the appellants.

9.2 The aforesaid decision of the Tribunal in the case of R.A. Casting Pvt. Ltd. is affirmed by the Hon'ble High Court reported at **CCE Vs. R.A. Castings Pvt. Ltd. – 2011 (269) ELT 337 (All.)** and further maintained by the Hon'ble Supreme Court reported at **2011 (269) ELT A108 (SC)**.

9.3 Further, in the case of **SRJ Peety Steel Pvt. Ltd. Vs. CCE – 2015 (327) ELT 737 (Tri.)**, the issue pertained to clandestine manufacture and clearance of ingots without payment of excise duty by the assessee. The entire case was based mainly on the allegation that the assessee was showing more electricity consumption for production per MT of MS ingots as compare to the electricity consumption mentioned in the study conducted by Dr. N.K. Batra, Professor of IIT, Kanpur. In this case, there was difference of opinion between the Members in the Bench. On reference, the third member after relying the case of R.A. Castings Pvt. Ltd. (supra) had rejected the contention of the Revenue and held that allegation of clandestine removal has to be established by Revenue by adducing positive evidence and cannot be merely on hypothesis; that charge of clandestine removal cannot be merely on presumption and assumptions and to be established on basis of preponderance of probabilities. The portion of the order, relevant for the present dispute is extracted hereunder:

“79. No incriminating statement recorded in the instant case has been brought to my notice by the department. In the matter of SRJ Peety, on being asked to clarify on higher consumption of electricity than in Dr. Batra's report, in his statement dated 3-5-2008, Shri S.S. Peety gave many reasons such as unscheduled shut downs in supply of electricity and furnace, unskilled labour, furnace efficiency, model of furnace, units required in burning loss of inputs, power

voltage fluctuation, inferior quality of scrap, tripping of electricity supply, power transmission losses, decrease in efficiency of plant and machinery and consumption of roughly 20% power in Auxiliary Load. He has not accepted the allegation of clandestine removal in his statement.....

90.8 In the present appeals, none of the so called other evidences referred in the impugned Orders prove clandestine clearance. The primary evidence of department is admittedly excess electricity consumption based on benchmark adopted allegedly from report of Dr. Batra, which was already held to be arbitrary by Hon'ble Tribunal in R.A. Castings (supra). Thus, in my opinion the primary evidence relied in the impugned order is itself inadmissible, and no other evidence in the instant case proves clandestine production and clearance to sustain the demand. It is contended by Revenue that furnaces installed in the factory of present appellants were in sound condition as compared to R.A. Castings (supra), however I neither could find any material in support of this argument, nor any such finding in the Orders impugned in the appeals. The Revenue sought to rely on an order passed by Tribunal in Gulabchand Silk Mills Pvt. Ltd. v. CCE, Hyderabad-II, 2005 (184) E.L.T. 263, however the same was also considered in R.A. Castings (supra). It has been contention of the department that the Department is not required to prove its case to its mathematical precision, by relying on judgment of the Hon'ble Supreme Court in the case of D. Bhoomull - 1983 (13) E.L.T. 1546 (S.C.) relied upon by the Commissioner as well as the Hon'ble Member (Technical). It is seen that even this judgment was considered in R.A. Castings (supra).....

91. There can be no dispute on the fact that in adjudication proceedings, the charge of clandestine removal is definitely to be established on the basis of preponderance of probabilities. However, it cannot be merely on the basis of presumptions and assumptions. Regarding the claim of the Revenue that subsequent to passing of impugned orders the power consumption for manufacturing one MT of Ingots has reduced in factories of all the appellants, I am of the view that it cannot be a basis to sustain the findings in the impugned orders by assuming that there could not be any reason for lower consumption of electricity during the subsequent period. I also agree with the finding of the Hon'ble Vice-President that in any event, this additional material is also only of power consumption."

9.4 Similarly, in the case of **J.J. Re-Rollers** (supra), Revenue had alleged suppression of production and clandestine clearance without payment of duty mainly on the following basis - (a) the unusual deviation of electricity consumption figures for different months; (b) huge amount shown in the Balance Sheet on account of trading activity of grey cloths without any proper supporting bills; and (c) the un-explained source of funds shown in the business in the name of a close relative of the active partner of the respondent-firm. In this case, the Tribunal had rejected the appeal of Revenue, by holding that charge of clandestine removal based on abnormal electricity consumption and sale proceeds of alleged bogus trading transaction is not sustainable in the absence of any evidence of procurement of extra raw materials, deployment of additional labour, unaccounted

transportation and buyers of goods. The relevant paragraphs in the said order are extracted hereunder:

“5. On the first issue, we note that the products being manufactured by the respondent are shown as window sections, angles, flats, CTD bars, etc. There is no details about the proportion of manufacture of these items or the nature of standard machinery used in the manufacture. It is also not known what will be the normal consumption per machine for a given period of time when in continuous normal operation. We have only electricity consumption for few months in 2008-2009 and certain calculation based on purported average electricity used for production of 1 M.T. of final product. We are also not very clear as to how 91 units are considered as standard for calculation as nothing is recorded regarding the nature of machinery and the consumption capacity of said machinery. We find that the calculation made is completely presumptive.

6. Further, we find that the trading income of the respondent was sought to be linked to the sale on clandestine clearance of the manufactured goods. We find that for such assertion to be established, first of all, that the trading income should be proved to be not on account of trading and secondly, it should be proved that such income is actually from the sale of clandestinely manufactured and cleared excisable goods. While precise evidence to tally the income may not be possible, at least demonstratively it should be shown that the income is out of sale of unaccounted excisable goods. On this account, we find no sustainable evidence has been brought out by the Revenue in the proceedings against the respondent. Further, we note that all the incomes have been taken out of recorded balance sheet and the attempt by the Revenue to interfere the linkage between the clandestine clearance of the excisable goods to that income has not been materially supported by any evidence. We also note that the main respondent had actually suffered losses of more than Rs. 1 crore/each during the year 2004-05 and 2005-06 as per the books of accounts. We are in agreement with the Original Authority and hold that in the absence of any tangible evidence, the financial transaction as per the Balance Sheet and other financial dealings cannot be questioned without any substantial evidence to make a demand of Central Excise duty based on the inference and presumption. The same is not legally sustainable. Even for argument, it is accepted that the some of their trading activities are bogus, it is necessary to show that in such transaction, the real product involved is clandestinely manufactured excisable goods.

7. In the present case, we note that there is no evidence relating to procurement of extra unaccounted raw materials/inputs, deployment of additional labour, unaccounted transportation/sale, identity of any of the buyers of such goods, etc. Even where certain verifications were made regarding trading activities, no substantial evidence could be attributed to allege that the tradings undertaken by the respondent-firm are all bogus. We have already noticed in the absence of any tangible evidence, allegation of clandestine manufacture/clearance of excisable goods cannot be sustained. Even if the transactions on trading were to be found as bogus, the same by itself will not support the confirmation of duty demand as linkage to the clandestine manufacture and the income on bogus trading should be brought out by the evidence. We have perused the impugned order and the grounds of appeal carefully. We find nothing in the present grounds of appeal to persuade as to interfere with the impugned order. Accordingly, the appeals filed by the Revenue are dismissed.”

9.5 Further, in the case of **Kamboj Ispat P. Ltd. & Shri Chatar Singh Vs. CCE – 2016 (1) TMI CESTAT Mumbai**, the case of the revenue was

that the assessee had not recorded the production in their factory premises and clandestinely removed the goods. To come to such conclusion, the Revenue relied upon the electricity consumption and the statements of various transporters. The Tribunal had allowed the appeal of the assessee by holding that there is no evidence which indicated that assessee had procured raw materials which were unaccounted. The allegations of clandestine removal of manufactured goods is very serious allegation and needs to be substantiated by Revenue authorities with tenable evidence to show that there was large scale manufacturing of commodities.

9.6 We find that similar views were also expressed by different judicial forums in the cases, relied upon by the appellants. It has consistently been held that high consumption of electricity by itself not a ground to infer suppression of production. The onus is on the department to prove allegation of clandestine removal with positive and concrete evidence.

10. The ratio of the decisions cited by the learned AR for Revenue is distinguishable from the facts of the present case, inasmuch as there were existence of direct and circumstantial evidences in support of clandestine manufacture and removal of the finished goods in those decided cases; whereas, in the cases in hand, the department had only relied upon the articles published in journals, report of some agencies, third party records etc., to conclude that the disputed goods were manufactured and cleared in the clandestine manner. Further, we also find that the decisions relied upon by Revenue were considered in the case laws referred to and relied upon by the Learned Advocate for the appellants, wherein it has been consistently held that demand of excise duty cannot be confirmed on the basis of electricity consumption and statement of various transporters. It has further been held that allegation of clandestine removal of manufactured goods is a very serious allegation and needs to be proved by Revenue with tangible evidence and not merely on the basis of consumption of electricity in the factory.

11. In view of the foregoing discussions and analysis, we are of the considered opinion that the charges levelled against the appellants for clandestine manufacture and removal of final products, without payment of duty are not substantiated with cogent and reliable evidence. We find that a

case of this magnitude needs to be corroborated by establishing other facts such as purchase of raw material, deployment of labour, additional consumption of electricity, manufacture of final products, removal and transportation of the same to customers premises and payments received for the same. We find that in the instant case, no other criteria has been investigated and established. The whole case is sought to be made by surmises and conjectures. Therefore, we are of the considered opinion that the allegations of clandestine removal against the appellants do not stand judicial scrutiny. Consequently, levy of duty and imposition of penalties on the appellants are not also substantiated. In the result, the impugned orders are liable to be set aside and we do so.

12. Accordingly, the impugned orders are set aside and the appeals are allowed with consequential relief, if any, as per law.

(pronounced in the open court on 06.04.2022)

(S.K.Mohanty)
Member(Judicial)

(P. Anjani Kumar)
Member (Technical)