CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 1654 OF 2010

[Arising out of Order-in-Original No: 06/CEX/2010 dated 29th July 2010 passed by the Commissioner of Central Excise & Customs, Nashik.]

Jai Bharat Steel Rolling Mills
Plot No. A-16 MIDC Area, Ambad, Nashik - 422010 … ***Appellant***

versus

Commissioner of Central Excise & Customs
Kendriya Rajasva Bhavan, Ram Ganesh Gadkari Chowk
Old Agra Road, Nashik – 422 002 ***…Respondent***

APPEARANCE:

Shri Ashok Kumar Singh, Advocate for the appellant

Shri Amrendra Kumar Jha, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85305 /2023

DATE OF HEARING: 30/08/2022
DATE OF DECISION: 28/02/2023

PER: C J MATHEW

This appeal of M/s Jai Bharat Steel Rolling Mills lies against order[1] for recovery of ₹1,51,13,883/- under section 11A of Central Excise Act, 1944 as undischarged duty liability on unrecorded production alleged to have been clandestinely cleared between March 2005 and December 2005, liability of ₹78,99,000 owing to the actual clearance between 2005-06 and 2008-09 disentitling them to concessional rate afforded to 'small scale industry (SSI)' units by notification[2] and demand of ₹23,645 on shortages ascertained by physical inspection, along with interest thereon under section 11AB of Central Excise Act, 1944, besides imposition of penalty of like amount under section 11AC of Central Excise Act, 1944. Having determined capability, from supervised operation of facility on 14th December 2008 yielding 1570 metric tons of '6 mm round bars' by consuming 128 kwh of energy during a two hour window, of manufacturing 12.27 kg per kwh it was alleged that duty liability had been evaded on 4458.8 metric tons of 'round bars' valued at ₹11,13,35,828 that went unrecorded despite billings for energy consumption.

2. The alleged evasion *supra* was sought to be reinforced with circumstantial evidence of the cost of production ascertained from the final accounts to be higher than the value declared in the periodical returns rendering daily production report and the monthly, and quarterly, returns to be fabricated. It was also held by the adjudicating

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[1] Order-in-original no. 06-CEX-2010 dated 29th July 2010
[2] No. 8/2003-CE dated 1st March 2003

authority that the statements from the partner of the appellant-assessee confirmed the alleged evasion of duty.

3. Assailing the refutation of their submission before the adjudicating authority that the allegations were made in the absence of any evidence of procurement of inputs, unrecorded manufacture or of clandestine removal that could then rely upon 'preponderance of probability', espoused by the Hon'ble Supreme Court in *Bhanabhai Khalpabhai v. Collector of Customs* [*1994 (71) ELT 3 (SC)]* and the Tribunal in *Gulabchand Silk Mills Pvt. Ltd. v. CCE, Hyderabad-I [2005 (184) ELT 263 (Tri-Bang)],* the impugned order by holding that

> *'4.6. JBSRM argued that there is no cogent & convincing evidence produced by the department to support/ corroborate that there was actually excess production and clandestine removal. This plea is factually incorrect; the evidences/points made in sub-paras 4.3, 4.4 & 4.5 above provide good and sufficient corroboration of the allegation. After all, clandestine manufacture/removal of goods is an activity which is done surreptitiously; secrecy and stealth are its covering guards. In such cases, direct evidence proving everything beyond doubt will be rarely forthcoming. It is not feasible to unfold the every chain of the link, when the activity is kept concealed / secret. In such case, "pre-ponderance of probability" mechanism would come into play.*

is, according to Learned Counsel, leap of presumption warranted only for filling gaps in evidence and not substitute for evidence itself. According to him, the test production undertaken under supervision of officers does not reflect the reality of manufacturing and endorsement of sufficiency of that, as evidence of clandestine removal in the impugned order without any attempt at ascertainment of some facts on procurement of inputs or illegal removals that must, inevitably, leave a paper trail, is travesty of the filler permitted by the cited decisions.

4. He was critical of extrapolation of the mathematical equation derived from deployment of one among the many variables of production in the supervised manufacture within limited window over the five year period of dispute and which failed to take into account usual impediments, such as breakdown and disruption in electricity supply, as well as several other factors influencing operational capacity. It was pointed out that

> *'4.3. The allegation of unaccounted production of excisable goods and its clandestine removal is primarily based on two major grounds / evidences namely excess consumption of electricity and the manufacturing cost of the product as per the records of JBSRM. Electricity consumption is, like the scrap, one major input/ingredient in the manufacture of M.S. Rounds/Bars and in that sense, it is one of the major parameters to quantify the production when properly worked out. To ascertain/ arrive at the actual production, a test on experimental basis with reference to electricity consumption was conducted in the factory of JBSRM on 14.12.2008 and the result / findings were recorded under panchanama. As per result, 1570 Kgs. of 6 mm M.S.Round Bars were produced on consumption of 128 KWH of electricity within a span of four hours, resulted into the facts of production of 12.27 Kgs.of M. S. Bars on consumption of 1 KWH of electrical power. On this basis, the quantum of actual production was determined over a given period. It is true that there are so many variables, including the factors such as manual feeding of heated material taken out of furnace for rolling, hardness of the re-rollable scrap,*

> *frequent break-downs which creates mis-rolls generation etc., which influences the actual production, but all these parameters were taken into account, while ascertaining the actual production. Thus, there may be some valid points in some of the above defences made by JBSRM, but those are at best covered within the derived limit of electricity consumption, ascertained during panchanama, and so, it is but reasonable to hold that the maximum consumption of electricity per 12.27 Kgs. of production of M.S. Bars is 1 KWH; I hold accordingly. This finds support in the* ***Apex Court judgment in the case of Triveni Rubber and Plastics Vs. CCE [1994 (73) ELT 7 (S.C.)].*** *Though the then existing Rule 173E of CER,1944 referred to in the said judgment no longer exists now, the principle laid down therein is very much relevant as electricity consumption, being a major input, can be used to work out the actual production, whether specific legal provisions exists or not."'*

in the impugned order, has, without any elaboration, decreed that all factors have been built into the multiplicand in the computation.

5. The onus placed on the assessee, contrary to every known canon of taxation, to justify deviation from the derived norm was further assailed by him for drawing support from peripheral inferences which have ignored the reality of the market place; the loss allegedly incurred, as deduced from the books of accounts, did not factor in favorable market of a time and rising prices which conservativeness in accounting precluded from adopting in the valuation of unsold goods.

6. According to Learned Authorized Representative, the findings of the original authority are elaborate and has brought out culpability on the part of the assessee in suppressing production for illicit clearance. He

contended that there could be no better sustenance for the alleged evasion than from the statement recorded by officers on the day of visit.

7. The issue of clandestine clearances allegedly prevalent in the steel sector had been in controversy for long and, as pointed by the Learned Counsel, the Tribunal, in several decisions, has held that the deriving of presumed production with reference to electricity consumption is not sufficient for recovery by recourse to section 11A of Central Excise Act, 1944. From the decision of the Tribunal in *RA Casting Pvt Ltd v. Commissioner of Central Excise, Meerut – I [2009 (237) ELT 674 (Tri-Del)]* holding that

> *'23. The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside and the Revenue had been directed to carry out experiments in different factories on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. The impugned demand based merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.*
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> *24. The law is well settled that in every case of alleged*

clandestine removal, the onus is on the Revenue to prove what it alleges with positive and concrete evidence. In the absence of any positive evidence brought by the Revenue to discharge its onus, the impugned order cannot be sustained.

25. The law does not entitle the Revenue to disregard all the statutory excise records as well as audited financial accounts and records of the assessee-company, which have been duly verified and accepted by the competent authorities from time to time not only for central excise but also for purposes of income-tax etc. The Gujarat High Court in Arabian Express Line Ltd. v. Union of India (1995) ITR 31 has held that "the income-tax officer does not have any authority or jurisdiction to levy tax on the petitioner-company. Further, the ITO was not having jurisdiction to decide whether or not the petitioner which is incorporated in United Kingdom is a genuine company. It seems that he has forgotten the fact that he is not having the jurisdiction to assess the petitioner-company in view of the covenant under Section 90 of the Income-tax Act between the Government of India and Government of United Kingdom. In any set of circumstances, the fact whether or not the petitioner-company which is incorporated in the United Kingdom which is a genuine company is not required to be investigated by the income-tax officer under the Indian Income-tax Act, that too by ignoring the necessary certificates produced by the petitioner-company." Applying the ratio of this decision, the Central Excise authorities have no jurisdiction to examine or determine whether the share transactions of the assessee-company are genuine or not and whether the income from share trading duly verified, accepted, and assessed to the income-tax authorities could be disregarded by them to treat the same as proceeds of ingots alleged to have been clandestinely produced and sold by the appellants. The entire action of the Revenue in this regard is *without jurisdiction.'*

it is clear that the law does not permit detriment of duty liability, and other consequences, solely on the ground that energy consumption is not reflective of actual production. This view found favour with the Hon'ble High Court of Allahabad in *Commissioner of Central Excise, Meerut – I v. R A Castings Pvt Ltd [2011 (269) ELT 337 (All.)]*.

8. The lack of legal sanction for determination of clandestine removal merely from unexplained energy consumption is now too well settled to be disturbed. As no evidence, other than the outcome of the test of 2008 and that too for two hours, been employed for determination of production for a five year period commencing in 2004, the conclusion of goods having been clandestinely produced and cleared is clearly unacceptable. As it is by addition of allegedly clandestinely removed production that exemption extended to 'small scale industry (SSI)' has been denied, recovery of ₹ 78,99,000/- is also without legal sanction.

9. As far as determination of duty liability on shortage of stock is concerned, reliance placed by Learned Counsel on the decision of the Tribunal in *Chandpur Enterprises Ltd v. Commissioner of Central Excise Service Tax, Meerut-I [2014 (310) ELT 904 (Tri.Del.)]* and in *Vehalana Steel & Alloys Pvt Ltd v. Commissioner of Central Excise, Meerut- I [2015 (329) ELT 947 (Tri.Del.)]* holding that estimate of shortages does not suffice for recovery of duties clearly comes to

their assistance. It is seen from the records of the present dispute that the alleged shortages are outcome of estimate without proper weighment. Accordingly, demand of ₹23,645/- on shortage of 7.546 metric tons valued at ₹2,29,557 also fails.

10. For these reasons, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 28/02/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*