# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

## Excise Appeal No. 795 of 2009

(Arising out of Order-in-Original No. 01/2009/C dated 31.03.2009 passed by the Commissioner of Central Excise & Customs, Nagpur.)

**M/s Trimurti Ispat Ltd.** **.... Appellant**
B-26/1, MIDC Industrial Area,
Kamleshwar, Nagpur

Versus

**Commissioner of Central Excise & Customs, Nagpur** **.... Respondent**
Telangkhedi Road, Civil Lines, Post Box No. 81,
Nagpur – 440 001, Maharashtra

**WITH**

## Excise Appeal No. 1086 of 2010

(Arising out of Order-in-Original No. 10-26/2010/C dated 26.02.2010 passed by the Commissioner of Central Excise & Customs, Nagpur.)

**M/s Trimurti Ispat Ltd.** **.... Appellant**
B-26/1, MIDC Industrial Area,
Kamleshwar, Nagpur

Versus

**Commissioner of Central Excise & Customs, Nagpur** **.... Respondent**
Telangkhedi Road, Civil Lines, Post Box No. 81,
Nagpur – 440 001, Maharashtra

Appearance:

Shri Rajesh Ostwal, Advocate for the Appellant
Shri Deepak Bhilegaonkar, Authorized Representative for the Respondent

**AND**

## Excise Appeal No. 86049 of 2013

(Arising out of Order-in-Appeal No. PVR/17-18/NGP/2013 dated 17.01.2013 passed by the Commissioner of Central Excise & Customs, Nagpur.)

**M/s Trimurti Ispat Ltd.** **.... Appellant**
B-26/1, MIDC Industrial Area,
Kamleshwar, Nagpur

Versus

**Commissioner of Central Excise & Customs, Nagpur** **.... Respondent**
Telangkhedi Road, Civil Lines, Post Box No. 81,
Nagpur – 440 001, Maharashtra

Appearance:

None for the Appellant
Shri Deepak Bhilegaonkar, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**
**HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

**FINAL ORDER NO. A/85720-85722/2023**

Date of Hearing: 23.03.2023
Date of Decision: 23.03.2023

***Per: Dr. Suvendu Kumar Pati***

In all these three appeals, legality of confirmation of demand along with interest and penalty by the Commissioner of Central Excise & Customs, Nagpur vide orders dated 31.03.2009, 26.02.2010 and 17.01.2013 against the appellant company and penalty against its Director on the ground of clandestine removal of goods manufactured by it, calculated on the basis of electricity consumption and other ancillary evidence within the period from 2003 to 2007, 2007 to 2009 and Sept. 2009 to July, 2010 is assailed in these appeals.

2. Fact of the case, in a nut shell, is that the appellant company is a manufacturer of Iron and Steel Ingots, Alloy Ingots and Sponge Iron having its factory at Kamleshwar, Nagpur. It has also got kiln and connected machinery to manufacture sponge iron from iron ore that has been captively consumed for manufacture of final products like Steel Ingots and Alloy Ingots. Respondent Department conducted investigation in the appellant's factory and noticed minor shortages in stock of finish goods ascertained

through eye estimation but noticed no shortage of input procured by it. Then it conducted heat test to find out electric consumption on two different dates i.e. 08.12.2005 twice and on 12.12.2005 once. They noticed electric consumption of 1434.62 units per MT. of ingots in one test, 1359.90 units in subsequent test conducted on the same date and 1239 units per MT on the order day. Then they took average consumption of the electricity in the appellant's factory vis-à-vis total production of ingots and found the same to be at a lesser side, thereby established that the ingots production should have been approximately 16093.43 MT. in excess to the figures shown by the appellant. Further investigation conducted by them include recording the statements of witnesses and assessment of production of runners and risers, weighbridge income, commission income, writing off creditors etc. and ultimately arrived at a conclusion that the appellant had clandestinely removed 16093.43 MTs without payment of duty and suppressed the said production from the respondent Department. Accordingly the appellant was put to show cause, suffered adjudication and vide two Orders-in-Original referred above, duty demands of Rs.3,96,21,849/-; Rs.1,01,89,228/- and Rs.9,30,891/- were confirmed along with interest and equal penalty against each demand on the appellant company under Section 11 of the Central Excise Act, 1944 and penalty of Rs.40 lakhs and Rs.10 lakhs respectively under Rule 26 of Central Excise Rules, 2002 was confirmed against the other appellant Lalchand Fakirchand Garg, Director of the company. Legality of these three orders has been assailed before this forum. In the meantime, since the Director is stated to have died during pendency of these appeals for which his appeals are already abated and, therefore, we confine the discussions to the appeals filed by the appellant company.

3. During the course of arguments, learned Counsel for the appellant Shri Rajesh Ostwal argued that electricity consumption varies substantially and it is dependent on number of factors, which is apparent from the three tests conducted by the respondent Department with a variation of more than 200 units PMT, besides the fact that appellant company had only one electricity meter in which loads of auxiliary equipments including compressors, welding transformers, weighbridge, bundling machine etc. along with light, fans, air-conditioners, fridge etc. used in the office are noticeable. He has annexed a calculation sheet in the written note of submission itself wherein by taking electricity consumption on running auxiliary plants @ 25% of the total consumption, he arrived at the average figure of 1407.74 units of electricity consumption PMT production of ingots. In placing reliance on the series of decisions reported in *R. A. Casting Pvt. Ltd. Vs. CCE - 2009 (237) ELT 674 (T); SRJ Peety Steel Pvt. Ltd. Vs. CCE - 2015 (327) ELT 737 (T); Balshri Metals Pvt. Ltd. Vs. UOI - 2017 (345) ELT 187 (Jhar.)* and many others including the one authored by one of us in the case of *Shri Mithunlal Gupta, Bhavshakti Steel Mines Pvt. Ltd Vs. CCE 2019 (6) TMI 190 – CESTAT MUMBAI.* he further submitted that technical report submitted by one Dr. N. K. Batra of IIT, Kanpur in his individual capacity should not be given credibility and there was no occasion also to cross examine him to find out as to if he had taken those parameters into consideration including weather condition and auxiliary consumption to arrive at a particular figure. Learned

Counsel further submitted that placing reliance on the statements of the witnesses and taking into consideration some extraneous factors as well as depriving the appellants from cross-examining relied upon witnesses except one Superintendent Shri J.K. Devani, such adjudication order was passed which is contrary to the law and procedure of an adjudication process of the present litigation. Shri Rajesh Ostwal, learned Advocate further submitted that the onus is on Department to prove the allegation of clandestine removal with positive and concrete evidence concerning which in R.A. Casting Pvt. Ltd., a kind of guidelines is available and that has not been followed by the Commissioner for which his order is liable to be set aside.

4. In response to such submissions, learned Authorized Representative for the Shri Deepak Bhilegaonkar, while supporting the reasoning and rationality of the order passed by the Commissioner, in placing reliance on the case law reported in *Gulabchand Silk Mills Pvt. Ltd. Vs CCE, Hyderabad-II - 2005 (184) ELT 263 (Tri. Bang)* and *Commissioner of CEX., Chandigarh Versus Sahara Steel Rolling Mills - 2008 (224) E.L.T. 307 (Tri.- Del.)*, argued that clandestine activity at best can be established only by circumstantial evidence and it will be humanly impossible to establish every link in the chain of clandestine activity without any break. Further he argued that it has been held by the Hon'ble Bombay High Court in the case of *Commissioner of Customs, Mumbai Vs. Vaibhav Exports – 2009 (244) E.L.T. 527 (Bom.)* that retracted statements is admissible as evidence and when sufficient corroboratory material is available it can be held that those statements are voluntary and true. Further placing reliance on the

judgment of Hon'ble Supreme Court in the case of *CCE, Mumbai Vs. Kalvert Foods India Pvt. Ltd – 2011 (270) E.L.T. 643 (S.C.),* he argued that when a director who has voluntary deposited duty, there is no reason not to rely on his statement which was not outcome of duress.

5. We have gone through the case records and written notes of submissions as well as relied upon judgments. At the out set, it is to be noted here that basing on circumstantial evidence alone duty demand is confirmed since no evidence concerning clandestine removal of goods from the factory of the appellant without payment of duty in unaccounted manner is noticed by the Department during the investigation and minor shortages available in output record was on eye estimation alone which appellants claim to be either erroneous or process loss since input are clearly accounted for and input stock matching with the stock register. Further it has been consistently held by this Tribunal ever since pronouncement of the judgment in *R.A. Casting Pvt. Ltd. cited (supra)* that excess electricity consumption cannot be a parameter to establish clandestine removal and with reference to other ancillary factors, which respondent Department attributes to be of corroborative evidence, it can be stated that loss or marginal profit noted in the accounting statements none reflection of runners and risers factor in the register that accounted only 3 to 4% of ingots, commission income or weighment income etc. would in no way establish higher production in the factory that would only lead to the possibility of clandestine removal. In response to the submissions made by the learned Authorized Representative, learned Counsel for the appellant placed his reliance on the case

law reported in *Kamboj Ispat Pvt. Ltd. & Shri Chatar Singh Vs. CCE – 2016 (1) TMI CESTAT-Mumbai* to say that the decision relied upon by the Revenue were all considered in the said judgment wherein it had been held that demand of excise duty cannot be confirmed on the allegation of clandestine removal basing on electricity consumption and statement of witnesses, since such clandestine removal of manufactured goods is an allegation of serious nature that is required to be proved with tangible and cogent evidence. We find force in the submissions while reiterating the findings of this Tribunal made in para 22 of its order in the case of *R.A. Casting Pvt. Ltd. (supra),* which reads:-

> *"**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 L.Rs, 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.*
>
> *In the instant case, no such evidences to the above effect have been brought on record."*

6. As could be noticed in the present case, none of those parameters are met by the respondent Department while conducted investigation in the case. We, therefore, are of the considered view that on suspicion alone, no liability can be

fastened on any individual and we reiterated the observation made by this Tribunal in Shri Mithunlal Gupta case (supra) that Article 265 of the Constitution of India dictates that no tax shall be levied or collected except by authority of law. Unless the manufacturing 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 calculation, without taking into consideration the ground realities of the functioning of the factories.

7. To conclude, we must say that it is a settled principal of law that suspicion how so ever strong cannot take place of proof, hence the order.

**ORDER**

The appeals are allowed and the orders passed by the Commissioner in Orders dated 31.03.2009, 26.02.2010 and 17.01.2013 are hereby set aside with consequential relief, if any.

(Operative portion of the order pronounced in open court)

**(Dr. Suvendu Kumar Pati)**
**Member (Judicial)**

**(Saniv Srivastava)**
**Member (Technical)**

Sinha