

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 987 OF 2009

[Arising out of Order-in-Original No: 04/2009/C dated 1st June 2009 passed by the Commissioner of Central Excise & Customs, Nagpur.]

Manoj Maheshwari

Shree Steel Castings (P) Ltd
T-38/1 MIDC Hingna Road, Nagpur – 400016

... Appellant

versus

Commissioner of Central Excise

Telengkhedi Road, Civil Lines, Nagpur – 440 001

...Respondent

WITH

EXCISE APPEAL NO: 988 OF 2009

[Arising out of Order-in-Original No: 04/2009/C dated 1st June 2009 passed by the Commissioner of Central Excise & Customs, Nagpur.]

Shree Steel Castings (P) Ltd

T-38/1 MIDC Hingna Road, Nagpur – 400016

... Appellant

versus

Commissioner of Central Excise

Telengkhedi Road, Civil Lines, Nagpur – 440 001

...Respondent

WITH

EXCISE APPEAL NO: 593 OF 2010

[Arising out of Order-in-Original No: 36/2009/C dated 29th December 2009 passed by the Commissioner of Central Excise & Customs, Nagpur.]

Shree Steel Castings (P) Ltd

T-38/1 MIDC Hingna Road, Nagpur – 400016

... Appellant

versus

Commissioner of Central Excise

Telengkhedi Road, Civil Lines, Nagpur – 440 001

...Respondent

WITH

EXCISE APPEAL NO: 584 OF 2010

[Arising out of Order-in-Original No: 36/2009/C dated 29th December 2009 passed by the Commissioner of Central Excise & Customs, Nagpur.]

Manoj Maheshwari

Shree Steel Castings (P) Ltd

T-38/1 MIDC Hingna Road, Nagpur – 400016

... Appellant

versus

Commissioner of Central Excise

Telengkhedi Road, Civil Lines, Nagpur – 440 001

...Respondent

WITH

EXCISE APPEAL NO: 1583 OF 2010

[Arising out of Order-in-Appeal No: SR/164/NGP/2010 dated 1st June 2010 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur.]

Commissioner of Central Excise

Telengkhedi Road, Civil Lines, Nagpur – 440 001

... Appellant

versus

Shree Steel Castings (P) Ltd

T-38/1 MIDC Hingna Road, Nagpur – 400016

...Respondent

AND

EXCISE APPEAL NO: 1587 OF 2010

[Arising out of Order-in-Appeal No: SR/176/NGP/2010 dated 8th June 2010 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur.]

Commissioner of Central Excise

Telengkhedi Road, Civil Lines, Nagpur – 440 001

... Appellant

versus

Manoj Maheshwari

Shree Steel Castings (P) Ltd
T-38/1 MIDC Hingna Road, Nagpur – 400016

...Respondent

APPEARANCE:

Shri Pramod Kumar Rai, Advocate for the assessee-appellants

Shri Deepak Bilegaonkar, Deputy Commissioner (AR) for the Revenue

CORAM:

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

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87156-87161/2023

DATE OF HEARING:

08/06/2023

DATE OF DECISION:

22/11/2023

PER: C J MATHEW

There is a history of sorts to the three proceedings that are impugned before us in these six appeals of which two are of Revenue, two of Shri Manoj Maheshwari who has been saddled with penalties under rule 26 of Central Excise Rules, 2000 and the remaining that of the assessee, M/s Shree Steel Castings (P) Ltd, who was held liable, in addition to penalties under section 11AC of Central Excise Act, 1944, to recovery of differential duty under section 11A of Central Excise Act, 1944 along with interest thereon under section 11AB of Central Excise Act, 1944 due on 'mild steel (MS) ingots' allegedly

manufactured by them between September 2003 and July 2009 and removed clandestinely without entering in the production records.

2. The ingots were manufactured from ‘sponge iron’ and ‘steel scrap’ that, combined with certain ‘ferro alloys’ etc, is the ‘charge’ for the ‘heat cycles’ of the ‘crucible’ from which the molten mass is transported through channels within the solidifying chamber containing ‘ingot – shaped’ moulds. Owing to the design, the quantity of ‘runners and risers’ – which are the horizontal and vertical overflows that remain outside the moulding compartments when the molten metal is poured from above – are unvarying across ‘heat cycles’ for which the principal input is electrical energy.

3. Shortage of finished products and inputs on which CENVAT credit had been availed were noticed during visit of officers of central excise on 17th November 2005 which was regularized promptly by discharge of differential duty and reversal of credit. That was also the starting point of investigations that culminated in issue of show cause notice dated 7th October 2008 for recovery of duties not paid on clearances effected between March 2003 and December 2007 which appeared to have been prompted by two factors: the replacement of ‘electrotherm’ furnace with 5 MT capacity that was in place since February 1998 with a ‘inductotherm’ furnace of 7 MT capacity in May 2005 that necessitated additional sanction of load from the

Maharashtra State Electricity Board (MSEB) mandating record of daily consumption of electricity which was obtained on 19th June 2008 and, in accordance with statutory procedure then in vogue, the monthly production return filed with the Joint Plant Committee (JPC) which, for June 2006, reported capacity of 22000 MT. According to the impugned order pertaining to the first notice, the disproportionately high consumption of electricity consumption for the reported production was not in consonance with expert technical opinion.

4. The investigators took guidance from a study conducted by Indian Institute of Technology (IIT), Kanpur under the aegis of Commissioner of Central Excise, Kanpur (generally referred to as Dr Batra report) reporting consumption of 555 to 754 KWH of energy for manufacture of one ton of 'steel ingot' out of melting scrap and 815 to 1046 KWH for manufacture of one ton of 'steel ingot' out of sponge iron. Likewise, publication of a study by Shri RP Varshney of All India Induction Furnace Association had estimated 650 to 820 units for charge composition of 80% sponge iron over nine heats per day with number of heats increasing as the composition of sponge iron in the charge decreased. It was also taken note of that the manufacturer of the furnace deployed by appellant had confirmed to another customer that 660 to 690 units was required for manufacture of one ton of ingot from sponge iron and 600 to 625 units from other mixture

and the proportionality of energy for maintaining the required heat level was apparent from the enhancement of connected load from 2677 to 3477 upon installation of the new furnace. According to investigators, this norm was exceeded in the actual consumption of 994 to 1042 units per ton of the declared production quantity even as the 'heat' register for October 2007 to March 2008 showed consumption to be 866 units.

5. The case of the central excise authorities, in a nutshell, is that raw materials procured from the open market was utilized to enable unreported production which is evidenced by inflated consumption of electricity during the reported heat cycles preferring to take cover under inefficient performance per cycle. With the allegation revolving around unaccounted sourcing of raw material, the charge of concealment of 'heat cycles' was sought to be buttressed by the discrepancy of 686 nos. of 'BP set' between records of the assessee and of one of the vendors for the period from 10th July 2006 to September 2007 which was translated as deployed for as many 'heat cycles' yielding 4705.96 MT, at the rate of 6.8 MT of ingots per cycle, with duty liability of ₹ 1,49,40,275. The reported consumption of 572400 units on eight days between 10th March 2004 and 28th July 2004, when no production reportedly occurred, was alleged, on the basis of normative data, to have been utilized for manufacture of 678.470 MT of the finished product involving duty liability of

₹14,74,357 from 797.64 MT of raw material. Taking note of three movements of 122.255 MT, attributed to the assessee in accounts maintained by one of their transporters but not accounted for in production records, it was concluded that duty of ₹ 3,94,344 had been evaded.

6. These six appeals, arising from the same charge of ‘clandestine removal of ‘mild steel (MS) ingots’ in September 2003 - December 2007, January 2008 - August 2008 and September 2008 – July 2009, have been at the instance of M/s Shree Steel Castings (P) Ltd and Shri Manoj Maheshwari insofar as the first and last are concerned and of Revenue for the second in which the order of Commissioner of Central Excise & Customs (Appeals), by placing reliance on the decision of the Tribunal in *Mohan Steel v. Commissioner of Central Excise (Appeals), Nagpur [2004 (177) ELT 668 (Tri-Del)]*, set aside the recovery of ₹ 98,83,000 along with attendant penalties even as the order of Commissioner of Central Excise & Customs, Nagpur challenge the culmination of proceedings that, though commenced with investigations into the disproportionately high consumption of electricity in the manufacture of ‘melting steel ingots’ from out of ‘sponge iron’ and ‘steel scrap’, that held M/s Shree Steel Castings (P) Ltd liable to the detrimental consequences of ‘clandestine removal’ of 18, 328.080 MT of finished product on the basis of consumption of ‘silico manganese’ between September 2003 and December 2007. The

allegation of undisclosed production was prompted from the deployment of furnace of 7MT capacity after May 2005 in place of 5MT capacity installed in February 1998 and statutory declaration to Joint Plant Committee of installed capacity of 22000 MT per annum.

7. Upon investigation, it was ascertained that, on manufacture of 51,023.29 metric tons of 'mild steel ingots', 47658166 units of power had been consumed implying that about 1100 units were required for every ton of produced goods which was found to be unnaturally high and normative production from out of power consumption ranging from 700 to 1046 units was computed to allege that production ranging from 25193.60 MT to 4122.48 MT between September 2003 and December 2007 had been suppressed. Based on statement of Mr Sengar, the melter-cum-production contractor, indicating 'input charge' comprising 60% of sponge iron in 7MT capacity furnace operating 9 to 10 'heats' per day, and on the basis of 8 kg 'silico manganese' per MT of the finished product, it was concluded that actual production during the year was 62172 MT. The conversion rate adopted for computation of 'runners and risers' was also alleged to have been devised to facilitate undeclared production. Taking into account the discrepancy in procurement of 'BP set' from one of the vendors, indicating non-accountal of 686 between 10th July 2006 and September 2007 translating into as many 'heat cycles' yielding 6.80 MT of ingots per cycle and, thus, as indicative of number of heats

actually operated with 6.80 MT of ingots per heat, it was concluded that 4706 MT of 'ingots' involving duty liability of ₹ 1,49,40, 275 had been manufactured and clandestinely cleared. The consumption of 'ferro alloys' that, beyond a threshold would not add to the economic value of the finished goods was factored in to conclude that 22945.73 tons had been produced in excess of the declared quantity of 59,777 MT and from the enhanced usage of 10 kg of 'ferro alloys' indicating actual production by 4346.150 MT with duty liability of ₹ 6,43,30,468.86 thus evaded.

8. The 'charge mix' was examined and the role of 'scrap', as source of 'pig iron', was factored in to conclude that, against 5038.67 MT of 'scrap' declared to have been received in 2003-04, 8784.058 MT of 'scrap' had arrived at the factory without being accounted for with 'ingot yield' of 7466.40 MT. Taking the 'charge mix' proportion for 2004-05 and 2005-06, it was concluded that, against declared receipt of 3789.24 MT and 5475.805 MT in 2004-05 and 2005-06, 111052.66 MT and 10426.195 MT of 'scrap' had not been accounted for and, thus, concealed production of 9394.77 MT and 8862.27 MT of steel ingots' during the said period. It was alleged that the records mandated by trade notice no. 771/4/2006/Tech dated 23rd February 2006 had not been maintained to facilitate unaccounted receipts and removals which also prevented proper stock verification, that the selling price of ingots was less than the cost of production and the loss

offset by 'other income' which could be attributable to revenue from illicit transactions; it was recorded in the notice that none of the persons concerned were able to amplify on this aspect.

9. From the electricity consumption records, which, according to the notice, was the only factor that could not be accessed by the appellant, it was concluded that 29,301.76 MT, with duty liability of ₹ 6,43,30,469, had been produced without being reflected in the official records which was alleged to be corroborated by 'ferro alloys' usage computation indicating non-accountal of 22945.73 MT besides being reflected in unrecorded procurement of 'BP sets' (686 nos) with yield of 4705.96 MT from July 2006 with duty liability of ₹ 1,49,40,275 as also of unaccounted 'scrap' procured by them.

10. Thus the proposal in the notice was for recovery of ₹ 6,43,30,469 on account of the conflating of consumption of 'energy' and of 'ferro alloys' evidenced by unrecorded procurement of 'BP sets' and 'scrap' as well as the deficiency in the removal as seen from records of the transporter.

11. Based on the 'ferro alloys' consumption pattern, it was concluded that 18328.08 MTs of 'ingots' in excess of the declared 42789.42 MTs was produced and duty liability, on differential value of ₹ 31,96,19,037.05, amounting to ₹ 5,22,42,057.45 was ordered for recovery under section 11A of Central Excise Act, 1944, along with

applicable interest under section 11AB of Central Excise Act, 1944, besides imposing penalty of like amount under section 11AC of Central Excise Act, 1944, in the impugned order¹ of Commissioner of Central Excise & Service Tax, Nagpur that also imposed penalty of ₹ 54,00,000 under rule 26 of Central Excise Rules, 2002 on the individual-appellant before us.

12. The order² of Commissioner of Central Excise & Customs (Appeals), Nagpur dropped the proceedings for recovery of ₹ 98,83,000 for the period from January 2008 to August 2008 by placing reliance on the decision of the Tribunal in *Mohan Steels Ltd v. Commissioner of Central Excise, Kanpur* [2004 (177) ELT 668 (Tri-Del)] and appeal, seeking reinstating of recovery of duty, along with interest thereon, and penalties as had been determined by the original authority, came to filed by Revenue consequent to which demand for recovery of ₹ 1,32,00,000 for the period from September 2008 to July 2009 was confirmed in order³ of Commissioner of Central Excise & Customs, Nagpur by adopting the computation in the first of the adjudications leading to appeal by assessee and Shri Manoj Maheshwari.

13. Learned Counsel for M/s Shree Steel Casting (P) Ltd and Shri Maheshwari contented that the determination of evasion was not

¹ [order-in-original no. 04/2009/C dated 1st June 2009]

² [order-in-appeal no. SR/164/NGP/2010 dated 1st June 2010]

³ [order-in-original no. 36/2009/C dated 29th December 2009]

based on law for having relied upon a presumptive scale of production based on a minor input, viz., ‘ferro alloy’ without any rational justification and by erroneous interpretation of a statement of their melter, one Muniraj Singh Sengor. It was further contended that, in the impugned statement of the melter, the assertion of deployment of 10-12 kg for each ton of ingot was ignored by the central excise authorities. Relying upon the ‘standard input output norms (SION)’ – the only authoritative determination in exercise of statutory empowerment vested in the Central Government – in the Foreign Trade Policy (FTP), it was submitted by Learned Counsel that the input of 15 kg of ‘ferro alloy’, i.e. silica manganese, finds support in the technical opinion of Visveswariya National Institute of Technology, Nagpur that 11.78 kg/ton is an appropriate indicator. Reliance was placed on the decision of the Tribunal in *re Mohan Steels Ltd* and in *Ghodavat Pan Masala Products Ltd v. Commissioner of Central Excise, Pune [2004 (175) ELT 182 (Tri-Mum)]*. It was also argued that the statements relied upon in the orders, in which they are in appeal, could not be considered in the absence of evincing as set out in section 9D of Central Excise Act, 1944.

14. According to Learned Authorized Representative, the consumption pattern of energy between September 2003 and July 2009 indicated average of 1150 units per ton of recorded production

which was inconsistent with the consumption of 1088 units per ton during the experiment conducted by central excise officers and the actual production, considering the normal range, as per study of IIT Kanpur, of 760 units -1046 units, was estimated to be between 12352 tons to 17001 tons indicating under-reporting of 1138 tons to 5786 tons. According to him, the capacity and efficiency of the production facility, as ascertained from the manufacturer and the per heat/per day highs, also corroborated suppression to such extent. He pointed out that the manner in which the 'runner/riser' was recorded, as a mathematical derivation, discredited the production records as amenable to acceptance. He further submitted that the procurement of 'sponge iron' that was not entered in the factory records, though covered by octroi passes of Nagpur Municipal Corporation, was yet another corroboration of the conspiracy to suppress the actual production besides the attempt to underplay the relevance of 'BP sets' in production. It was also pointed out that consumption of 'silica manganese' – an essential and relatively expensive ingredient –, as attested by the smelter and the individual appellant in their respective statements during the investigation, was pointer to the differential production established to be 5834.54 tons. He distinguished the decision in *re Mohan Steels Ltd* as the present investigation had gone beyond statements to establish consumption patterns of essential materials and consumables.

15. This is not a case of clandestine removal as there is no evidence on record of any recovery of finished goods having been made or even of attributable sale proceeds; such clearance is merely implied and the evidence presented by central excise authorities is claimed to established suppression of production inferring from the use of significant inputs and consumables as well as alleged procurement of consumables and sponge iron that were kept out of the records at the factory. The consumption of energy, the production capacity of installed equipment, the procurement of 'sponge iron' and the purchase of 'BP sets', though not deployed for determining the extent of suppressed production, have been exhibited to corroborate under-recording of production. The actual requirement of 'ferro alloys' was ascertained in statements recorded during the investigation and this was applied for computation of actual production. Hence, leaving aside, for the moment, the circumstantial proof of having indulged in such conspiracy, the appropriateness of the computed duty liability must needs be evaluated.

16. In *re Ghodavat Pan Masala Products Ltd*, it was held by the Tribunal that

'14. After hearing rival submission, perusal of the records and the case laws relied on by both the sides, we find that the demand of the department is based only on theoretical calculation of PLR which is not the main input of the appellants. The main product of appellant is Star Gutkha and

as mentioned in the preceding paragraphs for preparation of Gutkha the main raw materials such as Supari, Katha, Tobacco, Menthol, Cardamom, lime etc. are needed. As contended by the Id. Consultant of the appellant, the wastage was claimed around 22% as against 14.69% allowed by the department. Though there is no statutory permissible limit fixed under the law, however, the Id. Consultant has contended that as per the trade practice the wastage of 22% is easily allowed in the manufacture of Pan Masala which is neither unreasonable nor illogical. The practice itself has assumed the force of law by its usage in the trade for a long time and as such we do not find any justification on the part of the department not to have allowed wastage of 22%. Besides, we find that when the department has based his case on the statement of certain parties and when the statements were retracted in writing by them, it was imperative on the department to have brought corroborative evidence to substantiate the allegation of clandestine removal. The department having not done so, has lost their right to raise the demand merely on presumption/assumption. In a case of its kind the department was duty bound to have brought direct, tangible, corroborative and strict evidence to prove the clandestine removal beyond reasonable doubt. We do agree with the contention of the Id. SDR that mathematical accuracy cannot be expected in such a matter. However, it does not mean that the Department is absolved of its responsibility to bring on record the tangible, strict, positive, direct and corroborative evidence to prove clandestine removal beyond reasonable doubt as there is no evidence of actual excess production, removal of such excess production, transport of such excess production, confirmation from buyers and receipt of unaccounted cash towards sale of such unaccounted clearances. We find that the department has not done so. Few more cases in this regard are as under :-

xxxxxx

The legal position as brought out in the cases mentioned above leaves no doubt that the demand cannot be sustained on the ground of presumption.’

and in *re Mohan Steels Ltd*, it was held that

‘9.1 We have considered the submissions of both the sides. The impugned Order has been passed by the Commissioner on remand by the Appellate Tribunal vide Final Order No. A/899-901/2000, dated 9-10-2000. The Tribunal had remanded the matter as the evidence produced by the Appellants from independent manufacturers and others “was not examined properly” and when the assessee had stated that power consumption may be taken as a factor for determining the quantum of final product the Commissioner had observed use of electricity which was not recorded in the bills without making such an allegation in the show cause notice. The defence of the Appellants before us is that the power used by them is only sufficient to manufacture the quantity of ingots/billets recorded by them in their records and the Commissioner has come to the conclusion that the Appellants had managed the manipulations of meter reading. The Commissioner has confirmed the demand on the basis that 9 kgs of ferro alloy is sufficient to manufacture one M.T. of ingots/billets. The Appellants have contended that the entire case of the Department is only on the basis of assumptions and presumptions whereas the contention of the Revenue is that the duty has been confirmed on the basis of statements of melters and other officials of the Appellants company and records. After considering the various submissions made by the learned Consultant for the Appellants and learned SDR for the Revenue we observe that

there are three vital raw materials for manufacturing the ingots/billets. These are M.S. Scrap/Sponge iron, ferro alloys and power. It is settled law that whenever the charge of clandestine removal is made the Revenue has to prove that the assessee has procured all the raw materials required for the manufacture of final product. In the present matter there is no mention as to whether the Appellants had procured any extra quantity of M.S. Scrap/Sponge iron in addition to what has been recorded in their records. It is also not an allegation that when the Central Excise Officers visited the factory premises of the Appellants on 18-1-93, there was any excess stock of MS scrap/sponge iron. We also note that no excess stock of final product manufactured by the Appellant seems to have been found by the visiting officers. Regarding second most important input "power", the Appellants have produced a Report "Technology Evaluation in Mini Steel Industry", prepared under Technology Absorption & Adaptation Scheme by Ministry of Science & Technology. This study was initiated by the Department of Scientific & Industrial Research to assess and evaluate the existing technological norms in important sector of priority and corresponding international norms and to ascertain the gaps in technological levels. As per the Report the minimum and maximum consumption of Power in India was 600 to 1000 kwh per ton of billet/ingot. The Report has also mentioned that the consumption of power can be reduced by recent developments such as oxygen assisted melting, oxy-fuel burner, scrap pre-heating, water cooled roof and panels for wall lining, etc. The Report envisaged two model plants and the norms for the important parameters were worked out in order to establish the benefits of the phase of modernization. The norms for power was 670 kwh/per ton of billet for 10/12 t furnace and 630 kwh for 25/30t furnace. These norms regarding consumption of power have not been disputed by the Revenue. The Adjudicating

Authority has come to the conclusion, merely on the basis of three furnaces found to be working by the visiting officers, that the Appellants had indulged in a systematic manipulation of records of “power consumption. This finding is without any material brought on record. On the other hand the Appellants have brought on record a certificate dated 26-12-96 issued by the Divisional Engineer. Electricity Distribution Division, Unnao which mentions as under :-

“On the basis of the reports/raids conducted from 1988 till date of metering arrangement checks on USEB 33/11KV Sub-station at Mohan Steels Ltd., Unnao; manned by the employees of the Board for 24 hours, it is very clear and apparent that the metering arrangements were always found in order and there were no possibilities of electricity theft or pilferage of power.”

*9.2 The Divisional Engineer of Electricity Board, thus, rules out any manipulation of electric meter as “the metering arrangements were always found in order”. The Commissioner has disregarded this certificate by merely observing that the certificate had been issued on the request of the Appellants only; it also gives an indication that no irregularity was noticed during the time of raids; this certificate cannot be interpreted to mean that there could be no possibility of irregular use or manipulation. On the basis of such findings it cannot be claimed by the Revenue that the Appellants have indulged in a systematic manipulations of record of power consumption. It is well settled that strong suspicion and grave doubts cannot take the place of legal proof. It has been held by the Tribunal in the case of *Rajasthan Petro Synthetics v. CCE, supra*, that “the charge of clandestine removal of the goods has to be established by the Department by adducing tangible, acceptable, cogent and convincing evidence. Such a charge cannot be based only on assumption and presumption”. The learned Consultant has relied upon the decision in the case of *Gian Castings Ltd.,**

2001 (131) E.L.T. 380 wherein the Department had relied upon the theft case booked by Electricity Board. Even then the Tribunal did not uphold the demand holding that “there is nothing on record to show what ultimately happened to that case”. The Punjab & Haryana High Court rejected the Reference Application filed by the Revenue and the Supreme Court dismissed the Special Leave Petition filed by the Revenue. [2004 (163) E.L.T. A203 (S.C.)]. It has also been contended by the Appellants that the supply of electricity to their Sub-station is made from 132/33, KVA Sonik Sub-station on direct feeder. There is nothing on record to show that the power required by the Appellants to manufacture the quantity of ingots and billets alleged to have been manufactured by them had been supplied by Sonik Sub-station to the Sub-station at the Appellants’ end. Thus the Revenue has not succeeded in proving its allegation that the Appellants have manipulated their records of power consumption.

10.1 Regarding the quantity of ferro alloys required to manufacture 1 ton of ingot/billet, the Commissioner has confirmed the demand on the basis that 9 kgs. ferro alloys is required for manufacturing 1 kg. of ingot/billet. This is not supported by any technical data/literature on the subject. On the other hand, the Report on “Technology Evolution in Mini Steel Industry” clearly mentions that “Analysis of the ferro-alloy consumption in mini steel plants reveal that consumption of ferro-manganese varies from about 5 to 12 kg/t and that of ferro silicon from about 3 to 7 kg/t of billets. In general, it can be assumed that mini steel plants would consume about 10 kg/t of ferro manganese and 5 kg/t of ferro-silicon”. The Report also fixes the same quantum of consumption of ferro-manganese and ferro-silicon as norms while dealing with “Norms for Important Parameters”. The learned Consultant has also brought on record the Input-

Output ratio fixed by the Ministry of Commerce for Import-Export purposes. As per these norms also Silico Manganese required is 15 kgs. and Ferro Manganese 10 kgs. In view of this the Revenue cannot proceed on the assumption that only 9 kgs. of ferro alloys is required for manufacture of one ton of billet merely on the statement of melters. The Revenue has not verified the contention of the Appellants that ferro-alloy is also added at the stage of ladle and concast. As observed earlier, the Revenue has also not made any investigation in respect of another most vital raw material that is M.S. Scrap/Sponge iron. It has been held by the Tribunal in the case of Amba Cement & Chemicals, supra, when the Revenue alleged the clandestine manufacture of cement on the basis of formula for use of lime stone per ton of cement; that “No investigation is conducted in respect of other raw-materials such as coal, gypsum and clay which are also required for manufacture of cement... As no investigation is conducted in respect of other raw materials which are essential for the production of cement, therefore, the demand on the basis of that appellants suppressed the receipt of one raw material is not sustainable.” Similar views have been expressed by the Tribunal in Manbhai U. Patel v. CCE, Rajkot (T-Mum) and T.G.L. Poshak Corporation v. CCE, Hyderabad, 2002 (140) E.L.T. 187 (T-Chennai) wherein it has been held that “unless there is clinching evidence on the nature of purchase of raw materials, use of electricity, sale, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of note books maintained by some workers.....” The Tribunal went in great detail and have clearly laid down that unless department produces evidence, which should be clinching, in the nature of purchase of inputs and sale of the final product demands cannot be confirmed based on some note books.”’

17. It is, thus, clear that theoretical assumption of input-output ratio is no substitute for quantification of materials that were suppressed in the records. That 'sponge iron' brought within the urban limits of Nagpur may have been established by octroi passes but the alleged delivery at the factory premises was sought to be buttressed by statements of drivers of vehicles in which these were purportedly delivered to the appellant-assessee. Furthermore, the procurement of 'BP sets' was evinced from records of purported supplier. Therefore, the factum of utilization of 'sponge iron' and 'BP sets' rests upon statements. It is on record that the statements were not tested for acceptance as provided for in section 9D of Central Excise Act, 1944. In this context, Hon'ble High Court of Rajasthan, in *Commissioner of Central Excise and Service Tax, Jaipur v. RM Brothers Pvt Ltd & others*⁴, held that

'7. Taking into consideration the fact that the finding with regard to electricity consumption is contrary to decision of Supreme Court in R.A. Castings (supra), the said issue is required to be answered in favour of the assessee and against the department.

xxxxxx

11. *In the light of above, following directions are issued in all these appeals:-*

i. *The Original Authority will give documents to the parties, if it is not already supplied and not available*

⁴ [order dated 7th March 2018 in central excise appeal no. 58-66/2015 and 45/2016]

with the parties.

- ii. If any statement is to be relied upon and parties are desirous, they will be allowed to cross examine the same. The principles of natural justice will be strictly followed and thereafter, the authority will pass a reasoned order and if any cross examination is not allowed, the authority will pass a reasoned order for not granting cross examination.*
- iii. The parties will appear before the original authority/ Commissioner on 16.4.2018. The Authority will try to complete proceedings within four months.*
- iv. If any amount which has been paid by the assessee, the same will be kept in Suspense Account. In case the appeal is not heard within four months from 2.4.2018, the amount will be refunded on 1.9.2018. However, it is made clear that if any adjournment is taken by the assessee, that period will not be counted in the period of four months.*
- v. If the authority is not in a position to complete the proceedings within 120 days then he will be required to refund the amount deposited.*

XXXXX

13. The order of the tribunal and order in original are quashed and set aside. Dismissal of appeal filed by department will not affect the passing of adjudication order on merits. After original order is passed, it will be open for the department to pass appropriate order with respect to penalty in accordance with law. It is clarified that demand on the basis of electricity consumption is set aside and the

appeal is remanded only for the period of search as indicated above.'

18. In *re Shiv Shakti Rolling Mills Pvt Ltd* it has been held

'6. We find that the impugned order was issued without the participation of the noticees. And the participation, such as it was, limited to cross-examination of some of those whose statements had been relied upon had already established that the voluntary nature thereof was suspect. Accordingly, these cannot be relied upon as held by the Hon'ble Supreme Court in re Andaman Timber Industries. In such circumstances and, more particularly, as the other statements were claimed to contain affirmation of informal records that became the foundation of the case against the noticees, failure to allow cross-examination without an iota of justification thereof precludes consideration of those untested facts in adjudicatory proceedings.

7. It is no secret that establishing 'clandestine removal' is easier said than done and much latitude, in the form of preponderance of probability and deducing from corroborative evidence affirming testimony in statements, is permissible in determining the outcome. However, the proceedings may not be allowed to draw upon that flexibility for discarding even the most fundamental canon of evidence. Reliance upon a statement, to the exclusion of any material facts, in a show cause notice is, in effect, 'examination-in-chief' and credibility of the contents therein for resort to conclusion of detriment rests upon quicksand except by assertion through challenge of 'cross-examination'; we are unable to appreciate the notion of lack of bias in such denial that, especially in the light of section 9D of Central Excise Act, 1944, should not have occurred save with detailed

justification. A statement that serves to connect the dots, as facts may be called, for the purpose of determining inculpatory responsibility and willful acts of omission and commission. A case made out on statements and peripheral records must find corroboration in each other; the validity of statements lies in sustaining through cross-examination and, hence, the significance of section 9D of Central Excise Act, 1944.

xxxxx

10. The bare essentials for establishing occurrence of clandestine removal has been elaborated thus

‘40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :

- (i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
- (ii) Evidence in support thereof should be of :*
 - (a) raw materials, in excess of that contained as per the statutory records;*
 - (b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;*
 - (c) discovery of such finished goods outside the factory;*
 - (d) instances of sale of such goods to identified parties;*
 - (e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;*
 - (f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;*
 - (g) statements of buyers with some details of illicit manufacture and clearance;*

- (h) *proof of actual transportation of goods, cleared without payment of duty;*
- (i) *links between the documents recovered during the search and activities being carried on in the factory of production; etc.*

*Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What one could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who are not even permitted to be cross-examined, as in the present case, without one or more of the evidences referred to above being present. In fact, this Bench has considered some of the case-law on the subject in *Centurian Laboratories v. CCE, Vadodara* [2013 (293) E.L.T. 689]. It would appear that the decision, though rendered on 3-5-2013, was reported in the issue of the E.L.T., dated 29-7-2013, when the present case was being argued before us, perhaps, not available to the parties. However, we have, in that decision, applied the law, as laid down in the earlier cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchasers, distributors or dealers, record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. A co-ordinate Bench of this Tribunal has, in another decision, reported in the E.L.T. issue of 5-8-2013 (after hearings in the present appeals were concluded), once again reiterated the same principles, after considering the entire case-law on the subject [*Hindustan Machines v. CCE* [2013 (294) E.L.T. 43]. Members of Bench having hearing initially differed, the matter was referred to a third Member, who held that clandestine manufacture and clearances were not established by the Revenue. We are not going into it in detail, since the learned Counsels on either side may not have had the opportunity of examining the decision in the light of the facts of the present case. Suffice it to say that the said decision has also tabulated the entire case-law, including most of the decisions cited before us now, considered them, and come to the above conclusion. In yet another decision of a co-ordinate Bench of the Tribunal [*Pan Parag India v. CCE*, 2013 (291) E.L.T. 81], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge*

quantities of final products the assessee require all the raw materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal.'

in re Arya Fibres Pvt Ltd which does not appear to have been adhered to in the impugned order.'

19. From an analysis of the facts and judicial pronouncement *supra*, it would appear that correlation of certain factors concerned with production do not suffice for establishing the extent of evasion, if any; at best, these aspects may corroborate the allegation of clandestine removal of evasion of duties of central excise.

20. Doubtlessly, evidencing of clandestine removal must rest upon preponderance of probability as direct evidence is rarely possible, but interferences must indicate both probability and preponderance. Normally, it should happen that goods that have reached the market are traced to the assessee through a backward trail or raw materials that originated from a source be traced through forward trail to assessee. Ideally, both should converge but, for the purpose of ordering clandestine removal, one or the other would suffice; that is the true spirit of preponderance of probability. In the present instance, we find no whiff of the former whereas of the latter, there is 'free floating' evidence of procurement of 'sponge iron' and 'BP sets' by the assessee; nonetheless, the trail of investigation for linking delivery of alleged procurement of these raw materials and consumables at the premises of the assessee rests solely upon certain statements. Unless

those statements are tested for acceptability, connecting of dots will hardly reveal the hidden picture.

21. The witnesses relied upon by the central excise authorities are not acceptable evidence in the absence of cross-examination that was denied. The impugned order fails on that ground but, as the request for cross-examination had been rejected deliberately, availability or amenability to production for cross-examination is not in question. To enable such cross-examination, we set aside the impugned order and remand the matter back to the original authority for fresh determination on the facts and evidences limiting reliance to such statements that have crossed the hurdle of ‘relevancy’ prescribed in section 9D of Central Excise Act, 1944.

22. The appeals are thus disposed off.

(Order pronounced in the open court on 22/11/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)