(2017) 03 CESTAT CK 0001

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Cross No. 108 Of 2010 In Excise Appeal No. 59, 61 Of 2010

?M/s.Shree Sita Ispat & Power Pvt. Ltd & Others APPELLANT

Vs

C.C.E. Raipur RESPONDENT

Date of Decision : 01-03-2017

Acts Referred:

Central Excise Rules, 2002 — Rule 26

Citation : (2017) 03 CESTAT CK 0001

Hon'ble Judges : S.K. Mohanty, J;Ashok K. Arya, Technical Member

Bench : Division Bench

Advocate : Alok Barthwal, R. K. Manjhi

Final Decision : Allowed

Judgement

1. These appeals are directed against the impugned order dated 08.10.2009 passed by the Commissioner of Central Excise, Raipur, wherein Central Excise duty demand of Rs. 100,70,546/- alongwith interest was confirmed and equal amount of penalty was imposed against M/s Shree Sita Ispat & Power Pvt. Ltd. (appellant No.1), who is engaged in manufacture of Sponge Iron and M.S.Ingots. Besides, penalties were also imposed on Shri. Iqbal Razzak Hingora, Director (appellant No. 2) and Shri Sukumar Ghosh General Manager of the appellant company (appellant No. 3) under Rule 26 of Central Excise Rules, 2002. Feeling aggrieved with the impugned order, all the three appellants have preferred appeals before this Tribunal.

2. The reason for confirmation of demand is that during visit to the Appellant Unit, the officers recorded statement of Labour contractor, Shri Nasiruddin Sheikh who stated that during the period August' 2006 to Jan' 2007, the production of Sponge Iron was 1600 MTs per month. It was alleged that the Appellant company during this period has shown production of 1892.620 MT. only and thus, there is short recording of production of 4507.380 MT of Sponge Iron, which has been removed without payment of duty. A demand of Rs. 1,41,476/- was confirmed on the ground that one loose paper sheet revealed production of

57.032 MT of MS Ingots but on the said date the production in Daily Stock Account was shown as Nil. A demand of Rs. 18,83,992/- was confirmed on shortage of Sponge Iron and of Rs. 1,00,550/- on shortage of M.S Ingots.

3. Shri Alok Barthwal, the Ld. Advocate for the appellant has filed written submission. He submits that the duty demand is based upon assumption/ presumptions. As regard demand on the basis of statement of contractor Shri Nizzammudin Sheikh, he submits that it is mere statement of the Contractor that the monthly production of Sponge Iron was 1600 MT. and the same is not supported by any single corroborative evidence. There is no evidence in the form of records of contractor himself or wages paid to him or raw material, power, clearance of goods, transportation and no buyer of goods, not any amount receipt . That even the cross examination of the contractor was not given on the ground that he was employee of the Appellant firm which is wrong and incorrect. That his statement is contrary to the Director's statement. Shri Sheikh in his affidavit submitted to the adjudicating authority has denied his statement recorded by the Department. He submits that no demand can be made on the basis of statement of contractor and relies upon the decision of this Tribunal in case of Rinkoo Processors Pvt. Ltd. Vs. CCE, Ahmedabad 2007 (212) E.L.T. 529 (Tri. - Mumbai); He submits that to substantiate duty demand on this count, reliance has been placed on single page of daily Dispatch sheet, which came for weighment of 9.110 MT of Lumps from Shivalay Ispat as per the statement of Shri Sukumar Ghosh, General Manager and nothing contrary was found. That as regards demand of Rs. 1,41,076/- on 57.032 MT of M.S. Ingots, he submits that it is not necessary that as soon as production is made, the same are recorded in the register. The newly produced goods are subjected to quality control test and therefore, the particulars are recorded in the register. That no person was questioned in this regard and thus, it cannot be said that the loose sheet pertains to clandestine production and removal of goods. He submits that only on the basis of loose sheets, duty demand cannot be made against the assessee. He relies upon the judicial pronouncements in the case of Ambika Chemicals Versus CCE, Chennai 2002 (148) E.L.T. 101 (Tri. - Chennai) as upheld in 2003 (153) E.L.T. A298 (S.C.), Savitri Concast Ltd. Vs. CCE, Japipur 2015 (329) ELT 213, CCE, Trichy Vs Sree Rajeswari Mills Ltd. 2009 (246) E.L.T. 750 (Tri. - Chennai) upheld by High court in case of CCE, Tiruchirapalli Vs. Sree Rajeswari Mills Ltd. 2011 (272) E.L.T. 49 (Mad.), CCE, Surat Vs. Gandhi Texturisers 2008 (230) E.L.T. 186 (Tri. - Ahmd.), Sharadha Forge Pvt. Ltd. Vs. CCE, Rajkot, 2005 (179) E.L.T. 336 (Tri. - Mumbai), Someshwara Cem.& Chem. Ltd. Vs. CCE, Hyd. , 2005 (191) E.L.T. 1062 (Tri. - Bang.)

4. As regard demand on shortage of goods, he submits that the shortages has arisen as the quantity is recorded on the basis of estimation or formula basis. That only on the basis of acceptance of shortages by Shri Ghosh, demand cannot be made since nowhere in his statement he has stated that the attributed shortages gave rise to clandestine removal. That there is no evidence of removal of goods, its transportation or any reference of the buyer of such shortage

goods. He relies upon the following judgment to show that only shortages cannot be a ground to demand duty in absence of any evidence of clandestine removal :

(i) CCE, Kanpur Vs Minakshi Castings 2011 (274) E.L.T. 180 (All.)

(ii) CCE, Ludhiana Vs. Nexo Products (India) 2015 (325) E.L.T. 106 (P & H)

(iii) CC EX. & S.T., Ludhiana Vs. Anand Foun. & Eng. 2016 (331) E.L.T. 340 (P & H) 5

(iv) Comm. Vs. Vikram Cement (P) Ltd. Ltd. 2014 (303) E.L.T. A82 (All.) upholding judgment of Tribunal in case of Vikram Cement (P) Ltd. Vs. CCE, Kanpur 2012 (286) E.L.T. 615 (Tri. - Del.)

(v) National Eng. Ind. LTD. Vs. CCE, Jaipur-I 2015 (330) E.L.T. 681 (Tri. - Del.)

5. He further submits that in case of same investigation and similar allegations in case of their sister concern M/s Shivalay Ispat, the demands were set aside by the Tribunal vide Final Order No. A/52961-63/2016 - EX (DB) dt. 09.08.2016. He submits that in view of the submission and cited orders, demand and penalties are not sustainable.

6. Per contra, Shri R.K. Manji the ld. DR appearing for the respondent reiterated the findings recorded in the impugned order.

7. Heard both the sides and perused the records.

8. We find that the duty demand of Rs. 79,44,528/- has been confirmed merely on basis of statement of contractor with no iota of corroborative evidence. Except his statement of having done production, no other records or any corroborative evidence has been brought on record to prove clandestine removal of goods. Even the contractor could not produce his own records. No evidence in the form of procurement of excess raw material, production record, statement of any employee or owner, clearance of goods or receipt of any consideration towards such suppressed production has been relied upon. Further, demand can be made only in the eventuality, where the goods have been removed from the factory. We find that reliance placed upon one daily dispatch sheet, which was explained by the appellant that the same were brought to the factory for weighment from sister concern, no credible evidence was brought on record to prove clandestine removal of goods. Further the cross examination of labour contractor was denied and thus his affidavit was filed before the adjudicating authority negates its contents. We find that only on the basis of contractors statement and especially in case, when even his own record is not produced, the demand cannot be sustained. In this context, this Tribunal in case of Rinkoo Processors Pvt. Ltd. Vs. CCE, Ahmedabad (supra) has held that the chits recovered from residence of folding contractor stating processed MMF in absence of any indication therein as how clearances were made cannot be basis to allege clandestine removal. Similarly, in case of demand of Rs. 1,41,476/- based upon alleged production slip, we find that except allegation that on said date no production was found

entered, no other evidence is forthcoming, which can show that such quantity of goods were removed without payment of duty. The Appellant has submitted that the newly produced goods are subjected to quality control test and then only are recorded in the register. We find that only on the basis of production slip, it cannot be concluded that the goods were removed without payment of duty. Thus, we hold that the demand is not sustainable. In case of demand due to shortages, we find that except acceptance of shortages by Shri Sukumar Ghosh, no evidence of having removed such quantity of goods without payment of duty is available in the adjudication record. The Appellant has contended that the shortage has arrived due to their accounting method adopted over a period of time. We are of the view that except finding of shortages, no instance of removal of such goods without payment of duty has been brought on record. Placing our reliance on the judgments rendered in this context in case of CCE, Kanpur Vs. Minakshi Castings 2011 (274) ELT 180 (ALL.), CCE, Ludhiana Vs. Nexo Products (India) 2015 (325) ELT 106 (P&H), CCE & ST, Ludhiana Vs. Anand Foundaries & Engineers 2016 (331) ELT 340 (P & H) and COMM. Vs. Vikram Cements (P) Ltd. 2014 (303) ELT A82, we hold that demand of duty arising on account of shortages is not sustainable, as no evidence of removal has been adduced. Further we find that in same investigation conducted against sister concern, the demands already stands set aside by the Tribunal vide Final Order No. A/52961-63/2016 - EX (DB) dt. 09.08.2016.

9. In view of our above observations and findings we hold that the demand of duty and penalties against all the Appellants are not sustainable and accordingly, we set aside the impugned order and allow the appeals in favour of the appellant with consequential reliefs, if any, as per law.

(Pronounced in the open court on 01.03.2017).

