(2021) 06 CESTAT CK 0014

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No.53660 Of 2018

M/s.Super Iron And Steel Private Limited APPELLANT

Vs

Commissioner Of Central Excise And Customs RESPONDENT

Date of Decision : 23-06-2021

Acts Referred:

Central Excise Act, 1944 — Section 11AC, 11AC(1)(a), 14
Cenvat Credit Rules, 2002 — Rule 12, 25, 26, 27

Citation : (2021) 06 CESTAT CK 0014

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Advocate : Krishan Mohan Menon, Parul Sachdeva, P. Juneja

Final Decision : Allowed

Judgement

1. Whether in the light of the facts and circumstances, the appellant have evaded excise duty amounting to Rs.29,12,365/- during the period 2012-

2013, by clandestine removal of the finished goods.

2. The brief facts are that the appellant is a manufacturer of iron and steel products viz. M.S. Ingot and TMT bars, which are dutiable. The major raw

materials are sponge iron and pig iron, ferrous alloys, M.S. Billets, etc.. The appellant generally filed their returns with the Department and deposited

the tax. The books of accounts were also audited under the provisions of Companies Act as well as Income Tax Act. The appellant has manufactured

ingots from sponge iron, being 34,306 M.T. in 2011-2012 and 16,940 MT in 2012-13 of ingots. Most of the suppliers of the sponge iron are located in

the near vicinity, in the same jurisdiction of the CCE, Raipur. Further, ingots are power intensive products, which is manufactured in electric furnace.

The appellant purchases power from the State Government. For manufacture of

1 MT of ingots, 1.25 MT of sponge iron and approximately 800 to

850 units of power depending upon the quality of the raw materials and another factors. That during the period of dispute â?" 2012- 2013, the factory

of the appellant was visited by the officers of the Excise Department on 5.6.2012. The stock verification was done and a panchnama was drawn. The

stock verification was done mainly on the estimation basis. For verifying their stock of ingots, the average weight of ingots was assumed based on the

size (without measuring) and the same was multiplied by the number of pieces in the stockyard. In this manner, shortage of 725 MT of ingots was

worked out as compared with book stock. As per the panchnama, Shri D.R. Yadav, Manager and Authorised Signatory was present. Shri Yadav was

asked to produce the records for verification, thereafter officers asked Shri Yadav to submit declaration of stock of finished goods and raw materials,

which was duly submitted as per Annexure to the Panchnama. The stock of other finished goods were found to be tallying with the records of the

appellant.

3. The statement of the authorised signatory, Mr. Yadav was recorded on the spot, wherein he stated, inter alia, that the shortage as worked out can

be explained only by the Director viz. Shri Gurpreet Singh Chandok. He further agreed to the manner of stock verification and calculation of shortage

with regard to the M.S. ingots. Further, for the excise duty worked out on such shortage, on the presumption of clandestine removal, worked out to

Rs.29,12,365/-, the same was deposited â?" Rs.16,48,000/- by debit to cenvat account on 5.6.2012 and Rs.12,64,365/- by challan no.00065 dated

14.06.2012.

4. Subsequently on 6.2.2013, the officers recorded statement of the Director, Shri Gurpreet Singh Chandok under Section 14, wherein he, inter alia,

stated that he is the Director looking after the management and is the Authorised person for the purpose of excise matters. Further, he did not dispute

as regards the shortage worked out by the Revenue of 725.01 MT of ingots on 5.6.2012. He further stated that he was unable to explain the actual

reason for physical shortage, but the main reason for shortage may be attributable to burning loss beyond their calculation.

5. Accordingly, show cause notice dated 30.09.2013 was issued as it appeared to Revenue that shortage found in stock has not been properly

explained. Further, no proper documents have been produced with respect to the reasons given of burning loss, beyond their calculation. It appeared to

Revenue that the appellant have removed such shortage clandestinely without issue of proper invoices and accordingly, it was proposed to demand the

differential duty on the shortage of Rs.29,12,365/-, with further proposal to appropriate from the deposit made along with interest and further penalty

was proposed under Section 11 AC read with Rule 25, and also under Rule 27 of CER, 2002.Further, personal penalty was proposed on the Director,

Shri Gurpreet Singh Chandok under Rule 26.

6. The appellant contested the show cause notice and in their reply in para 4, it was categorically stated that the shortage in the stock of ingots may be

due to high burning loss. The day-to-day production is recorded in the RG-1 Register on the basis of standard quantity of production as per industry

norms, as it is not possible to weight the finished goods immediately on production of the same, being voluminous and in hot condition. Whereas sales

are recorded on actual weight basis. Due to this method of accounting, some difference happens. In their case, the shortage as worked out, which is

due to the under accounting of process loss and recording of higher production than the actual (being recorded on estimate basis). Thus, such shortage

is due to high burning loss relatable to 3 to 4 previous accounting years. It was further urged that the appellant has not resorted to any clandestine

removal of any finished goods or raw materials. It was further urged that in the facts and circumstances, the show cause notice may be dropped.

7. The show cause notice was adjudicated by the Joint Commissioner on contest, who was pleased to confirm the proposed duty as well as its

appropriation from the pre-deposit made during investigation. Further, interest as well as equal amount of penalty was imposed under Section 11 AC

(1)(a) of the Act. Further, penalty of Rs.2000/-was imposed for violation of Rule 12 read with Rule 27 of CER. Further, a penalty of Rs.3 lakh was

imposed under Rule 26 on the Director, Shri Gurpreet Singh Chandok.

8. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) on the same grounds, which were taken in reply to the show

cause notice and they also relied on several case laws for the proposition that for the apparent, shortage in stock, without any supporting evidence of

clandestine removal, no adverse inference can be drawn. In support of their contention, the appellant relied upon the case in RA Castings Pvt. Ltd.

2009 (237) ELT 674 (Tribunal-Delhi) and CCE, Kanpur Vs. Meenakshi Castings Ltd. - 2011(274) ELT (Allahabd High Court)

9. The ld. Commissioner (Appeals) observing that shortage as worked out by the officers has not been disputed and further, the appellant have failed

to explain properly such shortage found in the finished goods and accordingly, was pleased to dismiss the ground relating to demand and penalty under

Section 11 AC but was pleased to set aside the penalty under Rule 27.

10. Being aggrieved, the appellant is before this Tribunal.

11. Ld. Counsel for the appellant, Mr. Krishan Mohan Menon, Advocate urges that shortage has been worked out on the day of inspection by way of

guess work. There is no calculation sheet annexed to the panchnama. Thus, the difference worked out is only on the basis of an eye estimation.

Further, admittedly, there is no case of any clandestine removal made out in absence of any seizure or inspection of any goods being removed without

the proper documents or payment of duty. No buyer of alleged clandestine removal has been identified nor any flow back of cash for such transaction.

Further, there is no seizure of un-explained cash in the premises of the appellant. For removal of 725 MT of ingots, about 36 to 40 trucks/trips will be

required as one truck load is about 18 to 20 MT. Not a single truck load has ever been intercepted for the alleged clandestine removal. The clear case

of Revenue and confirmation of demand is on the uncorroborative seizure of the finished goods, found in the course of defective stock verification.

12. Further, urged that so far the quantitative data is concerned, production of ingots during the financial year 2011-2012 (inspection and stock

verification done on 5.6.2012) was 34,306 MT. Thus, the shortage of 725 MTs is approximately 2% of the annual production during the immediate

previous accounting year. Thus, the reason as stated by the Director in his statement under Section 14 as well as in the reply to the show cause notice,

that the same is relatable to the discrepancy in recording the actual burning loss and /or due to recording of less burning loss is a plausible explanation

given which has not been found to be untrue. It is a simple case of failure of the accounting system practised by the appellant resulting in recording of

less burning loss than the actual, as the same was being recorded on estimated basis.

13. It is further urged that the Revenue have tried to cover-up the shortcomings or inappropriate way of shortage verification, by referring to no

dispute being raised by the Director of the appellant or the staff of the company, Mr. Yadav at the time of drawing panchnama or thereafter. It is

further stated that in any case, the method of stock taking adopted by the Revenue and taking the average weight of ingots without measuring the size

and multiplying the same with the total numbers of pieces have been held to be inappropriate and defective by this Tribunal, time and again,

particularly in Raika Ispat Udyog Pvt. Ltd. Vs. CCE- 2016 (340) ELT 598 (Trb â?" Delhi) and Raj Ratan Industries Ltd.- 2013 (292) ELT 123 (Tri.-

Delhi), wherein it was held that admission by the authorised signatory of the shortage does not conclusively establish the charge of clandestine

removal.

14. It is further urged that the demand of duty is based on the presumption, there being no actual evidence of shortage. Further, there is no

corroborative evidence brought under record with respect to the alleged clandestine transaction of 725 MT of ingots valued at Rs.2,35,62,825/-

(@32,500 p.m.t.). It is further urged that simple allegation of clandestine removal is not enough, and the same has to be corroborated by the Revenue

beyond reasonable doubt, as held by the Honâ??ble Punjab & Haryana High Court in the case of CCE Vs. Anand Founders and Engineers - 2016

(331) ELT 340 (P&H) and Allahabad High Court in the case of Continental Cement Co. Vs. Union of India - 2014 (309) ELR 411 (All.)

15. It is further urged that in the facts and circumstances, the allegation of clandestine removal being unsubstantiated, the demand and penalty is fit to

be set aside.

16. By way of alternative submission, it is urged that the cum-duty benefit for calculation of duty liability, should be allowed. Ld. Counsel also refers to

the audit report by the Chartered Accountant, wherein with respect to the report in Form-3 CD for the accounting year ended March, 2013, at

Sl.No.20 and 28 A, the quantitative details have been given with respect to the raw materials, process consumption and the production of finished

goods and sales etc., wherein the yield has been stated at 75.05% , similarly for accounting year 2011-2012 in the Audit Report in form 3 CD (as

required under the Income Tax Rules), 84% yield has been stated and the burning loss is 2 to 5%. It is further urged that such production figures and shortage have been established by the Income Tax Department in assessment and no adverse inference was drawn in the income tax adjudication.

17. Ld. Authorised Representative for the Revenue, Shri P. Juneja relies on the impugned order. He further refers to the statement of Mr. Yadav, the person present at the time of inspection and also the subsequent statements of the Director, Mr. Gurpreet Singh Chandok. Both these persons have not disputed the shortage in the stock of ingots and the manner of calculation.

18. Having considering the rival contentions, I find that the burning loss in this type of industry varies from time to time depending upon the quality of inputs, the condition of furnace, climatic condition, etc. I further find that the Director of the appellant company at the time of recording of his statement under Section 14 gave a plausible explanation, that shortage is attributable to high burning loss depending upon the various factors and failure by them to record the actual burning loss, as the production is recorded on the estimate basis, whereas the sale of finished goods is recorded on actual weight basis. Further, I find that the appellant also manufactures M.S. Billets, for which M.S. Ingots is the raw materials, in such process also there is burning loss. Thus, the explanation given by the appellants for the apparent shortage is held to be plausible, as the same has been rejected summarily by the Department without reference to the books of accounts and other records maintained by the appellant. I further find that there is no other corroborative evidence brought on record with respect to the allegation of clandestine removal, which is a serious charge and has to be proved beyond doubt as held by the Honâ??ble High Court in the case of Continental Cement (supra) and Anand Founders and Engineers (supra).

19. Accordingly, this appeal is allowed and the impugned order is set aside.

[order pronounced on 23.06.2021]