IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76329 of 2014

(Arising out of Order-in-Appeal No.CCE/BBSR-II/NO.10/COMMISSIONER/2014 dated 18.06.2014 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. Shree Hari Sponge Private Limited
(Kendrikela, Bonaigarh, Dist-Sundargarh, Odisha.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bhubaneswar-II
.....Respondent
(C.R.Building, Rajaswa Vihar, Bhubaneswar-751007, Odisha.)

APPEARANCE

Shri Kartik Kurmy, Advocate for the Appellant (s)
Shri J.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75506/2022

DATE OF HEARING : 1 April 2022
DATE OF DECISION : 31 August 2022

P.K. CHOUDHARY :

The present appeal has been filed by the assessee, M/s. Shree Hari Sponge (P) Ltd. against the demand of central excise duty of Rs. 88,41,519/- along with interest and penalty confirmed by the Ld. Commissioner, Central Excise, Bhubaneswar vide Order-in-Original dated 18.06.2014.

2. Briefly stated, the facts of the case are that the assessee is engaged in the manufacture of sponge iron falling under Central Excise Tariff 7203 on which applicable central excise duty is being paid. An enquiry was initiated at the factory premises wherein the records maintained by the assessee viz daily stock account, raw materials

register, and central excise returns were scrutinized. It was found that the consumption of iron ore and electricity use for manufacture of final product i.e., sponge iron were comparatively high as against the one disclosed by the Appellant in their monthly central excise returns. Relying on some reports obtained by Central Excise Department from M/s. Popuri Engineering & Consultancy Services, Hyderabad and M/s. Industrial Technical Consultant, Raipur, an average input output ratio was formulated and compared with the actual production of the Appellant. The difference in the quantity of final product i.e., sponge iron was assumed to be unaccounted for which Show Cause Notice dated 31.05.2012 was issued to propose central excise duty demand for the period 2008-09 and 2009-10.

In the course of adjudication, the Appellant made a detailed submission justifying the reason of shortfall in the production quantity and also submitted that the reports relied by the Central Excise Department could not be made basis to allege clandestine manufacture and removal of excisable goods in the absence of any corroborative evidence. Without appreciating the submissions, the said Notice was adjudicated by the Ld. Commissioner vide Order dated 18.06.2014 whereby he confirmed the duty demand along with interest and penalty as proposed in the Notice, which is the subject matter of challenge in this appeal.

3. Heard Shri Kartik Kurmy, Ld.Advocate for the Appellant and Shri J. Chattopadhyay, Ld. Authorized Representative for the Revenue.

4. The Ld. Advocate appearing for the Appellant submitted that the instant demand has been made on the basis of estimated production and not the actual production. He submitted that the reports relied by the authorities are extraneous in nature which cannot be made the whole basis to allege the serious charge of clandestine manufacture and removal without any corroborative evidence. He relied on various decisions including the following:

- **R.A. Castings P. Ltd. vs. CCE, 2009 (237) ELT 674 (Tri. Del)** as upheld by the Hon'ble Allahabad High Court and reported in **(2011) 269 ELT 337 (All.)**
- **UOI vs. M.S.S. Foods Products Ltd. 2011 (264) ELT 165 (MP)**
- **Capital Ispat Ltd. vs. CCE 2016 (340) ELT 697 (Tri. Del).**
- **Amkap Marketing Pvt. Ltd. vs. CCE 2019-VIL-18-CESTAT-ALH-CE**

He further referred to the various submissions made before the Ld. Commissioner at the time of adjudication to substantiate the reasons for lower production of sponge iron (final product) which has not been dealt in the impugned order. He also referred to the findings made by the Ld. Commissioner in the impugned Order with regard to the alleged seizure of a consignment at Nagpur bearing the name of the assessee Appellant, which was never alleged in the notice. It is his submission that findings recorded by the Ld. Commissioner with regard to the above alleged seizure of consignment was not forming the part of notice. He also contested the demand on limitation and the imposition of penalty.

5. The Ld. Authorized Representative appearing for the Revenue reiterated the findings made by the Ld. Commissioner and argued that the Appellant has clandestinely cleared the goods without payment of duty. He prayed that appeal filed by the assessee be rejected being devoid of any merit.

6. We have elaborately heard both sides and perused the appeal records in great detail.

7. We find that the entire basis of the instant demand is the reports of external agencies. No efforts have at all been made to find out whether at all there was any unaccounted production and clearance of goods. The Tribunal in the case of **R.A. Castings (P) Ltd. (supra)**

has dealt with an identical issue wherein it has been held that duty demand cannot be raised on the presumption of higher production for reasons of high electricity and raw material consumption. It has also been held that tax is on the manufacture and clearance, and it is to be proved beyond doubt that goods have actually been manufactured.

8. In the present case we do not find any evidence, much less any corroborative evidence, to show that there is production and clearance of the quantity of final products which have been arrived at in the notice by comparing the external reports and the quantity of production disclosed by the Appellant in their excise returns. The relevant portion of the findings made by the Tribunal in the above case is reproduced herein below:

> *"19. The main question to be decided in the instant appeals here is whether the appellants during the period December 2001 to March, 2005 have actually manufactured M.S. Ingots in excess of what has been recorded in their statutory records and removed the said quantity clandestinely from their factory without payment of duty. The excess production has been worked out on the basis of electricity consumption for which the standard norms are imported from the report of late Mr. N.K. Batra, Professor of Material and Metallurgical Engineers, IIT Kanpur….*
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> *20.2 We note that no experiments have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing one MT of steel ingots.* ***It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation.*** *In this case, there is added problem. Estimation of production fluctuates widly depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are leviable to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture 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 calculations, without taking into consideration the ground realities of the functioning of the factories.* ***High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots.*** *The reasons for high consumption of electricity in the case of the appellants' factories have not at all been studied and analysed by the Revenue independently. Instead, the norm of 1046 units fixed as per Dr. Batra's report has been blindly*

applied to the appellants' cases to work out the excess production. This approach is flawed and does not have sanctity.

21. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date. There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. In the following case laws, it has been held that the consumption of the electricity alone is not sufficient to determine the production."

The above decision is upheld by the Hon'ble Allahabad High Court and further by the Hon'ble Supreme Court as reported in 2011 (269) ELT A 108 (SC).

9. We have also perused the findings made by the Ld. Commissioner in para 18 of the impugned Order wherein reference has been made to the alleged seizure of a consignment alleged to be bearing the name of the Appellant without valid invoices. We find that no such allegation was ever made in the Show Cause Notice. Moreover, no proceedings have been initiated pursuant to such seizure of consignment except the statement of the employees of the Appellant company wherein it was deposed that the company is not maintaining any process log book nor do they have any lab test report or drop test report. No statements of the driver of the vehicle or the owner of said consignments are in record nor there is any clue whether any proceedings have been taken subsequent to the alleged seizure. We are of the view that the above deposition could not be made the sole ground to assume that there has been clandestine manufacture

and removal of excisable goods without any supporting corroborative evidence. It is a settled legal position that the charge of clandestine clearance of goods is a serious charge and cannot be made on presumptions and assumptions and the onus lies on the Revenue to prove it with some evidence which has not been done in the present case.

For all the reasons stated above, the impugned Order cannot be legally sustained and hence, the entire demand is set aside. The appeal is allowed with consequential relief as per law.

(Order pronounced in the open court on 31 August 2022.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(RAJU)
MEMBER (TECHNICAL)

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