

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

REGIONAL BENCH - COURT NO.1

Excise Appeal No.162 of 2012

(Arising out of Order-in-Appeal No.90/Commr/BOL/11 dated 23.12.2011 passed by
Commissioner of Central Excise, Bolpur.)

M/s. Micky Metals Limited

(Dubrajpur Road, P.O.-Suri, Dist-Burdwan, West Bengal, Pin-731101.)

...Appellant

VERSUS

Commissioner of Central Excise, Bolpur

.....Respondent

(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

APPEARANCE

Shri N.K.Chowdhury, Advocate for the Appellant (s)

Shri S.Mukhopadhyay, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75906/2023

DATE OF HEARING : 20 June 2023

DATE OF DECISION : 04 July, 2023

Per : ASHOK JINDAL :

This appeal is filed challenging the demand of central excise duty along with interest and imposition of penalty imposed against the appellant alleging clandestine removal of the goods.

2. The facts of the case are as under :-

2.1 On scrutiny of the Financial records for the 2006-07 (Additional Information under part-II of the Schedule VI to the company Act, 1956 and Form 3CD, at the time of examination of

the records of the appellant under Rule 22 of the said Rules, it was observed that the appellant had shown production of Steel Ingot at 13800.355 MT and steel rolled product at 10842.822 MT. Whereas, from the daily stock account maintained under Rule 10 of central excise rules, 2002, the production of steel ingot was shown as 12345.150 MT and steel rolled products as 10447.662 MT. Hence, it appears that in the daily stock accounts, the appellant had suppressed the production of 1455.205 MT of steel ingots and 395.160 MT of steel rolled products and had evaded central excise duty amounting to Rs.51,02,506/-.

2.2 It was also observed on scrutiny of the financial records of 2006-07, such as Annual Report (Additional information to be submitted under part-II of the schedule VI to the company act, 1956, that the said appellant had consumed 8911.67 MT steel ingots in their rolling mill division. But as per the daily stock account, only 7566.57 MT ingot was shown to have been consumed captively for manufacture of rolled products. Hence, 1345.10 MT ingots consumed captively was not shown in DSA and it appears that the rolled products manufactured out of this quantity of inputs have been cleared without payment of duty. Since as per Form 3CD the percentage of yield in rolling mill division is 94.43%, it seems that by captive consumption of 1345.10 of ingot the said appellant had manufactured 1271 MT of rolled products and cleared them without payment of Central Excise duty amounting to Rs.47,00,463.00/- as basic + 94,009.00 as E.Cess + Rs.47005.00 as S&HCE. Cess. Totalling to Rs.48,41,477.00/-.

2.3 On further scrutiny of the Financial records for the 2006-07 such as Form 3CD, it was observed that the appellant had cleared 6942.37 MT of Steel Rolled products and 3714.495 MT of conversion dispatch, and as per the financial statement 10656.865 MT of rolled products were sold by the appellant. But as per the daily stock account the appellant had shown sale of

rolled products as 10261.815 MT. Thus as sale of 395.05 MT of rolled product were not reflected in the daily stock account which appears to have been cleared without payment of duty amounting to Rs.14,60,990.00/- as basic + Rs.29220.00/- as E.Cess + Rs.14610.00/- as S&HE Cess, totaling to Rs.15,04,820.00.

2.4 The calculation of evasion of central excise duty by the appellant, the involvement of duty in respect of removals of MS ingot and steel rolled product has been done on the basis of the assessable value of the concerned goods as reflected in the central excise invoice No.804 dt.15.02.2007 and invoice No. 911 dt.27.03.2007.

3. It was alleged that the appellant has suppressed the fact from the central excise department by not mentioning the production and clearance in central excise statutory returns in form ER-1, therefore, evaded the payment of duty and show cause notice was issued to the appellant on 01.03.2011 for the period 2006-07. The matter was adjudicated and demand of duty was confirmed alleging clandestine removal of goods and suppression thereof. Against the said order, the appellant is before us.

4. The Ld.Counsel for the appellant submits that as per the show cause notice demand has been confirmed due to some variation in the figures shown in audit report and ER-1 filed by the appellant before the department without any evidence to show that the appellant has cleared clandestinely manufactured goods. He also submitted that in this case the period involved is 2006-07 whereas show cause notice has been issued on 01.03.2011 on the basis of the figures shown in audit report of the year 2006-07. As the audit report is a public document available on record, in that circumstances, extended period of limitation is also not invocable.

5. On the other hand the Ld.AR supported the impugned order.

6. Heard the parties.

7. Considered the facts that in this case the demand of duty sought from the appellant on the basis of difference in figures of audit report

and ER-1 return for the year 2006-07. The appellant being a public limited company the financial records are available on net all the times. But, the show cause notice has been issued on 01.03.2011 by invoking extended period of limitation.

8. We further take note of the fact that apart from difference in figures of financial records and ER-1 return, no investigation was conducted to establish clandestine removal of goods which is serious allegation. No statement of has been recorded. In that circumstances the charge of clandestine removal of goods not sustainable as similar issue came up before this Tribunal in the case of Chanduka Hi-Tech Steel Pvt.Ltd. v. CESTAT, Kolkata, wherein by Final Order NO.FO/7766/2017 this Tribunal has observed as under:-

"3. After going through the impugned order and after appreciating the submissions made by both sides, I note that admittedly, the findings of the lower authorities are solely based upon the Sales Tax Returns' figures. The Tribunal's decision in the case of Vigirom Chem Pvt.Ltd. referred (supra) laying down that the clandestine allegation cannot be made exclusively on the basis of record of sale of goods in the Sales Tax Returns. Otherwise also, I find that the allegation of clandestine activities are serious allegation and are required to be based upon the evidences, which reflected upon the same. In the present case, the Revenue has not made any investigation as regards the clandestine manufacture and clearance of the appellant's final product. In such a scenario, the said finding is neither warranted nor justified. The Revenue's reliance on the Tribunal's decision in the case of Victor Component Systems Pvt.Ltd. referred (supra) is not appropriate inasmuch as it is seen that in that case, the Revenue relied upon the entries made in private records seized and recovered from the appellant's premises and the matter was remanded for re-quantification, by taking into account the sales figures as reflected in the Sales Tax Returns. This was so done at the request of the appellant. I find no justification to follow the same in contrast to the Tribunal's decision in the case of Vigirom Chem Pvt.Ltd. referred (supra). As such, I set aside the impugned order and allow the appeal with consequential relief to the appellant."

9. Further in the case of Continental Cement Company v. Union of India [2014 (309) ELT 411 (All.)], the Hon'ble Allahabad High Court held that to allege clandestine removal of the goods, the following requirements are to be considered.

"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

(i) To find out the excess production details.

(ii) To find out whether the excess raw materials have been purchased.

(iii) To find out the dispatch particulars from the regular transporters.

(iv) To find out the realization of sale proceeds.

(v) To find out finished product receipt details from regular dealers/buyers.

(vi) To find out the excess power consumptions.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department."

10. Further in the case of Tally Solutions Pvt.Ltd. v. CCE, Bangalore [2020 (41) GSTL 520 (Tri.-Bang.)], the Tribunal observed as under:-

"8. The appellants have vehemently fought on the issue of limitation. They pleaded that SCN was issued on 5-9-2011 whereas the normal period expired on 10-9-2010; the SCN was issued on the basis of the Audit of records maintained by the appellants; therefore, extended period cannot be invoked by alleging suppression and that they were

also submitting/filing the Returns regularly. He relies upon the decisions in CCE v. ZYG Pharma Pvt. Ltd. - [2017 \(358\) E.L.T. 101 \(M.P.\)](#); CCE v. Sanmar Speciality Chemicals Ltd., [2016 \(43\) S.T.R. 347 \(Kar.\)](#); GAC Shipping (India) Pvt. Ltd. v. CCE, [2017 \(49\) S.T.R. 242 \(Tri. - Bang.\)](#) and others. While disposing the Stay Petition vide Final Order No. 26467/2013, dated 8-7-2013 [[2016 \(46\) S.T.R. 233 \(Tri. - Bang.\)](#)] observed that prima facie there was no suppression of facts or mis-declaration on the part of the appellants. We also find that in view of the above, timely scrutiny of Returns by the Department would have shown that there is huge accumulated credit; Department was free to further investigate the matter and issue timely SCN. In view of the same, we find that the appellants have a strong case on limitation too and the SCN is barred by limitation. In the result, we are of the considered opinion that the impugned order does not survive on merits as well as limitation.”

11. As revenue has raised the demand only on the basis of difference in the figures of audit report and ER-1 return which were available with them in time, in that circumstances as held by this Tribunal in the case Tally Solutions Pvt.Ltd. (supra) the extended period of limitation is not invocable as show cause notice for the period 2006-07 has been issued on 01.03.2011 by invoking extended period of limitation.

12. We further find that time and again it is held by the judicial pronouncements as discussed hereinabove that merely on the basis of difference in the figures of audit report and ER-1 return without establishing the parameters of clandestine manufacture and removal of goods, the charge of clandestine removal is not sustainable. Therefore, on merits also, we hold that in the absence of any statement or investigation against the appellant with corroborative evidence, the impugned order is not sustainable. Accordingly, the same is set aside.

In the result the appeal is allowed with consequential relief, if any.

(Order pronounced in the open court on 04, July, 2023.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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