

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

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 8 of 2011

(Arising out of Order-in-Original No. 43/Commissioner/CE/Haldia/Adjn/2010 dated 29.09.2010 passed by the Commissioner of Central Excise, Haldia Commissionerate, 25, Princep Street, 3rd Floor, Kolkata – 700 072)

M/s. Mittal Iron Foundry Private Limited : **Appellant**
545, G.T. Road (South),
Howrah – 711 101

VERSUS

Commissioner of Central Excise : **Respondent**
Haldia Commissionerate, 25, Princep Street, 3rd Floor,
Kolkata – 700 072

WITH

Excise Appeal No. 6 of 2011

(Arising out of Order-in-Original No. 43/Commissioner/CE/Haldia/Adjn/2010 dated 29.09.2010 passed by the Commissioner of Central Excise, Haldia Commissionerate, 25, Princep Street, 3rd Floor, Kolkata – 700 072)

Shri Vijay Kumar Agarwal : **Appellant**
545, G.T. Road (South),
Howrah – 711 101

VERSUS

Commissioner of Central Excise : **Respondent**
Haldia Commissionerate, 25, Princep Street, 3rd Floor,
Kolkata – 700 072

AND

Excise Appeal No. 7 of 2011

(Arising out of Order-in-Original No. 43/Commissioner/CE/Haldia/Adjn/2010 dated 29.09.2010 passed by the Commissioner of Central Excise, Haldia Commissionerate, 25, Princep Street, 3rd Floor, Kolkata – 700 072)

Shri Ramji Lal Agarwal : **Appellant**
545, G.T. Road (South),
Howrah – 711 101

VERSUS

Commissioner of Central Excise : **Respondent**
Haldia Commissionerate, 25, Princep Street, 3rd Floor,
Kolkata – 700 072

APPEARANCE:

Shri H.K. Pandey and Shri T.K. Mitra, Advocates for the Appellant(s)

Shri B.K. Singh, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOS. 75961-75963 / 2024

DATE OF HEARING: 15.05.2024

DATE OF DECISION: 22.05.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeals have been filed against the common Order-in-Original No. 43/Commissioner/CE/Haldia/Adjn/2010 dated 29.09.2010 passed by the Ld. Commissioner of Central Excise, Haldia Commissionerate, whereby demand of Central Excise duty amounting to Rs.4,58,05,289/- (including cess) has been confirmed under Section 11A(2) of the Central Excise Act, 1944 along with interest and CENVAT Credit of Rs.7,86,930/- (including cess) has been disallowed under Rule 14 of the CENVAT Credit Rules, 2004. Penalty of Rs.4,65,92,219/- has also been imposed under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 and Rule 15 of the CENVAT Credit Rules,2004. Further, penalty of Rs.10,00,000/- each has been imposed on the Managing Director of the company, Shri Ramjilal Agarwal and the Director, Shri Vijay Kumar Agarwal, under Rule 26 of the Central Excise Rules, 2002 read with Rule 15 of the CENVAT Credit Rules,2004. Aggrieved against the impugned order, all the three appellants have filed these appeals.

2. The facts of the case are that the appellants are manufacturers of C.I. Ingots moulds and unmachined C.I. Castings. A search operation was conducted by DGCEI officials at the factory and office premises of the appellant simultaneously on 23.08.2008. During search of the factory premises, physical stock of the input and finished materials was taken in presence of Shri Vijay Kumar Agarwal, Director of M/s. Mittal Iron Foundry (P) Ltd. During the joint physical stock taking, the following shortage of finished goods and inputs were found in comparison to Stock register maintained by the appellant: -

- (i) Shortage of C.I. Ingot Moulds : 495.960 MT
- (ii) Shortage of C.I. Castings : 137.8 MT
- (iii) Shortage of Pig Iron (Input) : 165.37 MT.

The total duty liability on the finished goods found short during the joint stock verification has been worked out as Rs.48,41,515/-. CENVAT credit availed on the raw material (viz. Pig Iron) found short during the verification was arrived at as Rs.7,86,930/-. The Director of the appellant-assessee admitted the shortage in his statement dated 23.08.2008 and handed over the officers post-dated cheques for Rs. 50 Lakhs towards probable tax liability attributable to the stock shortage.

2.1. During the search of the office premises, two numbers of CPUs and two pen drives which were in use in the office computer, were voluntarily tendered by the appellant. Subsequently print outs from the said CPUs were taken in the presence of the appellant's representative. On analysis of the print outs, it was found that the appellant has cleared many consignments of their finished goods without payment

of duty during the financial years 2004-2005 and 2005-2006. The duty involvement on the alleged clandestine removal of the goods on the basis of the said print outs retrieved from the CPUs was arrived at as Rs.3,33,97,266.44/-.

2.2. On completion of the investigation, a Show Cause Notice dated 06.04.2009 was issued to the appellant demanding Central Excise duty (including Cess) amounting to Rs.4,58,05,289/-. The Notice also proposed to disallow Cenvat Credit of Rs.7,86,930/- availed on the raw material found short at the time of joint stock taking.

2.3. On adjudication, the Ld. Commissioner vide the impugned order confirmed the demand of Central Excise duty amounting to Rs.4,58,05,289/-(including cess) along with interest and imposed equal amount of duty as penalty. Penalty of Rs.10 Lakh each has been imposed on the Managing Director namely, Shri Ramjilal Agarwal and the Director, namely, Shri Vijay Kumar Agarwal. CENVAT credit of Rs.7,86,930/- availed on the input found short, has been disallowed. Rs.15,00,000/- already paid by the appellant was appropriated against the demand of duty.

3. After the said search operation, the appellant-assessee reported to the investigation officers that they had taken stock of goods lying in the factory premises as on 23.08.2008 on their own physically and the shortage was found as: (i) C.I. Ingot Moulds 178.7 MT (ii) C.I. Castings 8.96 MT and Pig Iron (Input)-20.78 MT only which is much less than what was ascertained by the visiting officers. They requested to appropriate Rs. 15 Lakh from the amount of Rs.50 Lakh towards the duty liability attributable to this quantity of shortage.

4. Regarding the Central Excise duty liability of Rs.48,41,515/- and the disallowance of CENVAT Credit amounting to Rs.7,86,930/-, the appellants submits that the stock was not properly taken at the time of search of the factory premises and the confirmation thereof by the Directors who were present at the spot was obtained under coercion and duress; the weight of the finished goods was taken on the basis of a rough estimate provided by the Directors. They have two weigh bridges - one for weighment 1 MT and another for 0.5 MT inside the factory. The appellant submits that the weight of the moulds were admittedly more than 1 MT and as such it cannot be doubted that the stock was not physically taken and it was on the basis of eye estimate only. It was also submitted that after the search on 23.08.2008, the appellant-assessee undertook physical stock taking of the goods lying in the factory and vide his letter dated 31.10.2008 addressed to the ADDGCI, Kolkata, it was informed that the joint stock taking conducted by the officers was not correct. It is submitted that on the verification of stock, the shortage was found by them as (i) C.I. Ingot Moulds 178.7 MT (ii) C.I. Castings 8.96 MT and Pig Iron (Input)- 20.78 MT only. It was also pointed out that the seizing officer at the time of cross examination before the Id. adjudicating authority has admitted that during stock taking 13 defective pieces were not included in the stock of 381 pieces and those were featured separately. Accordingly, they submitted that the demand of duty confirmed on the shortage of finished goods and denial of CENVAT Credit on the shortage of raw material, is not sustainable.

4.1. Regarding the demand of duty confirmed in the impugned order on the alleged clandestine clearances, the appellants submit that the demand has been raised for the financial years 2004-2005 and 2005-2006 whereas the search was conducted on 23.08.2008; the installed capacity of the unit during the material time was limited to 6000 MT, but taking the quantity of removal as per the appellant's record and the alleged clandestine removal production, the same should have exceeded of the installed capacity. The appellants also submit that it is on record that the names of the probable buyers were available in the print outs taken from the CPUs; however, no enquiry was caused at the buyer's end and with the transporters by the Revenue; that no receipts of any consideration towards clearance of goods without payment of duty have been adduced by the Revenue; there is no evidence of any wages that have been paid towards clandestine manufacturing of goods. It is also submitted that the investigation could not unearth even a single buyer who might have received the clandestinely removed goods, though more than Rupees 3 Crores of duty evasion has been alleged.

4.2. The appellant submits that the computerized documents relied upon by the department are not admissible evidences, since the mandate provided under Section 36B of the Central Excise Act, 1944 was not followed. They also stated that clandestine removal cannot be confirmed on the basis of statements alone; there must be positive evidences like admission of clandestine removal, purchase and consumption of unaccounted raw materials, discrepancy between recorded stock and physical stock, seizure of any goods en route, consumption of excess electricity, actual clandestine removal of

finished goods without payment of duty, mode of removal, evidence of transporters and buyers of the clandestinely removed goods and flow back of funds pertaining to clandestine removals. They stated that the demands confirmed in the impugned order without any of the above mentioned evidences are not sustainable.

4.3. In support of their contentions, the appellants relied upon the following decisions:

(i) Commissioner of C.Ex., Tiruchirapalli v. Sree Rajeswari Mills Ltd. [2011 (272) E.L.T. 49 (Mad.)]

(ii) Commr. Of C. Ex., Ahmedabad v. Shree Laxmi Steel Rolling Mills [2008 (232) E.L.T. 695 (Tri.-Ahmd.)]

(iii) Dalmia Vinyls (P) Ltd. v. Commissiainer of C.Ex., Hyderabad [2005 (192) E.L.T 606 (Tri. - Bang.)]

4.4. In support of their submission that demand based upon computer print outs without any corroboration is not sustainable, the appellant relied on the following decisions:

(i) Shivam Steel Corporation Vs CCE, BBSR-II [2016 (339) E.L.T. 310 (Tri. - Kolkata)]

(ii) Super Smelters v. Commissioner of C.Ex., Durgapur 2020(371) E.L.T. 751 (Tri. - Kolkata)]

4.5. In view of the above, the appellant prayed for setting aside the demands of duty and the penalties imposed in the impugned order.

5. The Ld. Authorized Representative appearing for the Revenue submits that the joint stock verification was conducted by the officers in the presence of the Director, Shri Vijay Kumar Agarwal and the shortage noticed was accepted by him in his

statement recorded on 23.08.2008. Mr. Ramjilal Agarwal, Managing Director also admitted the shortage in his statement dated 23.08.2008; the stock taken by the appellant-assessee after departure of the officers, in their absence, cannot be relied upon.

5.1. Regarding the demand of duty on the alleged clandestine removals, during the years 200-04 and 2005-06, he submits that the demand has been quantified based on the data available in pages 143,141 and 139 of the computer print outs taken from the CPU on 18.11.08; the figures reflected in page 141 are exactly four times the figures mentioned in page 143. He submits that the figures mentioned in page 141 reflects their official accounted sale whereas, the figures available in page 143 reflects their clandestine removal for the years 2004-05 and 2005-06. Accordingly, he submitted the demand has been rightly confirmed in the impugned order on the goods clandestinely removed, on the basis of the data recovered from the CPU on 18.11.2008.

6. Heard both sides and perused the appeal documents.

7. We observe that the demands confirmed in the impugned order is in two parts; one based on shortage of stock found during joint stock taking conducted by the officers in the presence of the Director of the company and the second one is the demand of duty confirmed on the alleged clandestine removal of goods, on the basis of the data recovered from the CPU on 18.11.2008.

7.1. Regarding the demand of Central Excise duty of Rs.48,41,515/- and the disallowance of CENVAT credit

amounting to Rs.7,86,930/-, on the basis of the shortages noticed during the joint stock verification done on 23.08.2008, the appellants submit that the stock verification was not done properly at the time of search of the factory premises and that the weight of the finished goods was taken on the basis of a rough estimate provided by the Directors; the confirmation of the shortages by the Directors who were present at the spot was obtained under coercion and duress.

7.2. We observe that the verification of stock was done in the presence of the Director. The weighment sheet is prepared on the basis of weight of each article as provided by the Director multiplied by number of such articles. Counting numbers of the articles was noted down in the rough sheets at the time of stock taking which has been authenticated by the Director on the spot and he has confirmed the shortage in his statement dated 23.08.2008. Subsequent retraction of the statement and alleging that the stock taking was not done properly, seems to be an afterthought. We observe that shortage of stock was ascertained on comparison of the stock so found with the stock recorded in the books of accounts maintained by the appellant-assessee. The shortage of pig iron as on date was declared by the Director on the same date.

7.3. We observe that there is no dispute that the quantification of the goods was done in the factory and office premises of the appellant-assessee and the Director himself had provided with the quantity of each article and pig Iron. Subsequent retraction that the statement was taken under duress does not prove that the piecewise weight of the goods and that of pig iron provided by the Director in his own premises

would have been obtained under duress. Factory is his own place and admittedly the witnesses were also the security persons of the factory only. Hence, we hold that the stock verification has been done properly and there is no reason to suspect the findings arrived at during the course of the stock verification by the officers.

7.4. We observe that the appellant-assessee has conducted a separate stock taking wherein also there were shortages noticed, but that stock taking was done by the appellant-assessee after departure of the officers. We observe that the stock taking conducted by the appellant-assessee in the absence of the officers cannot be relied upon. We also find that the Id. adjudicating authority has discussed the various points raised by the appellant in the impugned order and there is nothing new in the argument put forward by the appellant to question the genuineness of the stock taking. Regarding valuation adopted in the impugned order to demand duty, we agree with the findings of the Id. adjudicating authority in the impugned order.

7.5. Accordingly, we do not find any infirmity in the findings of the Ld. Commissioner insofar as the demand based on the shortage of stock is concerned. Hence, we uphold the demand Central Excise duty of Rs.48,41,515/- and the disallowance of CENVAT Credit amounting to Rs.7,86,930/-, confirmed in the impugned order along with interest. As the suppression of fact with intention to evade duty has been established, we uphold the imposition of penalty equal to the duty confirmed and credit disallowed, in the impugned order.

8. Regarding the demand of duty confirmed in the impugned order on the alleged clandestine clearances, we observe that the demand has been confirmed for the financial years 2004-2005 and 2005-2006 whereas the search was conducted on 23.08.2008. The demand is confirmed based on the print out retrieved from the computer CPUs that was admittedly in the official use of the appellant-assessee.

8.1. The appellant submits that the computerized documents relied upon by the department are not admissible evidences, since the mandate provided under Section 36B of the Central Excise Act, 1944 was not followed. We find merit in the submission of the appellant. The pen drives recovered from the office premises of the appellant-assessee are floating devices. Many staff from the office would have used the pen drive to store data. Thus, it is required to identify the person who entered the data in the computer. We also observe that the author of the computer printout recovered from the Appellant's office has not been established in this case. Without identifying the author who entered the data, the information available in the pen drive cannot be relied upon to demand duty. This view has been held in the case of *Super Smelters v. Commissioner of C.Ex., Durgapur [2020 (371) E.L.T. 751 (Tri. - Kolkata)]*. The relevant paragraph of the decision in the said case is reproduced below:

"22. Further, we find that an similar issue has come up for consideration of this Tribunal in case of Bihar Foundary and Casting Limited v. Commissioner of Central Excise and Service

Tax, Ranchi, Appeal Nos. 75819 and 75822 of 2015. The Tribunal vide its Final Order Nos. 75994-75995 of 2013 ha held tht in view of non-compliance of mandatory requirement of 36B of the Act case the clandestine removal cannot be made applicable merely based on the printouts taken from the laptop, computer obtained during the search. And the appeals were allowed by setting aside the order passed by the Adjudicating Authority. The ratio of this case is squarely applicable in toto to this case on hand also thus the demand is not sustainable and liable to be set aside."

8.2. We observe that the decision is squarely applicable in this case. As the Department has not followed the mandate under Section 36B, the computer print outs taken from the CPU on 18.11.2008 cannot be relied upon to work out the duty liability on the allegation of clandestine removal.

8.3. We observe that the alleged clandestine removal relates to an earlier period and the revenue has not been able to corroborate the said removal by way of producing admission from any of the buyers or otherwise. It is on record that no enquiry has been conducted at the buyer's end who appears to be Central Excise assesseees in most of the cases. To substantiate the allegations of clandestine removal, there must be some positive evidences like admission of clandestine removal, purchase and consumption of unaccounted raw materials etc, which are not there in this case.

8.4. The appellant submitted that the installed capacity of the unit during the material time was limited to 6000 MT, but taking the quantity of removal as per the assessee's record and the alleged clandestine removal production, together, should have exceeded of the installed capacity. We observe that there is no finding in the impugned order on this submission of the assessee. There is no evidence that the appellant has increased their installed capacity of production. Thus, we observe that the appellant could not have produced the quantity as demanded in the impugned order, which is much beyond their installed capacity.

8.5. We also observe that the names of the probable buyers were available in the print out taken from the CPUs. However, no enquiry was caused at the buyer's end and with the transporters by the investigation. No receipts of any consideration towards clearance of goods without payment of duty have been adduced by the Revenue. There is no evidence of any wages been paid towards clandestine manufacturing of goods. The investigation could not unearth even a single buyer who might have received the clandestinely removed goods, though more than Rupees 3 Crores of duty evasion has been alleged.

8.6. The appellant relied upon the decision in case of *Rawalwasia Ispat Udyog Ltd. v. Commissioner of C.Ex., Delhi [2005 (186) E.L.T. 465 (Tri.-Del.)]* and contended that in absence of information/identification of person from whom the invoices were recovered and in absence of investigation from the buyers of the goods, no demand can be made on account of clandestine removal. We find merit in the argument of the

appellant. Clandestine removal cannot be substantiated without any corroborative evidence. We observe that the investigation has not brought in any corroborative evidence to substantiate the allegation of clandestine removal.

8.7. Accordingly, we hold that the charges of clandestine removal against the appellant assessee M/s. Mittal Iron Foundry Pvt. Ltd. in the impugned order is not sustainable. Thus, we set aside the demand confirmed in the impugned order on account of clandestine removals.

9. Regarding the penalties of Rs.10 Lakh each that have been imposed on the Managing Director Shri Ramjilal Agarwal and the Director Shri Vijay Kumar Agarwal, under Rule 26 of the Central Excise Rules,2002 read with Rule 15 of the CENVAT Credit Rules, 2004, we observe that they were in charge of the day-to-day affairs of the company. They admitted the shortage noticed during the joint stock verification. Thus, they are liable for penalty for the shortages noticed during joint stock verification. However, we observe that the demand raised on clandestine removal is not substantiated. Accordingly, we hold that they are liable for penalty, but the penalty can be reduced commensurating with the offence. Since the demand is confirmed only relating to the shortages found, we observe that the penalty of Rs. 10,00,000/- imposed on each can be reduced to Rs. 1,00,000/- each, to meet the ends of justice.

10. In view of the above discussions, we pass the following order:

(i) The demand Central Excise duty of Rs.48,41,515/- and the disallowance of CENVAT credit amounting to Rs.7,86,930/-, confirmed in the impugned order is upheld along with interest. As the suppression of fact with intention to evade duty has been established, we uphold the imposition of penalty equal to the duty confirmed and credit disallowed, in the impugned order on this count.

(ii) The demand of duty confirmed in the impugned order on the alleged clandestine clearances for the financial years 2004-2005 and 2005-2006, is set aside.

(iii) Penalties imposed on the Managing Director, Shri Ramjilal Agarwal and the Director, Shri Vijay Kumar Agarwal, is reduced to Rs. 1,00,000/- each.

(iv) The appeals filed by the appellants are disposed on the above terms.

(Order pronounced in the open court on **22.05.2024**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)