CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH, COURT NO. IV

EXCISE APPEAL NO. 52765 of 2019 (SM)

[Arising out of the Order-in-Appeal No. BHO-EXCUS-002-APP-40-19-20 dated 24/06/2019 passed by The Commissioner (Appeals), Central Excise, Customs & Service Tax, Raipur.]

M/s Sky Alloys & Power Pvt. Ltd. **Appellant**
Khasra No. 166, Village Temtema, Kharsia,
Raigarh (C.G.)

VERSUS

Assistant Commissioner, **Respondent**
Customs & Central Goods & Service Tax,
Division Raigarh (C.G.).

Appearance

Shri Vinay K. Jain, Advocate – for the appellant.

Shri Yashveer Singh, Authorized Representative (DR) – for the Respondent.

CORAM: **HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

FINAL ORDER NO. 51253/2021

DATE OF HEARING : 05/04/2021.
DATE OF DECISION: 12/04/2021.

RACHNA GUPTA :-

The appellant M/s Sky Alloys & Power Pvt. Ltd. are engaged in manufacture of Sponge Iron, MS Ingots and Silico Manganese. Their premises were got searched on 7 November 2015 and 8 November 2015 by the team of Preventive Officers of Central Excise, Customs and Service Tax acting upon the intelligence gathered about evasion of central excise duty by the appellant by way of procurement of unaccounted raw materials, clandestine manufacture of excisable goods without accounting the same in their daily stock account and removing the same without

payment of central excise duty. The documents were recovered during the search and the investigating team also got stock of finished goods and raw material during the physical verification. While comparing the said physical verification report and the documents recovered with the opening stock finished goods and the raw material declared by the noticee the team noticed that 56.300 MT of MS Ingots and 221.693 MT of Iron Ore is excess/ unaccounted stock in the factory premises. Resultantly a show cause notice No. 3976 dated 3 May 2016 was served upon the appellants proposing the seized MS Ingots and the Iron Ore to be confiscated alongwith the proposal of imposition of penalty. The said proposal was initially confirmed vide order-in-original No. 20/ADJ/AC/RGH/C.Ex/2018-19 dated 15 January 2019. The appeal thereof has been dismissed vide order-in-appeal No. BHO-EXCUS-002-APP-40-19-20 dated 24 June 2019. Being aggrieved the appellant is before this Tribunal.

2. I have heard Shri Vinay K. Jain, learned Counsel for the appellant and Shri Yashveer Singh, learned Authorized Representative for the Department.

3. Learned Counsel for the appellant has mentioned that the shortage is noticed in the single day production procedure of the appellant when it was yet to be entered in the records. There is no such allegation that the records were not maintained by the appellant for a quite a long period. It is mentioned that there is no other evidence to corroborate the impugned allegations of clandestine removal since the excess finished goods were not for more than one day“s production. The non-entry of that day“s production in record cannot result in imposition of penalty. It is submitted that the original Adjudicating Authority has specifically acknowledged that present is not the case where the raw material should be ordered confiscation. But despite forming the said opinion, the proposal of show cause notice has been confirmed. The Commissioner (Appeals) has also erred in not recognizing that the raw material was of one day production only

and there was no removal of any excisable goods from the appellant"s premises. There is no evidence to prove either of the two allegations. He again has erred by relying upon Rule 25 (1) (b) of Central Excise Rules, 2002. The appeal has been dismissed under the wrong interpretation of the said provision. The order is accordingly prayed to be set aside. While relying upon the various case laws, as mentioned in the grounds of appeal, learned Counsel has prayed for the appeal to be allowed.

4. While rebutting these arguments, learned Departmental Representative has mentioned that in terms of Rule 10 of Excise Rules, it is the mandate that proper records shall be maintained on daily basis in a legible manner. Since the daily stock account was not maintained by the appellant, there is a define contravention of said Rule 10. In consequence whereof, Rule 25 permits confiscation and imposition of a penalty. It is impressed upon that there is no infirmity while endorsing the Rule 25 (1) (b) of Central Excise Rules while for the confiscation of seized 56.300 MT of MS Ingots and 221.693 MT of Iron Ore. Appeal is accordingly prayed to be dismissed.

5. After hearing the same and pursuing the entire record of appeal and the orders of the Adjudicating Authority below, I observe and hold as follows :

two allegations were leveled against the appellant in the show cause notice : (i) the appellant was not accounting the raw material and the manufacture of excisable goods in their daily stock ; (ii) appellant was removing the same without payment of central excise duty. If order-in-original para 2.8 thereof is perused, the original Adjudicating Authority has specifically recorded that unaccounted stock of MS Ingots was seized under the belief that the same was intended to be cleared clandestinely and this observation is sufficient for me to hold that the authorities below have proceeded on the basis of the presumptions. No doubt, MS Ingots found in excess over the

declared stock were not found entered in the daily stock account of the appellant but whether or not it was a deliberate act of appellant with an intent to remove those unrecorded goods without issue of invoice and without payment of central excise duty was to be ascertained that too on the basis of cogent evidence. The burden was to be discharged by the Department. Also whether mere violation of Rule 10 of Central Excise Act amounts to deliberate intention is again for the Department to prove. But I observe that there is no such evidence produced by the Department. Contrary there has been a decision of this Tribunal in the case of **Pepsi Foods verses CCE – 2002 (139) E.L.T. 658 (CEGAT)**, wherein it has been held that „account for" as has been used not only in Rule 10 of the Central Excise Rules, but also in Rule 25 thereof does not merely mean "making entry in books" it only means explaining the correct position of excisable goods as per law and not "account" which would relate to making of correct entries in accounts books. This Tribunal in another case **Dhanraj Enterprises versus CCE – 2006 (199) E.L.T. 518 (CESTAT SMB)** has held that "account for" means giving explanation and not entering in the books of accounts. Tribunal also held that non-accountal of goods in RG-1 Register does not, ipso facto indicate the intention on the part of the assessee to evade the payment of duty and accordingly there cannot be a case to confiscate goods or to even impose penalty. Even the improper accounting is denying the mean clandestine removal in the absence of circumstantial evidence, proving the same.

6. The original Adjudicating Authority has acknowledged that the noticed excess is for not more than one day"s production. Except that the same was not properly recorded in the register, there is no direct or corroborative evidence proving the allegations against the appellant. There is no evidence on record indicating previous clandestine removal by the appellant. The original Adjudicating Authority also observed from the documents

that goods were not even ready for dispatch, accordingly goods cannot be held to have been removed clandestinely. The Assistant Commissioner in para 8.7 of order-in-original has specifically recorded :

> "8.7 I find that the Noticee have relied in the case of A. Kumar Industries versus Commissioner, Excise and Customs, Vapi, Daman – 2010 (261) E.L.T. 486 (Tri. – Ahmd.) and pleaded that goods cannot be confiscated and no penalty can be imposed. I find in the said case there was no documentary evidence that the goods were ready for clandestine removal apart from the initial statement of authorized signatory. Mere non-accountal of goods in RG-1 Register would not invite confiscation of same or imposition of any penalty unless there is an evidence to show that goods were meant for clandestine removal".

In subsequent para while relying **Nilesh Steel & Alloy Pvt. Ltd. versus Commissioner of Central Excise, Aurangabad – 2008 (229) E.L.T. 399 (Tri. – Mumbai)**, it has been observed that penalty should not have been imposed merely because stock of finished goods lying in factory without entry in production register was found specially there was no evidence of the clandestine removal. Such stock is observed to be not liable to confiscation in para 8.110 of the said order it is specifically recorded :

> "8.10 I agree with the Noticee"s contention that production was on the day of visit of the officers and was yet to be entered in records. There is no allegation that the records were not being maintained by the assessee for quite long period. I am of the view that the in absence of evidence showing clandestine removal as the excess finished goods not more than one day"s production and non-entry of that day"s production in the records cannot result in imposition of penalty – **Held Accordingly**".

7. Similarly, findings of Adjudicating Authority are noticed difference with respect to Iron Ore (raw material) quantity in the order-in-original para 8.11 thereof where Assistant Commissioner has specifically recorded :-

> "8.11 Since excess stock was within the factory, *mens rea* manifesting that goods were ready for clandestine further manufacture of excisable goods removal has not been reached to that stage. ….. I find that there is absolutely no

> evidence to show excess stock of Iron Ore is meant for clearance without payment of duty or was in the process of being manufacture of illicit excisable goods and attempt shall be made to remove them clandestinely. The goods were still in factory premises and in absence of positive evidence the theory of universal knowledge cannot be applied. Simple failure of non-accounting of goods in records does not prove malafide intention to clear goods clandestinely and cannot invite confiscation. Mere acceptance of such excess stock at time of visit of officers is not a conclusive proof that the said goods would be used in clandestine manufacture. Evidences placed on record lead to nowhere let alone the allegation of clandestine manufacture. Evidences remain to be provided to establish that such excess stock not entered in records is a deliberate act and with malafide intent to manufacture and remove excisable goods clandestinely".

8. Relying upon the case of **Commissioner of Central Excise, Aurangabad versus Gal Aluminium Extrusions Pvt. Ltd. – 2011 (274) E.L.T. 582 (Tri. – Mumbai)** it has been held in order-in-original para 8.12 that raw material is not liable to confiscation under Rule 25 of Central Excise Rules, 2002. Despite these findings surprisingly Assistant Commissioner has confirmed the proposal of confiscation of 56.300 MT of MS Ingots and 221.693 MT of Iron Ore, however, penalty on said quantity of Ingots was not imposed upon nor the order with respect to Iron Ore was passed.

9. There was no better evidence before Commissioner (Appeals) than it was before Assistant Commissioner. Commissioner (Appeals) has held that the verification of stock of Ingots was conducted in presence of the Authorized Signatory of the appellant, who neither had objected the method of physical verification nor made any complaint. He had rather admitted the same and also in the excess stock of 56.300 MT of MS Ingots valued at Rs. 11,09,110/-. The statement of said Authorized Signatory Shri Kumar Chakraborty is perused. It shows that there is no admission for the alleged excess stock. None as his answers recorded in the statement amount to admission except that "no satisfactory reason has been cited" is alleged against said Shri Chakraborty. Such kind of statement cannot be called as admission neither of guilt nor of the modus operandi of the

investigation. No doubt there is no retraction as in impressed upon by the Department, but once there is no admission retraction is not required. It is otherwise apparent from record that the appellant requested for the opportunity of cross-examining the witnesses the said opportunity has been denied cross examination is the basic rule of ensuring fair trial the denial thereof in the case which lacks any cogent evidence adversely affects the Department. Department has not bring for any such evidence which may prove their allegations. In absence thereof, however, in view of the acknowledge that the notice shortage is just of one day production even if recording as required under Rule 10 is missing, but the same does not warrant the application of Rule 25 (1) (b) of Central Excise Rules, 2002. As already discussed on the basis of the above cited case law, as a result, I am of the opinion that neither the MS Ingots as well as the Iron Ore are liable for confiscation nor present is the case of imposition of penalty. As a result of entire above discussion order under challenge is hereby set aside. Appeal stands allowed.

(Order pronounced in open court on 12/04/2021.)

(Rachna Gupta)
Member (Judicial)

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