

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/14/2020
IA NO. GA/2/2022

COMMISSIONER OF CGST & CENTRAL EXCISE BOLPUR
COMMISSIONERATE

Versus

M/S. STEEL AUTHORITY OF INDIA LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE BIVAS PATTANAYAK
Date : 22nd July, 2022

Appearance :
Mr. Uday Shankar Bhattacharyya, Adv.
Mr. Sukalpa Seal, Adv.
Ms. Banani Bhattacharyya, Adv.
...for appellant

Dr. Samir Kr. Chakraborty, Sr. Adv.
...for respondent

The Court : This appeal by the revenue filed under 235C of the Central Excise Act, 1944 (the Act) directed against the order dated 13th August, 2019 passed by the Custom Excise and Service Tax Appellate Tribunal, Regional Bench, II, Kolkata (Tribunal) in order No. FO/A/7593 of 2019.

The revenue has raised the following substantial questions of law for consideration :-

- “1. Whether in the de novo proceedings, the learned tribunal has followed the direction of the Hon'ble High Court, as given by the order dated 20th February, 2019, in its true sense as regards to

the points that what was the stock notionally determined and actually determined by the respondent – assessee and how it was adjusted in their accounts without being reflected in the Central Excise records ?

2. Whether the learned tribunal, being the last fact finding authority, has rightly followed the direction of the Hon'ble High Court, as given by the order dated 20th February, 2019, by accepting a reconciliation statement as submitted by the respondent – assessee without explaining the same that what was the stock notionally determined and actually determined by the respondent – assessee and how it was adjusted in their accounts without being reflected in the Central Excise records ?
3. Whether the Circular of CBEC being CBEC circular No.52/79-CX-6 dated 26th October, 1979 is applicable in the present facts and circumstances of the instant case ?”

We have heard Mr. Uday Shankar Bhattacharyya, learned standing Counsel appearing for the appellant/revenue and Dr. Samir Kumar Chakraborty, learned Senior Counsel appearing for the respondent/assessee.

This is the second round of litigation before this Court. Earlier the revenue had filed appeal being CEXA 13 of 2018 challenging the order passed by the Tribunal dated 13th March, 2018, which was in favour of the assessee. The Tribunal in its earlier order dated 13th March, 2018 had followed the order passed in assessee's own case for an earlier period and allowed the appeal filed by the assessee.

The Hon'ble Division Bench by judgment dated 20th February, 2019 remanded the matter back to the Tribunal noting that it is true that the circumstances of the case relied on by the Tribunal were similar to those of the case of the assessee on hand but what was the stock, notional details and actual details in the case on hand, how it was "adjusted" and "not being reflected in the Central Excise record" were not explained in the order of the Tribunal dated 13th March, 2019. Therefore, the matter was remanded to examine as to whether the facts were identical as that of the earlier decision. Pursuant to such order of remand the Tribunal took up the matter for de novo consideration and on going through the order passed by the Tribunal we find an elaborate exercise has been done by the Tribunal to compare the facts of the decision rendered by the Tribunal earlier with that of the facts of the case on hand and after taking into consideration the facts, the Tribunal opined that they are identical. More importantly, the assessee had filed a reconciliation statement for the period in dispute which was not objected by the revenue and the Tribunal on facts was satisfied that the shortage of stock was well within the permissible limit prescribed by the Central Board of Excise and Statute in its Circular No. 52/79-CX-6 dated October 26, 1979.

Aggrieved by such order the revenue is before us.

Firstly, we need to point out that there is no allegation against the respondent/assessee of any clandestine removal and this has been noted by the Tribunal while taking note of the fact. If such is the admitted position then the show-cause notice itself is barred by time. Be that as it may, we have noted the Circular issued by the CBEC dated 26th October, 1979, which

pertained to annual stock taking in relation to iron and steel items and condonation of losses. Paragraph 3 of the Circular is as follows :-

“Circular No.52/79-CX-6

P.No. 223/31/73-CX.6
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
NEW DELHI : DATED THE 26TH OCTOBER, 1979.

To

All Collectors of Central Excise.

Sub: Central Excises – Annual stock taking in relation to iron and steel –
condonation of losses noticed _____instructions re._____

XXXXXX	XXXXXXX	XXXXXX	XXXXXX
XXXXXX	XXXXXXX	XXXXXX	XXXXXX

3. As regards the percentage of losses that can be allowed in relation to the various iron and steel items the issue has been examined in consultation with the Director of Inspection and with regard to the various items following percentage of condonable losses observed during annual stock taking is fixed –

- | | | |
|---------------------------|---|-----|
| i) Tariff Item 26AA | - | 1% |
| ii) Tariff Item 26 | - | 1% |
| iii) Tariff Item 25 | | |
| a) Pig Iron | - | 2% |
| b) Iron in any crude form | - | 25% |

The above percentage should be used as a guideline and while deciding cases the investigation reports of the Plant authority referred to above should also be taken into account.

4. All pending cases of stock taking losses may be adjudicated quickly in the light of these instructions.”

In terms of the above Circular, the condonation of losses for pig iron have been fixed at 2% and for the iron in any crude form at 25% and

with regard to tariff item 26AA and 26, it was fixed at 1%. The assessee had filed a reconciliation statement before the Tribunal which shows that the percentage of loss was well within the parameters fixed by the CBEC in the Circular stated above. That apart, the Tribunal has also taken note of the earlier decisions of the Tribunal and in particular, the decision in the case of *Rashtriya Ispat Nigam Ltd. vs. Commissioner of Customs & Central Excise, Visakhapatnam, 2009 (235) E.L.T 248 (Tri. – Bang.)*. The facts of the said case are identical to that of the case on hand. Since we find that there are no decisions of the other High Courts nor it has been shown by the revenue that the decision of the Tribunal has been appealed against, we are inclined to take note of the finding rendered by the Learned Tribunal in *Rashtriya Ispat Nigam Ltd.*, which is as follows :-

“4.1. It has also been decided that since the production in many instances has to be determined on the basis of sectional weight which is calculated weight, the variations between the quantities finally cleared and the initial account should be viewed by Central Excise Officers in their proper perspective. However, the Commissioner has not accepted the explanation of the party on the ground that they had not intimated the Central Excise Officers in terms of the Board’s in Section the appellants are required to inform the Central Excise officers so that they could also participate in the stock taking exercise, this has not been done. This is a lapse, but for this purpose in our view demanding duty and imposition of heavy penalty is not at all warranted. In any case, the invocation of the longer period is not justified. We cannot say that one of the largest public sector undertakings Rashtriya Ispat Nigam is doing all these things with an intention to evade payment of duty. Further, this Bench had occasion to deal with similar issues in the following cases :

- (a) *Steel Authority of India Ltd. v. CCE, Mysore – 2006(200) ELT 229 (Tri.-Bang.)* where a similar situation was examined and it was decided that the shortage is inflated due to errors in taking opening balance and a physical stock. It is also held that considering the practical difficulties in estimating the actual stock and in view of the submissions made by the appellants, the demand of duty made by the Adjudicating Authority cannot be sustained. The ratio of that case would be applicable for this

case also. In the case decided by us also the steel products are involved. We are reproducing the findings given in that order:

“We have gone through the records of the case carefully. The demand has been issued under Rule 223A covering a period of 13 years from 31-3-1998 to 31-3-2001. The Revenue has issued the show cause notice on the belief that Section 11A is not applicable for demands made under Rule 223A. The Department’s view is not correct in terms of the judicial pronouncements cited by the appellants. There is no allegation that the appellants have removed goods in clandestine manner. Moreover, the stock taking was done by the appellants themselves. The departmental officers only associated with the same. Hence, the stock taking cannot be said to have been conducted in terms of Rule 223A of the Central Excise Rules. In any case, the shortage arrived at is based on estimates. The estimate cannot be said to be very accurate, as it has got its own limitations. It should also be appreciated that there are practical problems in steel plants in the matter of accounting of their production. The C.B.E.C. Circular No.52/79 Cx.6, dated 26-10-1979 has also laid down certain guidelines with regard to condonation of losses observed during annual stock taking. The appellants’ submission that the excess/shortage noticed was only marginal should have been given its due consideration. The Tribunal in the case of *M/s. Micro Forge (I) Pvt. Ltd. v. CCE, Rajkot* reported in 2004 (169)E.L.T. 251(T) has held that when the stock position is arrived at on the basis of estimation, the allegation of shortage of stock and consequent illicit removal of finished goods cannot be sustained. A plethora of case laws hold that provisions of Section 11A would apply in making demands of duty on deficiencies found during stock taking. The appellants based many reasons for discrepancies between the RG-1 and the physical stock. For example, RG-1 is only based on estimated production and not based on actual weighment. Physical stock is also based on estimation of weight on the basis of volumetric estimate and conversion to theoretic weight based on sectional weight. A comparison between two estimation is inherently inaccurate. Losses like cutting, grinding and milling, scale loss after heat treatment and straightening, reprocessing after inspection at various stage of manufacture are not recorded in RG-1. Rejections are not recorded while accounting for quantity produced or issued in the form of sections and ingots. Shortage is inflated due to errors in taking opening balance as on 1-4-1998 and physical stock on 31-3-2001. Considering the practical difficulties, in estimating the actual stock and in view of the submissions made by the appellants, we find that the demand of duty made by the adjudicating authority cannot be sustained. Therefore, we allow the appeal with consequential relief.”

- (b) Similarly in the case of *Widia India Ltd. v. CCE, Bangalore – 2007 (207) E.L.T. 562* (Tri.-Bang.) similar decision was taken. In the case of *Steel Authority of India Ltd. v. CCE, Bhubaneswar – 2001 (47) RLT 343 (CEGAT-Kol.)* it was held that allegation of clandestine removal based on difference in figures of production and clearance given in the annual financial accounts and RG-1 cannot be sustained and annual financial accounts are made public within two months from the date of close of the year.”

We also take note of the decision in the case of *Rourkela Steel Plant(SAIL) vs. Commissioner of Central Excise, Bhubaneswar, 2001 (137) E.L.T 566 (Tri. – Kolkata)*, wherein the adjudication was identical to that of the adjudication in the case on hand and the appeal filed by the SAIL was allowed. The said decision has attained finality. That apart, we note that in the case of *Steel Authority of India Ltd. vs. Commissioner of Central Excise, Mysore, 2006 (200) E.L.T. 229 (Tri. – Bang.)*, which decision was followed by the Tribunal, pertains to the case of the assessee in respect of their unit at Mysore and the said decision has attained finality. It is not shown to us that the Department has preferred any appeal against the said decision. Therefore, the Department is bound to adopt consistent approach in the matter. Further, we are surprised to note that the period covered by the show-cause notices was as on 31st March, 1989, 31st March, 1990 and 31st March, 1991. Two show-cause notices were issued on January 30, 1991 and March 31, 1992 for which the assessee had submitted replies on August 2, 1991 and January 25, 1993, after a gap of nearly 17 years from the relevant period where a notice of personal hearing was issued on 19th August, 2006 and the respondent assessee co-operated with the adjudication and also filed the written submission and the adjudication

order was passed on 21st November, 2006. It is not clear as to why there was so much of delay in taking up the show-cause notice for adjudication and more particularly, when 17 years have elapsed after the relevant period the adjudication itself should be termed to be a stale adjudication.

Thus, for the above reasons, we are of the view that the Learned Tribunal rightly allowed the appeal filed by the respondent assessee and the revenue has not made out any grounds to interfere with the said order.

Accordingly, the appeal fails and is dismissed.

Consequently, the substantial questions of law are answered against the revenue.

With the dismissal of the appeal, the stay application GA/2/2022 also stands dismissed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)