CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 1

EXCISE APPEAL NO. 50174 OF 2016

[Arising out of Order in Original No. RPR/EXCUS/000/COM/29/2015 dated 30.10.2015 passed by the Commissioner of Customs & Central Excise, Raipur]

PANKAJ TEKRIWAL **.....Appellant**

M/s Hi-tech Abrasive Ltd.,
740/I & J, Sector-B,
Urla Industrial Area,
Raipur (C.G)

Vs.

COMMISSIONER OF CENTRAL EXCISE-RAIPUR(CG) **.....Respondent**

The Commissioner Customs & Central Exicse
Central Excise Building, Tikrapara,
Raipur-492001

WITH
EXCISE APPEAL NO. 50175 OF 2016

[Arising out of Order in Original No. RPR/EXCUS/000/COM/29/2015 dated 30.10.2015 passed by the Commissioner of Customs & Central Excise, Raipur]

HI TECH ABRASIVES LTD. **.....Appellant**

740/I & J, Sector-B,
Urla Industrial Area,
Raipur (C.G)

Vs.

COMMISSIONER OF CENTRAL EXCISE-RAIPUR(CG) **.....Respondent**

The Commissioner Customs & Central Exicse
Central Excise Building, Tikrapara,
Raipur-492001

Appearance:
Shri Bipin Garg and Ms. J. Kainaat, Advocates for the Appellant

Shri Unmesh Kumar, authorised representative for the Respondent

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO'S. 58766-58767/2024

Date of Hearing : 30/07/2024
Date of Decision : 04/10/2024

P.V. SUBBA RAO:

1. M/s. Hi Tech Abrasives Ltd.[1] and Shri Pankaj Tekriwal[2] filed these two appeals to assail the Order-in-Original[3] dated 30.10.2015 passed by the Commissioner Customs and Central Excise, Raipur whereby he decided the proposals made in the Show Cause Notice[4] dated 25.9.2014 and confirmed duty demand of Rs. 60,72,088/- under section 11A(4) of the Central Excise Act, 1944[5] along with interest under section 11AA and imposed a penalty of equal amount under section 11AC. He refrained from confiscating goods under Rule 25 of the Central Excise Rules,2002[6] but imposed a penalty of Rs. 7,00,000/- on Tekriwal under Rule 26.

2. The assessee is assailing in its appeal the confirmation of duty along with interest and imposition of penalty under section11AC. Tekriwal is contesting the imposition of personal penalty under Rule 26.

3. We have heard learned counsel for the appellant and the learned authorised representative for the Revenue and perused the records.

4. The assessee manufactures Steel shots/grits and CI Shots/Grits and is registered with the central excise. It also avails CENVAT credit on its inputs and input services.

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1 Assessee
2 Tekriwal
3 Impugned order
4 SCN
5 Act
6 Rules

5. The officers of the Directorate General of Central Excise Intelligence[7] received intelligence that the assessee was evading duty by under-reporting production and removing the quantity so under reported without paying duty. Acting on this intelligence, the officers of DGCEI visited the premises of the assessee, examined their records and took stock of the goods physically available. While the work-in-progress records showed 951.646 MT as the WIP, the actual quantity of goods in the semi-finished state was only 70 MT. Thus, there was a shortage of 882 MT of semi-finished goods (or WIP).

6. The assessee maintained inventory of (a) raw material; (b) finished products; and (c) Work In progress (WIP). No discrepancies were found in the raw material and finished products but huge shortages were found in the WIP.

7. Since the semi-finished goods (WIP) will with time, become finished goods, the demand is of duty on shortage of semi-finished goods treating them as finished goods.

8. Duty has been demanded and confirmed invoking extended period of limitation under section 11A(4) along with applicable interest under section 11AA and mandatory penalty under section 11AC.

Submissions on behalf of the appellants

9. Shri Bipin Garg learned counsel for the appellant made the following submissions.

a. Generation of dust in the process of the manufacture of their final products is inevitable.

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7 DGCEI

b. When the Panchnama was drawn, Shri Pramod Kumar, authorised signatory of the appellant and Shri Manoj Kumar Jain, Production Manager, explained that during the manufacture, there was a manufacturing loss of 7%, dust loss of about 5 % (which is recoverable) and blow holes loss of about 1% and skull formation loss of about 1%. He further explained that since 2007-08, the appellants stopped accounting of the dust loss; before this, they had sold the dust for about Rs. 1,000/- per metric ton.

c. Since 2008, the appellant used the dust to fill pits and dumped it on the roadside, etc.

d. The demand was confirmed based on assumptions and presumptions without any evidence.

e. In **Continental Cement Company vs UOI[8],** the Allahabad High Court held to substantiate allegations of clandestine removal, clinching evidence was required and it cannot be merely based on assumptions. Revenue must prove this charge through sufficient evidence.

f. The entire demand is made on theoretical calculations.

g. The alleged shortage can be explained by the loss of 5% dust which the appellant had stopped accounting for in view of the low market value.

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8 2014(309) ELT 411 (All)

Instead, the appellant simply dumped it on the roads around to fill in the pits, etc.

Submissions on behalf of the Revenue

10. Shri Unmesh Kumar, learned authorised representative for the Revenue vehemently supported the impugned order and asserted that it calls for no interference and submitted as follows:

a. The charge of clandestine removal is based on the WIP register maintained by the appellant itself. It is not based on any other third party data.

b. Analysis of this register revealed that there is a direct correlation between the raw material, work in progress and the finished goods. The quantity shown as consumed in the WIP register is the quantity of the final product that will be produced and all production losses have been taken into account.

c. No prudent business will produce dust which is saleable in the market even for a low price and not account for it and dump it on public roads.

d. Shri Pankaj Tekriwal was the Director of the company during the relevant period and was responsible for maintaining all the records. Therefore, the penalty imposed on him under Rule 26 must also be sustained.

Findings

11. We have considered the submissions advanced by the learned counsel for the appellant and the learned authorised representative for the Revenue and perused the records.

12. Officers of the DGCEI visited the appellant's factory and took stock of the goods and compared them with the records maintained by the appellant. There were records of raw material, work-in-progress and of finished goods. There was no shortage in the raw material and in the finished goods. The dispute is only regarding the shortage of stock found in the work in progress.

13. The semi-finished stock was maintained by the assessee in a WIP register accounting for the goods on monthly basis. A facsimile of the page for August 2011 is reproduced in paragraph 9.1 of the impugned order as an example. This clearly shows how the WIP register was maintained by the appellant. The details of this page are as follows:

SEMI FINISHED STOCK (WIP)

(WIP as on 31.8.2011)

Opening WIP as on 01.08.2011		**987.146**
Add:		
Raw material consumed	736.450	
Less		
Burning loss	105.450	
	630.945	
Finished goods manufactured during Aug 2011	**664.420**	
Decrease in semi-finished goods		**-33.475**

WIP as on 31.8.2011		**953.671**

14. In this elegant but simple accounting system, the appellant had maintained record of the **WIP.** The raw materials consumed minus the loss is added to the opening stock of the WIP and the finished goods manufactured during the month are subtracted out of the WIP to arrive at the closing balance of the WIP. In other words, the entire loss which occurs during the process of manufacture was already subtracted and the quantity of final product which would emerge after deduction was recorded in the WIP register. For example, in the above table, although the raw material issued for production during August 2011 was 736.450 MT, manufacturing losses of 105.450 MT were deducted and only 664.420 MT was recorded as the final product in the WIP register.

15. The finished goods manufactured could be out of the raw materials consumed during that month or those which were are already part of the work-in-progress at the beginning of the month. If the quantity of finished goods manufactured during the month is more than the raw materials consumed (minus losses) during the month, it results in a decrease of the WIP at the end of the month and vice versa. The losses in the production are accounted for by subtracting from the raw materials consumed itself. So, there is no need to account for any production losses separately. For instance during August 2011 discussed above, although 736.450 MT of raw materials

was consumed, only 630.945 was added to the WIP after deducting 105.450 MT towards losses.

16. The question which may arise is if this is the only production loss or if there are other losses during production because it is recorded as 'burning loss'. To examine this, we need to understand what is the percentage of various losses during the manufacture. According to the statement of the Production Manager of the appellant Shri Manoj Kumar Jain, there will be 7% hot metal loss, 5% Dust loss (which is recoverable), Blow holes (porus shots) loss of 1% and skull formation loss of 1%. These figures are not in dispute and these have been reiterated by the learned counsel for the appellant in the synopsis submitted before us. Thus, the total loss is 7% +5% +1% +1%= 14%. It includes all four forms of losses including the dust loss (which is recoverable).

17. The loss recorded as 'burning loss' in the WIP during August 2011 was 105.450 MT out of raw material of 736.450 MT which is 14.31%. Thus, it is evident that all forms of losses including the dust loss which is recoverable have been accounted for in the WIP by subtracting them from the raw materials itself. The percentage of losses recorded in different months between April 2007 to May 2012 varied and the average loss was 15.11% as recorded in table titled Annexure-A in the impugned order.

18. After accounting for these losses, the recorded stock of goods in WIP as on the close of May 2012 was 951.646 MT. The

actual WIP found in stock during the Panchnama was only 70 MT.

19. The submission of the learned counsel for the appellant was that the shortage was due to dust loss and the dust so generated was not accounted for by the appellant nor had it sold it to anyone because it was of low value. According to the learned counsel, the appellant had dumped the dust on roads. On a specific query from the bench, learned counsel confirms that these were not the roads within the factory but the entire 882 MT of shortfall was of dust which the appellant had dumped on public roads.

20. These submissions cannot be accepted for more than one reason. Firstly, the dust loss of 5% has already been accounted for in the total losses (average of 15.11%) while entering the figures in the WIP register. Therefore, the shortage cannot be explained by claiming it was dust loss. Secondly, if such a large amount of dust was generated and which was of some value, no businessman or factory will not account for it or not sell it. Thirdly, it is unthinkable that 880 MT of the dust could be dumped on public roads without anyone noticing it. The first fact that the loss detected was after accounting for all losses including dust losses itself should remove any doubt about the shortage.

21. The next question is what would have happened to the WIP found short. Once raw material is issued for production, they can only move forward towards finished products and they cannot go back and become raw material. The irresistible

conclusion is that the final products were removed after manufacture. No duty has been paid on those goods and they have not been accounted for in the Register for Final Products.

22. Learned counsel vehemently argued that duty cannot be demanded based on theoretical calculations and he relied on several judicial decisions in support. We have considered these decisions and they were on different set of facts. In the case of **Oudh Sugar Mills Ltd.** vs. **Union of India[9],** the appellant was a public sector sugar manufacturer which was under the physical control of the department and nothing could move out of the factory without the permission of the officer posted therein. Duty was demanded based on calculations of the Assistant Chemical Examiner based on the weight of the sugarcane crushed, weight of the juice and the sugar content. The appellant was manufacturing about 12 lakh maunds of sugar and paid duty thereon. Based on the calculations by the Assistant Chemical Examiner, production of 11,606 maunds of sugar was alleged to have been short reported. It is in this context, the Supreme Court set aside the order of the Government of India and allowed the appeal.

23. In **Commissioner of Customs, C. Excise and ST** vs. **Auto Gollon Industries P. Ltd.[10],** there was no record of purchase of various raw material and there was only a record of purchase of Armature Assemblies and the Allahabad High Court held that it was not possible for the assessee to manufacture

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9 1978 (2) ELT (J172) (SC)
10 2018(360)ELT 29 (All.)

motors with only armature assemblies and therefore, upheld the order of the Tribunal in favour of the assessee.

24. In **Continental Cement Company** vs. **Union of India**[11], Allahabad High Court found that there no investigation to establish that the raw material was procured, transported and the goods were manufactured and sold. The case was built only on the documents allegedly establishing the clandestine production and sale. The genuineness of these documents was not accepted by the High Court because they were all written by one person in his handwriting.

25. Similarly all other cases relied on by the learned counsel were based on the specific facts of each case. In this case, the procurement of the raw material is not in doubt. There is nothing on record to show that there was any discrepancy in the stock of the raw material and its physical stock. The raw material is issued for production and thus, the raw material register ties up with the work-in-progress register. The quantity shown as manufactured is recorded in the finished products register and there is no discrepancy in the finished products register. It is a matter of record that the appellant availed CENVAT credit on the raw materials which it procured and paid duty on the finished products which it recorded and cleared as per its finished product register.

26. The genuineness of these records is not disputed by either side. These were not recovered from any third party sources but

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11 2014 (309) ELT (411 (All.)

these were the appellant's own records maintained in its own factory and produced by the appellant during investigation by the officers of DGCEI. The discrepancy that was found was in the WIP register. The appellant does not dispute that the WIP register maintained by it is genuine and that it reflects the quantity of the raw material issued for production. The losses that would occur in the manufacture of the final products have already been accounted for in the WIP register as discussed above. Thus, the 933 MT of WIP reflected in the WIP register has to be the stock lying manufactured or which is in the process of completing the manufacture and it is expressed in terms of the quantity of the final products after deducting all the production losses. Against this quantity, only 70 MT was found.

27. The question which arises is as to what had happened to the rest. The assertion of the appellant is that it was lost as dust and that dust could be sold at a low price of about Rs. 1,000/- per kg but it had, instead, dumped it on public roads and therefore, it was not found.

28. The percentage of various losses indicated by the appellant during the initial statements recorded during investigation and up to the synopsis produced before us by the learned counsel is that there will be a 7% hot metal loss, 5% Dust loss (which is recoverable), Blow holes (porus shots) loss of 1% and skull formation loss of 1%. These add up to 14%. The entire 14% and in some cases more has already been deducted in the WIP register as discussed above. Therefore, there is no doubt about the genuineness of the register and the

entries made therein and there is no other explanation for the shortage.

29. Learned counsel also submitted that there are no invoices or documents showing sale of the allegedly clandestinely removed goods and no evidence of cash flow. We find that if invoices are issued and the sale proceeds are also accounted for, then the entire sale would be genuine sale. Clandestine removal, necessarily implies that some actions have been taken clandestinely. Clandestine activities have to be proved with whatever evidence is available and if all records are available and everything is accounted for, it cannot be clandestine removal. What needs to be seen is whether given the evidence on record, it can be reasonably presumed that there was clandestine removal of the goods. In the case of **Collector of Customs, Madras and others** vs **D. Bhoormull[12],** the Supreme Court laid down the principle to be followed with respect to proof in such cases. The relevant portions of this judgment are reproduced below:

> **30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day**

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12 1983(13)ELT. 1546(SC)

world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Blatch* v. *Archar* (1774) 1 Cowp. 63 at p. 65 "**According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted**". **Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden**.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in `Law if Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, *presumptio juris* : but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. **Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.**

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34. The propriety and legality of the Collector's impugned order had to be judged in the light of the above principles.

35. It is not correct to say that this is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of Baboothmull and Bhoormull, could

> **reasonably lead to conclusion drawn by the Collector, that they were smuggled goods.** These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them.
>
> **(emphasis supplied)**

30. Applying the principles laid down by the Supreme Court in **Bhoormull** to this case, we find that the allegation is of clandestine removal. There is no dispute about the authenticity of the records and who had maintained them. The only dispute is regarding how the shortage of WIP is interpreted. The appellant's explanation is that it is due to dust of about 5% generated during the manufactured which it claims to have not accounted for and dumped on the roads because its sale value is low but this loss has already been taken into account in the WIP register and the shortage is after accounting for these losses. Since the raw material were already put through the process of manufacture the logical conclusion would be that the final goods were manufactured but lesser quantity was recorded in the final products register and duty was paid. The remaining quantity was not found in the factory. The shortage is also not of small quantity in the case of **Oudh Sugar Mills** but in this case, of the 933 MT only 70 MT was found in stock.

31. In the facts of this case, we have no hesitation in upholding the decision of the impugned order that the appellant had removed the goods found short clandestinely and is liable to pay excise duty under section 11A invoking extended period of limitation along with interest and penalty under section 11AC.

32. As far as the penalty on Shri Tekriwal is concerned, it is imposed under Rule 26 of the Central Excise Rules,2002 which reads as follows:

> **"Rule 26. Penalty for certain offences**. (1) **Any person who acquires possession of, or is in any way concerned** in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which **he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable** to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater."

33. A plain reading of the above Rule shows that the pre-requisite for imposing penalty under Rule 26 is confiscation of the goods and the person being concerned in any manner with such goods. In this case, the Commissioner dropped the proposal to confiscate the goods. Therefore, Rule 26 cannot apply.

34. In view of the above, **Excise Appeal no. 50174 of 2016** filed by Shri Pankaj Tekriwal is allowed and the penalty imposed on him is set aside. **Excise Appeal no. 50175 of 2016** filed by M/s. Hi tech Abrasives Ltd. is dismissed and the impugned order is upheld insofar as it pertains to it.

[Order pronounced on **04.10.2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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