

2022-TIOL-28-CESTAT-KOL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EAST REGIONAL BENCH, KOLKATA**

Excise Appeal No. 75018 of 2021

[Arising out of Order-in-Original No.01//MP/Commr./2020, Dated: 09.10.2020
Passed by Principal Commissioner of CGST & Excise, Patna II]

Date of Hearing: 15.11.2021

Date of Decision: 21.12.2021

**M/s CARBON RESOURCES PVT LTD
(UNIT II, BARAUNI INDUSTRIAL AREA, TILRATH
BEGUSARAI, BIHAR-851122)**

Vs

**COMMISSIONER OF CGST AND EXCISE,
PATNA II, CTTC BUILDING, SANCHAR PARISHAD,
BUDDA MARG, PATNA-800001**

Appellant Rep by: Shri Ankit Kanodia, Adv. & Shri Anand Agarwal, AR

Respondent Rep by: Shri J Chattopadhyay, AR

CORAM: P K Choudhary, Member (J)

Raju, Member (T)

CX

- Appellant is engaged in manufacture of Calcined Petroleum Coke (CPC) - During audit, some discrepancy in 3CD Return filed by appellant with IT Department and ER 1/ER 4 return filed for year 2013-14 was noticed, i.e; excess production in respect of CPC over and above the ER 1/ER 4 return and hence it was alleged that the appellant has clandestinely removed such goods without payment of excise duty - Appellant has produced their Tax Auditor's certificates certifying the reconciliation which was also produced by appellant before Adjudicating Authority and the said certificate clearly puts up the reconciliation between figures of clearance as per 3CD and ER-1 - Further, Patna High Court in case of **Universal Polythelene Industries,**

had clearly held that in case of difference in figures between balance sheet and returns, it is not a rule that balance sheet figures are to be taken as correct - Appellant has been able to produce relevant reconciliations to explain the differences in clearance figures as per ER-1 and as per form 3CD which was on account of inclusion of 7031.42 MT twice by considering the conversion from CPC ROK to CPC Screen and CPC fines in captive consumption details and yield of finished products both in annexure to the Tax Audit report - Adjudicating Authority has not given any cognizance to submission of appellants as regards allegation of clandestine removal and the burden to prove the same - Thus, going by judgment of Tribunal in case of **Sri Durga Cables Pvt. Ltd.,**

no investigation has been conducted by department to prove allegation of clandestine removal in the case and thus the recovery of excise duty merely based on differences in figures of consumption cannot be made by department - Demand has been raised for the period 2013-14 in 2018 onwards whereas the spot memo was issued by Department in 2016 itself - No explanation has been furthered by Department in respect of such gross delay in proceeding with the matter - Therefore, invocation of extended period of limitation is not justified - Demand of excise duty only on assumptions and presumptions in quantity of clearance of finished goods figures of Tax Audit form 3CD and ER-1 cannot be sustained both on merits and on limitation and is accordingly set aside: CESTAT

Case laws cited:

Commissioner Of C. Ex., Patna Versus Universal Polythelene Industries [2011 (270) E.L.T. 168 (Pat.)]... Para 3...referred

Commissioner V. Universal Polythelene Industries - 2016 (342) E.L.T. A226 (S.C.)... Para 3...referred

Golden Steel Corporation Ltd. Versus Commissioner Of C. Ex., Kolkata-Ii - [2017-TIOL-440-CESTAT-KOL](#) ... Para 3...referred

Sri Durga Cables Pvt. Ltd. Versus Commr. Of C. Ex. & Cus., Bhubaneswar-I 2020 (374) E.L.T. 459 (Tri. - Kolkata)... Para 3...referred

Shree Nirmalanand Steel Casting (P) Ltd. Versus C.C.E., Raipur (Cg)] - [2016-TIOL-3229-CESTAT-DEL](#) ... Para 3...referred

Sanket Food Products Pvt. Ltd. Versus Commissioner Of C. Ex., Aurangabad [2005 (188) E.L.T. 107 (Tri. - Del.)]... Para 3...referred

Jai Balaji Industries Limited (Unit-Iii) Vs. Commissioner Of Cgst & Cx - [2020-TIOL-1712-CESTAT-KOL](#) ... Para 3...referred

Shivalaya Ispat & Power Pvt. Ltd. Versus Commissioner Of C. Ex., Raipur - [2017-TIOL-601-CESTAT-DEL](#) ... Para 3...referred

Commissioner Of Central Excise, Aurangabad Versus Cosmos Films Ltd. 2013 (292) E.L.T. 116 (Tri. - Mumbai)... Para 3 ...referred

FINAL ORDER NO. 75861/2021

Per: P K Choudhary:

The present appeal has been filed by the Appellant being aggrieved with the Order-in-Original dated 09th October 2020 passed by the learned Commissioner, whereby the demand of excise duty of Rs.2,53,48,269/- has been confirmed for the period 2013-14, along with interest and penalty as proposed in the Show Cause Notice dated 09th May, 2018.

2. Briefly stated, the facts of the case are that the Appellant is engaged in the manufacture of Calcined Petroleum Coke (CPC) classifiable under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985 (in short 'Tariff'). During the audit of the records of the appellant by the CERA team, some discrepancy in the 3CD Return filed by the appellant with the Income Tax Department and ER 1/ER 4 return filed for the year 2013-14 was noticed i.e; excess production in respect of CPC over and above the ER 1/ER 4 return and hence it was alleged that the appellant has clandestinely removed such goods without payment of excise duty. Based on the above, on May 9, 2018, the Commissioner of CGST & CX, Patna II (hereinafter referred to as the Commissioner) issued a Show Cause – cum – demand notice to the Appellant proposing to demand excise duty on the quantities of the finished goods shown as excess clearance in 3CD form as compared to the ER 1 Return for the period 2013-14. The Appellant vide letter dated November 5, 2018 replied to the said show cause – cum – demand notice pointing out inter alia that the said difference is in relation to conversion of Calcined Petroleum Coke (CPC) into various grades viz. ROK, Fines and Screen and that the tax audit report has inadvertently included 7031.42 MT twice by considering the conversion from CPC ROK to CPC Screen and CPC fines in captive consumption details and yield of finished products both. The Appellant further contended that demand is based only on the figures reported in the annexure of the tax audit report for the year 2013-14 without any other substantive allegation in this regard. It is the case of the Appellant that the duty can only be demanded in the present case if the basic allegation of clandestine removal is proved against them, which has not at all been discussed or touched upon by the Ld. Adjudicating Authority. The Appellant further contended that the said Show Cause – cum – demand notice was substantially barred by limitation. Department has raised the demand of excise duty alleging clandestine removal. Hence, the present appeal before the Tribunal.

3. Shri Ankit Kanodia, learned Advocate, appeared on behalf of the Appellant. He contended that the excise duty demand is not sustainable for the following reasons:

(i) That the demand is based only on the figures reported in the annexure of the Tax Audit report for the year 2013-14 without any other substantive allegation;

(ii) That the Appellant has already provided detailed reconciliation for the same supported by Tax Auditor's two certificates to explain the reasons of difference before the Adjudicating Authority which has not been considered at all by him.

(iii) That there is no difference in value of sales of manufactured products as per ER 1 and form 3CD of Income tax and that the difference is only on account of quantitative disclosure

(iv) the Adjudicating Authority has not discussed any reasons for confirmation of demand on account of clandestine removal and the same has not been brought on record; He further relied on the following judgments which have held that to prove the allegation of clandestine removal of goods, the evidence must be brought on record by the department:

a. Commissioner Of C. Ex., Patna Versus Universal Polythelene Industries [2011 (270) E.L.T. 168 (Pat.)],

b. Commissioner V. Universal Polythelene Industries - 2016 (342) E.L.T. A226 (S.C.).

c. Golden Steel Corporation Ltd. Versus Commissioner Of C. Ex., Kolkata-Ii 2017 (347) E.L.T. 570 (Tri. - Kolkata) = [2017-TIOL-440-CESTAT-KOL](#)

d. Sri Durga Cables Pvt. Ltd. Versus Commr. Of C. Ex. & Cus., Bhubaneswar-I 2020 (374) E.L.T. 459 (Tri. - Kolkata)

e. Shree Nirmalanand Steel Casting (P) Ltd. Versus C.C.E., Raipur (Cg)[2017 (357) E.L.T. 1012 (Tri. - Del.)] = [2016-TIOL-3229-CESTAT-DEL](#)

f. Sanket Food Products Pvt. Ltd. Versus Commissioner Of C. Ex., Aurangabad [2005 (188) E.L.T. 107 (Tri. - Del.)]

g. M/S.Jai Balaji Industries Limited (Unit-Iii) Vs. Commissioner Of Cgst & Cx, Bolpur Commissionerate, Final Order No. 75583- 75585/2020 Dated 12/11/2020 = [2020-TIOL-1712-CESTAT-KOL](#)

h. Shivalaya Ispat & Power Pvt. Ltd. Versus Commissioner Of C. Ex., Raipur 2017 (357) E.L.T. 742 (Tri. - Del.) = [2017-TIOL-601-CESTAT-DEL](#)

i. Commissioner Of Central Excise, Aurangabad Versus Cosmos Films Ltd. 2013 (292) E.L.T. 116 (Tri. - Mumbai)

The learned Advocate has also produced reconciliation copies to show the actual clearance as per ER 1 and as per Form 3CD for manufactured goods. He has also submitted the certificates from the Tax Auditor dated 17/06/2016 and 12/10/2018 certifying the reconciliation and explaining the reasons of difference between ER 1 and 3CD.

He further submitted that the production ratio of the Appellant is approximately 1.3:1 to 1.40:1. Hence, for every 1.3-1.4 MT of Raw Petroleum Coke, approx. 1 MT of ROK Coke is produced. Thereafter, the ROK is further screened to form Screens and Fines. In view of the same, it is submitted that the quantity of Screens and Fines cannot be in excess to the Quantity of ROK Coke produced by the Appellant.

He further submitted that the actual production and clearance figures for the period of dispute are extracted here-in-below for ease of reference:

Finished Goods

K)	He further submitted that on a basic perusal of the table extracted herein above, it is evident that the quantity of ROK consumed, i.e. 7031.42 MT is nothing but a sum total of the production of CPC Fines and Screens, i.e. sum total of 694.07 MT of CPC Fines and 6337.35 of CPC Screens. Hence, effectively, there has been no increase in the quantity of ROK produced to that extent. The allegation of the department that the Appellant suppressed the production and clearance of quantity of 7031.42 MT is therefore grossly unsustainable, without any legal basis and is liable to be dropped on this ground also.	Calcined Petroleum Coke Fines Calcined Petroleum Coke Screens	Total CPC
	-	-	239.02
	It is his submission that the demand is also barred by limitation as the demand covers the period from 2013-14 whereas the SCN was issued on 09TH May, 2018 much after the expiry of normal period of limitation. He further submits that the spot memo was issued in April 2016 whereas the Show Cause Notice was issued in May 2018 and thus the question of invoking extended period of limitation does not arise as the department was fully aware of the facts of the case of the Appellant and hence, no penalty is imposable.	694.07 6337.35	13948.25
5.	The learned Authorized Representative, Shri J. Chattopadhyay, appearing on behalf of the respondent department, justified the order of the lower authority. He also submitted a synopsis of his detailed arguments.	6337.35	14187.27
6.	Heard both sides through video conferencing and perused the appeal records.	54 6337.35	9717.70
7.	In the instant case, it is seen that the Adjudicating Authority has confirmed the demand of excise duty only on the ground that there are differences in the quantity of manufacture of goods as per ER 1 and form 3CD as filed by the Appellant, without at all considering any of the explanation and reconciliation provided by the Appellant throughout the adjudication stage as also during the audit memo stage. It is the case of the Department that the said Appellant has manufactured and cleared the goods to the extent of excess reported in form 3CD of Tax Audit Report as filed with the Income tax authorities. However it is seen that such allegation is only on the basis of the figure work of the Department without production of any other evidences for demand of excise duty for clandestine removal of manufactured goods.	640.07 694.07 6337.35	3498.00 13215.70 9717.57

8. The Appellant has produced before us their Tax Auditor's certificates certifying the reconciliation which was also produced by the Appellant before the learned Adjudicating Authority and we find that the said certificates clearly puts up the reconciliation between the figures of clearance as per 3CD and ER 1.

Further, we find that the Hon'ble Patna High Court in the case of

Commissioner Of C. Ex., Patna Versus Universal Polythelene Industries [2011 (270) E.L.T. 168 (Pat.)],

had clearly held that in case of difference in figures between balance sheet and returns, it is not a rule that balance sheet figures are to be taken as correct-

"8. We are of the opinion that in case of discrepancy between the balance sheet prepared by the qualified Chartered Accountant and RT-12, as a proposition of law it cannot be said that it is the balance sheet which will prevail. It will depend upon the facts and circumstances of each case. In the facts of a given case, RT-12 may prevail. Similarly in case of conflict, in a particular case the balance sheet may prevail. In case the manufacturer come out with plausible explanation and assigns valid reason for showing higher production in the balance-sheet, the later may be accepted. In our opinion both are pieces of evidence and which deserve acceptance is to be decided on the basis of further material available. There is no material to suggest that the manufacturer had manufactured the quantity as shown in the balance sheet, then what has been shown in RT-12 returns. The Tribunal as also the Commissioner has noted the common feature that manufacturers show inflated figures of its production in the balance sheet for taking higher loan facilities from the Bank and accepted the plea of the manufacturer.

9. Accordingly, we are of the opinion that the balance sheet prepared by the Chartered Accountant can be ignored on relevant and good grounds. The grounds assigned by the Commissioner as also the Tribunal are good and valid grounds. We are of the opinion that the balance sheet prepared by the qualified Chartered Accountant is not conclusive proof in regard to the production.

10. Accordingly, we answer the reference against the department and in favour of the assessee and it is held that the balance sheet prepared by the Chartered Accountant was not ignored on irrelevant or arbitrary grounds."

We find that the above judgment was also confirmed by the Hon'ble Apex Court reported in

Commissioner v. Universal Polythelene Industries - 2016 (342) E.L.T. A226 (S.C.).

9. In the instant case also, we are of the view that the Appellant has been able to produce the relevant reconciliations to explain the differences in clearance figures as per ER 1 and as per form 3CD which was on account of inclusion of 7031.42 MT twice by considering the

conversion from CPC ROK to CPC Screen and CPC fines in captive consumption details and yield of finished products both in the annexure to the Tax Audit report.

10. The above submission is explained with the help of the figures provided in the table herein-above:

The total amount of Raw Petroleum Coke consumed during the period in dispute is 18128.60 MT [Column C, Row –Consumption]. Hence, on applying the input : output ratio of 1.3:1, the total quantity of Calcined Petroleum Coke that can be manufactured by the Appellant amounts to (18128.60/1.3) MT which equals to 13945 MT (approx.). In "Column G, Row – Production" of the table, the total production by the Appellant amounts to 13948.25 MT. In view thereof, it is evident that based on the production norm of 1.3 : 1, the total amount of CPC manufactured during the period in dispute could only have been 13945 MT approximately. In the present case, the total production amounts to 13948.25 MT, which is nearly same as the quantity of finished goods that could have been manufactured with the given quantity of raw materials used. Therefore, the allegation of clandestine production and clearance thereof cannot be sustained.

11. Alternatively, it is also on record that the Adjudicating Authority has not given any cognizance to the submission of the Appellants as regards allegation of clandestine removal and the burden to prove the same. In this regard we refer to the judgment of the Tribunal in the case of **Sri Durga Cables Pvt. Ltd. Versus Commr. Of C. Ex. & Cus., Bhubaneswar-I 2020 (374) E.L.T. 459 (Tri. - Kolkata)** wherein this Tribunal held as-

"7. We find that the issue to be decided in this case is whether the appellant has clandestinely removed the goods on which the duty demand has been made. We find that in the entire proceedings, no evidence, much less corroborative evidence, has been adduced to show that input goods have been procured to manufacture goods for clandestine clearance. No evidence for extra production or unaccounted cash or statement of buyers or transporters has been obtained. It is a settled legal position that charge of clandestine clearance is a serious charge and the onus to prove the same is on the Revenue by adducing some evidence. The Tribunal has taken consistent view that in absence of corroborative evidence, the charge of clandestine clearance cannot be levelled against the assessee. Some of the decisions are as below :

- Ghodavat Pan Masala Products Ltd. v. CCE - 2004 (175) E.L.T. 182 (Tri.-Mumbai) = [2003-TIOL-326-CESTAT-MUM](#)

- CCE v. Supreme Fire Works Factory - 2004 (163) E.L.T. 510 (Tri.-Chennai)

- CCE v. Suvidha Limited - 2009 (236) E.L.T. 675 (Tri.- Del.)

9..... In fact, in the instant case, no shortages of goods were ever found which fact is on record and not in dispute. any case, since we have already noted hereinabove, that the whole basis of allegation of clandestine removal is the production pattern of other assessees, which has no legal or scientific basis, the impugned duty demand cannot be sustained.

10. In view of the above discussions, the impugned order cannot be sustained and accordingly the same is set aside. The appeal is allowed with consequential relief as per law."

Thus going by the above judgment we find that no investigation has been conducted by the department to prove the allegation of clandestine removal in the case and thus the recovery of excise duty merely based on differences in figures of consumption cannot be made by the department.

12. Further, on perusal of records, we find that the demand has been raised for the period 2013-14 in 2018 onwards whereas the spot memo was issued by the Department in 2016 itself. No explanation has been furthered by the Department in respect of such gross delay in proceeding with the matter. Therefore, we find that invocation of the extended period of limitation is not justified.

13. In view of the above discussions, settled legal judicial precedence and provisions contained in statutes referred to above, demand of excise duty only on assumptions and presumptions in quantity of clearance of finished goods figures of Tax Audit form 3CD and ER 1 cannot be sustained both on merits and on limitation and is accordingly set aside.

14. The impugned order is therefore set aside and the appeal filed by the Appellant is allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 21.12.2021)

(Paras are numbered as per the original text: **Editor**)

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