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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Calcutta

Decided On : Sep-10-2002

Reported in : (2004)(95)ECC4

Judge : S T G.R., A Wadhwa

Appellant : Nalco

Respondent : Commissioner of C. Ex.

Judgement :

1. M/s. NALCO have filed this appeal being aggrieved by the order passed by Id. Commissioner disallowing an amount of Rs. 59,07,599/- being Modvat credit imposing a penalty of an equal amount and directing payment of interest.

2. The facts of the case briefly stated are that the appellant is engaged in the manufacture of aluminium and calcined alumina. In the course of preventive checks of all the private records of the appellant, the Central Excise Officers came across a verification of annual audit report for the year 1992-93 and 1994-95 prepared by the Auditors. This report indicated a shortage of bagged calcined alumina to the tune of 3656.559 MT during the year 1992-93 and 1994-95. Since the persons concerned could not provide satisfactory explanation for the shortage, Show-cause Notice was issued to the appellants asking them to explain as to why duty amounting to Rs. 59,07,599/- should not be imposed and why interest should not be charged.

3. Arguing the case, Shri S.C. Mohanty, learned Counsel submits that the appellants were receiving bagged calcined alumina as also powdered alumina in BTAP wagons. He submits that only a very small quantity of calcined alumina is bagged and received. He submits that this bagged calcined alumina is when required for use in the factory is emptied in BTAP wagons and used in the manufacture of aluminium. He submits that sometimes bagged calcined alumina is emptied in the wagons for use in the manufacture and sometimes emptied in silos. He submits that sometimes this bagged calcined alumina is not separately indicated in the cards maintained. It is stated only as calcined alumina. He submits that thus whatever was found short as bagged calcined alumina on the date of verification by the short verifier was actually emptied in the wagons for use in the manufacture of the final product. He submits that the fact is that sometimes excess calcined alumina is found in silos and if the two figures are taken together, the net result will be an excess of 123.347 MT of calcined alumina for the year 1992-93, an excess of 455.616 MT of calcined alumina for the year 1993-94 and a shortage of 1.406 MT for the year 1994-95. He submits that thus two figures are compensating and should be taken and read together. The learned Counsel submits that if the two figures i.e. the figures of bagged calcined alumina is added to the figure of alumina found in silos, there will be no shortage and on the contrary, there will be an excess. The Id. Counsel submits that the Department has taken one sided view whereunder they have only considered a shortage of bagged calcined alumina reported by the short verifier. He submits that in the reports submitted by the stock verifier, there were certain quantities, which were not accounted for by them inasmuch as they were lying loose and a proper estimate could not be done, Ld. Counsel submitted that the appellants were maintaining RG 23A Part I Accounts properly and these accounts were not examined by the Central Excise authorities. The learned Counsel submits that there are a number of decisions of the various Courts including the Hon'ble Supreme Court in which it has been set out that all the figures must be considered before arriving at any shortage or excess, and excess in one case can be adjusted against a shortage of similar goods. Learned Counsel submits that the goods in this case are calcined alumina. It was being carried as indicated above namely, by BTAP wagons and sometimes by trucks when calcined alumina was bagged. Learned Counsel

submits that a broad view is required to be taken in this case inasmuch as the raw material is only calcined alumina and the figures as indicated above, if combined yearwise the shortage during the year 1994-95 was very insignificant which may be because of natural losses or damage or spill over etc. The learned Counsel, therefore, submits that no case has been made out by the Department, the appeal may be allowed after dispensing with the condition of pre-deposit of duty and penalty.

4. Shri T.K. Kar, learned SDR submits that the demand is based on the verification done by the stock verifier of M/s. R.K. Das & Associates.

He submits that this verification report became available only at the time of preventive checks undertaken by Central Excise authorities. He submits that various statements were recorded which included the statement of Chief Manager, Shri Sadananda Singh, Shri D.C. Sahu, Chief Manager (Finance) etc. He submits that in their statement, they stated that for smooth accounting, the appellants' company maintains two separate bin cards and stated that after all bagged calcined alumina is fed into the silo and if it is taken with the loose alumina already in the silos, there will be an excess. It was also submitted that alumina lying in a loose condition outside godown which according to the stock verifier, was not included in the report. If the same is taken the figure of shortage will get considerably reduced. The Id. DR submits that there were separate bin cards, one for calcined alumina brought by BTAP wagons and other set for bagged calcined alumina. He submits that in view of this separate record, there was very little chance of a mix up. He submits that since Modvat credit has been taken on the quantities found short, which was not used in the manufacture of final product, therefore, the demand for duty, imposition of fine and demand of interest is sustainable in law. He submits that the learned Commissioner has given detailed findings on each issue including limitation. He reiterated the findings.

5. We have heard the submissions made and the arguments adduced before us by both the sides. We have also perused the findings on record. We note that calcined alumina is received by the appellants either in BTAP wagons or in bagged form. We note that the Modvat credit is taken by the appellants on the total

quantity of calcined alumina received by two modes of transport. Since the Modvat credit was taken, it became incumbent for the appellants to explain any shortage or any discrepancy that may arise.

6. The contention of the appellants was that in both the cases, it was calcined alumina which was received and that as shown above when calcined alumina received as bagged or in BTAP wagons, it was the same product and therefore, the two must be taken together before any demand of duty is fastened on the appellants. The contention of Revenue was that there were separate bin cards. Shortages have been arrived at after examining the bin cards in details. We note that the bin cards should have shown receipt and issues of various quantities from these two sources. Since the two sources were distinct and different therefore, there was no question of mix up. In the report submitted by the stock verifier, it has been mentioned that the representative of the Finance Department and the concerned custodian department of the assessee were present during physical verification; that not only the bagged calcined alumina kept in stores, but also 11 racks kept open at platform which were fit for use in the manufacturing process were accounted for in the course of conducting the stock verification.

7. The stock verifier's report also indicated that the approval of various representatives of the assessee who were also associated with the Chartered Accountant was taken of the manner of verification. The stock verification was done in the presence of the custodian of the bagged calcined alumina, Internal Audit Department, Representative of Finance Department and the Departmental Representative of Raw Materials. The report also shows that the discrepancies and reconciliation were discussed with the concerned officials during the course of verification as well as while finalizing the report. The report further goes on to say that the findings of the Auditor of M/s.

R.K. Das & Associates for the year 1992-93, 1993-94 and 1994-95, have duly been accepted by the assessee and the shortage detected are found to have been accordingly incorporated in trial balance in Schedule A-10 and that the physical verification report of M/s. R.K. Das & Associates, has been accepted.

8. Having regard to the fact there were separate bin cards; that the responsible officers of the appellants company were associated with the stock verification; that verification was done in their presence and the method of verification was approved by them. No room is left for any doubt that there were shortage of bagged calcined alumina and we hold accordingly.

9. In so far as the point of limitation is concerned, we note that the verifier report was never sent to Central Excise authorities nor was the claim of shortage ever disclosed in any return to the Central Excise Department. Thus there was suppression of facts with intention to evade payment of duty. In the circumstances, we hold that the demand has rightly been raised extending the period beyond six months under the provisions of Section 11A(1) of Central Excise Act, 1944, and Rule 57-I of Central Excise Rules, 1944.

10. Having regard to the above findings, we uphold the disallowance of Modvat credit amounting to Rs. 59,07,599/- (Rupees fifty nine lac seven thousand five hundred ninety nine).

11. In so far as penalty is concerned looking to the facts and circumstances of the case and having regard to the facts that there may be some wastage in the process of manufacture, we reduce the penalty to Rs. 10 lac (Rupees ten lac). Interest will however be payable in accordance with law.

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