

India Forge and Drop Stampings Vs. the Commissioner of Central

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-31-2004

Reported in : (2005)(183)ELT453Tri(Mum.)bai

Judge : A Wadhwa, S T S.S.

Appellant : India Forge and Drop Stampings

Respondent : The Commissioner of Central

Judgement :

1. As per facts on records, the appellant is engaged in the manufacture of forging and motor vehicles parts falling under chapter heading No.72 and 87 respectively, to the schedule to the Central Excise Tariff Act, 1985.
2. On 04/03/98, a truck emerging from the appellant's factory was intercepted by the Central Excise Officers and on examination of the goods loaded in the said truck, was found to contain 1.500 M.T of scrap in excess of the scrap reflected in the duty paying documents. Further investigations were conducted and the statements of Shri A.K. Mitra, Director of the company was recorded. The goods were seized and subsequently released on furnishing of bond and cash security. During the post seizure investigation statements of other persons were recorded and the various records maintained by the appellants in the ordinary course of their business were put to scrutiny.

3. On the basis of the result of the above investigation, show cause notice dated 01/09/98 was issued to the appellants raising the following demands of duty against them:- a) Duty of Rs. 1350/- involved as additional duty on 1.5 MT of scrap loaded in the intercepted truck.

b) Duty of Rs. 6.75 lakhs on the clearances of unaccounted scrap during the period 1996-97 and 97-98 on the ground that the invisible loss declared by the appellants was on the higher side.

c) Duty of Rs. 1.46 lakhs was demanded on the charge of under valuation of scrap cleared by the assessee.

d) Duty of Rs. 14.62 lakhs was proposed to be confirmed for the period January 95 to July 97 on the charge of removal of bearing rings under the guise of scrap at reduced rate.

e) An amount of Rs. 97.47 lakhs representing the modvat credit availed on steel inputs for the period August 93 to March 98 was sought to be denied to the appellants on the allegations that quantum of visible/invisible losses availed by them was on the higher side and the quantity of steel inputs representing the same was not accounted for properly. The notice also proposed recovery of interest, imposition of penalty and confiscation of the various goods.

4. The appellants represented against the proposed action and submitted that the truck in question was sent by them for outside weighment and was being brought back to the factory for preparation of the excise papers. As regards the demand of duty on the losses, they submitted that the said demand was based on one of their letters written to the department detailing losses in respect of around 12 items, whereas they are manufacturing 700 to 800 items and the ratio adopted cannot be made applicable to all types of goods. They contended that in most of the cases visible percentage of material loss is 5% to 8% in the form of rejected pieces and scrap generation and invisible losses are to the tune of 8% to 10%. These invisible loss occurred in the process, like heating due to burning in forging stage, heat treatment stage, grinding and shot blasting stage, etc. Percentage loss varies jobwise and it is not possible to work out exact percentage of loss as forgings are

dealt on piece basis and the weight as reflected in their records was not actual weight but notional weight.

5. As regards the allegation of clearances of bearing rings under the guise of scrap at reduced price, the appellant explained that a strict quality control is maintained at their end and is also demanded by their customers. The customer M/s. SKF Bearings India Ltd., Pune, returned the defective bearing rings to them by reversing modvat credit and under the cover of an invoice. In all such cases they have filed D-3 intimation and wherever it is not possible to repair and reclear the rings, they are sold as defective and damaged rings at scrap price on payment of duty. The investigation conducted by the revenue from their buyers end has already shown that they have purchased defective rings at the price shown on the invoice and there was no other consideration.

6. As regards the duty demand on the ground of under valuation of scrap they clarified that the price charged in the invoice was Rs. 6/- per Kg, which reflected selling price and was cum duty. The assessable value, after deducting duty comes to Rs. 5.10 per Kg on which they had paid the duty. There is no proof that the scrap was sold by them at a higher value.

7. In respect of the main demand of duty of Rs. 90,47,700/- the appellants clarified that the entire case of the revenue is based upon the higher percentage of invisible loss. They clarified that the total loss in their case is about 8% out of which 3% is burning loss up to forging stage, another 3% as burning loss in heat treatment and 1% loss each in grinding and shot blasting process. They also referred to one of the cases, where the department has accepted emergence of 11% visible loss.

8. The above submissions made by the appellants were not accepted by the Commissioner, who vide his impugned order confirmed the demand of duty as proposed in the show cause notice. In addition, the seized scrap was confiscated along with the confiscation of truck with an option to the appellants to redeem the same on payment of redemption fine of Rs. 10,000/- and Rs. 15,000/- respectively. Penalty of Rs. 80,36,345/- was imposed upon the appellants under the provisions of Rule 173Q read with Section 11AC. Land, plant and machinery, building were

also confiscated with an option to redeem the same on payment of redemption fine of Rs. 1 lakh. In addition, personal penalty of Rs. 1 lakh was imposed on Shri A.K. Mitra, Director of the manufacturing company.

9. We have heard Shri. V.S. Nankani, Ld. Advocate appearing for the appellants and Shri R.K. Chandan, Ld. JDR appearing for revenue.

10. As regards the removal of 1.5 M.T. of scrap in excess of 7.860 M.T of scrap loaded in the intercepted truck, the appellants have explained that on 03/03/98 they had loaded the truck with the reduced quantity and had sent the same outside for weighment purpose. After weighment the truck was brought back and the excise invoice was made. However, their buyers refused to take delivery of the scrap and the same had to be kept in the factory premises. The next day their buyer again approached them and proposed to buy full truck load. The same was loaded with additional scrap and was sent back outside for the purposes of weighment. When it was being brought back the same was intercepted.

The appellants have contended that the Board's circular allows them to adopt the above procedure. In fact it is seen that the Commissioner has also not observed that the circular of the Board does not allow the assessee to send the truck outside for weighment purpose. In any case, we find that the duty involved on the additional scrap is only to the tune of Rs. 1350/- and the appellants has argued that since there was sufficient balance in their RG-23 Part-II, there could not be any ulterior motive to evade the duty. In any case, the said goods were provisionally released to the appellants and have been cleared subsequently on payment of duty.

11. As regards the second demand of duty of Rs. 6.75 lakhs we find that the same is raised only on the ground that the invisible loss declared by the appellant is to the tune of 8%. The Commissioner has extended the invisible loss to the tune of 5.5% and has confirmed the demand of duty in respect of the excess loss on the ground that the same has been cleared by them clandestinely. We do not find any justification for confirming the said demand of duty on the sole ground of excess loss claimed by the appellants during the period in question. The appellants have furnished a table showing the losses from 1993-98 which vary from year to year. In

the absence of any evidence to show that the excess loss claimed by the appellants has, in fact been cleared clandestinely, the duty cannot be confirmed on the same. The charge of clandestine removal is a serious charge and requires the department to prove by production of sufficient and tangible evidence. In the instant case, there is no evidence at all on record to reflect upon the clandestine activity on the part of the appellants. We, accordingly, set aside the said demand of duty against the appellants.

12. As regards the findings of the under valuation of scrap dealt in para 35 of the impugned order, it is seen that the Commissioner has given adverse findings against the appellants on the ground that the price of the scrap in the market was on the higher side and many parties were ready to offer higher price than adopted by the appellants. Reference has also been made to some of the documents quoting the rate at the higher price but there is no evidence to show that the scrap has actually been cleared at higher price. As such, we extend the benefit of doubt to the appellants and drop the said demand against them.

13. As regards clearance of bearing rings under the guise of scrap, the appellants have explained that it was rejected and damaged rings received back by them from their customers which were sold at much reduced price. The Commissioner has referred to a letter written by M/s. Jay Engineering indicating that for a consignment of 9 MT of rejected annealed ball and taper rolling rings, they are sending a demand draft for Rs. 60,000/- and their representative for collection of the rings with payment. From this he has calculated that the payment referred to in the said letter is relatable to some additional hand cash payment and does not refer to the demand draft. We do not find any justification for the above assumption and interpretation on the part of the Commissioner. There is no reference to any additional hand cash payment and the expression "payment" in the said letter definitely relates to the demand draft for Rs. 60,000/-. In fact, it is found that in some of the cases the Director of the company Shri Mitra has accepted that extra cash was received by them and he has also paid differential duty of about Rs. 86,036/- but this fact by itself cannot extend to all the clearances of rejected ball bearings, in the absence of any other evidence on record and in the absence of any statement by their buyers.

On the other hand, the appellant has been able show that the goods were rejected by their buyers and D-3 intimations were also filed. In some cases, the goods were subsequently cleared after repairs but wherever the repair was not possible, they have cleared the goods as scrap. We do not find any justification for confirmation of demand of duty on this count and set aside the same.

14. As regards the demand of duty of Rs. 97.47 lakhs it is seen that the same has been confirmed by denying the modvat credit availed by the appellants on the inputs on the ground that the consumption of the raw material is not equal to the production of forgings plus scrap generated and the burning loss, thus indicating that the inputs to the above extent have not been used in the manufacture of forgings. In other words, the findings of the Commissioner are that the loss of inputs claimed by the appellants are much on the higher side and reflected upon the clandestine activities of the appellants. For better appreciation of the appellants point on the said issue we re-produced para 30 and 31 of the Commissioner's order:- "I have gone through the record I this case and carefully considered submissions made by the party in reply to the show-cause notice and during personal hearing. M/s. India Forge and Drop Stamping Ltd. is an old forging unit in existence for the last 35 years and they manufacture about 700-800 varieties of forgings required for automobile and mechanical industries./they purchase raw material directly from the manufactures and supply forged products mainly to original equipment manufacturers. The raw material are supplied by Ms. Ispat Profiles, M/s. Kalyani Steels, etc. And at the point of supply itself, the supplier furnish test report containing grade, chemical mechanical properties. The clients specify the grade and material to be used of reach product. Each grade contains composition of all the properties of various ranges. In respect of manufacturers of forgings, raw material is accounted at the point of receipt in terms of actual quantity of each grade whereas once it is taken for processing the forged products are accounted in terms of numbers of specified shapes and dimensions. It has been contended by the assessee that it is not the normal practice to weigh each item of forged product as there would be some marginal difference during the course of forging and, therefore, in the information submitted to the Central Excise Department, the weight of the forged products recorded is only a notional weight and not actual weight. During the course of forgings, first the

raw material is sheared to the required size and in the process of shearing there would be some loss. This loss would vary from each item depending on the size, shape and volume of the material but the loss noticed at this stage would be visible loss and this could be indicated between the gross weight and the cut weight. In technical terminology, the difference would be termed as end pieces. These end pieces either could be sold as scrap or it could be used for forging small items.

The cut material is transferred to forge shop where the process is to heat the metal upto forging temperature. In the process, there would be a burning loss and this loss is termed as invisible loss as no material would be left behind to account for the difference in quantity. Then the material is passed through closed die for forging where hammer and press turns the product into the required form. At this stage scales, flash and slag are formed. The next step is the trimming and in some cases piercing will have to be carried out. At this stage, visible loss in the form of flash or slag and invisible loss in the form of scales occur. The semi forged product is inspected and reworked on hammer by heating and steaming, where also invisible losses occur. In a few cases light flash or fins may remain in the job which is removed by trimming or grinding. The next stage is heat treatment involving annealing, hardening tempering and spherodized annealing where the material has to be pushed through two furnishes. Here also invisible losses may occur. The products which do not answer to the correct requirement of hardness, range, etc are sent to reheat treatment. The next stage is shot blasting which remove the scales deposited during forging heat treatment mainly to clean the surface of the job as per customer's specifications. In this process scales pits are removed full and last stage is grinding where extra fins or burrs are removed in case of mismatch of scale pits causing additional invisible losses. The assessee in short, contended that during the whole process of forging, the forged products are inspected 8 to 10 times. They are reworked for 5 to 7 times. They contended that as the company manufacture 700 to 800 varieties of forged products of different types and standards and specifications, the percentage of visible loss 5% to 8% and invisible loss 8% to 10%, thus making the total loss in the range of 12% to 15%. One of the dispute raised in this show cause notice is relating to percentage of visible and invisible loss and non-accounted of the raw material brought in for

forging fully. The department contended that the entire quantity of raw material brought in have not been properly accounted for in terms of the finished products, physical scrap and losses and, therefore, the assessee is not liable for the entire MODVAT credit utilised by them. In the forging industry, the following are treated as visible losses i.e. cutting, rejection of job at any stage, die forging in hammer or press, piercing and trimming and matching. The invisible losses are burning at forging stage, heat treatment, shot blasting and grinding. " 15. The above stand of the appellants has not been accepted by the Commissioner on the ground that they have been changing their stand inasmuch as in one of the letter written by them to the department they have shown less invisible loss. He has made his own analysis and has come to a finding that the loss cannot exceed 5.74% whereas in the appellant's case, it varies from 5.3% to 10%.

16. However, we find that apart from the above stand of the revenue, there is nothing on record to show that either inputs have been cleared as such by the appellants, after availing the benefit of modvat credit or the same have been converted into final products cleared without payment of duty. The appellants has strongly contended that their buyers M/s. SKF India Ltd., were availing the benefit of the modvat credit of duty paid on their final products and as such, there was no motive for them to indulge in clandestine activities. In fact the credit availed by their buyers was further being used for payment of duty on their final products. It was, in fact beneficial to them to clear the goods on payment of duty.

17. Apart from the above, we find that the revenue has not adduced any evidence to reflect upon the clandestine activity of the appellants.

The entire demand of duty in this case is based upon the permissible percentage of the loss, which is invisible as well as visible. Such loss depends upon a number of factors and no fixed quantum can be made.

The quality of the raw materials, processing of the same by the workers and the handling of the entire process, etc. are some of the factors which would result in loss variation. The said factor, ipsofacto can not lead to an inevitable conclusion that the loss has been shown on the higher side to cover the clandestine activities. We do not find any justification for reversal of the modvat credit on the said

ground.

18. For the above reasoning, we do not find any justification for imposition of penalty or the confiscation of the goods. In a nutshell the appeal is allowed with consequential relief to the appellants.

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