Simplex Castings Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-09-1994

Reported in : (1994)(72)ELT585TriDel

Appellant : Simplex Castings Ltd.

Respondent : Collector of Central Excise

Judgement :

1. M/s. Simplex Castings Ltd. have filed this appeal being aggrieved by the order of Collector, Central Excise (Appeals). The Collector Central Excise (Appeals) in his order had held, "I have gone through the facts of order-in-original, Memos of appeal and the submissions made by the appellants at the time of hearing. I find that adjudicating authority has passed a fair and sustainable order. Taking into account the totality of the facts I reduce the personal penalty to Rs. 2,000/- only. The impugned order is otherwise upheld." The order-in-original was passed by the Dy. Collector who had held, "I hold that the allegations levelled in the show cause notice are correct. The party had removed the goods i.e. 216.889 MT without payment of duty in contravention of Rules 9(1), 52A, 173Q of Central Excise Rules, 1944.1 therefore order that the duty payable on these goods amounting to Rs. 83,153.66 shall be paid forthwith. I also confiscate 17.881 MT of M.S.Ingots which have not been accounted for in RG 1 register but allow the party to redeem the same on payment of Rs. 3,000/- for contravention of Rules 9(1), 52A, 173Q of Central Excise Rules, 1944 and remove the same on payment of appropriate duty. I impose a penalty of Rs. 5,000/- on M/s. Simplex Casting Pvt. Ltd. under Rule

173Q of the Central Excise Rules, 1944 and direct that the same shall be paid forthwith." 2. Briefly stated the facts of the case are that on a surprise visit by Central Excise Officers to the appellant's factory on 7-9-1988 verified the stock of excisable goods and found that there was a shortage of 216.889 MT of small M.S. Ingots (size 3' x 4') and also found that there was an excess of 17.881 MT of M.S. Ingots of big size. Shri N.K.Naidu, Liaison and Admn. Officer stated that there was no weigh-bridge and that the production of the goods was being recorded in the RG 1 register on the basis of estimated averages. As the excess was not properly explained it was seized and a show cause notice was issued to the assessee as to why duty should not be demanded on the shortage and why the goods found in excess should not be confiscated and why penalty should not be imposed on them.

3. Shri L.P. Asthana, the ld. Advocate appearing for the appellant submitted that nothing was removed without payment of duty; that the production was being recorded on the basis of averages as the weigh-bridge was about 150 Mtrs. away near the gate of the factory; that the records are being maintained in accordance with the law and non-saleable Ingots comprising defective and rejected Ingots were being sent for re-melting under the third proviso of Rule 9(1) of the Central Excise Rules, 1944; that in spite of the fact that the production is recorded on estimated average basis, variation has been estimated only 216.889 MT; that this variation was of very minor nature, in view of the fact that the total production during the period was 21147.588 MT; that the variation works out to only 0.8%; that the factory had started manufacturing sometime in March, 1987 and no reconciliation was done on actual weighment basis as the unit was new; that the excess was also because of the method of accounting used inasmuch as there were some rejects and small pieces of Ingots obtained by pouring the hot metal into Moulds but the hot metal was not sufficient for big size Ingots; that the discrepancies could not be properly explained as no responsible officer from production side was present at the time of visit of the officers; that on the date of visit the officers took only the saleable Ingots (small size) into account without considering the stock of rejected ones included in the recorded balance; that no evidence has been brought on record to establish the removal of goods without payment of duty; that during the course of personal hearing RG 1 register and

account of raw-material in Form IV was produced before the Adjudicating Authority to explain as to how rejected Ingots were being transferred for re-melting; that a weigh-bridge was installed in the factory which was affixed near the gate and clearances were being effected on actual weighment basis; that the ld. adjudicating authority has based his findings on the stock taking report which was neither mentioned in the show cause notice nor was a relied upon document; that average shortage calculated on the basis of average weight without actual weighment and exact weight cannot be a basis for demanding duty.

In support of his contention the ld. Advocate cited and relied upon the decision of the Hon'ble Supreme Court in the case of Oudh Sugar Mills v. U.O.I, reported in 1978 (2) E.L.T. 0 172) and Associated Cylinder Industries v. C.C.E., reported in 1990 (48) E.L.T. 460 decided by the Tribunal.

4. Shri V.K. Sharma, the ld. SDR submitted that the appellant had contended that the production was being recorded on the basis of average estimation of weight; that the same method of estimation of weight was adopted by the verifying officers and therefore the difference in weight is not erroneous but must be actual; that Shri Naidu in his statement submitted that there was no weigh-bridge and therefore the actual weighment for recording the production was not being done; that now the appellant has come with the contention that they had a weigh-bridge in the factory. In support of their contention that the goods were being cleared after actually weighing them that this contention of the appellant may not be accepted now; that the shortage and excess in the two varieties of Ingots manufactured by the appellant were real as the method of calculation adopted was the same and, therefore the demand for duty and the imposition of penalty as also the confiscation of the goods were justified in law. He reiterated the findings of the lower authorities to support his contentions. In regard to the case law relied upon and cited by the appellant the ld.SDR submitted that the facts in the two cases are different and therefore the cases were distinguishable.

5. Heard the submissions of both sides and considered them. The admitted position in the case is that the discrepancies were detected on the basis of average weight. I do not see any evidence on record to show that the exact weight

of discrepancy was the same as the approximate weight on the basis of which the demand has been calculated. Moreover, I find that the adjudicating officer in his order has held that "Central Excise Officers calculated the weight on average basis". It was further held by the adjudicating officer "had the facilities been made available to the Excise Officers, they would have resorted to physical verification of the goods." This finding clearly indicated that the excess and shortage was determined on the basis of averages. The Hon'ble Supreme Court in the case of Oudh Sugar Mills v.U.O.I, had held that averages cannot be the basis for calculating the production and consequently for raising the demand the Tribunal in the other case cited and relied upon by the appellant had held that there must be definite proof for clandestine removal before alleging that the goods were removed clandestinely. Having regard to these findings and examining the present case in the light of the ratio of the decisions cited and relied upon by the appellant, I find that the stock has been verified and the shortage has been determined on the basis of average weight. Average weight cannot be the basis for determining the quantum of demand. In the absence of any finding about what the exact excess or shortage was -; I find that the demand is based on presumptions and assumptions. Presumptions and assumptions cannot take the form of proof. I therefore hold in these circumstances of this case and evidence available on record and pleaded at the time of hearing that the demand for duty is not sustainable in law.

6. In regard to the imposition of penalty I find that it has been admitted by the appellant and confirmed by the department that the production records were being maintained on the basis of estimated average weight. This method of maintaining records is neither correct nor legally sustainable. Production of goods must be shown in exact numbers, quantity or units. As it was not being done, I hold that the penalty is sustainable in law. In view of the above findings the appeal is partly allowed.