

Central Construction and Engg. Vs. Collr. of C. Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-31-1994

Reported in : (1994)(72)ELT777TriDel

Appellant : Central Construction and Engg.

Respondent : Collr. of C. Excise

Judgement :

1. M/s. Central Construction & Engg. Co. Ltd. have filed this appeal being aggrieved by the order passed by the Id. Addl. Collector. The Id. Addl. Collector in his order had held :- "In view of the above, I am convinced that the cement mill had run for extra hours during the period from 24-2-1988 to 15-8-1988.

However, in the Show Cause Notice while calculating the duty short paid, the benefit of those cases where the working hours recorded in the production slips were more than the ones shown in the log books, has not been given during the period from 1-3-1988 to 15-8-1988 which I hold to be incorrect. After allowing this benefit, total hours for which the mill had run extra, comes to 228.3 hours. On the basis of average production per hour during the relevant period, the quantity of cement less accounted for and duty evaded come to 471.150 MT and Rs. 91,622.06 (BED Rs. 87,350.99 + SED Rs. 4,271.07) respectively. I, therefore, demand a duty of Rs. 91,622.06 under Rule 9(1) read with Section 11A of the Central Excises and Salt Act, 1944. I also impose a penalty of Rs. 10,000/- (Rupees Ten Thousand only) on M/s. Central Construction and Engineering Co. Ltd., Sirohi under Rule 173Q of the Central Excise Rules, 1944." 2. Briefly stated

the facts of the case are that the appellant is a manufacturer of cement. When Central Excise Officers paid a surprise visit to the appellants factory at Sirohi on 16-8-1988 they found that there was a lot of variations in the number of working hours of cement Mill as recorded in the Log Book of the cement Mill and the other one recorded in the daily production report. Such variations for the period from 24-2-1988 to 15-8-1988 was found to be 228.3 hours. It appeared that the appellant manipulated the number of hours of their cement factory work and suppressed production of 716.170 MT of Ordinary Portland Cement. The appellant factory appeared to have removed this quantity of cement clandestinely without payment of Central Excise duty to the tune of Rs. 1,39,217.20. Shri Anurag Jain, Executive Director of the appellant's company was interrogated. He admitted the variations of the number of hours explaining that for recording the number of hours their Cement Mill has worked in the daily production report, their laboratory staff watches the efficiency of the Cement Mill for a period with the aid of stop watch and the actual production obtained is back calculated to the number of hours which can be taken for production of the quantity of cement obtained physically and such back calculated working hours of the Cement Mill were being reported in the production slips, while the actual working hours of the Cement Mill as per the reading of the Cement Mill hour meter are reported in the Log Sheet of the Cement Mill. As the explanation explaining the difference in working hours between the private records and the statutory production slips was not found satisfactory, a show cause notice was issued to the appellant asking them as to why Central Excise duty amounting to Rs. 1,39,217.20 should not be demanded from them as also why penalty should not be imposed on them.

3. Shri N. Singh, the Id. Consultant appearing for the appellant submitted that the method of calculating the total production of cement adopted in the mini cement plant is by multiplying the number of bags filled in a day with the capacity of the bag and that this method was used by the appellant also; that the number of hours required for production of the ascertained amount of cement are calculated on the basis of pre-determined ratio and this number of hours is then recorded in the production slips; that a perusal of the show cause notice would show that the working hours of the Cement Mill as per the hour meter reading when compared with the hours of production indicated in the production slips, there is a difference.

Sometimes the number of hours recorded in the production slip are more than the number of hours recorded in the Cement Mill Log Book and vice-versa; that the reading of hour meter is subject to change on account of Voltage fluctuations as also on account to non-functioning of the meter etc. and therefore, the hours shown by the hour meter indicating the running of the Mill cannot be relied upon; that the efficiency of the Cement Mill depends on a number of factors mainly, Quality of clinder, Quality of grinding media and the Mill running without material; that the appellant was using limestone, literite, Clay and Coke for manufacture of cement; that on the basis of the hours worked more than recorded in production slip, the company would be needing 1,217.05 tonnes of raw material; that no evidence has been brought on record to show that there was consumption of raw material dis-proportionate to the quantity of cement produced and recorded in statutory records; that raw materials account of the appellant's firm were being examined by the Department from time to time and no discrepancy was ever detected; that the demand was barred as the same has been raised much beyond the period of six months; that the order passed by the Id. Addl. Collector is based on pure surmises as no evidence has been brought on record to prove, that there was any clandestine removal or there was use of raw material dis-proportionate to the production of the Cement during the relevant period. Having regard to all the facts and circumstances the Id.Consultant prayed that the order passed by the Id. Addl. Collector may be set aside.

4. Shri B.D. Bhagat, the Id. JDR appearing for the respondent submitted that the production of a Mill depends on the hours it runs; that the private records maintained by the appellant clearly shows that the Mill of the appellant's company worked for different hours than those shown in the production slips. As the hours of working of the Mill shown in the production slips did not tally with the hours shown in the Log Book of the Cement Mill, therefore the obvious conclusion was that the actual production was not being recorded as it was found that the Mill had worked much longer than shown in the production slips. Reiterating the findings of the lower authorities, the Id. JDR submitted that the order passed by the lower authorities is valid in law.

5. Heard the submissions of both sides and considered them. From the evidence on record, we find that duty has been demanded on the presumption that there was a difference in the working hours of the Mill and that working hours on the basis of which the production was calculated was less than the working hours shown by the hour meter of the Cement Mill. No doubt there is a difference in the working hours shown in the Log Book according to the hour meter of the Cement Mill and the working hours shown in the production slips. We also find that sometime the production slip is showing more hours as the working of the Cement Mill in comparison to the hours shown by the hour meter and sometime the production slip shows the smaller number of hours than those shown by the hour meter and noted in the Log Book. Thus there is no consistency. If the assessee desired to show less production according to the production slips then he would have uniformly recorded the working of the Cement Mill for a small number of hours than those actually worked and shown by the hour meter and noted in the Log Book, this is not the case. There is no other evidence brought on record to show that the larger number of bags were used a larger quantity of raw materials were used. No evidence has been brought on record that there was clandestine removal. The Hon'ble Supreme Court in the case of Oudh Sugar Mills v. U.O.I. reported in 1978 (2) E.L.T. (J 172) [Paras 8 to 14] had held that :- 6. Now examining the facts of the case before us in the light of the ratio of the judgement of Hon. Supreme Court cited supra, we find that the entire calculation of excess production is based on averages. For calculating the production a number of factors are required to be taken into consideration. As pointed out by the appellant that the production of cement depends on not only the time for which the factory worked but on the quality of clinker and quality of grinding media. It was also argued that sometimes the Mill had worked longer hours but sufficient raw material was not available and hence there was no production. Thus it was argued that all these variable factors are taken as precise factors and thus the presumed production has been calculated. It was also argued that the hour meter was subject to the variations of voltage and at times did not show the correct number of hours worked.

Having regard to all these variable factors we hold that the entire production was calculated on the basis of averages over which no control or very little control

could be exercised.

7. We also observe that no evidence has been brought on record to prove that there was larger consumption of raw materials or there was use of a larger number of bags. As the quantity of cement produced on account of averages is quite large, a large quantity of raw materials would have been used and a large number of bags would have been used but there is no evidence on record to show that there was use of a large quantity of raw materials or a large number of bags.

8. No evidence has also been brought on record that any quantity out of this large average calculated on the basis of a number of variable factors and after utilisation of a large quantity of raw materials and use of a large number of bags was actually removed from the factory. No record, private or statutory has been brought as evidence to show that there was removal of this large quantity supposed to have been manufactured and thus, we find that suppression of production and clandestine removal has not been proved.

9. In the circumstances and the evidence on record, we hold that the demand of duty on the presumed quantity of cement is not maintainable in law.

10. However, having regard to the fact that two sets of timings were being maintained for the running of the same mill: one for the purpose of showing production in RG-1 register and the other for showing the running of the mill, we hold that the imposition of penalty is sustainable in law. As the quantum of penalty does not appear to be large, we do not see any reason to interfere with the quantum of penalty.

11. But for the above modifications, the impugned order is upheld and the appeal is disposed of accordingly.

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