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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-08-2010

Judge : The Honourable Mr. M. Veeraiyan, Member (Technical)

Appeal No. : Central Excise Appeal No.1159 of 2008-SM with Cross-Objection No.73 of 2010-SM

Appellant : C.C.E., Delhi Iv

Respondent : M/S Pt. Rati Ram Engineering Works

Advocate for Pet/Ap. : Shri I. Baig Authorised Departmental Representative (SDR) for the Revenue and Shri K.K.Sharma, Advocate for the respondent

Judgement :

Per M. Veeraiyan:

This appeal is by the Department against the order of Commissioner (Appeals) No. 13/CE/App/ DLH IV/2008 dated 3.3.2008, by which the order of the original authority dated 29.3.07 was set aside.

2. Heard both sides.

3. The matter is before the Tribunal for the second time having been remanded to the original authority by Final Order No.A/175/2003-NB/SM dated 28.1.2003.

4. The relevant facts, in brief, are that on 18.3.98, when the officers visited the factory premises of the respondent, they ascertained shortage of 327.417 MT of inputs which was based on the details like opening balance of stock as on 1.4.96, quantity of inputs received from 1.4.96, quantity of input used and the finished product manufactured and adopting per piece requirement on uniform basis. The original authority, in terms of the remand order examined the issues and came to the conclusion that out of the total shortage of 327.417 MT of raw materials alleged, taking into account the discrepancies pointed out by the respondents and allowing 5% of burning loss, the respondents had explained the shortage to the tune of 209.078 MT and the balance shortage was not explained and accordingly, she treated the said quantity of inputs as having been removed clandestinely and confirmed the demand of Rs.1,68,633/- along with interest and imposed equal amount as penalty under Section 11AC of the Central Excise Act, 1944. On appeal by the party, the Commissioner (Appeals) has set aside the order of the original authority.

5. Learned SDR submits that the stock taking was done in the presence of independent witnesses and in the presence of the representative of the company and their belated claim that the same was based on eye estimation should not have been accepted by the Commissioner (Appeals). The original authority has allowed 5% burning loss based on the opinion of Foundries Association , according to which the burning loss was to the tune of 4 to 6%. In view of the above, he submits that since the original authority has relied upon the expert opinion, the Commissioner (Appeals) should not have set aside the order of the original authority.

6. Learned Advocate for the respondent submits that the weighment was not done physically and was based on eye estimation as claimed by them in the show cause notice. The opinion of the Foundries Association to the effect that the burning loss would be 4 to 6% cannot be applied to every unit. The burning loss in any unit depends upon the conditions of machineries and the nature of raw materials utilised etc. He also assails the input-output ratio adopted uniformly from 1.4.96 for the final products. He also fairly concedes that cross-objection is basically in support of the order of the Commissioner (Appeals) and it does not

claim any further relief as the order of the Commissioner (Appeals) is totally in their favour.

7. I have carefully considered the submissions from both sides. The original authority has adopted 5% burning loss and it is said to be an average of minimum and maximum in the report of the Foundries Association. The Commissioner (Appeals) has accepted the claim of the respondents for 8% burning loss which was adopted by the investigation officers themselves at the time of drawing panchanama. In short, the original authority has estimated the shortage of inputs based on assumption of percentage loss and assumption of input and output ratio for all the CI castings and no basis for adopting such uniform input-output ratio has been disclosed. In the process, out of initial shortage alleged 327.417 MT the original authority held that shortage to the tune of 118.339 MT was not explained. Having estimated the shortage in the above fashion, she has also concluded that the said inputs have been removed clandestinely without payment of duty and chose to impose equal amount as penalty.

8. Commissioner (Appeals) taking the above fallacy in the approach of the original authority in adopting arbitrary burning loss and uniform input output ratio for the entire period chose to set aside the order of the original authority.

9. On perusal of the grounds and submissions of the learned SDR, I do not find any material to fault the reasoning adopted by the Commissioner (Appeals). The method of estimation of shortage based on assumption and presumption adopted by the original authority cannot be approved, especially in the absence of any evidence of alleged clandestine removal of short found inputs.

10. In view of the above, the appeal by the Department is rejected. Cross-objection which is merely in support of the order of the Commissioner (Appeals) is also disposed of.

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