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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 31/01/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70106-70109/2017-EX[DB] dated 19/01/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/1569/2007	**SHRI M.L.AGARWAL,EX-PRESIDENT** M/S RATHI UDYOG LTD, III-A/49, NEHRU NAGAR, GHAZIABAD.
2	E/1570/2007	**RATHI UDYOG LIMITED** ISPAT NAGAR, GHAZIABAD.(UP)
3	E/1571/2007	**SHRI PRADEEP RATHI,DIRECTOR** M/S RATHI UDYOG LIMITED, ISPAT NAGAR, GHAZIABAD
4	E/1572/2007	**SH. P.C. RATHI, DIRECTOR,** M/S RATHI UDYOG LTD., ISPAT NAGAR, GHAZIABAD.
		Name and Address of Respondent
5		-C.C.E. GHAZIABAD C.G. O. Complex-II, Kamla Nehru Nagar, Ghaziabad 201302

-C.C.E. GHAZIABAD
C.G. O. Complex-II, Kamla
Nehru Nagar, Ghaziabad
201302

-

7 -C.C.E. GHAZIABAD
C.G. O. Complex-II, Kamla
Nehru Nagar, Ghaziabad
201302

-

8 -C.C.E. GHAZIABAD
C.G. O. Complex-II, Kamla
Nehru Nagar, Ghaziabad
201302

-

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Other Appellants and Respondents as per Annexure

Copy To

9 Advocate(s) / Consultant(s):

Prabhat Kumar
B-51(BASEMENT),
SARVODAYA ENCLAVE
NEAR MOTHER
INTERNATIONAL SCHOOL
NEW DELHI
DELHI

10 **Rajesh chibber**
FA-9, KAVI NAGAR,
GHAZIABAD,
UP

11 Bar Association, CESTAT, Allahabad

12 Director Publications, Customs, Excise. I.P. Estate, Delhi

13 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

14 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

15 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

16 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

17 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

18 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

19 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

20 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

21 C.D.R. 22 Office Copy 23 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. 1

APPEAL No. E/1569-1572/2007-EX[DB]

(Arising out of Order-in-Original No. 17/Commr./GZB/2007 dated 28/03/2007 passed by Commissioner of Central Excise & Customs, Ghaziabad.)

For approval and signature:
Hon'ble Mr. Anil Choudhary, Member (Judicial)
and
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Shri M.L. Agarwal, Ex-President, Rathi Udyog Limited, Shri Pradeep Rathi, Director & SH. P.C. Rathi, Director **Appellant**

Vs.

Commissioner of Central Excise, Ghaziabad. **Respondent**

Appearance:

Shri Rajesh Chibber, Advocate (In Appeal No. E/1569/2007 & E/1570/2007), for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision : 04/10/2016

FINAL ORDER NO. 79106 - 79109/2016

Per: Anil G. Shakkarwar

The present four appellants were issue with common Show Cause Notice. Therefore, the appeals are taken together for decision.

2. The brief facts of the case are that the above four appellants were issued with a Show Cause Notice No. 50/MRT/Commissionerate/96 dated 31-12-1996. Through the said Show Cause Notice M/s Rathi Udyog Limited (RUL) were called upon to show cause as to why assessable value of all the clearances of S.S. Flats during the period from March, 1994 to 29-11-1995, be not enhanced to Rs.27,000/- Per Metric Ton, assessable value of all clearances of S.S. Waste & Scrap during the period from March, 1994 to March, 1996 should not be enhanced to Rs.15,000/- Per Metric Ton, the clearances of all the higher value O.A.S. Flats during the period from 05-08-1993 to February, 1994, be not treated as S.S. Flats, the clearance of all O.A.S. Flats during the period from March, 1994 to July, 1994, be not treated as S.S. Flats and the assessable value of the same should not be enhanced to Rs.27,000/- Per Metric Ton, the assessable value of all the clearances of S.S. Rounds during the period from March, 1994 to June, 1995 should not be enhanced to Rs.27,000/- Per Metric Ton, the clearances of T.O.R. Bars, M.S.- RIL and Waste & Scrap should not be treated as actual clearances during April, 1994 to September, 1996, Central Excise duty of

6

Rs.4,20,99,820/- on the clearance of S.S. Flats during the period from March, 1994 to 29-11-1994 for the differential value of Rs.2,80,66,547/- should not be demanded under Section 11A of Central Excise Act, 1944, Central Excise duty of Rs.14,94,550/- on clearance of S.S. Waste & Scrap during the period from March, 1994 to March, 1996 for the differential value of Rs.99,63,668/- should not be demanded under Section 11A of Central Excise Act, 1944, Central Excise duty of Rs.2,29,84,266/- on clearances of S.S. Flats in the guise of O.A.S. Flats during the period from 05-08-1993 to February, 1994 for the value of Rs.28,95,71,442/- should not be demanded under Section 11A of Central Excise Act, 1944, Central Excise duty of Rs.1,00,35,326/- on the clearances of S.S. Flats in the guise of O.A.S. Flats during the period from March, 1994 to July, 1994 for the differential value of Rs.6,69,02,166/- should not be demanded under Section 11A of Central Excise Act, 1944, Central Excise duty of Rs.4,80,765/-on the clearances of S.S. Rounds during the period from March, 1994 to June 1995 for the differential value of Rs.32,05,100/- should not be demanded under Section 11A of Central Excise Act, 1944, Central Excise duty of Rs.15,99,61,757/- on the clearances of Bars and Rods, M.S.-RIL and Waste & Scrap during the period from April, 1994 to September, 1996 for the total value of Rs.1,06,64,11,719/- should not be demanded under Section 11A of Central Excise Act, 1944 and why interest on said amounts of Central Excise duty should not be demanded. There was a proposal for imposition of penalty on M/s Rathi Udyog Limited, Shri Pradeep Rathi, Director, Shri M.L. Agarwal, Ex-President, Shri. P.C. Rathi, Director & Rathi Ispat Limited.(RIL)

3. The basis for said allegations are as follows:-

(a). The basis for demand of Rs. 15,99,61,757/- was that for the manufacture of Bars & Rods, M.S.-RIL and Waste & Scrap, Natural Gas was used during year 1993-94. The consumption of 56.66 Cubic Meter of Natural Gas was required for manufacture of 1 Ton of Steel. On the basis of consumption of Gas during the period from April, 1994 to September, 1996 1 Ton of Steel can be manufactured by consumption of 56.66 Cubic Meter, it was worked out that the appellant manufactured some quantity of goods and taking into consideration the quantity on which duty was paid the differential duty on the basis of consumption of Gas required for production of Steel was worked out and on the basis of that said demand was raised in the said Show Cause Notice.

(b). The assessable values were enhanced in the proposal for demand of differential duty. The basis for enhancement of assessable value was that M/s Rathi Ispat Limited used to send their finished product to M/s Rathi Udyog Limited and M/s Rathi Udyog Limited used to take Cenvat credit of duty paid by M/s Rathi Ispat Limited M/s Rathi Udyog Limited used to manufacture final product out of the said inputs and on the basis of value of clearance of those final products sold again to M/s Rathi Ispat Limited they used to pay duty. The investigation made allegations against M/s Rathi Ispat Limited that they undervalued their final product. The said allegations were carried forward to M/s Rathi Udyog Limited stating that M/s Rathi Udyog Limited also undervalued their final product since their inputs were undervalued. There were proposals to enhance assessable value and there were proposals to demand duty on the differential value.

4. M/s Rathi Udyog Limited contended before the Original Authority that the entire demand of undervaluation was unsustainable because the three pricelist were filed by them before the Assistant Commissioner, Division-III, Ghaziabad. Further during the earlier period pricelists were filed in the year 1993 which were approved by Assistant Commissioner. Subsequently filed three pricelist were dealing with the period for which there was proposal for enhancement of assessable value. The said pricelist were neither approved nor rejected by the Divisional Assistant Commissioner. There was no order even for provisional assessment under Rule 9B of Central Excise Rules, 1944. The Range Superintendent had made endorsement of "provisional approval" on the back of RT-12 return. When the Assistant Commissioner had not ordered provisional assessment under Rule 9B such a remark by Superintendent was not as per law. The right course of action

was to first decide~~d~~ the pricelists and if the assessee had collected ~~mere~~ more consideration than declaration of consideration in the pricelist then there was reason for demand of duty within the normal period of limitation. Had there been any misdeclaration in pricelists filed then there was a case for invocation of extended period. The Original Authority did not appreciate the submissions made before him and decided the matter through Order-in-Original No. 40/Commr./M-I/1997 dated 28-11-1997 and confirmed the demand of Rs.23,70,56,484/-. Aggrieved by the said order appellant preferred appeal before this Tribunal. This Tribunal passed Final Order No. 1186-1189/99-A dated 18-08-1999 in Appeal No. E/48/98-A, E/263/98-A, 264/98-A & E/515/98-A and remanded matter for de-novo consideration. While remanding the matter back to the Original Authority, this Tribunal had directed the Original Authority to ~~afford~~ offer the appellants the opportunity to take photo copies of document relied upon using their own photo copy machine and appellants were directed to file written reply after obtaining the photo copies of required documents and thereafter the Original Authority was directed to decide the matter. In compliance to this Tribunal's said final order dated 18-08-1999, the Original Authority has passed Order-in-Original No. 17/Commr./GZB/2007 dated 28-03-2007. Through the said Order-in-Original dated 28-03-2007 the Original Authority has confirmed the demand of Central Excise duty of

Rs.4,20,99,820/-, 14,94,550/-, 4,80,765/-, 2,29,84,266/-, 1,00,35,326/-, 15,99,61,757/-, and imposed penalty of Rs.23,70,56,500/- on M/s Rathi Udyog Limited under Rule 173Q(1) of Central Excise Rules, 1944. He further ordered the confiscation of land, building, plant, machinery and materials of M/s Rathi Udyog Limited under Rule 173Q(2) of Central Excise Rules, 1944 and gave an option to redeem the same on payment of fine of Rs.2,00,00,000/-. He imposed penalty of Rs.1,75,00,000/- each on Shri P.C. Rathi & Shri Pradeep Rathi under Rule 209-A of Central Excise Rules, 1944. He has further imposed penalty of Rs.20,00,000/- on Shri M.L. Agarwal under Rule 209-A of Central Excise Rules, 1944.

5. The appellants preferred, above stated, four appeals aggrieved by the said Order-in-Original No. 17/Commr./GZB/2007 dated 28-03-2007.

6. The ld. Counsel for the appellants submitted that in respect of allegation of undervaluation the Show Cause Notice contends that it appeared to Revenue that M/s Rathi Udyog Limited received the balance consideration that is 'Actual Value Received – Actual Value Declared' from the customers in cash without reflecting it in the Books of Accounts. He submitted that such statement is only a presumption and there is no evidence available on record for arriving at such a presumption. He, further, contended that when the pricelist was pending before the Divisional Assistant Commissioner

and prices were declared and pricelist was not finalized the demand in extended period was not sustainable. Further, the charges in the Show Cause Notice impugned do not indicate invocation of proviso to Sub-section (1) of Section 11A of Central Excise Act, 1944. He contended that the Show Cause Notice was issued on 31-12-1996 and demand was raised for period from April, 1994 on allegation of undervaluation and when the pricelist submitted under Rule 173C of Central Excise Rules, 1944, was pending finalization before the Divisional Assistant Commissioner. In respect of demand of Rs.15,99,61,757/- he contended that the said demand is on the basis of consumption of Gas for manufacture of goods. Revenue has worked out that 56.66 Cubic Meter Per Ton as the consumption of gas and such a figure of computation is presumptive and that even if it is presumed that the alleged quantity of goods were manufactured, Revenue has not produced any evidence to establish as to from where the raw material for such manufacture was procured and to whom such goods were sold and who were the buyers and transporters etc. The statements on the basis of which allegations made were subsequently retracted immediately after the witnesses came out of the control of Central Excise Officers and once again during cross-examination before Adjudicating Authority. He has further contended that on the basis of similar presumption that is on the basis of electricity consumption presumptive Show Cause Notices were issued to large number of manufactures by Revenue and in the case of R.A. Castings Pvt. Ltd. *Versus* Commissioner of Central Excise, Meerut-I reported at 2009 (237) E.L.T. 674 (Tri.- Delhi) this Tribunal has held that demand of duty on the basis of electricity consumption is arbitrary and that no experiment was conducted in the factory of appellant for devising power consumption norms. Further, this Tribunal had held that Commissioner was required to prescribe first the norms as per rules and there were no such norms prescribed therefore, demand of duty on the basis of consumption of electricity was held to be unsustainable. The said matter was carried before the Hon'ble High Court of Allahabad. The Hon'ble High Court through its ruling in the case of Commissioner of Central Excise, Meerut-I *Versus* R.A. Castings Pvt. Ltd. reported at 2011 (269) E.L.T. 337 (Allahabad) has held that there was Rule 173E of Central Excise Rules, 1944 which required fixation of norm for electricity consumption, notify the norms to manufacturers and therafter ascertain reasons for deviations from norms and then taking into account the consumption of various inputs was required to arrive at figures of production and that was not done so in those cases and that mere electricity consumption cannot be the only basis for determine of duty liability. Further, the matter was carried before Hon'ble

Supreme Court as reported at 2011 (269) E.L.T. A108(S.C.). The Hon'ble Supreme Court dismissed the petition filed by Commissioner of Central Excise, Meerut-I against the judgment of Hon'ble High Court of Allahabad reported at 2011 (269) E.L.T. 337 (Allahabad) which is Commissioner of Central Excise, Meerut-I *Versus* R.A. Castings Pvt. Ltd. Relying on the said ruling of Hon'ble Supreme Court the ld. Counsel for the appellants has contended that in a similar manner consumption of gas cannot be the basis for determination of quantum of production.

7. It has been further contended that entire case made out by the Department on the basis of so called investigation against RIL that they misclassified the goods e.g. Stainless Steel Billets were cleared as Other Alloy Steel (OAS), which allegation was primarily based on the test reports. It has been contended by the appellant that though they were not concerned with said allegation against RIL, yet a perusal of the impugned order shows that even then the Department had no case. The chemical examiner had reported the contents of chromium more than 10.5% (para 8.8.3 of Order-in-Original) whereas in terms of Note 1(e) of chapter 72 for treating any goods as SSI Exemption of carbon was also one of the criteria.

8. It is contended that there being no mention about the carbon contents in test report, the same could not be relied upon for deciding the classification at the end of RIL.

9. It ~~is~~ was also contended that in the entire case of Department, it was not brought on record that the so called wrong classification on the part of RIL was with the connivance or in the knowledge of RUL.

10. It has also been contended by the appellant that even otherwise the so called misclassification and/or under valuation was on the part of RIL as whatever goods were received by RUL were converted into flats and were returned to RIL. RUL received excisable good on payment of duty of which credit was taken at their end and while returning the goods to RIL, RUL was required to pay differential duty. Therefore, if at all some duty was to be paid at the end of RIL, credit of the same was available to RUL and accordingly the whole exercise was revenue neutral and therefore it has been a settled legal position that where the entire exercise is revenue neutral, extended period could not be invoked. They relied upon latest decision of Apex Court in the case of Special Steels reported in 2016 (334) E.L.T.-A1239SC).

11. It ~~is~~ was also contended that assuming without admitting the stand of the Department that since some of the Directors of RIL and RUL were related to each other or some of the Directors were common, both the units were to be treated as related persons. It was submitted that it is a settled legal position that when the transactions are between related persons, no extended period can be invoked.

12. It ~~is~~ was also contended by the appellant that as per the case of Department as is apparent from the SCN that the Department carried out massive investigation. The investigation was started on 19/09/1995 whereas the period of demand has been upto 30/09/1996. Therefore, by no stretch of imagination the extended period could ~~not~~ be invoked beyond 19/05/1995.

13. It was also contended by the appellant that since the Department had some suspicion, it had appointed its officers from time to time. Reliance is placed on office Orders No. 06/1993 dated 01/09/1993, 11/1993 dated 22/10/1993, 03/1994 dated 21/02/1994, 08/1994 dated 24/08/1994 (page 667/668/669/) filed in Paper Book.

14. As regards the role of co-appellants, it ~~is~~ was contended that nowhere in the entire order, the individual role was discussed. Merely because they were holding key posts in the company, the same in itself was not sufficient to prove the ingredients of Rule 26 of Central Excise Rules, 2002. Penalty on M.L. Aggarwal has been imposed for the only reason that he had explained role of different persons and that he was the Vice President of company. Further, penalty on Pradeep Rathi was proposed primarily on the basis that he did not respond to the summons issued to him. In any case, it was contended that when the appellants have proved that the Department had miserably failed to substantiate the charge of clandestine production and removal, on account of gas consumption and

also the demand on account wrong classification on the part of RIL, the impugned demand is not sustainable at all, no question of imposition of individual penalty arises.

15. The ld. D.R. has taken us through findings of the Original Authority and supported the Order-in-Original.

16. We have taken the rival contentions into consideration. During the relevant period the provisions of assessment were ~~where~~ that the assessee was required to file classification list under Rule 173B of Central Excise Rules, 1944, pricelist under Rule 173C of Central Excise Rules, 1944 before the Jurisdictional Assistant Commissioner. It was the duty of the Assistant Commissioner to decide classification of goods on the basis of classification list and assessable value on the basis of pricelist. Decision on pricelist was for arriving at assessable value by the Assistant Commissioner and such decision was treated as adjudication and on such finalization of value, if the Jurisdictional Commissioner disagreed then he was required to review such approved pricelist and give direction to the Divisional Assistant Commissioner to file appeal against such finalization of pricelist before the Jurisdictional Commissioner (Appeals). In the present case the pricelist were admittedly filed by the appellant. The Divisional Assistant Commissioner did not finalize them. Therefore, the Commissioner had no jurisdiction to call upon the assessee for adoption of any other prices, till such time, assessable value through said pricelist was finalized by the

Divisional Assistant Commissioner. So far as undervaluation charges are concerned, the Jurisdictional Commissioner did not have jurisdiction to demand duty till such time the price list were finalized and if aggrieved Appeal was not filed before Commissioner (Appeals) and such appeal was not decided by Commissioner (Appeals). So far as the allegation of short levy on production arrived at on the basis of Gas consumption is concerned, we find that the ruling by Hon'ble Supreme Court in the case of Commissioner of Central Excise, Meerut-I *Versus* R.A. Castings Pvt. Ltd. is squarely applicable in the present case wherein it was ruled that on the basis of consumption of energy required for manufacture of unit quantity of goods quantum of manufacture of goods cannot be arrived at and such conclusion of manufacture shall be treated as presumptive. We, therefore, hold that the confirmation of demand on the basis of consumption of Gas does not survive. Since both the demands do not survive, the penalties imposed also do not survive. In above terms we set aside the impugned Order-in-Order and allow all the appeals.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member (JUDICIAL)

-Sd/-
(ANIL G. SHAKKARWAR)
Member(TECHNICAL)

Ansari

प्रमाणित प्रति / Certified True Copy
8-2-17
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001