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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

To

Dated: 07/11/2017

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71309/2017-SM[BR] dated 16/06/2017

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/874/2010	**SHRI RATHI STEEL LTD.** PLOT NO. E, UPSIDC, INDUSTRIAL AREA, PHASE-III, MASOORIE-GULAOTHI ROAD, GHAZIABAD (U.P.)
		Name and Address of Respondent
2		-C.C.E. MEERUT II (Now Hapur) Opp. Saheed Park (Near Ashok ki Lat) Delhi Road, Meerut (UP)

Copy To
3Advocate(s) / Consultant(s):

BIPIN GARG & CO.
ADVOCATES(ALLD)
102, MAHALAXMI ENCLAVE
(ADJ. INCOME TAX OFFICE),
STANLEY ROAD, CIVIL LINES,
ALLAHABAD (U.P.)-211001

4 Bar Association, CESTAT, Allahabad

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

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

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

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

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

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

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

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

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

14 C.D.R.   15 Office Copy   16 Second Folder Copy   17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL No. E/874/2010-EX[SM]

(Arising out of Order-in-Appeal No.01-CE/MRT-II/2010 dated 25/01/2010 passed by Commissioner of Central Excise & Customs, (Appeals), Meerut-II)

Shri Rathi Steel Limited **Appellant**

Vs.

C.C.E. & S.T.- Meerut-II(Now Hapur) **Respondent**

Appearance:

Shri Bipin Garg (Advocate) &
Ms. Stuti Saggi (Advocate) for Appellant
Shri Gyanendra Tripathi, AC(AR) &
Shri Pawan Kumar Singh, Supdt. (AR) for Respondent

CORAM:

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

Date of Hearing : 16/06/2017
Date of Decision : 16/06/2017

FINAL ORDER NO.....71309/2017.........

Per: Anil Choudhary

The issue in this appeal filed by the appellant-assessee is whether under the facts and circumstances, the issue of show cause notice is in accordance with the provisions of the Central Excise Act.

2. The brief facts as per the show cause notice dated 15 May, 2008 are that the appellant is engaged in manufacture of M.S. Bar/Rod – TMT Steel falling under Chapter 72 of CETA, 1985. There was an inspection in the factory on 15 November, 2007. At the time of visit no production activity

was going on. During the scrutiny of records, it was noticed that appellant had availed Cenvat Credit amounting to Rs. 79,618/- and Rs. 2,74,421/- on the items namely B.P Sheets and Shapes and Sections, respectively claiming them as capital goods. On enquiry, it appeared that the said goods were used by appellant as a part/component in expansion of the factory shed. The said credit appeared to be wrongly taken, as the said goods and had not been utilized in manufacture of final products. Instead had been used for construction of structure and shed in the factory premises. On being so pointed out the appellant reversed the total amount of Rs. 3,54,039/- on the spot, vide Cenvat Account Entry Nos. 2852 and 2853 dated 15 November, 2007.

3. It further appeared that the appellant have received Intellectual Property Service (Trade name license) from M/s Centre De Recherches Mettallurgiques, Belgium for use of Trade Mark – TEMPCORE for the iron bars. From perusal of letter dated 27 June, 2007 it appeared that the appellant on the basis of invoices issued by the "overseas service provider" have paid Euro, 15,000 in two installments as 'Fee' for the aforesaid services. It appeared that the said Intellectual Property Service received was taxable on reverse charge basis under the provisions of Section 66A of the Finance Act, 1994 read with Rule 2(1) (d)(iv) of the Service Tax Rules, 1994. The appellant deposited the tax amount as calculated at Rs. 89,985/- along with Rs.15,751/- as well as interest vide TR6

Challan dated 26 November, 2007 and Challan dated 21 November, 2007 and gave intimation to the Revenue.

4. Further, the inspection team conducted a stock verification in respect of MS Ingots/Billets, the raw materials, and the finished products M.S. Bars in presence of the representative of the appellant, namely Shiv Kumar Sharma, Cashier/Accountant and Nirankar Singh, stockyard supervisor and two independent witnesses. On counting, the quantity of M.S. Ingots available in the premises was found to be 25,468 pieces lying in 80 lots and the quantity of Billets was found to be 1234 pieces lying in 10 lots in the premises. With the assistance of the representative of the appellant, the stock was sought to be verified, but it appeared that the actual weighment of the goods was not possible as the production in the factory was suspended for the last three days for maintenance work and no labour was available. So, the quantity was ascertained, and weight was as certained by taking the average weight of such ingots on random sampling basis. One piece of ingots was randomly selected from each of the 10 big lots, was actually weighed on the electronic weighing scale installed in the factory premises and total weight thereof was found to be 1,110 Kg as per the weighment slip– RUD 10. Thus, the average weight of one ingot was ascertained by dividing the total weight by 10 and it was certain to be 111 Kg. On this basis, the total number of 2,5468 pieces of MS Ingot available in the factory were

multiplied arriving at the weight of 2826.948 MT. Similarly the MS Billets has also weighed and the average weight taken thus calculating the total weight of billets and 2,57,800 Kg. Thus, the total weight of 1234 number of billets was calculated at 257.800 MT. On comparison with the actual stock of raw materials entered in record Form-IV for register, RUD 13, maintained by them, it was observed that consolidated entry for MS Ingots and Billets were made in the raw material register and a stock of 3084.748 MT was shown as closing balance of 15 November, 2007, whereas on physical stock taking, the stock of the above goods, as ascertained was worked out at 3340.044 MT. Therefore, there appear to be shortage of 255.296 MT (3340.044-3084.748) in the stock of MS Ingots/Billets. On being asked about the reason for the said shortage, Shri V.K. Tyagi, Manager (Taxation), Authorized Signatory of the appellant in his statement recorded on 15 November, 2007 attributed the shortage in the stock to the possible variation in the stock as it was taken on the basis of average weight of ingots/billets taken on random sampling basis and not on the basis of actual weighment of the whole stock. Shri Tyagi had also stated that the shortage is due to actual weight which was arrived at by taking the average weight of each ingot as 111 Kg. Whereas as per the general practice observed by him so far, the average weight of MS Ingots varies between 101 Kg to 120 Kg, depending upon the specification of the MS Ingots suppliers. However, it appeared to Revenue that such shortage was on account of clandestine removal and accordingly, the appellant was required to reverse the Cenvat Credit on the same calculated at Rs. 8,31,893/-. The appellant apparently agreed with the shortage, reversed the Cenvat Credit of Rs. 8,31,893/- vide entry No. 2851 dated 15.11.2007.

5. Further, the verification of stock of finished goods – MS Bars was also done similarly on the next date i.e. 16 November, 2007 as the stock was huge quantity and lying scattered in factory premises, therefore, Shri V.K. Tyagi Manager (Taxation) & Authorized Signatory stated that the actual weighment of whole stock was practically impossible. Weight of the lots of the bars was taken on estimate basis and on totaling the same total weight of stock – MS Bars worked out to 3255 MT and on verification from the register it was noticed that the stock register showed the balance 3067.389 MT. Thus the verification showed that the stock of finished goods was in excess of 187.611 MT. On being asked about the difference Shri V.K. Tyagi Manager (Taxation) explained that it is not possible for them to weigh the stock of finished products (being in not condition) after production and the weighment of the same is done only at the time of clearance. Statement of Shri K.J. Dhawan in charge of finished goods in the factory was also recorded who stated that he is looking after the stock of finished goods and working with the unit

since 2004 and as per wide experience in the industry, he stated that he takes physical verification of the stock of finished goods on daily basis. On the basis of production data, dispatch data the estimation of finished goods stock is done on the basis of his experience in the field. He further stated that the stocktaking is done by way of estimation on the basis of size of the bars bunching and overall size of the particular lot. Similar statement was given by Shri Rout. It appeared to Revenue that the excess stock was liable to confiscation under Rule 25 of CER, as the responsible person of the appellant could not state any convincing information about the shortage. Therefore, there was reasonable belief that the excess stock of 187.611 MT MS Bars was not accounted for deliberately with intent to suppress the production and clear the same clandestinely. The said excess stock was seized vide seizure memo and Supurdnama dated 16 November, 2007. The value of the seized goods appeared to be Rs. 48,36,612/- and on which duty @ 16% worked out to Rs. 7,89,335/-. The said seized stock was released provisionally on furnishing of bank guarantee and bond with the satisfaction of the Deputy Commissioner.

6. It further appeared that the appellant have failed to discharge liability towards payment of Service Tax on the input services received from the overseas service provider. Further, failed to properly account for the raw material and finished goods and also availed inadmissible Cenvat Credit in

contravention of the provisions of the Central Excise Rules and the Cenvat Credit Rules and accordingly they were required to show cause why the amount of Cenvat Credit Rs. 8,31,893/- be not demanded and recovered and since the said amount stood paid, why it should not be appropriated and further, why not penalty be imposed. Similarly the demand was raised for the Cenvat Credit amounting to Rs. 3,54,039 with proposal to appropriate the matching amount already reversed along with further proposal to impose penalty. Similarly demand was proposed for shortage or the excess of stock found, in the value of stock of raw material, finished goods involving duty of Rs. 7,89,335/- with proposal for confiscation under Rule 25 of CER, 2002 with further proposal to demand Service Tax of Rs. 89,985/- on Reverse Charge Basis on Intellectual Property Services received from abroad with further proposal to impose penalty.

7. The SCN was adjudicated on contest and the proposed demands were confirmed vide Order-in-Original dated 29/05/2009 and equal amount of penalties imposed. Further, excess stock of finished goods 187.611 MT was held liable to confiscation, valued at Rs. 48,38,612/- involving duty of Rs. 7,89,335/- under Rule 25 CER. Further, giving option of redemption on payment of fine Rs. 30 lakhs. Further, the demand of Service Tax of Rs. 89,985/- was also confirmed along with order for appropriation. Being aggrieved the appellant preferred appeal before learned Commissioner

(Appeals) who was pleased to confirm the demands but was pleased to set aside the penalty of Rs. 3,34,039/- which was imposed with respect to Cenvat Credit taken on P.C. Sheets and Shapes and Sections. Further, the redemption fine was reduced from 30 lakhs to Rs. 10 lakhs. Being aggrieved the appellant is before this Tribunal.

8. The learned counsel for the appellant states that from the very plain reading of the show cause notice, it is evident that no element of contumacious conduct, suppression of facts etc. being found attributable to the appellant. The transactions have been found to be duly recorded in the books of accounts maintained in the ordinary course of business. Further, the appellants without disputing the liability on all the aspects, save and except the variation in the stock of raw materials and finished goods, have not disputed the liability and deposited the tax as calculated and/or the Cenvat Credit as proposed to be disallowed, the same was reversed to the satisfaction of the Department. Further, so far the variation in the stock taking found, a cogent explanation was given in the statement recorded soon after the stock verification, that the variation is due to the method of stock verification as there has been no actual weighment, but only a small sample of 10 ingots/billets were actually weighed and such average weight was multiplied with the number of ingots and the billets. Similarly the stock of finished goods was also done by way of eye estimation. In

such manner of verification there has to be allowance for variation. Admittedly, such variation have been found to be only 2 to 3% and as such did not call for any adverse inference against the appellant. Thus the whole exercise by the Revenue in issuing the show cause notice and confirming the demand is bad and against the scheme of the Act and the Rules. Accordingly, she prays for allowing the appeal with consequential benefits.

9. Heard learned AR, who supports the impugned order.

10. Having considered the rival contentions I find that the issue of show cause notice is bad and against the provisions of the Act. It has been particularly specified in Section 11 A sub Section 2(B), that where an assessee either on its own motion or on being so pointed out by the Departmental Officers, deposit the tax under intimation to the Department, in such case, no show cause notice be issued. As the appellant have deposited or reversed the tax so pointed out by the Revenue, I find that the issue of show cause notice on some issues is bad and against the provisions of the Act. So far the variation in the stock of raw material and finished goods is concerned, admittedly the stocktaking was done by way of estimation and in such manner of stocktaking. There has to be allowance for variation. I find that Revenue erred in not giving any such allowance. I hold that the variation of 2% to 3%, as worked out by the Revenue is a normal variation not calling for any adverse inference. Accordingly, I find that

the whole show cause notice is untenable and cannot be upheld. Accordingly I set aside the impugned order and allow the appeal with consequential benefits. The appellant shall be entitled for the consequential benefits in accordance with law.

(Dictated and pronounced in Court)

-Sd/-

(ANIL CHOUDHARY)
Member(JUDICIAL)

Ankit

प्रमाणित प्रति/Certified True Copy
28/11/19
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/(C.E.S.T.A.T.)
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