

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

Regional Bench COURT-2.

Excise Appeal No. 2882 of 2012

[Arising out of the Order-in-Original No. 16/2012 dated 31.07.2012 passed by the
Commissioner of Central Excise, Bangalore-I]

Hindustan Granites

No. 5, Lalbagh Hosur Road
Wilson Garden, Opp. 2nd cross
Bangalore - 560 027
Karnataka

.....**Appellant**

VERSUS

**Commissioner of Central Excise
Bangalore-I**

P.B. No. 5400, C.R Building
Queens Road, Bangalore GPO,
Bangalore - 560 001
Karnataka

..... **Respondent**

Appearance:

Mr. Jatin Christopher, Advocate for Appellant

Mr. Rajesh Shastry, Authorized Representative for Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

Hon'ble Mr. Pallela Nageswara Rao, Member (Technical)

FINAL ORDER NO. 20862 / 2025

Date of Hearing: 20.08.2024

Date of Decision: 19.02.2025

Per: P. A. Augustian

The issue in the present appeal is regarding valuation of 'marble and granite' slabs manufactured by M/s. Hindustan Granites (HG) the Appellant. Alleging that the appellant has resorted to undervaluation and clandestine removal of the goods, Adjudication authority as per Order-in-Original No.16/2009 dated 25.05.2009 confirmed the demand of Central Excise duty along with interest for the period from September 2004 to October 2006 and also imposed penalty. Aggrieved by said

order, an appeal was filed before this Tribunal and this Tribunal vide Final Order No. 365/2011 dated 12.05.2011 considered the evidentiary value of the document in view of the Section 38B of the Act and remanded the matter for de-novo adjudication. Aggrieved by said order, a Writ Petition was filed before the Hon'ble High Court of Karnataka in W.P(C) No. 27352/2011. The Writ Petition was disposed on the ground that Tribunal has remanded the matter, and all the contentions of the parties have been kept open to be urged before the Commissioner. Accordingly de-novo adjudication was conducted and as per the impugned order, Adjudication authority confirmed the demand of duty along with interest and penalty. Aggrieved by said order, present appeal is filed before the Tribunal.

2. When the appeal came up for hearing, Learned Counsel submits that the entire proceedings were initiated without any admissible evidence. As regards the activity of manufacturing, the process of cutting and polishing of slabs into tiles did not amount to manufacture as per the judgment of Hon'ble Supreme Court in the matter of **M/s. Aman Marble Industries Vs. Central Excise, Jaipur (2003 (157) E.L.T 393 (SC))** till 01.03.2006.

3. The Learned Counsel further submits that the Adjudication authority has wrongly concluded that Hindustan Marbles and Granites (HMG) as a branch of the Appellant M/s. Hindustan Granites (HG), whereas HMG is a partnership firm and Appellant is a proprietary concern. Thus, both these firms have got separate legal entity. As regards the production, the Learned Counsel submits that to allege clandestine removal, Adjudication authority relied on the freight charge register and held that the raw blocks received have not been taken into account but used in clandestine manufacture as per entries on 03.08.2006 and 18.08.2006, it is alleged for 3(three) months April, May and June 2006, whereas the non-accountal of the receipt of the stone blocks pertains to the subsequent period. Further to allege illegal production, Adjudication authority referred to entries in the 'route card reports' and 'gang saw register' and concluded that the entire production was not accounted. However, there is no discussion in the

impugned order regarding the wastages and Adjudication authority held that every quantity shown in these registers must end up as finished goods. The Adjudication authority also not taken into account the quantity exported by the Appellant.

4. Learned Counsel further submits that as per the show cause notice, Adjudication authority has invoked Section 4 of the Central Excise Act. 1944 read with Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. However, the impugned order is issued by considering Rule 8 of Customs Valuation Rules, 1988. Thus, it goes beyond the scope of show cause notice. The Learned Counsel relied on the following catena of decisions to support the said submission.

a) 2012 (280) E.L.T. 236 (Tri.-Mumbai) - Ispat Industries Ltd.

Vs. Commissioner of Central Excise, Nagpur

b) 2012 (275) E.L.T. 582 (Tri.-Mumbai)-Saurabh Organics Pvt.

Ltd. Vs. Commissioner of Central Excise, Thane

c) 2011 (267) E.L.T. 610 (Jharkhand) - McNally Bharat

Engineering Co. Ltd. Vs. Commr. of C. Ex., Ranchi

d) 2007 (215) E.L.T. 489 (S.C.)-Commissioner of C. Ex.,

Nagpur Vs. Ballarpur Industries Ltd.

e) 2009 (241) E.L.T. 481 (S.C.)-Commissioner of C. Ex.,

Bhubaneswar-I Vs. Champdany Industries Ltd.

f) 2002 (146) E.L.T. 311 (Tri.-Del) - Pahwa Chemicals (P) Ltd.

Vs. Commr. of C. Ex., New Delhi

g) 2002 (142) E.L.T. 687 (Tri.-Del) - Spectrum Paints Pvt. Ltd.

Vs. Commissioner of Central Excise, Jaipur

h) 1999 (106) E.L.T. 12 (S.C.) - Hindustan Polymers Co. Ltd.

Vs. Collector of C. Ex., Guntur

i) 2006 (199) E.L.T. 711 (Tri.-Bang)-Vaspar Concepts (P) Ltd.

Vs. Commissioner of C. Ex., Bangalore

j) 2009 (242) E.L.T. 275 (Tri.-Bang)-Commr. of Cus.,

Bangalore Vs. Wipro Ge Medical Systems Pvt. Ltd.

5. Learned Counsel further submits that the justification given by the Adjudication authority that the valuation adopted as per Customs Valuation Rules, 1988 is as per the Tribunal order is also unsustainable, since there is no such direction that the value has to be determined in terms of Customs Valuation Rules, 1988.

6. The Learned Counsel further submits that as per the impugned order, Adjudication authority held that goods were mis-declared in the clearance documents. In this regard, Learned Counsel submits that the Appellant is an EOU. At the time of clearance, description and value are declared in the clearance documents. Thereafter goods are allowed clearance after assessment by officer posted in the unit. If there was any mis-declaration, the officer would not have allowed clearance. Further, Adjudication authority has recorded that defect/damaged goods were cleared in DTA. The goods which do not meet the quality standard required for export can be treated as rejected. This is the practice in the industry. A register is also maintained showing the quantity of rejects, generated and they are cleared in DTA. Facts being so, the finding of the Adjudication authority regarding mis-declaration while clearing the goods is factually incorrect and unsustainable. As per the practice, goods containing even slightest defect like discoloration, invisible cracks, chipping, etc., are treated as rejects and cleared as rejects. Thus, the Adjudication authority held goods which were rejected as mis-declared. The Learned Counsel further submits that even as per Rule 8 (2) of Customs Valuation Rules, 1988, no value shall be determined under the provisions of this Rule on the basis of selling price in India of the goods produced, whereas Adjudication authority adopted the value by adopting the prices for sales in DTA without any admissible evidence.

7. As regards the quantification, the Learned Counsel submits that though the Adjudication authority has considered the value on the basis of Rule 8, the prices as per the relied upon documents was Rs. 125/sq.ft, whereas by applying this rate, the total value would get drastically reduced. However, no attempt has been made to work out the value and consequently the duty liability is not assessed by applying

this rate. Further the valuation is based on the documents issued by HMG with which the Appellant is not concerned. There is no corroborative evidence forthcoming in the impugned order confirming the price paid by the customers. In any case, the invoices were issued by the HMG. There is no indication that said invoices pertain to the goods cleared by the Appellant and there is no extra amount being passed on to the Appellant out of the sale proceeds carried out by the HMG. The evidences relied by the Adjudication authority are not admissible, since it does not pertain to the goods procured from the Appellant. Further as per the Show cause notice, there is no allegation that M/s HMG and Appellant are related parties. However, in the impugned order in para 6.6, it is held that the Appellant and HMG are related parties under Central Excise and Customs Law. In the absence of any such allegation in the show cause notice, said finding is also unsustainable.

8. The Learned Counsel further submits that M/s HMG procures only 4% of their turnover from the Appellant and once it is cleared from the factory premises to HMG and once goods are sold to HMG at factory gate, DTA sale is complete and no presumption can be drawn that DTA sale were affected from HMG premises. The Appellant is not concerned in any manner with the disposal of the goods by HMG to adopt the price list of the HMG as admissible evidence. The Learned Counsel also draws our attention to the impugned order where the Adjudication authority has only held that the Appellant has not effectively discharged the burden. This is a subjective statement. Thus, it is admitted that the Appellant had discharged the burden cast on him and even if it is not sufficient for the subjective satisfaction of the Adjudication authority, no finding can be given that appellant has not effectively discharged the burden. The Learned Counsel further submits that the Appellant had declared the value as Rs. 45/sq.ft and said value was not rejected in accordance with law. The Learned Counsel draws our attention to the judgment of Hon'ble Supreme Court in the matter of ***M/s Eicher Tractors Ltd Vs. CC, Mumbai-(2000 (122) E.L.T 321 (SC)*** wherein the Hon'ble Apex Court held that if the transaction value can be

determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules.

9. The Learned Counsel also submits that there is no suppression of fact or fraudulent act, collusion or wilful mis statement to invoke the extended period of limitation as per Section 11A (1) of the Act. The Appellant unit being an 100% EOU is under physical supervision of the officer, every activity is under the watchful eyes of the officer. Though it is alleged that the goods which are bulk in nature were cleared clandestinely in three months, it is surprising that not even once the goods were intercepted. There is no allegation of discrepancy in the stock of the finished goods, nor of the raw material. The Learned Counsel also submits that the computer printouts have no admissible evidence value, since it is relied without complying with the provision of Section 36B of the Act and none of the conditions were fulfilled. In this regard, the Learned Counsel relied on large number of decisions including the decision of the Hon'ble Supreme Court in the matter of **State of Jharkhand Vs. M/s Ambey Cements - 2004 (178) E.L.T 55 (SC)**. Once the mandatory conditions have not been fulfilled, evidentiary value of the computer printout is lost. The conditions prescribed in the statute cannot be substituted by other circumstantial factors. The Learned Counsel also submits that the penalty is also unsustainable, since there is no violation of any provision of law. The goods were cleared after due declaration of the description and value. The Learned Counsel further submits that there are no proceedings initiated by EOU authorities though it is alleged that the Appellant had clandestinely removed material from the premises. The Learned Counsel also draws our attention to the copies of tax paid invoices under which Hindustan Marbles & Granites (HMG) procured granite slabs from other independent manufactures of granite slabs during the period from 2004-2005 and 2005-2006 which was produced on 28.10.2013. However, said documents were not considered by the Adjudication Authority.

10. The Learned Counsel further submits that during the impugned period, Appellant was paying the applicable duties while clearing waste marble slabs/rejected granites slabs. Adjudication authority relied on certain entries in the 'route card reports' and 'gang saw register' and concluded that the entire production was not accounted. On the basis of the above, Commissioner compared the clearance on payment of duty in the month of April, 2006 in the data given and on the basis of that concluded that number of granites and marble slabs cleared on payment of duty was 3358 slabs which if converted in to square feet comes to 201480 sq.ft by taking each slab as 60 sq.ft against the accounted and cleared slabs of 23283 sq.ft as per DTA register. On this basis the Learned Commissioner concluded that the difference of 178197 sq.ft remains unaccounted and cleared without accounting and payment of duty in the subsequent months. On this basis, duty of Rs. 1,65,45,521/- has been demanded and confirmed. In this regard, the Learned Counsel submits that the Adjudication authority presumed that every granites/marble block cut through the machine would result in perfect granite/marble slab. It is common knowledge that during processing of granites/marbles slabs apart from exportable slab, there will be non-exportable slabs, rejected slabs and waste slabs. Out of these, non-exportable slabs and rejected slabs can only be cleared to DTA on payment of duty. The waste slabs which are about 48% are not marketable and only fit for destruction. While arriving at 201480 sq.ft said to have been manufactured and cleared, the Learned Commissioner assumed that the average slab would be around 60 sq.ft. In reality the slabs would depend on the size of the block, the wastage that would arise while cutting, finishing/polishing. There would be breakages/defects at every stage of production and allowance has not been given to such factors by Adjudication authority. Thus, the Adjudication authority has used a hypothetical figure of production to compare with the clearance on payment of duty. Law is well settled that to sustain the allegation of clandestine removal which is a serious charge, it is to be proved by Revenue with tangible and positive evidence such as installed capacity, purchase and utilisation of raw

material, labour employed, power consumed, details of goods cleared on the basis of Lorry Receipts/ documents etc. Thus, the conclusion arrived by the Adjudication authority is based on presumption of hypothetical figures are not supported by any corroborative evidence and are unsustainable.

11. As regards allegation of undervaluation, learned counsel draws our attention to Tax Invoice No. 307 / 2006-07 dated 21.4.2006 raised by HMG to M/s. Sobha Developers Pvt. Ltd., mentions the rate per sq. ft., as Rs. 65/- on which the total value of Rs. 1,197.04 has been calculated for 18.416 sq.ft of 'Yellow Jaisalmer Granite' and submits that Adjudication authority has observed that Hindustan Granites (HG) the appellant has cleared the goods to the DTA by undervaluing the same for the purpose of payment of duty. In this connection reference was made and as against this the net rate in the account of Sobha Developers Pvt. Ltd. in Receipt dated 04.05.2006, for the above Invoice No. 307 is mentioned as Rs. 787.12 per Sq. Ft. and the total value for 18.416 sq. ft. of 'Yellow Jaisalmer Granite' received by them is Rs. 14,495.56 and the difference amount as per the invoice have been obviously collected in cash. It is submitted that by mistake Sobha Developers Pvt. Ltd., have written sq. ft. instead of sq. mtrs. in their accounts and if the conversion factor of 1 sq. mt. equals 10.764 sq. ft. is applied, the rate per sq. ft. would work out to Rs. 65/- per sq. ft. approximately. On this basis, the actual value adopted by considering 90.71% for undervaluation and on this basis the differential duty demand has been arrived at Rs. 4,49,04,401/- which is not sustainable in law.

12. The Learned Authorised Representative (AR) for the Revenue reiterated the finding in the impugned order and also relied on the decision of this Tribunal in the matter of **M/s Noble Ply Vs. CCE, Calicut- 2009 (248) E.L.T 440 (Tri.-Bang)** wherein it is held that suppression of value is once established, short levy to be determined based on the transaction value. As regarding production of the granite slabs making using of cutting machine, learned AR submits that as per the prevailing norms of Granite Cutting using Gang saw Machine, the

standard Input/Output is governed by the established norms and Adjudication Authority has adopted the same.

13. Heard both sides and perused the records.

14. As regards the allegation of clandestine removal from EOU to DTA, the Adjudication authority reached the finding regarding clandestine removal based on the entry in gang saw register and consumption of resin. Further we observed that the entries on 03.08.2006 and 18.08.2006 are relied for alleging non accounting for the month of April, May and June 2006. Further the Adjudication authority has not considered the wastages and presumed that every quantity shown in the block receipt register must end up as finished goods. Such presumption is not sustainable specifically when an allegation of clandestine removal is made. As regarding clandestine removal, no attempt was made by the Adjudication authority or the investigating officers to find out the practice followed in the industry and also no attempt was made to verify the register maintained for the quantity of rejects generated and cleared into DTA. Further we find strong force regarding the contention of the appellant that being an EOU, manufacture and clandestine removal of huge quantity of such goods through an EOU which under the supervision of Development Commissioner CSEZ, Bangalore, cannot be likely without specifying the reasons more than what is stated in the impugned order. Specifically in such a case, where no proceedings were initiated against the Appellant herein under the EOU. Once the unit is under the control of EOU authority and in the absence of any discrepancy in the stock of the finished goods nor in the raw material, no presumption can be drawn that the Appellant had involved in clandestine removal of the goods.

15. As regards the activity whether it amounts to manufacture, Learned Counsel relied on the judgment of Hon'ble Supreme Court in the matter of **M/s Aman Marble Industries**, wherein it does not amount to manufacture till 01.03.2006. As regarding valuation also, we find that impugned order is considering Rule 8 of Customs Valuation Rules, 1988, whereas while issuing the show cause notice, Section 4 of the Central Excise Act read with Rule 11 of the Central Excise Valuation

(Determination of price of excisable goods) Rules, 2000 was invoked. Though the Adjudication authority has held that the reliance on the Customs Valuation Rules, 1988 is as per the decision of this Tribunal, we could not find any such direction in the Final Order issued by this Tribunal directing the Adjudication authority to conduct de-novo adjudication based on the Customs Valuation Rules, 1988. As regarding valuation, even if it is assumed that this Tribunal had directed Adjudication Authority to carry out valuation of the goods as per the provisions of Customs Valuation Rules, 1998, no value shall be determined under the provisions of said Rule on the basis of selling price of goods in India. However, the Adjudicating authority adopted the value by adopting the price for sales in DTA without any admissible evidence. Further there is no admissible evidence to hold that the price adopted by the Appellant was regarding the goods cleared by the Appellant through DTA. When DTA clearance are available on record, no attempt was made to find out the rate of sale of such goods to ascertain the value of goods allegedly cleared by the Appellant through alleged clandestine removal. Even if an attempt was made adopted to Customs Valuation Rules as held in the matter of **M/s Eicher Tractors Ltd.**, if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules.

16. As regards invoking the extended period, we find that the appellant is legally bound to maintain the record and to follow the guidelines issued by DGFT for day-to-day activities and such goods registries are subject to verification by proper officer from time to time. Fact being so, invoking the extended period of limitation is unsustainable. As regards the documents relied by the Adjudication Authority, while the remanding the matter, specific guidelines were given to Adjudication Authority to consider the objections regarding noncompliance with Section 36B of the Act. However, no finding was given to that effect. Following the ratio of the judgment of the Hon'ble Supreme Court in the matter of **M/s Ambay Cements (supra)**, once mandatory conditions are not fulfilled, it cannot be considered as having

any evidentiary value specifically without any corroborative evidence. Considering the same, there is no admissible evidence to allege clandestine removal of goods and undervaluation as alleged, thus the impugned order is unsustainable and is set aside.

17. In view of the above discussion, the appeal is allowed with consequential relief, if any, as per law.

(Order pronounced in open court on 19.02.2025)

(P. A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Sasidhar