CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISON BENCH
COURT NO.1

Appeal No. E/72,69/2015

[Arising out of the Order-in-Appeal No. JAL-EXCUS-000-COM-0012-14-15-16 dated 14.09.2015 passed by the CCE (Appeals), Ludhiana]

Date of Hearing/Decision: 31/08/2018

For Approval & signature:

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

M/s Ambika Overseas
M/s Ambika Industries **Appellant**

Vs.

CCE, Ludhiana **Respondent**

Appearance

Shri. Jitin Singhal, Shri. Pravesh Bahuguna, Advocates- for the appellant
Shri. Tarun Kumar, AR- for the respondent

CORAM: **Hon'ble Mr. Ashok Jindal, Member (Judicial)**
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

FINAL ORDER NO: 62899-62900 / 2018

Per Ashok Jindal:

1. The appellants are in appeal against the impugned order wherein the duty has been demanded along with interest and penalty has been also imposed on both the appellants.

2. The facts of the case are that M/s Ambika Overseas (In short 'M/s AO') is engaged in the manufacture of Hand Tools falling under chapter 82 of the Central Excise Tariff Act, 1985. The partners of the M/s AO are having another unit in the name and style of M/s Ambika Industries, (In short 'AI'). M/s AI are also engaged in the manufacture of Hand Tools',

especially 'Spanners' and located in the state of Himachal Pradesh and availing benefit of area based exemption Notification No. 50/2003-CE dated 10.06.2003, as amended. On the basis of investigation, the DGCEI alleged that the appellants were indulged in evasion of Central Excise duty by way of (i) fraudulent availment of cenvat credit and (ii) fraudulent availment of area based exemption Notification No. 50/2003-CE dated 10.06.2003. The investigation was started on the premises that the goods manufactured by M/s AO has been shown on paper but the same has been manufactured and cleared by M/s AI without payment of duty. On the basis of that intelligence, the factory premises of both the appellants were visited on 17.05.2012 and certain documents/records were recovered. Various statements were recorded and on the basis of the investigation, the show cause notice was issued to the appellants on the following grounds:

(A) M/s AO has cleared finished goods to M/s AI in the guise of forgings and mis-used the exemption Notification No. 50/2003-CE.

(B) M/s AO has fraudulently availed cenvat credit of Rs. 55,48,523/- without actually receiving goods in its factory

(C) As M/s AO and M/s AI are related person and the M/S AO has undervalued its goods sold to M/s AI.

3. The matters were adjudicated and benefit of exemption Notification was denied. Consequently, the duty was demanded and cenvat credit sought to be denied on inputs received by M/s AO and it was also held that the clearance made by M/s AO to M/s AI has been undervalued, therefore, deferential duty has been demanded. Against the said order, the appellants are before us.

4. The ld. Counsel for the appellant submits that as M/s M/S AO is located in the state of Himachal Pradesh and cannot avail the benefit of

area based exemption, therefore, the question of mis-use of exemption Notification by M/s AO does not arise. The case of the Revenue is that the M/s AO has cleared fully finished chrome plated spanners under the guise of forgings. It is his submission that there is no dispute, duty has been paid on forgings to M/s AI. As there is no allegation of clandestine removal, quantity of goods mentioned in RG-1 register has to be accepted. There cannot be any difference in the quantity so as to demand duty. He further submits that in RG 1 register and the quantity reflected in 'Electroplating Production Reports' or Work Order progress Chart but which has been assumed that after Electroplating, the spanners were subject to clearance from factory, whereas after electroplating, the said spanners were subject to visual inspection for any crack/fault and electroplating fault. Go/no-go gauge test was also performed to check that the sizes of spanners in accordance with DIN/Turkish standards. The tests are possible only after electroplating as before that it is not possible to find any fault in the spanners due to its colour. In case of any visible fault, the spanners are sent back for repair/rectification of defects, if possible whereupon it again comes back for electroplating and in case the repair/rectification of defect was not possible, the same are scrapped and sold as waste and scrap. Similarly, spanners manufactured for export were subjected to salt spray test to check the quality of electroplating. In case, randomly selected spanner fails in test, the entire lot is rejected and sent back for repair/rectification of defects whereupon they again come back for electroplating. It was due to this reason that the quantity shown in the Electroplating Production Reports or Work Order Progress Chart are more than the quantity recorded in RG 1 register.

5. The fact regarding various types of test to be undertaken by M/S AO before clearing goods for export or in domestic market was brought to the notice of the ld. Commissioner by way of affidavits which are admissible in

terms of decision of the ***Hon'ble Apex court in the case of Mehta Parikh & Co. v. CIT-AIR 1956 SC 554***. But the adjudicating authority did not consider the same. It is his further submissions that the ld. Commissioner has mis-construed the expression CP as chrome plated spanner. In fact, CP stands for Cold Pressed and not Chrome Plate. These spanners were sent to M/s AI for further processing as "Nickel Chrome Plated" Hand Tools. To that effect, they filed affidavit and the same has not been considered and no cross objection was granted. It is his submissions that it has been alleged that forgings of spanners was also received at M/S AO and the same were also shown to have been cleared by M/s AI as fully finished spanners. It is submits that the ld. Adjudicating authority did not appreciate the fact that the M/S AO had transported the said forgings along with forgings manufactured by it to M/s AI and this procedure was adopted just to save transportation cost as transportation of small quantity of spanners was not economically viable. It is further submits that M/s AI was having electroplating plant as well as other machines required for manufacturing of spanners, were found installed during the course of search by the DGCEI officer. No reason why M/s AI would keep not to utilize its machines and, instead, get fully finished chrome plated spanners from M/s AO, especially when the product would be cheaper at M/s AI due to various subsidies and incentives offered by State and Centre Government. Further, it is submits that M/s AI had regularly filed its monthly returns with the jurisdictional Range. The said monthly returns have never been questioned and, were accepted by department. Therefore, without questioning the returns filed by M/s AI who had availed benefit of Area based exemption Notification, the present allegation is not sustainable.

6. With regard to fraudulently availed cenvat credit of Rs. 55,48,523/- without actually receiving goods in its factory, it is his submissions that

the said allegation has been alleged that on the basis of statement given by one of the supplier M/s Jagannath Steels, who had stated that they had issued invoices only without supply of goods physically and with regard to other suppliers, they had supplied mild steel to M/s AO but did not know whether the goods supplied by them were got unloaded by M/s AO in its factory or somewhere else. One of the supplier has also stated that they have supplied rounds of mild steel of 12mm and it was alleged that rounds of 16mm onwards of steel grade 31CrV3 and EN8 only could be used by M/s AO and not rounds of mild steel of 12mm. One of the supplier had allegedly stated that proof of receipt from M/s AO was not taken when goods were unloaded by vehicle/driver so did know where goods were unloaded. Three suppliers have stated that they have manufactured goods out of ingots and mild steel.

7. With regard to above allegations, it is his submissions that no inquiry was conducted with the transporter who had delivered the goods to M/s AO and no opportunity of cross examination was afforded to M/s AO. The cross objection has also not been granted of Shri. Manjit Singh or M/s Jagannath Steel who has stated that he had merely issued invoices without physically selling goods especially whereas the said goods duly entered in their statutory records by the appellant for manufacture of their final goods. No efforts have been made, if the said goods were not received in the factory of the appellant, from where the appellant has procured the goods. It is his submissions that there is nothing on record in terms of statement of transporter regarding unloading of goods, buyer's details, money transaction etc., to substantiate the allegation of non receipt of goods in M/S AO's factory. Therefore, demands are not sustainable in the light of the decision of this Tribunal in the case of ***Century Metel Recycling Pvt. Ltd. reported in 2016 (333) ELT 483 (Tri. Del.) and A.R. Shanmugasundaram reported in 2016 (333)***

ELT (158) Tri. Chennai, wherein it has been held that charge of clandestine removal cannot be based merely on statement and private records unless corroborated by any other evidence.

8. He is further submits that for the invoice issued by M/s Atul Kumar Rohit Kumar, invoice issued by M/s K.J. Steel Rolling Mills , the goods were directly sent to the job worker or cleared as such upon payment of duty, therefore, cenvat credit cannot be denied.

9. In some of the case, cenvat credit sought to be denied on the ground that there was no entry in the private records but their entry is in the statutory records and the said goods has been used for manufacture of their final product. In that circumstances, it cannot be said that the goods has not been received. The statement recorded during the course of investigation never allowed for cross objection and merely on the basis of the statement, without any corroborative evidence, the statement cannot be relied upon.

10. On the issue of undervalued of its goods sold to M/s AI. It is his submissions that the appellants are clearing the said goods to independent buyers as well as to M/s AI. These facts has not been disputed, therefore, the Rule 9 read with Rule 8 of the Central Excise Valuation Rules, 2000 will not applied to the facts of this case. In that circumstances, the charge of undervalued is not sustainable.

11. To support this contention, he relied on the decision of this Tribunal in the case Of ***JMP Castings Ltd. vs. CCE, Jallandhar reported in 2017 (349) ELT 648 (Tri.).***

12. On the other hand, the ld. AR reiterated the finding in the impugned order.

13. Heard the parties and considered the submissions.

14. On careful consideration submissions made by both the sides, we find that the demand has been raised against the appellants on the three issues:

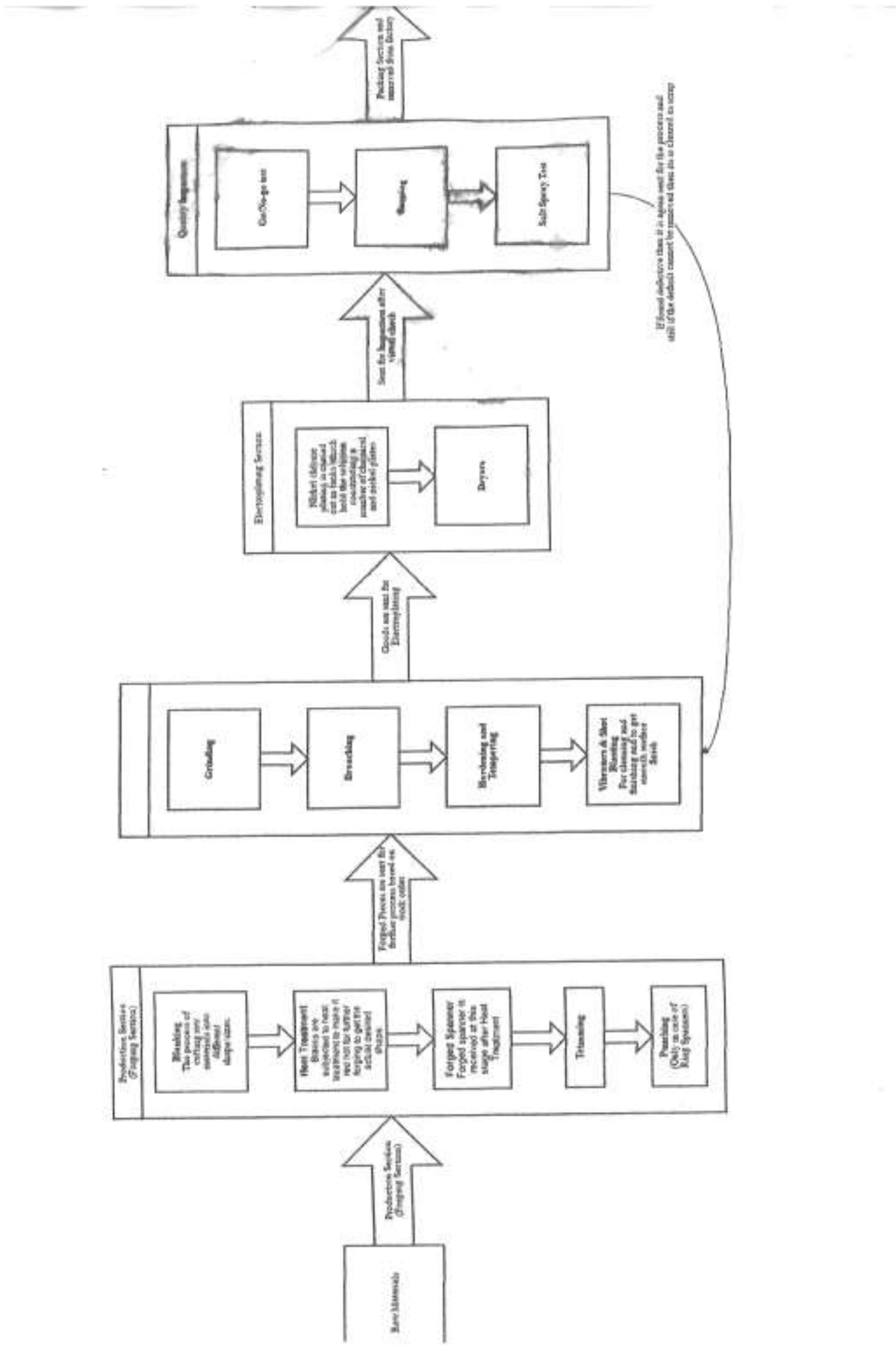
(A) The appellant have mis-used the benefit of exemption Notification No. 50/2003-CE dated 10.06.2003 and availed benefit of the said Notification without manufacturing the goods.

(B) The appellant M/s AO has not received the inputs and availed cenvat credit without receipt of the goods.

(C) The clearance made by M/s AO to M/s AI have been undervalued.

15. All the issues are dealt separately:

(A) **Regarding mis-used of Notification No. 50/2003-CE dated 10.06.2003, we find that the appellant has shown their process chart which has been extracted herein below**:



It has been alleged against by the appellant is that the appellant had cleared fully finished chrome plated spanners under the guise of forgings to their sister unit. The appellant has explained that the manufacturing process which has been recorded here as under:

> *"After electroplating, the said spanners were subject to visual inspection for any crack fault and electroplating fault. Go/no-go gauge test was also performed to check that the sizes of spanners were in accordance with DIN/Turkish standards. The tests are possible only after electroplating as before that it is not possible to find any fault in the spanners due to its colour. In case of any visible fault, the spanners are sent back for repair/rectification of defects, if possible whereupon it against comes back for electroplating and in case the repair/rectification of defect was not possible, the same are scrapped and sold as waste and scrap. Similarly, spanners manufactured for export were subjected (by randomly selecting out of the export lt) salt spray test to check the quality of electroplating. In case, randomly selected spanner fails in test, the entire lot is rejected and sent back for repair/rectification of defects whereupon they again come back for electroplating. It was due to this reason that the quantity shown in the Electroplating Production Reports or Work Order Progress Chart are more than the quantity recorded in RG 1 register."*

It is above said explanation has been ignored by the ld. Commissioner. Further, the appellant has explained CP stands for 'Cold Pressed' whereas it has been presumed by the adjudicating authority as 'Chrome Plate' and explanation given by the appellant by way of affidavits has not been considered. In that circumstance, it cannot be presumed that CP is used for "Chorme Plates", therefore, on that ground it cannot be held that the appellant M/s AO was cleared "Chrome Plate" spanners under the guise of forgings to M/s AI.

We also take a note of the fact that M/s AI is having facility of electroplating and installed the machinery in their factory. The same has been found installed by the authorities below. In that circumstances also, the benefit of doubt goes in favour of the appellants, therefore, the goods cleared from the premises of M/s AI are entitled under exemption of Notification No. 50/2003-CE dated 10.06.2003.

In view of the above, the demand cannot be raised on account of denial of benefit of exemption Notification No. 50/2003-CE dated 10.06.2003, therefore, the demand of Rs. 57,81,475/- is set aside.

(B) Fraudulently availment of cenvat credit.

We have gone through the records placed before us. On going through the said records, we find that the sole reason for denial the cenvat credit is based on the statement of the various suppliers that they have issued invoice and not supplied the goods or they are not knowing when the goods have been unloaded at the factory premises of M/s AO.

We find that all the allegations against the appellant M/s AO is that they have not received the goods are based on the various statements, no cross objection of the persons whose statements have been relied and granted and no other corroborative evidence has been produced on record by the Revenue in support of the allegation. We take note of the fact that the statements recorded during investigation were not tested in terms of Section 9D of the Act, the examination of Chief is required and thereafter, the cross objection is to offer as held by this Tribunal in the case of ***Kuber Tabbaco ltd. Reported in 2018 (338) ELT 113 (Tri. Del.)***. In these circumstances, it cannot be held that the appellants had not received any goods in the absence of any corroborative evidence and merely relying statements of the suppliers. Further, we find that no statements of the transporters has been recorded to substantiate the statements of the suppliers. In that circumstances, cenvat credit cannot be denied to M/s AO to the tune of Rs. 55,48,523/-.

(C) Undervaluation:

There is an allegation against M/s AO that they have cleared the goods to their sister unit had not paid duty in terms of Rule 9 read with Rule 8 of the Central Excise Valuation Rules, 2000, hence, have undervalued the goods.

We find that the fact on record that M/s AO is clearing the goods on the same price to M/s AI as well as to independent buyers, therefore, Rule 9 of the Valuation Rules, is not applicable to the facts of the case. The same view was taken in the case of M/s JMP Castings (Supra) wherein this Tribunal observed as under:

> ***"7.*** *It is admitted fact that the appellant is not clearing the 100% of the production to the related person and only 80% to 90% of the production was cleared to the related person, therefore, it is to be seen whether the provisions of Rule 9 read with Rule 8 of the Central Excise Valuation Rules, 2000 are applicable to this case or not?*
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> *For better appreciation of the provisions of Rule 10, Rule 9 and Rule 8 are extracted here below :*
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> ***Rule 8.*** *Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture or other articles, the value shall be 110% of the cost of production or manufacture of such goods.*
>
> ***Rule 9.*** *When the assessee so arranges that the excisable goods are not sold by him except to or through a person who is related in the manner specified in either of sub-clause (ii) or (iii) or (iv) of clause (b) of sub section (3) of Section 4 of the Act, the value of the goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail :*
>
> *Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in Rule 8.*
>
> ***Rule 10.*** *When the assessee so arranges that the excisable goods are not sold by him exempt to or through an interconnected undertaking, the value of goods shall be determined in the following manner, namely :*
>
> *(a) If the undertakings are so connected that they are also related in terms of sub-clause (ii) or (iii) or (iv) of clause (b) of sub-section (3) of Section 4 of the Act or the buyer is a holding company or subsidiary company of the assessee, then the value shall be determined in the manner prescribed in Rule 9.*
>
> *Explanation - In this clause "holding company" and "subsidiary company" shall have the same meanings as in the Companies Act, 1956 (1 of 1956).*
>
> *(b) In any other case, the value shall be determined as if they are not related persons for the purpose of sub-section (1) of Section 4.*
>
> ***8.*** *On going through the said rules, the said rules are applicable only in a situation where the appellant is clearing 100% of production through the person who is related.*

> *Admittedly, the appellant is not clearing 100% of production through related person. In that circumstances, we hold that the provisions of Rule 9 read with Rule 8 of Valuation Rules, 2000, are not applicable to the facts of this case. Therefore, the charge of undervaluation. is not sustainable against the appellant.*
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> ***9.*** *In these terms, the impugned order deserves no merits, hence set aside. The appeal is allowed with consequential relief, if any.*

16. In view of the above observations, we find that the charge of undervalued is not sustainable against the appellants.

17. In view of the above analysis, we do not find any merit in the impugned order, the same is set aside. The appeals are allowed with consequential relief.

(Dictated and pronounced in the open court)

Anil G. Shakkarwar
Member (Technical)

Ashok Jindal
Member (Judicial)

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