

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

Appeal Nos. E/162 to 164/2011 and E/107/2011

(Arising out of Order-in-Original No.1/2010 dated 31.12.2010 passed by the Commissioner of Central Excise and Service Tax, Trichy)

M/s. Elango Industries Ltd.
Shri S.Elangovan, MD
Shri S.A. Prem Kumar
M/s. Goyal Ispat Ltd.

Appellants

Vs.

Commissioner of GST & Central Excise
Puducherry

Respondent

Appearance

Shri N. Viswanathan and
Shri A. Mudimannan, Advocates for the Appellant
Shri K. Veerabhadra Reddy, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing :20.11.2018

Date of Pronouncement :20.12.2018

Final Order Nos. **43123-43126 / 2018**

Per Bench

Brief facts are that the appellant M/s. Elango Industries Ltd. (herein after referred to as M/s. EIL) is engaged in manufacture of MS ingots. Based on intelligence that they were evading payment of central excise duty by suppression of

production and clandestine removal of MS ingots, the officers of DGAE conducted search operations in the appellant's factory on 6.5.1997 and recovered documents under mahazar. The registered office, corporate office and residence of Shri Elangovan, MD of the appellant-company was also searched by the officers. The documents were recovered from the transporter M/s. Rajarathina Transport and statements were recorded. Based on such evidence, show cause notice dated 17.6.1998 for the period March 1995 to August 1996 was issued to the appellant demanding Rs.25,67,595/- being the duty on finished products removed clandestinely and Rs.18,93,298/- being the wrongly availed MODVAT credit. Prior to this notice an earlier show cause notice dated 18.8.1997 was issued by the Trichy Commissionerate demanding duty of Rs.26,00,949/- alleging clandestine removal and proposing to disallow MODVAT credit to the tune of Rs.48,788/- covering the period from 3.11.1994 to 28.10.1995. The appellant opted for settlement under Kar Vivag Samadhan Scheme (KVS Scheme) and settled the first notice by paying 50% of the duty demanded at Rs.13,24,869/.

1.2 The second notice dated 17.6.1998 was adjudicated earlier by the Commissioner and taking note of the fact that period of seven months is overlapping with the period of first notice and that appellant had paid 50% of the duty in the

earlier show cause notice, he confirmed Rs.6,73,546/- as duty with reference to clandestine clearance of finished products and the demand of MODVAT credit was confirmed to the tune of Rs.40,500/-. Penalty under section 11AC read with Rule 9(2) and Rule 173Q and Rule 57I of Central Excise Act, 1944 was imposed on M/s. EIL. Separate penalty under Rule 209A was imposed on Shri Elangovan, MD of M/s. EIL, M/s Goyal Ispat, Shri Premkumar, Director of M/s. EIL, Shri T.K. Raghunathan, GM of M/s. EIL, Shri S.Sankar PO of M/s. EIL, Shri G. Odayappan Managing Partner of M/s. ASRM and Shri Vijay Jain of M/s. Subash Trading Co. The adjudicating authority dropped proposal to impose penalty against remaining persons like transporters, supplier of inputs / dealers etc.

1.3 An appeal was preferred by the department before the Tribunal aggrieved by the dropping of major part of the demand by the adjudicating authority. The aggrieved appellants also preferred appeals before the Tribunal. The Tribunal vide Final Order No. 853 to 859/2008 dated 7.8.2008 disposed the appeals filed by the appellants as well as the department by a common order. In such order, the Tribunal remanded the matter to the adjudicating authority to consider afresh the issue with regard to clandestine clearance and wrongful availment of MODVAT credit. However, there was a specific direction not to impose penalty on those persons

whose charges have been dropped by the adjudicating authority, since department did not appeal against this.

1.4 Pursuant to such remand order, the Commissioner has passed the present denovo adjudication order dated 31.12.2010, wherein he confirmed the demand of Rs.24,13,918/- being the duty on goods clandestinely cleared and Rs.18,93,298/- being the wrongly availed MODVAT credit. Equal penalties are imposed on M/s. EIL under Rule 173Q (1) (a), (b), (d) r/w Rule 9(2) and Rule 226 of Central Excise Rules, 2002. Penalty under Rule 209A is imposed on Shri S. Elangovan, MD of M/s. EIL, M/s. Goyal Ispat, Shri A. Premkumar, Shri T.K. Raghunathan, Shri S. Sankar, Shri G. Odayappan and Shri Vijay Jain. Aggrieved by such order, M/s. EIL, Shri S. Elangovan, MD of the appellant-company, Shri Prem Kumar and the dealer M/s. Goyal Ispat Ltd. have filed these appeals.

2.1 On behalf of the appellants, Id. counsel Shri N. Viswanathan and Shri A. Mudimannan appeared and argued the matter. Shri N. Viswanathan submitted that the Tribunal had remanded the matter to the adjudicating authority to consider afresh the issues regarding allegation of clandestine clearance as well as wrong availment of MODVAT credit. There was specific direction that the penalties which were set aside by the adjudicating authority in the earlier proceedings on the

transporters, dealers etc. should not be disturbed. When the dealers and transporters have been exonerated fully by dropping charges against them, the allegation of clandestine clearance or wrong availment of credit would have no legs to stand.

2.2 He referred to the periods involved in both the show cause notices and argued that the period in second show cause notice overlaps or takes in about seven months of the earlier show cause notice. In the earlier proceedings which was settled under KVS Scheme, the production of appellant factory with regard to the electricity consumption etc. was ascertained and on the basis of such data, the duty was quantified. The allegation of the department that appellant had suppressed actual electricity consumption is false. The electricity consumption was the basis for quantification of demand in the earlier proceedings to which the department was also a party. Though it is alleged that there is difference in the consumption noted by appellant in the log sheet and the EB card, the department has not verified the payment of electricity charges. The electricity consumed by office of the factory, general maintenance and other connected places have not been taken into account by the adjudicating authority while arriving at the electricity consumed per heat. The quantity of waste also has been totally ignored. The appellant had paid up the duty and

settled the earlier proceedings only to buy peace with department and to avoid litigation.

2.3 In any case and without prejudice, the respondent ought to have seen that for the periods between 21.3.1995 and 28.10.1995, the demand was quantified based on the maximum production the unit could make and the demand for duty on the clandestine removal determined based on power consumption to the extent of 1307.55 MTs was demanded and settled under the KVSS. So the claim of department that the DGAE notice has quantified the demand on different set of buyers compared to the earlier notice has no logic at all. The unit is not able to make production in excess than that quantified based on electricity consumption. Even if the two notices are on different set of buyers, the demand cannot sustain.

2.4 Though the appellant had requested for cross-examination of various persons whose statements were relied upon by the department, the same has been denied without giving any cogent reasons. This is against the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries - 2015 (324) ELT 641 (SC). None of the parties have stated that they have purchased any clandestinely removed goods from the appellant. So also there is no

evidence to support that the appellant has availed MODVAT credit on invoices without supply of goods.

2.5 The department has mainly relied upon the documents alleged to be recovered from the transporter Shri Rajarathina Transporters. It is to be noted that the said transporter was exonerated fully in the earlier proceedings and the same has been maintained by the Tribunal in its final order dated 7.8.2008. The statement of the transporter or the documents furnished by him cannot be relied as the issue of penalty on the transporter having attained finality, the same evidence cannot be applied against the appellant to hold that the appellant has cleared the goods clandestinely with the help of the transporter. The mere statements of Nagappan, A. Rawther, the alleged brokers cannot be relied without corroboration. They have stated that the statements were made under coercion. Therefore, the case of the department that these persons assisted in procuring unaccounted raw materials by payment in cash is not sustainable. Again, when the statements of such persons which have been relied upon by the department to issue the show cause notice and demand duty as well as recover MODVAT credit has been fully held to be unreliable so as to drop the proceedings against such persons, the deposition of the very same co-noticees cannot be relied against the appellant to demand duty or deny the

MODVAT credit. He relied upon the decision of the Tribunal in S.S. Organics – 2017 (357) ELT 545.

2.6 The records if any, recovered from the transporter or private records maintained by the transporter, are not connected to the appellant factory. The said records cannot be used to demand duty from the appellant. Such private records cannot be relied upon without any corroboration.

2.7 Though the factory was visited by the officers on 6.5.1997, the demand of duty has been quantified upto 1.8.1996. The officers have not found any discrepancy with regard to the stock of raw materials or the finished products in the premises or in the registers maintained by the appellant. If the department was relying on the evidences of the private records maintained by the transporter and other dealers, the department ought to have verified the stock of such dealer which has not been done. Since there is no discrepancy in the stock, it indicates that the appellant is not guilty of such charges of clandestine clearance of finished product. The wrong availment of credit is alleged stating that there is difference in the quantity shown in commercial invoice and the excise invoice. The difference if any is very less and of 1 to 2 MTs in few occasions and cannot form basis for alleging clandestine removal of about 1700 MTs.

2.8 The other evidence relied upon by the department is the bank account of Shri Prem Kumar who is one of the Directors. It is the case of department that he was maintaining accounts wherein cash from clandestine clearance was deposited. The said director has clearly stated that he was having other construction activities and had maintained receipts and expenditure with regard to such transactions. The department has wrongly proceeded on presumption that these are financial transactions relating to clandestine clearance of goods. This explanation was not considered or verified by department.

2.9 The entire case of department is built on isolated and uncorroborated entries in some private records and statements. Such persons have deposed that their statements were obtained on coercion. The kutchra slips and other private documents are not supported by any reliable evidence or statutory records. He therefore pleaded that the impugned order may be set aside and the appeals may be allowed with consequential relief.

3.1 The Id. AR Shri K. Veerabhadra Reddy supported the findings in the impugned order. He submitted that the appellants were procuring unaccounted raw materials and were also clandestinely clearing the finished products. The suppliers / dealers of the scrap have given statement to the effect that they have supplied raw materials without any documents. He

adverted to para 96 (96A) of the impugned order and submitted that in cross-examination the suppliers / traders have deposed that there could be a possibility of mixing of scrap at their end. Therefore, it can be inferred from such statement that these persons are admitting that there could be supply of better variety scrap to M/s. EIL. Their contradictory statements would show that they have supplied unaccounted raw materials to M/s. EIL. The commissioner has not imposed any penalty on these dealers / suppliers only because of the direction of the Tribunal that no penalty can be imposed upon such persons in denovo adjudication. However, their role for supply of unaccounted raw materials is brought out from their statements.

3.2 The second allegation is with regard to unaccounted clearance of finished products. The main argument of the Id. counsel is with regard to the production capacity and that the alleged quantity cannot be manufactured by the appellant. He adverted to para 21 of the show cause notice. From the evidence gathered, it is clear that appellant had been suppressing the actual production by showing lesser heats in their log sheets for the period from October 1995 to August 1996. For the months of December 1996 to May 1997, M/s. EIL have themselves made a calculation of electricity consumption per MT. The figures were noted on the reverse side of log

sheets. Electricity consumption is around 740 units per MT. During this period, there was no clandestine clearance of final products. Similarly, electricity consumption was calculated from the available production log sheets during the period from October 1995 to July 1996 and it was found to be 850 units per MT. Thus, it is seen that M/s. EIL have not only suppressed the number of heats in the production log sheets during the period but have also adjusted the electricity consumption by showing inflated power consumption figures in the accounted heats. Therefore, the contention of the appellant that the quantification of demand ought to have been on the basis of electricity consumption / production capacity cannot be accepted.

3.3 The payments for unaccounted finished products were made by cash. On verification of the accounts maintained by Shri Prem Kumar, director of M/s. EIL, it was seen that one Shri Muthusamy, who was an ex-employee of Anjaneya Steel Rolling Mills (M/s. ASRM) was depositing cash in the said account maintained by Shri Prem Kumar. Shri Prem Kumar has not been able to give proper explanation for these cash deposits made by Shri Muthusamy. It is very much clear that the cash deposits are the funds received from unaccounted clandestine clearance of finished products. The department has been able to prove the unaccounted purchase of raw materials

as well as clandestine clearance of finished products and therefore the demand of Rs.24,13,918/- against clandestine clearance and disallowance of MODVAT credit to the tune of Rs.18,93,298/-, the interest thereon and the penalties imposed are legal and proper.

4. Heard both sides.

5.1 The allegations are two-fold. Firstly, that the appellant has purchased unaccounted raw materials and also availed fraudulent MODVAT credit to the tune of Rs.18,93,298/-. Secondly, that the appellant has clandestinely cleared finished products (MS Ingots) during the period March 1995 to August 1996 without payment of duty to the tune of Rs.24,13,918/-.

5.2 The matter had earlier reached the Tribunal and vide Final Order dated 7.8.2008, the Tribunal had remanded the matter for fresh adjudication. However, while analyzing the case at that stage, it was observed by the Tribunal that the department has not filed any appeal against the earlier order passed by the Commissioner on the issue of dropping the penalties on the traders / suppliers and transporters and therefore no penalty can be imposed on such persons in the denovo adjudication. The main evidence in the present case is the documents recovered from the premises of M/s. EIL, the document recovered from Rajarathina Transport, electricity consumption details and statements recorded.

5.3 The allegation of wrongful availment of MODVAT is mainly based on the statement of various traders / suppliers. All these persons have been exonerated by the Commissioner by setting aside the penalty imposed in the earlier proceedings and the said findings have become final as observed by the Tribunal in its Final Order dated 7.8.2008. Taking this into consideration, we may now address the arguments put forward by the Id. AR adverting to para 96 (96A) of the impugned order. The Commissioner has concluded that there has been unaccounted purchase of raw materials merely for the reason that in cross-examination, the traders / suppliers have deposed that there might have been a mixing up of scrap at their end. We do not find any logic in drawing inference from such statements that the appellants have procured unaccounted raw material. Apart from such statement, there is no evidence adduced by the department to show that the appellants have procured unaccounted raw materials. The other evidence is that some katcha slips were recovered from the residence of Shri Elangovan which showed payment details of scrap. That in the commercial invoices and Central Excise invoices there is difference of one or two metric tonne of raw material (scrap). For eg. In the invoice dated 23.2.1996, the quantity was shown as 9.870 MT whereas in the commercial invoice the quantity is an additional quantity of 1.550 MTs. When the

department alleges that more than 1700 MTs of MS ingots (finished products) have been manufactured and removed clandestinely, the difference of one to two metric tonnes of raw material in a few instances would not and cannot support the huge quantity of clandestine clearances alleged in the show cause notice. We are not able to find any reliable evidence supporting wrong availment of MODVAT credit.

5.4 The second allegation in show cause notice is that the appellant M/s. EIL manufactured and clandestinely cleared 1752.34 MTs of MS ingots without paying duty to the tune of Rs.25,67,595/- during the period from March 1995 to August 1996. In the impugned order, the Commissioner has confirmed duty of Rs.24,13,918/- It is to be stated that an earlier show cause notice dated 18.8.1997 was issued to the appellant covering the period from 3.11.1994 to 28.10.1995. Almost seven months of the present show cause notice overlaps with the earlier show cause notice which was settled under KVS Scheme by paying 50% of the duty demand. In such show cause notice and settlement, the duty demand was quantified on the basis of production capacity / electricity consumption. The department was also part of such settlement. However, in the second show cause notice, the department has quantified the demand on different basis which is evidence of dealers and buyers of finished goods. We do not understand how at least

for the overlapping period, the department can adopt a different method for quantifying the demand when the production capacity on the basis of electricity consumption has been the basis for quantifying the demand for a period of seven months overlapping in the earlier show cause notice. It is worthwhile to reproduce the observation of the Tribunal in its order dated 7.8.2008 with regard to this issue, which is noted as under:-

5. Yet another crucial fact which is not disputed is that the dispute arising from the Commissioner's show cause notice which demanded duty from M/s. EIL on the basis of power consumption per MT on ingots was settled under the KVS scheme on payment of 50% of the duty demanded. Needless to say that both the department and the assesseees are parties to this settlement. Neither of them is entitled to plea anything against the formula adopted in the Commissioner's show cause notice for quantification of duty (power consumption formula). If that be so, there could have been no demand of duty on M/s. EIL on a different formula for the overlapping period (7 months). This is part of the period comprised in the period of dispute involved in the present case. It would follow that the demand of duty raised on M/s. EIL in the show cause notice of DGAE (CE) on a basis different from the formula accepted by both sides for the purpose of settlement under the KVS Scheme cannot be sustained insofar as the overlapping period is concerned. The question which now arises for consideration is whether a different formula is applicable to the rest of the period of dispute covered by DGAE (CE) notice. The show cause notice have offered factual support to adoption of such different formula for a part of the period of dispute. No such thing is forthcoming in the present case."

(emphasis supplied)

5.5 Even in the denovo proceedings, the department has not been able to establish the reason for applying a different formula for demanding duty for the overlapping period. We have also to mention that when we have already concluded

that the department has failed to establish procurement of unaccounted raw materials and when there is no discrepancy with regard to the stock of raw materials and finished products, noted by the department, the allegation of clandestine clearance of finished products of such huge quantity has to be supported by reliable and cogent evidence which is not present before us.

5.6 Another evidence relied by the Id. AR is with regard to the transport document from the Rajarathina Transporters. It is the allegation of the department that the said transporter was used by the appellant for transporting the unaccounted finished products. However, as already stated, the penalty imposed on the transporter has been set aside by the Commissioner which implies that he has no role to play in such alleged transport of goods. This exoneration indicates that such documents relied are of no assistance to the allegation of clandestine transport of goods.

5.7 The other evidence is small spiral note book recovered from M/s. EIL which is alleged to have maintained by Shri T.K. Renganathan, GM of the company. These contained details of clearances. According to department, on comparison of these notes with RG-I and invoices, there is difference in quantity in some cases. For eg. Against net weight of ingots of 11.065, 12,060, 12.625 MTs. cleared on 30.1.1996, the invoices show

only 9.065, 10.060 and 10.265 MTs. The difference is 1 to 2 MTs only. The allegation is that M/s. EIL cleared 1752.34 MTs clandestinely. Such minor differences in quantity in few instances are not sufficient to prove clandestine clearance of huge quantity of MS Ingots. The other evidences are the statements of brokers like D. Nagappa, R. Kumar etc. Such statements can be relied only with corroboration of documents since clandestine clearance is a serious charge. Apart from some katcha slips and private documents, department has not been able to prove the correlation of clearance of such huge quantity of finished goods with the stock / account of the buyers. Though one to one correlation may not be possible, a probable case has to be made out which is totally lacking before us.

5.8 It is further to be noted that on physical verification of stock, no discrepancy with regard to raw materials has been noted by the department. Even though statements of various traders were taken, the stock as recorded in the RG-I register and that was lying in the factory did not show any difference. The other evidence relied is with regard to the cash deposits made in the account of Shri Prem Kumar, who is the director of the company. The amounts in his Karur Vysya Bank account has been explained by him stating that he had other business of construction activities and amounts are with regard to such

business. The department has rejected and not accepted this explanation. No verification has been done in this regard. Therefore, merely because there are certain cash deposits in the account of the director of the company, it cannot be concluded that these are amounts received from sale of clandestinely removed finished products. Therefore, we have to conclude that the department has failed to establish the allegation that the appellant availed fraudulent MODVAT credit to the tune of Rs.18,93,298/-. The demand on this count cannot sustain and therefore requires to be set aside, which we hereby do. The department has not been able to establish clandestine clearance of finished products also and the demand on this count is also set aside.

6. From the above discussions, we are of the view that the department has not been able to establish the clandestine removal of goods or wrongful availment of MODVAT credit. Consequently, the charges against other appellants also cannot sustain. In the result, the impugned order is set aside and the appeals are allowed with consequential relief, if any.

(Pronounced in court on 20.12.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Rex