

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Division Bench B1]**

Appeal No.: E/525/2011

[Arising out of Order-in-Original No. 09/2011 (Commr.)
dated 29.09.2011 passed by the Commissioner of Central
Excise, No. 1, Foulks Compound, Anai Road, Salem]

M/s. JSW Steel Ltd., **: Appellant**
P.O. Pottaneri, Mecheri,
Mettur Taluk, Salem – 636 453

Versus

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Salem Commissionerate

Appearance:-

Shri. M.S. Nagaraja, Advocate
Shri. V.S. Viswanathan, Consultant
for the Appellant

Shri. K. Veerabhadra Reddy, ADC (AR)
for the Respondent

CORAM:

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing: 06.02.2019

Date of Pronouncement: 29.04.2019

Final Order No. **40700 / 2019**

Per Madhu Mohan Damodhar :

The issue in question is with respect to the assessable value to be adopted in case of goods cleared to the sister concerns and also for self-use within the factory of the appellant, which have been utilized in the expansion (civil works) projects.

2.1 It appeared to the Department that the appellants, manufacturers of MS Billets and CTD bars/rods, have cleared the bars/rods to their group concerns for utilization in various expansion projects declared as "Self Consumption". While clearing CTD bars/rods, appellant discharged Central Excise duty @ 110% of the cost of production as per Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 (CEVR). It appeared to the Department that the valuation so adopted by the appellant is not correct and that they should have adopted assessable value in terms of the provisions of Rule 11 of the Central Excise Valuation Rules, 2000 read with Rule 4, consistent with provisions of Section 4 of Central Excise Act, 1944.

2.2 It also appeared to the Department that Rule 8 would not be applicable to the appellant in respect of goods cleared to sister concerns and also self-consumed. In terms of Rule 8 the goods are required to be consumed in the production or manufacture of other articles; that instead the goods which have been transferred to the sister concerns and also self-consumed, have been utilized only in various expansion projects. Hence, in terms of Rule 11 read with Rule 4 *ibid*, the value of similar goods sold and delivered to

independent buyers would require to be adopted for the purpose of valuation.

2.3 Accordingly, a SCN dated 19.08.2010 was issued to the appellant *inter alia* proposing as under:-

- i) that valuation of inter-unit transfers should be on the basis of Rule 11 read with Rule 4 of the Rules in as much as the conditions of Rule 8 of the Central Excise Valuation Rules were not satisfied;
- ii) Demand of an amount of Rs. 4,92,93,111/- under the provisions of Section 11A of the Central Excise Act, 1944 for the period from 2007-08 to 2009-10 along with interest thereon;
- iii) Imposition of penalties under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002.

2.4 In adjudication, the Commissioner vide the impugned order dated 29.09.2011 *inter alia* confirmed the demand of differential duty as proposed in the SCN with interest, imposed equal penalty under Section 11AC of the Act and also imposed a penalty of Rs. 1,00,00,000/- under Rule 25 of the Rules. Hence this appeal.

3. Today when the matter came up for hearing, on behalf of the appellant, Ld. Advocate Shri M.S. Nagarajan made oral and written submissions, which can be broadly summarized as under:-

i) By a scheme of amalgamation, appellant (M/s. Southern Iron and Steel Company Limited (SISCOL) has amalgamated with M/s. JSW Steel Ltd. w.e.f. 07.03.2008. Prior to that date appellants and M/s. JSW Steel Ltd., were independent entities and not related to each other. There is no basis to reject the transaction value in respect of sale of goods by the appellant to M/s. JSW Steel Ltd on principal to principal basis for the period up to 07.03.2008.

ii) Post 07.03.2008, the transaction of supply of goods was in the nature of sale to independent buyers, captive consumption within the same factory and stock transfer to other units of the appellant for their consumption.

iii) The goods were captively consumed in the appellant's own factory and also in other sister units for the purpose of increasing manufacturing capacity in the respective factories.

iv) The adjudicating authority has held that Rule 8 of the Central Excise Valuation Rules is applicable only when the goods are used for consumption for the production or manufacture of other articles. This is an erroneous conclusion.

It is submitted that Rule 8 comprises of :

a) goods used for consumption by the assessee; and

b) goods consumed on his behalf in the production or manufacture of other articles.

Hence, the goods consumed within the factory of production or in other factories of the same company, for the purpose of expansion of manufacturing facilities and capacities are fully covered by the provisions of Rule 8.

v) This being so, Rule 4 cannot be made applicable for valuation of the clearances made for captive consumption and stock transfer to other sister units. When Rule 4 is not applicable directly, it cannot be applied indirectly by applying Rule 11 of the Central Excise Valuation Rules.

vi) Ld. Advocate takes us to the provisions of Board's Circulars dated 30.06.2000, 01.07.2002 and 25.11.2013 and draws our attention to paragraph 21 of the Board's Circular dated 30.06.2000, paragraph 5 of the Board's Circular dated 01.07.2002 and paragraphs 1 and 2 of the Board's Circular dated 25.11.2013 to support his contentions.

vii) He placed reliance on the ratio of the case law in *M/s. Eicher Motors Limited Vs. CCE, Indore – 2008 (228) E.L.T. 43 (Tri.-LB)*, wherein the Larger Bench of the Tribunal *inter alia* held that Rule 8 is generally applicable to non-sale

transactions. He also draws our attention to paragraph 26 where the Larger Bench has held that the words “using reasonable means consistent with the principles and general provisions of these rules occurring in Rule 11 clearly indicate the relevance of the provisions of Rule 8”.

viii) Ld. Advocate also placed reliance on the ratio of the Tribunal decision in *C.C.E., Nagpur Vs. M/s. P.C. Pole Factory – 2006 (199) E.L.T. 865 (Tri.-Mum.)*, where it was held that even though the impugned goods were not used by the assessee in the production or manufacture of other articles but were used by them for transmission of electricity, Rule 8 of the Rules is not applicable. However, since no other Rule is applicable to the case, the Tribunal held that applying the provisions of Rule 11, the method of valuation should be on the basis of 115% of the cost of production of impugned goods. The said decision has been confirmed by the Hon’ble High Court of Bombay as reported in *2018 (360) E.L.T. 452 (Bom.)*.

ix) The entire proceedings are hit by limitation. The CERA audit had been conducted in October, 2007 of the appellants, based on which objection had been conveyed vide

department's letter dated 17.01.2008, wherein *inter alia* it had been advised that value of goods transferred for consumption for use in construction work and also transferred to associated companies should be based on CAS-4 Valuation and duty paid accordingly; that as per Rule 8 & 9 of Valuation, captively consumed goods or used by for self-use in activity, a margin of 10% by way of profit prescribed under the Rules has to be added to arrive at the assessable value. Further, internal audit had been conducted of the appellant in October 2009 based on which spot memo dated 10.10.2009 was issued. It further stated that in respect of bars/rods cleared to appellant's other units, such goods are used in production and as such 110% cost of production is to be adopted. The practice followed by the appellant was also reiterated in a statement of the Vice President recorded on 07.10.2008, where it was clarified that the valuation adopted for such sales prior to 07.10.2008, has been at arm's length; that subsequently the value adopted for transfer of steel products to other units of JSW Steel Ltd. is based on the cost of production plus 10%. Hence, the department was fully aware of the methodology followed by the appellant in respect of clearances made for captive use and

also for clearances made to stock transfer to sister units right from October, 2007. Hence, this being so, the SCN issued only on 19.08.2010 is squarely hit by limitation.

x) Further, even in the SCN dated 19.08.2010, there is no allegation of suppression or mis-statement or fraud while invoking the extended period of limitation. Ld. Advocate drew my attention to paragraph 10 of the SCN to support his contention. Further, pointed out that the allegation of wilful suppression is made only in paragraph 12 of the SCN, wherein while invoking penal provisions.

xi) In any case, all the clearances involved are Revenue neutral since whatever duty would be paid on such clearances, would always have been taken as CENVAT credit by the concerned sister concern.

4. On the other hand, Ld. AR Shri K. Veerabhadra Reddy, ADC (AR), made oral and written submissions, which can be broadly summarized as under:-

i) Rule 8 will only be applicable in respect of goods which are cleared for captive consumption or cleared to related persons for further production or manufacture of other articles.

ii) In the present case, the goods that have been cleared for captive use or stock transfer to sister units were not utilized for further manufacture but only for construction activity in their expansion projects. Hence, Rule 8 Valuation cannot be adopted.

iii) For enabling valuation @110% of cost of production, the provisions of Rule 8 and relevant portion of Rule 9 should be applicable.

iv) Ld. AR drew our attention to the question 4 to the statement of the Vice President dated 07.10.2008, wherein in his reply, it has been clarified that the appellants had not availed any CENVAT credit and duty paid in respect of steel products manufacture in the unit and utilized in self-consumption in various expansion projects.

v) In the circumstances, there is no infirmity in the conclusion of the adjudicating authority to the extent that Rule 8 valuation will not be applicable to the impugned clearances effected by the appellants in this case.

vi) The extended period is very much invokable considering the facts of the case. Entire *modus operandi* came to light only on the investigations made by the department.

Contrary to the submissions of the appellant, ER-1 returns for April and May, 2008, under heading 7(a) "Details of goods removed for captive and without payment of duty" against the product " "Rebars". Appellants have quoted notification No. 52/2000, which is the exemption notification for clearances to SEZ. In other words, for Rebars appellants have not declared that they are captively consuming the same. The earlier audit on October, 2007 has been done prior to the date of merger and hence the same is not to be made relevance in respect of the present SCN.

vii) Even for the period after 07.03.2008, appellants have claimed valuation under Rule 8 which shows they are not eligible since the goods have been cleared only for construction activity, a fact which has not been disclosed by them.

viii) Ld. AR relies upon the case law in *M/s. BSNL Vs. C.C.E., Haldia - 2007 (215) E.L.T. 127 (Tri.-Kol.)*, wherein the Tribunal has held that mere supply of goods without any manufacture does not amount to captive consumption and hence, Rule 8 of the Central Excise Valuation Rules will not be applicable.

ix) He relies upon the case of *C.C.E., Jaipur Vs. M/s. Boorathnam & Co. – 2009 (247) ELT 295 (Tri.-Del.)* to point out that wherein it has been held that where goods have not been used for captive consumption or for production or manufacture of other articles, Rule 6(b) of erstwhile Central Excise (Valuation) Rules, 1975 will not be applicable.

x) In *M/s. Ispat Industries Ltd. Vs. C.C.E., Raigad – 2007 (209) ELT 185 (Tri. - LB)*, to point out that the Larger Bench of the Tribunal *inter alia* held that transfer of part of production to another plant of the same assessee and balance production sold to independent buyers has occurred, the value is to be determined under Rule 4 and not under Rule 8.

5. In response, Ld. Advocate submitted that the contention of the Ld. AR with respect to ER-1 returns is outside the scope of the SCN.

6. Heard both sides and have gone through the facts of the case.

7.1 The provisions of Rule 8 are reproduced below for better understanding :

“5.3 **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 of other articles, the value shall be one hundred and ten per cent of the cost of production or manufacture of such goods.*”

7.2 Hence, to fit into the ambit of Rule 8, excisable goods are not sold by the assessee, but are used for consumption by him (viz.,

captive consumption) or on his behalf in the production or manufacture of other articles.

8.1 However, what is forthcoming from the facts is that the impugned goods which have been cleared for captive use or stock transferred to other units were not used for consumption by or on behalf of the appellant. The impugned goods were used for construction activities in the expansion projects of the appellant and/or sister units concerned. From the facts on record, it is also evident that the appellants had cleared CTD bars/rods to their group concerns situated at Vijayanagar, Tarapur and Vasind for utilization in various expansion projects of those entities.

8.2 This being so, in our view, they cannot come under the fold of “self consumption” as claimed by the appellants, to justify resorting to valuation at 110% of the cost of production as envisaged under Rule 8 of the Central Excise Valuation Rules, 2000.

9. It is also pertinent to note that in the statement of Shri. Alok Mehrotra, Vice-President (Finance) of the appellant given on 07.10.2008, it has been clarified that sale transactions of the appellant with group company M/s. JSW Steel Ltd. had been at arm’s length till the date of merger of M/s. Southern Iron and Steel Company

Limited (SISCOL) with it on 07.03.2008 and value adopted for such sale was based on transaction value.

10. There is no doubt that some of the clearances made under the claim of “self consumption” were also for captive consumption. However, even in these cases, the impugned goods were only used for Expansion (Civil Works) Projects. Just because the goods have been captively consumed for use within the same factory, it cannot automatically fall within the four walls of Rule 8 *ibid*. To do so, the excisable goods should be used for “consumption” in the production or manufacture of other articles.

11. In the circumstances, on merits, we are not able to find any infirmity with the following conclusions of the adjudicating authority in paragraphs 12 and 13 of the impugned order :

“12. Plain reading of Rule 8, implies that the value of 110% has to be adopted for excisable goods which are not sold but used for consumption in the production or manufacture of other articles. The impugned goods are not used by the JSW themselves but it is so used for utilization in various expansion projects (including civilworks) and not in the production or manufacture of other articles. The identical goods also are found to have been sold to JSW to other independent buyers, adopting the ‘Price’ at arm’s length. Hon’ble Tribunal in the case of BSNL vs CCE, Haldia as reported in 2007 (215) ELT 127 (Tri) had held, Valuation (Central Excise)-Captive Consumption-Mere supply of goods without any manufacture does not amount to captive consumption-Determination of value by addition of 15 per cent, rejected Rule 8 of Central Excise (Valuation) Rules, 2000. Respectfully following the same, I am of the view that Rule 8 of the Central Excise (Valuation) Rules, 2000 is not applicable as such to the case at hand.

13. Therefore, I hold that the method of valuation to be adopted in the case of impugned goods which are consumed internally for activities other than for further manufacture of other articles, is under the provision of Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules,

2000 (for determination of valuation of any excisable goods for the purpose of Section 4(1)(b) of CEA, 1944). Applying the aforesaid provisions of Rule 11, which is the residuary rule, I find that the principles of Rule 4 which reads, "The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the date of delivery of such goods and of the excisable goods under assessment, may appear reasonable."

12. We are then of the considered opinion that the assessable value to be adopted in the case of the impugned goods cleared to sister concerns and also for self-use within the factory, which have only been utilized in expansion projects (civil or construction works), is required to be done as envisaged under Rule 4 of the Central Excise Valuation Rules, 2000 read with Rule 11 *ibid*.

13.1 However, we find that there is some merit in the contentions of the appellant on the issue of limitation.

13.2 The period that has been sought to be covered in these proceedings is from 2007-08 to 2009-10. The Show Cause Notice was issued on 19.08.2010. The CERA Audit had been conducted in October 2007, based on which the Department had vide letter dated 17.01.2008 advised the appellants that value of goods *inter alia* transferred to associate companies should be based on CAS-4 Valuation and as per Rules 8 and 9 of the Central Excise Valuation Rules, a margin of 10% by way of profit should be added up with the assessable value. A Departmental Internal Audit had also been

conducted in October 2009 based on which the Spot Memo dated 10.10.2009 was issued.

14.1 Such practice followed by them was reiterated in the statement of the Vice-President recorded on 07.10.2008, wherein it had been clarified that the valuation adopted for such sales prior to 07.10.2008 has been at arm's length; that however, the value adopted for transfer of steel products to other units of M/s. JSW Steel Ltd. is based on the cost of production plus 10%.

14.2 We then find ourselves in agreement with the contention of the appellants that the Department was fully aware of the methodology followed by the former in respect of clearances made for captive use and also made on stock transfer basis to sister units right from October 2007.

14.3 In the circumstances, the allegations of suppression, mis-statement, etc., cannot be made on the appellants and in consequence, extended period of limitation cannot be invoked based on such allegations. This being so, we find that the Show Cause Notice dated 19.08.2010 is hit for the most part by limitation and that the demand can only survive for the normal period from the date of issuance of the Show Cause Notice. So ordered.

15. In the circumstances, while upholding the issue on merits, we hold that the demand is restricted to the normal period of one year calculated from the date of issuance of the Show Cause Notice, along with interest at applicable rates. So ordered.

16. On the issue of penalties, as the necessary ingredients for the imposition of penalties are absent and especially since there is absence of suppression, mis-statement, etc., equal penalty imposed under Section 11AC of the Central Excise Act, 1944 as also the penalty imposed under Rule 25 of the Central Excise Rules, 2002, cannot be sustained and will require to be set aside, which we hereby do. So ordered.

17. The appeal is partly allowed on above terms.

(Pronounced in open court on 29.04.2019)

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

Sdd/BB