

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

Appeal Nos.E/789 to 791/2007

[Arising out of Order-in-Original No.19/2007-(C) dt. 30.08.2007
passed by the Commissioner of Central Excise, Puducherry]

1. Goyal Ispat Ltd.
2. Ghisulal Kothari
3. J.Balaji

Appellant

Versus

Commissioner of Central Excise,
Puducherry

Respondent

Appearance:

Shri M.A. Mudimannan, Advocate
For the Appellant

Shri A. Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Shri Justice (Dr.) Satish Chandra, President
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 18.01.2017

Date of Pronouncement : 07.03-2017

FINAL ORDER No. 40398-40400/2017

Per: Madhu Mohan Damodhar

All these three appeals since emanating from the same
impugned order, they are being taken up for common disposal.



2. M/s.Goyal Ispat Ltd., the main appellants herein (hereinafter referred to as GIL) are engaged in the manufacture of CTD Bars and MS Rounds etc. falling under Chapter Sub-heading 7214 99 90 of Central Excise Tariff. GIL manufactures goods on their own account as well as on job work basis for M/s.Kamatchi Steels Limited, Chennai (hereinafter referred to as KSL).

3. From scrutiny of records by the department, the following apparent irregularities emerged :

(i) Actual cost of raw materials received and consumed for conversion, i.e. the cost of entire raw materials used was not included in the value of the goods; only the cost of raw materials contained in the final products was included in the value excluding the cost of burning losses etc.;

(ii) Cost of transportation of raw materials from the principal supplier (KSL) to factory premises of job worker (GIL), not included in the value of the goods;

(iii) Differential duty appeared to be payable on account of non-inclusion of raw material cost and transportation cost [(i) and (ii) above], which worked out to Rs.1,73,40,743/-;

(iv) GIL had cleared more quantity than reported in ER-1 returns. During 2003-04 to 2005-06, they had shown lesser quantity of clearances in their ER-1 returns. The difference



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between the quantity declared in the ER-1 Returns for the said period and the particulars given by them in their letter dated 03.08.06 is 232.835 MT; it appeared that these were undeclared excess clearances resulting in short payment of duty of Rs.8,35,693/-.

4. Accordingly, a show cause notice dt. 07.05.2007 was issued *inter alia* proposing total demand from GIL of differential central excise duty of Rs.1,81,76,436/- along with interest liability thereon, imposition of penalties on GIL and on the Director and Excise Manager of GIL.

5. After due process of adjudication, the original authority vide Order-in-Original No.19/2007 (C) dt. 30/08/2007 (Impugned Order) confirmed the said duty demand proposal of the SCN and also imposed the following penalties :

- Penalty of Rs.1,81,76,436/- under Section 11AC of the Central Excise Act, 1944 on GIL,
- Penalty of Rs.10 lakhs under Rule 26 of Central Excise Rules, 2002 on Shri Ghisulal Kothari, Director of GIL,
- Penalty of Rs.10,000/- under Rule 26 *ibid* on Shri J. Balaji Excise Manager of GIL.

Aggrieved, above appellants are before this forum.



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6. On the date of hearing, Shri M. Mudimannan, Id. Advocate, appeared on behalf of the appellants. The major thrust of the Id. advocate's arguments was focused on the contention that the demand *per se* was barred by limitation. It is seen that even in the grounds of appeal, the appellants have mainly argued on limitation. Appellants' arguments can be summarized as follows :-

(a) the date of show cause notice is 07-05-2007, however, the demand of differential duty is made for the period April 2002 to March 2007;

(b) during the impugned period, i.e. April 2002 to March 2007, they were subjected to various periodical inspections/audits by departmental officers;

(c) there is no requirement in E.R.1 returns to furnish cost of raw materials received, conversion charges collected etc., therefore appellant is not required to furnish these details;

(d) investigation commenced in April 2006 as admitted in SCN, however, the SCN was issued after a lapse of more than one year on 07-05-2007;

(e) in the impugned order, duty is quantified by adding 11% to the cost of raw material towards burning loss. However, 4% burning loss has already been included in the cost construction;



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(f) with regard to allegation of non-inclusion of cost of transportation, upto 2003-04, they (GIL) were incurring cost of transportation of ingots from the place of principal and the conversion charges collected by them included this cost, hence there was no necessity to include the same again. From 2003-04, the cost of transportation was incurred by KSL and the same was included in the cost of raw material itself and therefore there was no need to include such cost separately.

(g) with regard to allegation of unaccounted clearances of CTD bars/rounds, department has not brought on record any evidence to corroborate the details submitted by Shri J.Balaji, their Excise Manager, nor has any statement been recorded from him or any other person.

7. In respect of Appeals No.E/790/2007 & E/791/2007, appellants therein have contended that penalty under Rule 26 of the Central Excise Rules, 2002 cannot be imposed since the said rule presupposes the existence of ingredient of confiscation under the Act or the Rules of which there is no specific allegation in the SCN.

8. On behalf of Revenue, Shri A. Cletus, Ld.A.R reiterated the correctness of the impugned order.



9. Heard both sides and have gone through the facts and records of the matter. The contentious issues which have been brought up in these appeals are analyzed hereinbelow :

10. Demand with respect to non-inclusion of actual cost of the raw material received and consumed by appellant for conversion:

As per the "Conversion Agreement" between KSL and GIL, the former would supply the latter raw materials (MS ingots) for conversion into MS angles, channels, MS flats, Squares, rounds and CTD bars. Sl.No.3 of the agreement states that the contractor (GIL) shall deliver the finished products deducting wastage/gas cutting/heating, burning losses, dust, mud etc. at 7% on the raw materials. S.No.4 of the agreement states that the contractor (GIL) shall be entitled to claim conversion charges @ Rs.2000/- per MT on the converted finished goods. This rate has been enhanced to Rs.2500 per M.T with effect from 24/04/2003 and to Rs.3200/- per MT with effect from 15/07/2006. Raw materials supplied by KSL to GIL are cleared under Central Excise invoices on payment of duty, with remarks "for conversion". GIL avail cenvat credit on said raw material and remove the jobworked goods viz. CTD bars etc. to KSL under Central Excise invoices on payment of duty, adopting the cost of raw materials plus the conversion charges as value thereof. The agreement entered into between GIL and KSL for conversion of



goods on job work basis indicates that GIL are entitled to claim 7% conversion loss on the raw materials processed by them. However, verification of documents such as Form IV Registers maintained by the assessee and enquiries conducted revealed that GIL were actually claiming conversion loss to the tune of 11%. Shri Balaji, Manager of GIL, in his statement dt. 28.12.2006 also admitted that they were incurring burning loss of 11%. For example, if GIL receives 100 M.T of raw materials, they return only 89 M.T of finished goods to KSL after deducting 11 MT as conversion loss. However, for discharging central excise duty liability on these clearances, actual cost of raw materials received for conversion was not taken into account while arriving at assessable value but only cost of raw material contained in final products considered and the cost of burning loss excluded to extent of 11%. There is no controversy that in respect of impugned goods manufactured on job work basis, valuation thereof is governed by Rule 11 of the Central Excise (Valuation) Rules, 2000, read with Rule 6 of Central Excise Rules, 2002 read with Section 4 (1) (b) of Central Excise Act, 1944, which read as follows :

Section 4(1) of Central Excise Act, 1944

Valuation of excisable goods for purposes of charging of duty of excise. — (1) Where under this Act, the duty of excise is chargeable on



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any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

- (a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;
- (b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation. — For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

Rule 6 of Central Excise Rules, 2002 – Assessment of duty –

The assessee shall himself assess the duty payable on any excisable goods :

Provided that in case of cigarettes, the Superintendent of Inspector of Central Excise shall assess the duty payable before removal by the assessee.

Rule 11 of Central Excise (Valuation) Rules, 2000 –

If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act.

From a combined reading of the aforesaid provisions, it is evident that the value of goods manufactured by GIL on job work basis will necessarily be the cost of raw materials used in the manufacture of the item (including the cost of raw materials



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supplied free of cost) for the job work plus the job charges (including the profit of the job worker, if not already included in the job charges). This being the case, GIL should have taken into account the cost of raw materials that were received from KSL and have gone into the manufacture of their final products and not the quantity of raw materials as may have been present in their end product. The reduction from such costing of higher burning loss to the extent of 11% and treating the same as assessable value for discharge of duty liability is then without any basis by the appellant and has resulted in short payment of duty. GIL have relied upon Board's circular dt.15.01.1988 in their defence. However, perusal of the said circular indicates that it only clarified that credit of duty on inputs cannot be denied on the ground that part of the inputs is contained in the waste and scrap which may even be exempted from Central Excise duty. Reliance of GIL on this circular is therefore misconceived since denial of credit on inputs is not the issue in dispute herein, but the fact of non-inclusion of value of inputs for working out the assessable value of final jobworked product. In the event, demand of differential duty on account of incorrect value of raw materials utilized for manufacture demanded in adjudication and confirmed in the impugned order, along with interest liability thereof does not call for any interference.



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11. Demand with respect to non-inclusion of cost of transportation of raw materials in the assessable value:

It is not disputed that as per the "Conversion Agreement" entered into between KSL and GIL, it was agreed upon that *appellants shall arrange for transport and bear all transport charges, loading charges and all other incidental charges in connection with lifting of raw material from principal factory*". It is well settled that for the purpose of arriving at assessable value at the job worker's end, cost of transportation of raw material between the principal and the job worker shall form a component for the purpose of arriving at the cost of raw materials. This requirement was reiterated by the CBEC Circular No.643/34/2002-CX. dt. 01-07-2002 which *inter alia* clarified that cost of transporting raw materials/inputs to the premises of job work will also be added to determine the cost of raw material/input. The relevant portion of the circular is reproduced below :

Sl.No.	Points of doubt	Clarification
11.	How will valuation be done in cases of job-work?	Please also refer to Board's Circular No.619/10/2002-CX dt. 19.2.2002. Cost of transporting the raw materials/inputs to the premises of the job-worker will also be added to determine the cost of the raw material/input. [1997 (071) ECR 381 (TRIB)]



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GIL have contended that upto 2003-04, they were incurring cost of transportation of ingots and that the conversion charges collected by them included the element of cost of transportation; that from 2003-04, cost of transportation was incurred by KSL and the same was included in the cost of raw material; therefore for both these periods, there was no need to show and include the cost of transportation again separately. However, no proof or evidence has been adduced by the appellants to support such a contention. On the other hand, during investigation, documents like lorry receipts, extracts of ledger accounts pertaining to freight amount in respect of transportation of MS ingots from KSL to the appellants were obtained by department and these documents revealed that an uniform amount of Rs.120 per MT was being claimed by the transporters engaged by the principals, (KSL) for transport of ingots to appellants from 2003-04 onwards and the freight charges were all paid by KSL. Adjudicating Authority has correctly observed that irrespective of the fact that whichever party incurred the cost of transportation, the said cost has to be taken into account for the purpose of arriving at the cost of raw materials. He has also pertinently highlighted the fact that cost of transportation has been dealt with separately in the agreement and that invoices issued by KSL contain only the assessable value and other taxes but do not show any transportation charges. In the event, we are of the



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considered opinion that there is no cause for interfering with the demand of differential duty in respect of non-inclusion of transportation charges in the impugned order.

12. Demand with respect to unaccounted clearances of CTD bars/rounds: From the investigation, based on the data provided by GIL themselves, vide their letter dt. 03-08-2006, it has emerged that the appellants have cleared 232.835 MTs of CTD bars/MS rounds more than what was reported by them in their ER-1 returns, resulting in undischarged duty liability of Rs.8,35,693/-. This discrepancy in clearance quantities has been worked out only based on the information submitted by the appellants and is the difference between the quantity earlier declared in their E.R-1 returns in 2003 to 2005-06 when compared to the data provided by GIL in their letter dt. 03-08-2006. GIL have not disputed the veracity of any of these documents. They have only contended that department has not brought on record any evidence to corroborate the details submitted by their own Excise Manager and that statement towards that end has not been recorded from him or any other person. In our view, this contention does not hold any water. Since the discrepancy emerged, as discussed above, based on the declarations/information made/provided by GIL themselves to department, there is no need of further corroborating the



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same. In the event, here also there is no cause for interfering with the demand of differential duty of Rs.8,35,693/-.

13. In view of the foregoing discussions, we do not find any cause for interfering with the demands of differential duty totally amounting to Rs.1,81,76,436/- in the impugned order from GIL under Section 11A (2) of the Central Excise Act, 1944 along with interest liability thereon under Section 11AB of the Act and the appeal on that score will require to be dismissed which we hereby do.

14. GIL have primarily contended that the entire proceedings have been hit by limitation. In particular, they have contended that during the impugned period April 2002 to March 2007, appellants were subjected to various periodical inspections/audit by departmental officers and that officers had scrutinized the records and documents including E.R.1 returns. In this regard, the appellant's contention would have held merit, if there was no controversy on the correctness of the returns submitted by them or that there was no subterfuge involved in the activities. This is certainly not the case. On the other hand, it has emerged that appellants have suppressed the crucial information, wilfully misstated the value of raw materials used by them which resulted in depression of assessable value and consequently duty



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evasion. It is also **not** the case that appellants were in doubt about the manner of arriving at the correct assessable value, in which case, they could have very well approached the department for clarification. Clandestine removal/unaccounted removal of job-worked product has also been effected in secrecy and by doctoring their periodical returns and declarations made to the department. In the circumstances, the plea of appellants on limitation does not hold merit. We are of the considered opinion that there has been intentional undervaluation of the goods and also unaccounted/clandestine removal of job-worked goods by GIL by subterfuge, suppression and wilful misstatement with the sole intention of evading legitimate duty payable to the exchequer. The contentions of the appellant fail in all counts. Nothing has been demonstrated by them to show that they have come with clean hands to prove their innocence. On the other hand, investigation has successfully unearthed the questionable modus operandi of the racket who has caused prejudice to Revenue with intent to evade excise duty. Investigation has proved that clandestine removal of goods by the appellant was made following a pre-mediated design. Hence invocation of extended period of limitation in the notice under proviso to Section 11A of the Central Excise Act and its affirmation in the impugned order, are very much in order and does not require interference.



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15. Appeal No.**E/790/2007** has been filed by Shri Ghisulal Kothari, Director of GIL against imposition of penalty of Rs.10 lakhs on him in the impugned order under Rule 26 of the Central Excise Rules, 2002. The appellant herein has contended that Rule 26 presupposes the existence of ingredients of confiscation under the Central Excise Act or the Rules therein. As there is no allegation in the SCN that goods are held liable for confiscation, the imposition of penalty on him under Rule 26 is illegal and improper. Appellant also contends that he was not directly connected/concerned/involved with the payment of Central Excise duty or Central Excise procedures to be followed in the manufacture of clearances of impugned goods by GIL. To understand the contention of the appellant, it would be worthwhile to reproduce Rule 26 *ibid* as it existed at the relevant time :

RULE 26 – Penalty for certain offence. – Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand, whichever is greater.

A plain reading of Rule 26 will indicate that imposition of the penalty therein is not tied to a conditionality that excisable goods have to be placed under confiscation under the Act/Rules. On the other hand, what the rule propounds is that a person who is involved either directly or indirectly, by way of possession, or



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transporting, removing, depositing etc. or in any other manner dealing with excisable goods and who has the knowledge that consequence of such said acts or omissions on his part could result in the impugned goods becoming liable for confiscation under the Act/Rules is then exposed to imposition of penalty under this rule. Only, the person implicated/concerned should have the knowledge of "possible confiscation" of the impugned goods. From the facts on record, the appellant Shri Ghisulal Kothari has emerged as the mastermind of the entire modus operandi designed to evade payment of Central Excise duty liability. The appellant has planned/monitored and executed such duty evasion not only by undervaluation of their end product but also by unaccounted/clandestine removals of their job worked goods. This being the case, his acts and omissions surely fall within the ambit of Rule 26 and will get exposed to penalty therein. Considering that the appellant was the fulcrum of the ***Actio illicita in causa*** by GIL, resulting in short payment of differential duty of Rs.1,81,76,436/-, the penalty of **Rs.10,00,000/- (Rupees Ten lakhs only)** under the said Rule 26 on this appellant is very much proportionate to his acts and role and justified, hence there shall be no interference in the matter. Appeal filed by the appellant Shri Ghisulal Kothari will therefore have to be dismissed. We order accordingly.



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16. In Appeal No.**E/791/2007**, filed by Shri J. Balaji, Excise Manager of GIL, the same contentions with regard to non-imposability of penalty under Rule 26 ibid raised by the other appellant Shri Ghisulal Kothari (Appeal E/790/2007) has been reiterated which, as already discussed supra, is a misconceived argument. On the other hand, the appellant as Excise Manager, cannot claim that he was unaware of the modus operandi and affairs of GIL which resulted in such large scale evasion of duty. This being so, relatively low penalty of **Rs.10,000/- (Rupees Ten thousand only)** imposed on him by the adjudicating authority cannot be faulted with. Appeal filed on this count will merit dismissal. We order accordingly.

17. In the event, all the three appeals Nos.E/789 to 791/2007 are dismissed.

(Pronounced in open court on 07-03-2011)



(Madhu Mohan Damodhar)
Member (Technical)



(Justice (Dr.) Satish Chandra)
President

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