CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 51563 of 2018-SM

(Arising out of order-in-appeal No. 85(SM)CE/JPR/2018 dated 28.02.2018 passed by the Commissioner (Appeals) Central Excise & Central Goods & Service Tax, Jaipur).

M/s Kesri Steels Limited **Appellant**
A-350, RIICO Industrial Area
Bhiwadi, Distt - Alwar, Rajasthan.

VERSUS

Commissioner, Central Goods and Service Tax, Customs & Central Excise **Respondent**
A Block Surya Nagar, Alwar (Rajasthan).

APPEARANCE:

Shri R. Santhanam, Advocate for the appellant
Shri K. Poddar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 51279/2019

DATE OF HEARING: 11.09.2019
DATE OF DECISION: 30.09.2019

ANIL CHOUDHARY:

The appellant M/s Kesri Steels Limited carries on the business of manufacture of stainless steel pattas and pattis falling under Chapter 72 of Central Excise Tariff Act and registered with the Department. The goods manufactured are subject to duty and appellant are also entitled to cenvat credit on inputs and capital goods. Notification No. 17/2007-CE dated 01.03.2007 provides that the manufacturer manufacturing excisable goods like stainless steel, patta and pattis or aluminium circle by subjecting to the process of cold rolling with the aid of cold rolling machine, such assessee shall have option to pay the duty of excise on the basis of number of cold rolling machines installed for manufacture of these goods (compounding basis). In respect of manufacture of patta and pattis the compounded duty shall be Rs. 30,000/- per cold rolling machine per month, provided that no credit of duty on any raw materials, components part or machinery or goods (inputs) used in cold rolling of stainless steel, patta-pattis, shall be taken. Further requirement is that the prescribed procedure should be followed.

2. The admitted facts as per the show cause notice dated 31.03.2013, for the period in dispute August, 2012 to October, 2012 (three months), are the appellant is paying Central Excise duty under the special procedure or compounded levy scheme vide Notification No. 17/2007-CE read with Rule 15 of Central Excise Rules. Further facts are that the appellant have six cold rolling machines for manufacture since April, 2011. Prior to April, 2011, appellant had four cold rolling machines. Appellant have been permitted by the Superintendent of the Range, for the financial year beginning with 01.04.2012 to avail the special procedure vide form ASP-II, submitted by the appellant on 30.03.2012. Further, the appellant have filed the prescribed form AR-8AA, being application for removal of stainless steel patta and pattis under the special procedure read with Rule 96ZC, wherein for each of the months beginning from April, 2012 the appellant at the end of the previous month, filed the application/declaration declaring that they shall be employing/operating two machines for the month and accordingly paid the duty/ compounded levy @ Rs. 30,000/- per machine alongwith cess. Further, admitted fact is that there is no

inspection report on record during the financial year 2012-13, that the declaration so filed by the appellant was found to be untrue or false. Neither the appellant was any time found to be operating more than two cold rolling machines, in violation of their declaration. It is alleged in the show cause notice that statement of Authorised Signatory Mr. Umesh Kumar Binwal was recorded on 13.02.2012 before Superintendent, in which he categorically admitted that they are having six cold rolling machines in their factory w.e.f. April, 2011. He further stated that the other machines are lying in dismantled condition and have no electric connection and they are wrapped with PVC sheet, not ready for start of production. He further stated that they have paid duty correctly on the basis of number of cold rolling machines used for production in a particular month. Further stated that no duty is payable on the machines which were not used at all for production. It appeared to Revenue that since the appellant have six cold rolling machines in their factory during the month of August, 2012 to October, 2012 they were required to pay duty on the basis of six machines. Further stated by Shri Binwal that the other four machines have no electric connection and are wrapped with PVC sheet, in uninstalled condition does not help the appellant, and they are liable to pay duty on the maximum number of machines installed by or on behalf of them during the three calendar month immediately preceding the calendar month in which the application for compounding is made. Accordingly, it appears that appellant is liable to duty for six cold rolling machines for the month of August, 2012 to October, 2012. Accordingly, it appeared that appellant have short paid the duty of (Rs.5,56,200/- - Rs. 1,85,400/-) or Rs. 3,70,800/-, which appeared to be recoverable alongwith interest and further penalty was also proposed. The Assistant Commissioner on contest was pleased to drop the show cause notice, relying on the ruling of Rajasthan High Court in **Collector of Central Excise, Jaipur-II vs. Jupiter Industries - 2006 (206) ELT 1195 (Raj.)** wherein it has been held that no duty is leviable for the period when machine is not installed/ operated. It is especially so as levy of excise duty cannot go beyond the charging provision and manufacture of goods is a condition precedent - Section 3A of Central Excise Act, 1944. Rule 96ZB(2) cannot be read independent of Rule 96ZB(1). Thus in all cases whatever may be the situation, the tax is to be levied on the basis of maximum number of cold rolling machines installed and operated by and on behalf of such manufacturer in immediately preceding three calendar months. It that were so, the expression immediately preceding three calendar months in which application is made, the Rule will become redundant. Distinction has to be drawn between requirement of application under Section 96ZC, before removing the goods and the requirement of intimating the officer before removing the machine itself. The application is in respect of removal of the manufactured articles from the premises whereas intimation is only needed in respect of change in machines installed in the factory premises. The manufacture of goods is condition precedent for charging of excise duty, without which no levy can be made. Therefore, the rule cannot be made to go beyond the scope of charging provision.

3. Being aggrieved, Revenue preferred appeal before the Commissioner (Appeals) who after hearing the parties and cross

objection of the assessee, observed that in the defence reply of the assessee dated 31.12.2013 they have categorically submitted that out of six machines available/ installed only two machines were in working condition. Hence, out of six machines only four were not in working condition and therefore it cannot be treated as installed and have to be treated as dismantled. Further, concluded that there remains no doubt that the appellant have four machines installed and in working condition during the relevant period and accordingly the assessee was required to pay the duty under compounded levy scheme for four working machines from August, 2012 to October, 2012. Further, the contention of the appellant that this submission in reply to show cause, was a clerical error and in fact only two machines were in working condition, does not carry any weight as no evidence have been adduced to support their claim. Thus, the learned Commissioner (Appeals) confirmed the demand of duty on two additional machines, instead of four additional machines as proposed, or in other words, confirmed the duty on four machines. Being aggrieved, the appellant – assessee is before this Tribunal.

3. Heard the parties and perused the record.

4. Having considered the rival contentions, I find that there is no evidence on record that the appellant have operated more than two machines in violation of the declaration. Further, I find that the finding of the Commissioner (Appeals) is erroneous wherein he has observed that the appellant have no led any evidence to support that they have only operated two machines and not four machines, in contrary to its submission/ written submission. This finding cannot stand in view of

the monthly declaration filed by the appellant at the end of each preceding month wherein they have declared the number of cold rolling machine employed as two. Further, Revenue has not brought any evidence on record that the appellant have operated more than two machines during the disputed period, in violation of their declaration. Thus, the show cause notice is presumptive having no legs to stand. Accordingly, I allow this appeal and set aside the impugned order in appeal. Thus, the order-in-original stands restored. The appellant is entitled to consequential relief, in accordance with law.

(Pronounced on 30.09.2019)

(Anil Choudhary)
Member (Judicial)

Pant