CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH, COURT NO. II

Excise Misc.No.51087/2018 with
Excise Appeal No. 52587 of 2016-DB

(Arising out of order-in-original No. ALW-EXCUS-OIO-COM-08/16/17 dated 04.05.2016 passed by the Commissioner of Central Excise, Alwar).

M/s.Bhiwadi Rolling Mills Pvt.Ltd. .....Appellant
C/o Shri O.P. Gupta, B/32, Sector-11
Rohini, Delhi-11085.

VERSUS

Commissioner of Central Excise and Service Tax ....Respondent
A Block, Surya Nagar, Alwar

WITH
Excise Appeal No. 52583 of 2016-DB

(Arising out of order-in-original No. ALW-EXCUS-OIO-COM-08/16/17 dated 04.05.2016 passed by the Commissioner of Central Excise, Alwar).

Surender Kumar Jindal .....Appellant
E-927, Phase-III, Industrial Bhiwadi
Alwar.

VERSUS

Commissioner of Central Excise and Service Tax ....Respondent
A Block, Surya Nagar, Alwar

WITH
Excise Appeal No. 52584 of 2016-DB

(Arising out of order-in-original No. ALW-EXCUS-OIO-COM-08/16/17 dated 04.05.2016 passed by the Commissioner of Central Excise, Alwar).

Ankit Keriwal .....Appellant
E-927, Phase-III, Industrial Bhiwadi
Alwar.

VERSUS

Commissioner of Central Excise and Service Tax ....Respondent
A Block, Surya Nagar, Alwar

WITH
Excise Appeal No. 52585 of 2016-DB

(Arising out of order-in-original No. ALW-EXCUS-OIO-COM-08/16/17 dated 04.05.2016 passed by the Commissioner of Central Excise, Alwar).

Mukul Jindal, C/o Sh. O.P. Gupta **.....Appellant**
B-1/32, Sector-11, Rohini
Delhi-110085

VERSUS

Commissioner of Central Excise and Service Tax ....Respondent
A Block, Surya Nagar, Alwar

AND
Excise Appeal No. 52586 of 2016-DB

(Arising out of order-in-original No. ALW-EXCUS-OIO-COM-08/16/17 dated 04.05.2016 passed by the Commissioner of Central Excise, Alwar).

Satish Kumar **.....Appellant**
B-1/32, Sector-11, Rohini
Delhi-110085

VERSUS

Commissioner of Central Excise and Service Tax ....Respondent
A Block, Surya Nagar, Alwar

Appearance:

Shri Bipin Garg & Shri Himanshu Bansal, Advocates for the Appellants
Shri R.K. Mishra, AR for the Respondent

CORAM:

Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

FINAL ORDER Nos.50808-50812/2019

Date of Hearing: 26.02.2019
Date of Decision: 26.06.2019

Per Anil Choudhary:

Since these appeals have arisen out of common adjudication order dated 04.05.2016, passed by the Commissioner of Central Excise, Alwar, the same are being disposed of by this order.

2. The miscellaneous application is filed by M/s Bhiwadi Rolling Mills Ltd., requesting for issuing of direction to the Lower Authorities to issue 'No Objection Certificate' for selling its industrial plot No. E-927, Phase-III, Bhiwadi, to enable them to pay Central Excise duty, to the department.

3. The facts in brief are that the applicant, M/s Bhiwadi Rolling Mills Pvt. Ltd. were engaged in the manufacture of M.S. Flats, Rounds and Squares. On the basis of some intelligence, officers of the Directorate General of Central Excise Intelligence searched the factory premises and residential premises on 06.09.2012 and resumed certain documents, Desk top and hard disc, besides finding shortage of finished goods and excess in the stock of raw material. The officers also seized cash Rs.12,00,000/- from the residence of Shri Satish Kumar, Director of the Applicant. On the basis of the statements of Directors of the Applicant and resumed documents, statements of 5 suppliers of raw materials were recorded wherein they accepted the supply of raw materials without invoice to the Applicant and without payment of Central Excise duty. These five raw material suppliers also deposited Rs.36.90 Lakhs towards their duty liability.

4. A show cause notice dated 04.08.2014 was issued to the Appellants/Applicants for demanding Central Excise duty amounting to Rs.3,00,18,268/- for the period May, 2011 to September, 2012 for removing the goods valued @ Rs.27.39 Crores and for imposing penalties on directors, former director and Manager of the Applicant. It is mentioned in S.C.N that the duty liability has been calculated after deducting the sale value shown by the Applicant in its Central Excise Records, from the sale reflected in the Tally data (from computer) recovered. The learned Commissioner has passed the impugned Order-in-Original dated 4.5.2016 confirming the proposed demand of duty and imposed penalties on company, its Directors, former Director and Manager.

5. Shri Bipin Garg, learned Advocate has submitted that though the impugned order has been passed in gross violation of the principles of natural justice, as the cross-examination of the witnesses had not been allowed and without conducting the enquiry from all the suppliers of goods to the appellant company and without making enquiries from the buyers of goods of the appellant company, and without establishing fact of manufacture of all the goods alleged to have been clandestinely removed. The appellant company, with a view to have peace of mind and not to prolong litigation, is willing to pay the duty, correctly payable by them on the goods alleged to have been cleared by them.

6. The learned Advocate further, submitted that the duty has been demanded on the basis of 'tally data' maintained by the appellant

company for the period 15.05.2011 to 03.09.2012. The learned Advocate emphasized that as per the department, the actual purchase and sale details are reflected in the said laptop & tally data. The said data contains the details of all the suppliers who had cleared the goods to the appellant company, inclusive of Central Excise duty. The suppliers, however, had not issued the invoices to the appellant company. This fact is evident from the records maintained by the appellant company and relied upon by the Department and the statement of the Director - Shri Satish Kumar, who in his statement dated 01.01.2014, has explained the documents resumed by the officers during the search. While explaining the Daily Report of 26.05.2012, he has stated as follows (which is mentioned in internal page 38 of show cause notice).

> " … and rate of Rs. 3,500/- MT – 400 + 12.36% - 4,100 which is arrived at the following formula – (35,000 – 400) 112.36% - 4,100 = 34,776.56/ MT and similar purchases were made from M/s Young Steel & other parties; that local suppliers had not provided the raw materials under Central Excise bills but they had included Central Excise duty, in the value."

7. The learned Advocate submitted that it is evident from the said explanation that on the goods supplied by suppliers, Central Excise duty @ 12.36% was charged by them.

8. The Officers of DGCEI had confronted 5 of the suppliers, with only part of the data resumed from the appellants, and these 5 supplies had accepted and deposited a sum of Rs. 36.90 lakh towards duty. Since these 5 suppliers had deposited duty amounting to Rs. 36.90 lakhs with the department, the benefit of said duty should be extended to the

appellant company, and its duty liability should be reduced by the said amount.

9. The learned Advocate contended that those suppliers were, however, not confronted with the following purchase figure shown in the records of the appellant company.

Sl. No.	Name of supplier	Amount (Rs.)
1	M/s DSR Steel Pvt. Limited	90,59,260/-
2	M/s Shree jagdamba Castings (P) Ltd.	26,09,441/-
3	M/s Young Steels (P) Ltd.,	24,89,273/-
4	M/s Ramayana Ispat (P) Ltd.,	52,09,028/-

10. It is the contention of the learned Advocate that the duty involved in these transactions is Rs. 21,41,439/-, the benefit of which should also be extended to the appellant company as they had paid the duty element to their suppliers.

11. The learned Advocate, further, mentioned that the appellant company had also purchased goods from other suppliers involving Central Excise duty of Rs. 1,95,59,346/-. The department has already confirmed demand of Central Excise duty amounting to Rs.1,36,63,589/-. He pleaded that as the demand of duty for Rs.1,36,63,589/- has been confirmed by the proper Officer against the suppliers, the duty liability of the company should be reduced by such amount.

12. The learned Advocate submitted that as the appellant company had limited production capacity, they could not fulfill the demand of M.S. Flats. Hence, they were purchasing M.S. flats from the market and were selling the same (trading) as such to their buyers. This fact has been stated by Shri Satish Kumar, Director, in his statement dated 03.03.2014 wherein he has stated that flats were purchased from local market @ Rs. 38,000/- to Rs. 42,000/- per M.T. and sold the same @ Rs. 39,000/- to Rs. 43,000/- per M.T. after taking marginal profit and no manufacturing activity had been done on the said flats. Since flats purchased from market were not manufactured by the appellant company, no duty can be demanded from it.

13. The learned Advocate, further, contended that the records resumed by the DGCEI Officers, clearly show the purchase of flats, and the show cause notice clearly admits in para 7 the fact that "the purchase amount consist of two heads, i.e. M.S. flat & M.S. Miss roll…" The representative profit & loss account retrieved from laptop for the period 2011-12 and 2012-13 (upto 06.09.2012) as reproduced below para 7.1 of show cause notice, clearly mentions under the heading Purchase accounts – "Flat Pur". Inspite of such documentary evidence in the resumed records, the learned Commissioner has demanded Central Excise duty on such quantity of flats, as the appellant company had failed to produce any bills showing trading of flats. It is very surprising that the Commissioner has taken such a view when the sale figure of flats has been taken from the records maintained in the laptop only for confirming demand

of duty. Moreover, there is no evidence that these flats were used by the appellant company in the manufacture of any goods. The learned Advocate pleaded that duty involved on flats sold as such is Rs. 15,06,191/- for 2011-12 and Rs.1,66,991/- for 2012-13 which is liable to be reduced from the duty demanded in the impugned order.

14. Similarly the appellant company has sold Miss Rolls as such during 2012-13 involving Central Excise duty amounting to Rs.6,13,209/- which is also not demandable from the appellant company, it being not the manufacturer of the said miss rolls.

15. The learned Advocate submitted that since the penalty has been imposed on the appellant company, separate penalty is not imposable on Directors and Managers.

16. The learned Advocate further refers to the miscellaneous application. With a view to keep peace of mind, the appellant agrees to pay the duty amount after adjusting the amount paid by the appellant, seized by the officers, recovered from the suppliers of raw materials and also demand made on trading activities. He, further, mentioned that the applicant has to sell its Plot No. E-927, Phase-III Bhiwadi, Rajasthan, for which they need 'No Objection Certificate' from the Department, as no person is willing to buy the said plot since duty/ penalty has been demanded from the applicant. It is submitted that the request was made to the adjudicating authority, however he did not give 'No Objection Certificate' and passed the impugned order.

17. The applicant has also furnished an Undertaking dated 19.09.2018 for making a provision in Sale Agreement with the buyer of the said plot, to make payment through Demand Draft to Central Excise Department, after adjusting the amounts, as aforesaid.

18. The learned Authorised Representative for the Department reiterated the findings as contained in the impugned order and emphasized that the duty collected from the suppliers of the appellant company, has nothing to do with the demand of duty from the appellant company and those suppliers are legally liable to pay duty on the excisable goods removed by them. In respect of M.S. Flats & Miss Rolls, the learned Authorised Representative submitted that no document has been brought on record to show sale of flats and miss rolls as such, by the appellant company.

19. We have considered the submissions of both sides and perused the records. Since the appellant company is willing to pay the Central Excise duty demandable from them, their contentions about violation of principles of natural justice etc. are not being considered. One of the main contention of the appellant company is that the suppliers of goods had collected Central Excise duty from it while supplying the goods without invoices, and some of the suppliers had already deposited the said duty with the Department and considerable amount of duty has been confirmed against other suppliers. The appellant company has submitted that since the duty has been deposited by / demanded from its suppliers, their duty

liability should be reduced by the said amount as they had already paid duty amount to its suppliers. It is observed that though the appellant company has taken this stand since the beginning, even during the course of investigation, the Revenue has not controverted these facts. The documents resumed by the Revenue and relied upon in show cause notice, also supports this fact. In the interest of justice and in view of the fact that the appellant company, is not contesting the duty liability as they want peace of mind, we find substance and force in their submissions. However, where the amount of duty has been deposited by the suppliers, the duty liability of the appellant company is ordered to be reduced by the said amount. But in cases where demand of duty has only been confirmed and not deposited by the suppliers, such amount cannot be allowed to be deducted, at this stage. However, as and when such duty is deposited by the suppliers, the Revenue may refund such amount to the appellant company, as per Rules.

20. Regarding sale of M.S. Flats as such, we observe that the records resumed by the officers and relied upon in show cause notice and the impugned order clearly show purchase of M.S. Flats by the appellant company. This is evident from the profit & loss account of the appellant company scanned in the show cause notice itself. Once the Revenue has placed reliance on resumed documents and data retrieved from laptop, it cannot claim that M.S. Flats were not purchased and sold as such. The documents have to be believed in toto and not in part only. Further, the Revenue has not brought any

material to show that the purchased M.S. flat were used in or in relation to manufacture of any other product. We, therefore, agree with the contention of the appellant company that duty of excise is not demandable from the appellant company, on the quantity of M.S. flats purchased and sold as such.

21. Similarly, the duty of excise cannot be demanded on the quantity of Miss Rolls sold as such by the appellant company.

22. Coming to the question of penalty, we find that penalty on the appellant company is imposable under Section 11AC of the Central Excise Act, as the finished goods have been removed without payment of duty. However, we agree with the learned Advocate that separate penalties are not imposable on Directors and former Director once the penalty under Section 11AC has been imposed on the company.

23. Further, penalty is not imposable on Ankit Keriwal, as he was a mere employee bound to follow the directions of the company management. Moreover, there is no material to show that Ankit Keriwal has gained anything personally. We, therefore, set aside the penalties imposed on all directors/ former Director and Manager (Ankit Keriwal).

24. Hence, we allow the appeals by way of remand and direct the learned Commissioner, that he will compute the duty amount payable by the appellant company as modified in this order, and communicate

the same to the appellant company. Further, the amount of penalty under Section 11AC of the Central Excise Act would be reduced, equivalent to the duty amount now payable by the appellant company, and the option to pay duty, interest and reduced penalty within one month is extended. Further, the appellant company is entitled to dispose of the land & building, plant and machinery, if any. However, out of sale proceeds, they are liable to first deposit the duty liability and applicable penalty.

25. All the appeals and miscellaneous application are disposed of in the above manner.

(Order pronounced on 26.06.2019)

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

Ckp.