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Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/6070/2004 - EX[DB] WITH E/M/771/2009-EX — Date 27/10/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BANSIWALA IRON & STEEL ROLLING MILLS.

ADARSH NAGAR AJMER

M/S BANSIWALA IRON & STEEL ROLLING MILLS. — Appellant

Vs

C.C.E.JAIPUR — MISC ORDER NO.606/2010-EX — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 744/ **2010 EX[DB]** dated 25-10-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E.JAIPUR
   N.C.R.B.BUILDING STATUTE CIRCLE,C-SCHEME
   JAIPUR
2. Adv. / Consult SH. BIPIN GARG, C/O
   MR.ARVLIND SHARMA & ASSOCIATES.
   C-1A, SUFAL APARTMENTS, S.J.S. HIGHWAY, BANI PARK, JAIPUR

3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file
16.HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing: 09.06.10
Date of decision: 25/10/2010

Excise Appeal No. 6070 of 2004-Excise Branch
With Misc. Petition No.E/Misc./771/09-Ex.

[Arising out of Order-in-Appeal No.100 (RM)CE/JPR-II/2004 dated 9.2.2004 passed by the Commissioner of Central Excise (Appeals-II), Jaipur].

For approval and signature:

Hon'ble Justice Shri R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy of the Order?

4. Whether Order is to be circulated to the Departmental authorities?

M/s. Bansiwala Iron & Steel Rolling Mills — Appellant

Vs.

CCE, Jaipur — Respondent

Appearance: Rep. by Shri Bipin Garg, Advocate on behalf of the appellants.
Rep. by Shri Amrish Jain, DR on behalf of the respondent/Department.

CORAM: **Hon'ble Justice Shri R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Judicial)

FINAL Order No. 744/10-EX/Dated 25/10/2010
Misc order No 606/10-EX

Per Rakesh Kumar

The appellant are manufacturer of M.S. Angles, Channel, bars , rods, etc. chargeable to central excise duty under Chapter 72 of the Central Excise Tariff. They manufacture their finished goods from M.S. Ingots for themselves as well as on job work basis for various customers as per their specification out of the M.S. Ingots supplied by them. The period of dispute is from April 1995 to July 1996. The appellant in respect of the goods manufactured on job-work basis were paying duty on the value of the raw materials (M.S. Ingots), as shown in modvatable documents accompanying the goods supplied by the customers plus job charges. According to Department in a number of cases, the appellant were not filing the declaration about the cost of raw materials and job charges including job workers profit in respect of the goods manufactured on job work basis.

1.1 According to the Department, in respect of the goods manufactured on job work for M/s. Bansiwala Steel (P) Ltd., the assessable value of the goods was required to be determined under rule 6(b) (i) of the Central Excise Valuation Rules, 1975 on the basis of price of like goods cleared by the appellant, as complete information for determining the assessable value of the finished goods on the basis of cost of raw material and the job-charges including job worker's profit was not available and since this was not done, duty amounting to Rs.66,237/- has been short paid by the appellants in respect of the goods cleared to M/s. Bansiwala Steel (P) Ltd. during the period from 28.04.95 to 24.05.95.

1.2 In some cases, the goods manufactured by the Appellant on job work basis were being cleared by the merchant manufacturers from the Appellant's factory itself. According to Department in such cases, the duty was to be paid on the sale price charged by the merchant manufacturers from their customers, not on the cost of raw materials supplied plus job charges including job-worker's profit. The Department has, therefore, alleged that during December, 1995 to August, 1996 period there has been short payment of duty amounting to Rs.76,739/-.

1.3 According to Department, in respect of rods manufactured on job work basis for five merchant manufacturers dealing in agricultural implements, the assessable value has not been correctly determined and the same is required to be determined by the cost construction method, as neither the Appellant furnished the required information for determining the assessable value nor the price of comparable goods is available. According to Department, on this basis, in respect of their clearances of rods during Feb. 1996 to August, 1996 period, duty amounting to Rs.65,072/- has been short paid.

1.4 In view of the above, a show cause notice dated 12.05.99 was issued to the Appellant for –

(a) recovery of allegedly short paid duty amounting to Rs.208068/- (Rs.66,237 + Rs.76,739/- + Rs.65,072) from the Appellant under proviso to Section 11 A(1) of the Central Excise Act, 1944, along with interest on this duty under Section 11 AB ibid;

(b) imposition of penalty on the Appellant under Section 11 AC of Central Excise Act, 1944 as well as Rule 173 Q(1) of Central Excise Rules, 1944; and

(c) imposition of penalty under Rule 209 A on Shri Manmohan Lal, Ghai, Director of the Appellant Company.

1.5 The show cause notice was adjudicated by the Deputy Commissioner vide Order-in-Original dated 20.12.99 by which the duty demand as raised in the show cause notice was confirmed along with interest and while penalty of equal amount was imposed on the Appellant Company under Section 11 AC, penalty of Rs.5,000/- was imposed on the Appellant under Rule 173 Q(1) and penalty of Rs.5,000/- was imposed on Shri Manmohan Lal Ghai, Director of the Appellant Company under Rule 209 A of the Central Excise Rules, 1944.

1.6 On appeal by the Appellant Company, the Commissioner (Appeals) vide Order-in-Appeal No.100(RM)CE/JPR-II/2004 dated 9.2.2004, while upholding the duty demand and penalty of Rs.5,000/- under Rule 173 Q (1), set aside the penalty of Rs.208068/- on the Appellant Company under Section 11 AC and also the interest on duty under Section 11 AB, on the ground that the duty demand pertains to pre-September, 1996 period when Section 11 AB and Section 11 AC were not there.

1.7 The present appeal has been filed against the above order of Commissioner of Central Excise (Appeals) challenging the upholding of duty demand and penalty under Rule 173 Q(1) of the Central excise Rules, 1944. Miscellaneous application no.E/MISC/77/09-Ex. Has been filed for addition of some additional grounds.

2. Heard both the sides.

2.1 Shri Bipin Garg, Advocate, the learned Counsel for the Appellant made the following submissions:-

(1) As per Hon'ble Supreme Court's judgement in the case of Ujagar Prints & Others Vs. Union of India & Others reported in 1989 (39) ELT 493 (SC), duty on the goods manufactured on job work basis out of raw material supplied by the customers is to be paid on the "deemed factory gate price" of the goods, which is the cost of the raw materials plus job work charges including job worker's profit. The Appellant were paying duty on this basis only in respect of the job-work goods.

(2) While the cost of raw materials (M.S. Ingots) includes the cost of freight, the job charges include the cutting and burning loss. Moreover, there is no finding by the original adjudicating authority on the issue of burning loss.

(3) In the cases where the goods manufactured on job-work basis were sold by the merchant manufacturers at the Appellant's factory premises, the duty is payable only on the cost of raw materials plus job charges including job-worker's profit, not on the merchant manufacturer's selling price as it includes merchant manufacturer's profit margin also. In this

regard, reliance is placed in Hon'ble Supreme Court's judgment in case of Pawan Biscuits Co. (Pvt.) Ltd. Vs. CCE, Patna reported in 2000 (120) ELT 24 (SC).

(4) In respect of the rods manufactured on job-work basis for the traders dealing in agricultural implements, the duty is payable only on the cost of raw materials plus job-charges including Appellant's profit margin and , there is no basis for duty demand of Rs.65,072/- in respect of these goods.

(5) Judgements of the Tribunal in cases of Commissioner of Central excise, Jaipur-II Vs. Modern Woollen Mills Ltd. reported in 2004 (165) ELT 108 (Tribunal-Delhi) and Moti Biscuits Pvt. Ltd. Vs. CCE, Bolpur reported in 2003 (159) ELT 1037 were cited wherein it was held that the assessable value of the goods manufactured on job work basis out of the raw materials supplied by the customers, is the cost of raw materials plus job charges including job worker's profit and the job work goods are not comparable with similar goods manufactured on his own account by the job-worker and as such, the provisions of Rule 6 (b) of Central Excise Valuation Rules, 1975 are in-applicable for determining the value of the job work goods.

(6) There is no suppression of facts, mis-statement, etc. on the part of the Appellant. Investigation had been completed in December, 1996. Preventive officers visited on 16.08.96 and prior to this, the unit had been audited twice by the Central Excise Officers. In view of this, the show cause notice dated 12.05.97 issued for recovery of allegedly short paid

duty in respect of clearances during April, 1995 to August, 1996 period is time barred.

2.2 Shri Amrish Jain, the ld. DR, defending the impugned order, made the following submissions:-

(1) So far as 1st part of this duty demand of Rs.66,237/- is concerned, the Appellant did not include the cost of freight and burning losses and cutting losses in the value of raw materials. The cost of freight of M.S. Ingots was being separately recovered from the customers by issue of debit notes. In view of this, the duty demand has been correctly confirmed as the duty was payable on the price of the comparable goods.

(2) As regards the 2nd component of duty demand of Rs.76,739/- in respect of the job-work goods sold by the merchant manufacturers from the Appellant's factory, duty has been correctly charged on the merchant manufacturer's price as the loading charges recovered by the merchant manufacturers from their customers has also to be added in the assessable value.

(3) As regards the 3rd component of duty demand of Rs.65,092/- in respect of rods manufactured on job work basis for traders dealing in agricultural implements, the assessable value has been correctly determined by cost construction method under Rule 6(b) (ii) of Central excise Valuation Rules, 1975, as the Appellant had not filed any price declarations.

3. We have carefully considered the submissions from both the sides and perused the records.

4. Coming first to the miscellaneous petition for additional grounds, on going through the same, we find that the new ground sought to be added supplement the grounds of appeal and as such , no new fact is sought to be introduced. In view of this, in terms of Rule 10 of the CESTAT (Procedure) Rules, 1962, the additional grounds in the miscellaneous application are allowed to be added to the grounds of appeal.

5. There are three parts of the duty demand against the Appellants. Second part of the duty demand of Rs.76,739/- is in respect of the job work goods sold by the merchant manufacturers from the Appellant's factory premises and in these cases, the Department seeks assessment of duty on the selling price of the goods charged by the merchant manufacturers. This plea of the Department is incorrect as the merchant manufacturers' price would include their profit margin and expenses incurred by them, which is not includible in the assessable value in view of the Apex Court's judgement in case of Pawan Biscuits Co. (Pvt.) Ltd. Vs. CCE, Patna (Supra), wherein it was held that in respect of the goods manufactured on job-work basis, the assessable value would be the cost of the raw material supplied plus job charges including job-worker's profit and thus assessable value would not include the profit earned and the expenses incurred by the Merchant manufacturers. In view of this, the duty demand of Rs.76,739/- is not sustainable and the same is liable to be set aside.

6. As regards the 1st component of duty demand of Rs.66,237/- the same has been confirmed relying upon the "comparable price of identical goods". According to Department, this method was adopted as the cost of freight and octroi paid for transportation of inputs received from certain customers and burning and cutting losses were not included in the assessable value while there are evidences in form of debit notes having been issued by the Appellants to the customers, which show that some amount towards freight cost on transportation of the raw materials upto the Appellant's factory was being collected in addition to the job charges. According to Commissioner of Central Excise (Appeals)'s finding in para-7 of the impugned order, the Appellant and their sister concern, Bansiwala Steel (P) Ltd. from whom the M.S. Ingots had been received for job-work, were in possession of the information regarding freight and octroi expenses incurred. If this is so, this information should have been obtained and assessable value should have been redetermined by adding the freight and octroi expenses to the cost of inputs, as, as per the judgement of the Tribunal in the case of Reddy & Sons Vs. CCE, Jamshedpur reported in 2001 (137) ELT 677, freight for transportation of raw materials to the job worker's factory is required to be added to the assessable value of the final products manufactured and, cleared from the job worker's premises. Once the full cost of raw material has been included in the assessable value, there is no necessity of including the burning loss. As regards the cutting loss, unless the cutting waste is retained by the job-worker, which would increase his job charges, there

is no question of including the same in the assessable value. But there is no finding as to whether the cutting waste is retained or returned. In this case, the assessable value has been determined on the basis of the "comparable price of identical goods", which is not correct. Moreover, the order does not discuss as to how the goods, whose price has been adopted, are identical to the goods under assessment. There is also no discussion of the Appellant's plea that the expenses incurred on freight & octroi are included in the cost of the raw materials. Therefore, in respect of this part of the duty demand, the matter has to be remanded to the Commissioner (Appeals) for de novo decision after considering the Appellant's plea that freight and octroi expenses are included in the cost of raw materials and if these expenses were not included in the cost of raw materials, the quantum of the same as per the records of the Appellant or the customers.

7. As regards the third component of duty demand of Rs.65092/-the findings of CCE (Appeals) in this regard in the para-7 of the impugned order are as under:-

> "7. As for the remaining demand of Rs.65092/-, I find that the same is based on cost construction method which is the appropriate way to work out the duty in absence of submission of information relating to various ingredients required for computation of assessable value by the appellants."

7.1 The above demand is in respect of rods manufactured for five merchant manufacturers on job work basis out of the raw materials supplied by them. The Appellant pleaded that they had paid duty on the cost of raw materials plus job charges. The order does not discuss as to why the value has been determined by cost construction method. The Tribunal in case of CCE, Jaipur-II Vs. Modern Woollen Mills Ltd. reported in 2004 (165) ELT 108 and Moti Biscuits Pvt. Ltd. Vs. CCE, Bolpur reported in 2003 (159) ELT 1037 (Tribunal) has held that in respect of the goods manufactured on job work basis, the cost of raw materials plus job charges including job worker's profit is the correct assessable value and Rule 6(b)(i) and 6(b)(ii) of the Central Excise Valuation Rules, 1975 are inapplicable. Therefore, the part of the impugned order confirming duty demand of Rs.65092/- is not sustainable and the matter is required to be remanded to the Commissioner (Appeals) for re-determination of the assessable value by applying the ratio of Hon'ble Supreme Court's judgement in case of Ujjagar Prints Ltd. Vs. Union of India reported in 1989 (39) ELT 493 (SC) and also the Tribunal's judgement in case of Reddy & Sons Vs. CCE, Jamshedpur (supra),l and requantifying the differential duty, if any, recoverable from the Appellants.

8. It has been pleaded by the Appellant that, in any case, longer limitation period is not available to the Department for demand of duty and the entire demand is time barred as—

(a) The Appellant had submitted RT-12 Returns regularly during the period of dispute, alongwith copies of job work challans from merchant manufactures and also their invoices; and

(b) The visit of the preventive officers to the Appellant's factory was on 16.08.96. Earlier, the central excise records of the Appellant had been checked twice by the Central Excise Audit Team and no objection had been raised.

8.1 We find that the above submissions have not been discussed by the Commissioner (Appeals) at all while holding that the Appellants are guilty of suppression of the relevant information. On the question as to what constitutes "suppression" for the purpose of invoking longer limitation period under proviso to Section 11 A(1) of the Central Excise Act, 1944, the Apex Court in Pushpam Pharmaceuticals Company Vs. CCE, Bombay reported in 1995 (78) ELT 401 (SC); CCE Vs. Chemphar Drugs & Liniments reported in 1989 (40) ELT 276 (SC) and Continental Foundation Joint Venture Vs. CCE, Chandigarh-I reported in 2007 (216) ELT 177 (SC) has held that since the word, "suppression" in proviso to Section 11A(1) is accompanied by strong words as "fraud" or "collusion" , it has to be construed strictly, that mere omission to give correct information is not suppression of facts unless it was deliberate to evade the payment of duty, that suppression means failure to disclose full information with intent to evade the payment of duty and when the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression and that something positive other than mere inaction or failure on the part of the assessee when the assessee knew otherwise is required before he is saddled with any liability invoking longer limitation period.

8.2 The impugned order does not discuss as to how the Appellant's act or omission in this case constitutes "suppression of facts".

9. In view of the above discussion, while the Commissioner (Appeals)'s order upholding the duty demand ofRs.76,739/- is set aside, in respect of the duty demand of Rs.66,237/- and Rs.65,092/- and the imposition of penalty as the Appellant under Rule 173 Q (1) of the Central Excise Rules, 1944, the impugned order is set aside and the matter is remanded to Commissioner of Central Excise (Appeals) for de-novo decision after hearing the Appellant and keeping in view our observations in para-6, 7.1, 8, 8.1 and 8.2 of this order.

10. The appeal stands disposed of as above.

(Justice R.M. S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Ckp.