CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. IV

E-HEARING

EXCISE APPEAL NO. 52742 OF 2016

[Arising out of the Order-in-Original No. 39/COMMR/IND/CEX/2016 dated 31/05/2016 passed by Principal Commissioner, Central Excise, Customs & Service Tax, Indore.]

M/s Mittal Corp. Limited ……**Appellant**
Plot No. 159, Sector – III, Industrial Area,
Pithampur, Distt. Dhar,
Madhya Pradesh – 401 483.

Versus

Principal Commissioner, ….**Respondent**
Central Excise, Customs & Service Tax,
Manik Bagh Palace, Post Box No. 10,
Indore – 452 001.

APPEARANCE:

None for the appellant.
Shri Bhagwat Dayal, Authorized Representative for the Department

CORAM:
HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50543/2025

DATE OF HEARING : 19.12.2024
DATE OF DECISION: 30.04.2025

P.V. SUBBA RAO

M/s. Mittal Corp. Limited, Dhar, Madhya Pradesh[1] filed this appeal to assail the order-in-original dated 31.05.2016[2] passed by the Principal Commissioner, Indore whereby he confirmed the

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1. appellant
2. impugned order

proposals made in the show cause notice dated 21.04.2015[3] issued to the appellant. He confirmed the demand of Rs. 1,56,65,763/- with interest under Section 11A of the Central Excise Act and imposed an equal amount as penalty under Section 11AC of the Central Excise Act[4]. The period involved in this case is July 2010 to September 2010.

2. The matter was listed on several dates, but nobody appeared on behalf of the appellant. On 10.10.2024, the following order was passed :-

> "The appellant had been informed by the department about the hearing be conducted on 10.10.2024. An email has been sent by the learned chartered accountant for the appellant that hearing be conducted by virtual mode and the link be sent to them. The Court Master has informed that the link was sent at the address mentioned in the letter sent by the chartered accountant.
>
> 2. Case has been called out but no one has appeared on behalf of the appellant. List the appeal on December 19, 2024.
>
> 3. It is made clear that the appeal may be decided on merits even if the appellant does not appear".

3. When the matter was called today, nobody appeared on behalf of the appellant. We have heard Shri Bhagwat Dayal, learned authorized representative for the Revenue and perused the records and proceed to decide the matter as indicated on 10.10.2024.

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3. SCN
4. Excise Act

4. The facts which led to the issue of the impugned order are that the appellant is registered with the Central Excise department and used to manufacture SS Billets, SS Flats, SS Rounds and MS Billets falling under Chapter 72 of the Central Excise Tariff. It was also availing the Cenvat credit on inputs, input services and capital goods under the Cenvat Credit Rules, 2004[5] during the relevant period. On 29.09.2010 and 30.09.2010, the officers of the central excise searched the factory premises of the appellant, withdrew certain records under a panchnama dated 29.09.2010. They also conducted physical verification of the stock and found certain goods were in excess of what was recorded. The excess goods were seized and the SCN proposing confiscation of the seized goods was issued separately on 16.03.2011.

5. Simultaneously, searches were conducted on different premises and several incriminating documents were seized under different panchnamas. After examining the seized documents, it was found that the file mentioned at Sl. No. 13 & 45 of Annexure A to the panchnama dated 29.09.2010 were private records of the appellant showing actual production of the goods, which was higher than what was recorded in the official RG-1 production register. It was, therefore, concluded after investigation that the appellant had suppressed the quantity of SS Billets/SS Flats which were removed by it in a clandestine manner without paying the central excise duty.

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5. CCR

6. The officers also found documents evidencing receipt of raw material it was also not entered in the RG-23A Pt. I register (the register to record inputs on which Cenvat credit is taken).

7. Based on these documents the investigators found that the appellant had suppressed production of SS Flats in the month of August 2010 of a quantity of 768.770 M.T. on which a duty of Rs. 47,11,407/- was evaded. They also found that the appellant had suppressed production of 170.839 M.T. of SS flats during September 2010 on which a duty of Rs. 1,04,23,592/- was evaded. Therefore, the SCN demanded central excise duty of Rs. 1,51,34,999/- on the SS Flats and Billets.

8. It was also found that during the period July 2010 to September 2010 the appellant had removed used refractories and slag valued at Rs. 51,53,050/- without paying duty under Rule 3 (5) of CCR, 2004. It was felt that excise duty of Rs. 5,30,764/- is liable to be recovered from the appellant. According, the SCN proposed recovery of duties, as above, with interest and imposition of penalties under Section 11AC. The proposals in the SCN were confirmed in the impugned order.

<u>Submissions in the appeal</u> :-

9. The impugned order is appealed by the appellant in this appeal on the following grounds :-

(i) The charge of clandestine manufacture of SS Flats and of suppressed production of SS Billets has not been established by the department through corroborative evidence and the demand was made only on the basis of the records. No cogent positive evidence to establish the purchase of unaccounted for raw material or clandestine manufacture and removal have been established.

(ii) The charge of clandestine manufacture of SS Flats and of SS Billets is without any cogent evidence and, hence, is unsustainable. No evidence has been provided by the department to establish clandestine removal of SS Flats. No evidence of out-road transport, lorry receipt issued by the transporter, unaccounted dispatch of finished goods have been produced by the department.

(iii) Clandestine manufacture and clearance need to be proved with positive and cogent evidence and it cannot be based on assumptions and presumptions.

(iv) Extended period of limitation is not invokable in the present matter.

(v) The imposition of penalty under Section 11AC is not sustainable.

(vi) Interest is not recoverable as the duty itself is not recoverable.

(vii) The duty confirmed in relation to use refractories and slag is not maintainable.

<u>Submissions on behalf of the Revenue</u> :-

(i) Learned authorized representative for Revenue submitted that there were variations between the RG-1 register and the documents resumed from the factory premises and office premises of the appellant. On 28.09.2010, 10,700 units, 10,000 units and 22,900 units of electricity was consumed for production of 8 heats in the induction process, rolling mill, gas plant and pump house respectively, but no production was shown in the RG-1 register

(ii) As per the consumption report dated 29.09.2010, on 28.09.2010 ferro alloys, fluxes, gases, oil etc. were consumed for manufacture of Billets/Flats but the production was not recorded in RG-1 register.

(iii) Scrutiny of fax copies having details of stock of SS Billets showed that there was production of heat numbers Sep 01 to Sep 182 during September 2010 and the Billets produced in these heats were further converted into SS Flats. Thus, there is evidence that the appellant had not recorded production of 1806.611 M.T. of Billets.

(iv) Shri Ashok Mishra, Excise Clerk in his statement dated 30.09.2010 said that the documents recovered from the factory were related to the company and the printouts were signed by him were either related to receipt or removal of goods form their factory.

(v) Shri Mahender P. Desai, Steel Making shop and Chief Executive in his statement dated 17.06.2013 stated that the grades of the products were decided and heat-wise production records are maintained and each heat produces 25 to 28 MT and consumes 580-750 units of electricity per MT.

(vi) Shri Navin Kumar Goel, G.M. Works in his statement dated 16.03.2015 said that the burning loss and end cut loss are 3 to 5% and that the finished products manufactured in a day are recorded at 10 a.m. of the following date.

(vii) The appellant never disowned documents recovered from their premises and the statements tendered by the appellants operatives were never retracted.

(viii) In view of the above, the appeal may be dismissed and the statements tendered by the appellants and the impugned order may be upheld.

10. We have considered the submissions made by the learned authorized representative and the grounds of appeal in this appeal.

11. The case of the department that the appellant had evaded central excise duty of Rs.1,56,65,763/- by clandestinely removing SS Billets, Flats, Rounds etc. without recording them in

the RG-1 register. This allegation is based on the records recovered from the appellant itself which showed actual daily production of the goods. The quantity of goods shown as manufactured in the RG-1 register was lower than the quantity mentioned in the private registers. The present demand pertains to only two months namely August 2010 and September 2010. The appellant does not dispute the recovery of the documents or that the registers were their own records maintained by the staff. The submissions of the appellant is that the department failed to establish the clandestine manufacture and removal and sale of the goods through positive, cogent evidence.

12. Clandestine removal, by its their nature, is secretive. If every transaction is recorded in official registers and documents are issued, then there cannot be clandestine removal. Therefore, clandestine removal can only be established through indirect evidences. In this case, the evidence is in the form of the records maintained by the appellant itself as private registers which showed higher production compared to what was recorded in RG-1 register. The appellant neither disowns the records, which were recovered from it nor does it show as to why the production was recorded in them differently than in the RG-1 register. It is also a matter of fact that statements recorded by the officers during investigation have not been retracted till date. Thus, we find that there is positive evidence in the form of the appellant's own records maintained privately that more goods were manufactured than what was recorded in the RG-1 register. Therefore, the

appellant was bound to pay excise duty on the entire production, but had paid duty only on some part of the production.

13. The contention of the appellant is that the department should show through positive evidence that there was a clandestine removal. If there were documents showing clearance of every consignment of the appellant, then it would not be a clandestine removal. On the facts in this case, we are satisfied that there was sufficient evidence with the department to conclude that goods were clandestinely manufactured and cleared by the appellant. As far as the demand of excise duty under Rule 2 (3) (5) of the CCR is concerned, this is on account of refractories and slag which the appellant had removed from the factory. There is no dispute about such removal.

14. In view of above, we find that the entire demand of duty of excise in the impugned order needs to be upheld on merits. The appellant also contested the demand on grounds of limitation. The extended period of limitation under Section 11A (4) can be invoked if duty is not paid, short paid, not levied, short levied or erroneously refunded by reason of fraud or collusion or willful mis-statement or suppression of facts. In this case, the allegation is the suppression of part of the production by the appellant.

15. We, therefore, find that the extended period of limitation has been correctly invoked in this case. As the demand needs to be sustained consequently interest under Section 11AA also needs to be upheld.

16. As far as the penalty is concerned, it can imposed under Section 11AC, if the duty is not paid or short paid by reason of fraud or collusion or willful mis-statement or suppression of facts or violation of Act or Rules with an intent to evade payment of duty. As we have found in favour of the Revenue on the question of suppression of facts, we find no reason to take a different view on the question of penalty under Section 11AC also needs to be upheld.

17. After the matter was reserved for orders, a letter dated 07.03.2025 was received on 12.03.2025 from M/s Shyam Sel and Power Limited stating the appellant had undergone Corporate Insolvency Resolution Plan (CIRP) under the Insolvency and Bankruptcy Code, 2016 and an order has been passed by the National Company Law Tribunal, Mumbai and that M/s Shyam Sel and Power Limited had taken over the appellant. It further says as follows :-

> "Once a resolution plan is duly approved by the adjudicating authority under section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the creditors (including statutory authorities, employees and guarantors)."
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> Hence, the stipulations of the Approved Resolution Plan are legally binding upon all stakeholders, including Governmental Authorities, which are required to comply with the provisions of the Code and reliefs granted under the Resolution Plan.
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> Please note that REVENUE DEPARTMENT, CGST & CENTRAL EXCISE, DIVISION – II, PITHAMPUR, had already lodged previous dues during the CIRP period with Resolution Professional and the same had already been dealt under the provisions of the Act by Resolution

> Professional. And accordingly all the old dues stand discharged with effect from the 'Effective Date and therefore no amount is payable in respect of dues pertaining to the period till effective date to them. Hence, the captioned case has attained its finality by virtue of NCLT Proceedings.
>
> In view of the order of Hon'ble National Company Law Tribunal, we request you to kindly close the captioned proceedings in the interest of justice".

18. M/s Shyam Sel and Power Limited has erroneously submitted that this appeal before this Tribunal has attained finality by the proceedings of the NCLT. In any appeal before this Tribunal, the merits of the case are examined and an order is passed either upholding or setting aside the order of the lower authority which is challenged. This Tribunal is not concerned with nor does it have any role in recovery of any dues. The CIRP proceedings do not determine the tax liabilities but only determine the recoveries. Further, as per IBC, 2016, institution of suits or continuation of pending suits or proceedings <u>against the corporate debtor including execution of any judgment, decree or order in any court of law Tribunal, arbitration panel or other authority is prohibited</u>. This position is also reflected in para 'd' of the order of the NCLT enclosed with the letter of M/s Shyam Sel and Power Limited.

19. This appeal before us is not against the corporate debtor but by the Corporate Debtor assailing the liability of duty and penalty. It is also not about the recovery of the dues. Nothing in the IBC prohibits this Tribunal from hearing and deciding on

merits an appeal filed by the Corporate Debtor against the Revenue.

20. It was open for the Corporate Debtor or its successor in interest to have withdrawn this appeal but it is not open to it to not withdraw the appeal and insist that we do not decide the appeal. If a Corporate Debtor succeeds in the appeal, it may be entitled to consequential relief, if any. For example, if it had paid part or whole of the disputed duties and succeeds in its appeal, it would be entitled to refund.

21. In view of the above, we find no infirmity in the impugned order. The impugned order is upheld and the appeal is dismissed.

(Order pronounced in open court on 30/04/2025.)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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