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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

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

EXCISE APPEAL BRANCH

Date 18/05/2012

Appeal No. E/858 /2006 - EX[DB]

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

To :
SIGMA HEAVY ENGINEERING INDUSTRIES BHOPAL
PVT LTD(UNIT -I)
6-B, E SECTOR, INDUSTRIAL AREA, GOVINDPURA,
BHOPAL(M.P.)

SIGMA HEAVY ENGINEERING INDUSTRIES BHOPAL PVT LTD(UNIT -I) Appellant

Vs

C.C.E BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/585 2012 EX[DB]** dated 17-5-12 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 BHOPAL
HOSHANGABAD ROAD, 48,
ADMINISTRATIVE AREA, AREA
HILLS, BHOPAL (M.P.) 462011

2. Adv. / Consult SH. Z. U. ALVI, ADV, C/O APPELLANT.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

E/Appeal No.858/2006

(Arising out of order in original No.46/Comm/Cex/05 dated 30.11.05 passed by the Commissioner of Customs & Central Excise, Bhopal)

For Approval and signature:

Date of Hearing: 29.2.2012
Date of Pronouncement: 17-05-12

Hon'ble Mrs. Archana Wadhwa, Member Judicial
Hon'ble Mr.Mathew John, Technical Member

1.	Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?	NO
3.	Whether their lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	NO

M/s Sigma Heavy Engg Industries — Appellant

Vs

CCE, Bhopal — Respondent

Appeared for the Appellant: Shri Z.U. Alvi, Advocate
Appeared for the Respondent: Shri R.K. Verma , DR

Coram: **Hon'ble Mrs. Archana Wadhwa, Member(Judicial)**
Hon'ble Shri Mathew John, Member (Technical)

Final ORDER NO. A/585/2012-EX(DB)

Per Mathew John:

The appellants are engaged in the manufacture of parts and components of various engineering goods falling under Chapter 85 of the First Schedule to the Central Excise Tariff Act, 1985. They do manufacturing activity under three types of arrangements with their customers namely,-

i) Pure labour, that is where entire material is supplied by the buyers

ii) Pure manufacturing that is where entire material is used by the appellant from their own stocks and

iii) Mixed Contracts that is where part of material is supplied by the appellant and part of the material is to be by the customer.

2. The customers of the appellants included BHEL, VATECH, EMCO, Crompton Greaves, Central Railways, Northern Railways etc. The main raw material being used by the appellants were Mild Steel items. They were taking credit of such duty paid on material used as inputs in their manufacturing process.

3. On 20.12.02, the Central Excise officers visited the premises of the appellants and conducted a verification of inputs lying in stock as against inputs received in the factory as per their records. The officers assessed a shortage of 52,26,797 kgs of raw materials and made out a case that the appellants had taken Cenvat credit amounting to Rs. 1,69,51,548/- (as detailed in para 4 of SCN), on such quantity of inputs and cleared the goods without payment of duty.

4. The SCN also gave another calculation of shortage in para 12 of the SCN based on opening stock of materials as on 01-04-2000 and taking into account receipts of raw materials and clearance of final products after that. Thus calculation indicated a shortage of 29,37,295 Kgs of raw material. It appears that this calculation is given as a fallback position. But it was not mentioned so explicitly. It is seen that the demand for duty made in the SCN was for shortage of 52,26,797 kgs. that is based on statements given to the bank

5. After due process of reply and personal hearing duty demand of Rs. 95,26,238/- (on 29,37,295 kgs of raw material based on calculation in para 12 of SCN) was confirmed and a penalty of equal amount of Rs. 95,26,238/- was imposed under Rule 57-AH of Central Excise Rules, 1944 and Rule 13 of Cenvat Credit Rules, 2000. Aggrieved by the said order, the appellants have filed the present appeal.

6. The appellants submit that the show cause notice was issued on the basis that the stock statements given to their bankers for availing credit limits showed receipts far in excess of what was accounted in their books. They pointed out that the stock for each month declared to the bank included the stock received in the previous months and lying un-utilized. The stock statements were given to the banks for each month, to show value of assets lying in factory and hypothecated to the bank. The Department counted the same stock in each month and thus many times over and that has resulted in the alleged

shortage of inputs in the factory. They pointed out that they had taken credit of Rs. 1,29,31,823/- on materials purchased by them during the period whereas the show cause notice demanded reversal of Cenvat credit to the extent of Rs. 1,69,51,548/-. As far as material supplied by their customers like BHEL it is the contention of the appellants that such material is high valued items for which the customer does close monitoring and there is no scope for clandestine removal of those items .

7. After considering the submissions made by the appellants, the adjudicating authority gave a finding that demand based on stock statements given to bank is not maintainable but confirmed an amount of Rs. 95,26,238/- calculating the difference between opening balance of stock as per balance sheet on 01-04-2000, receipts and issues thereafter, as already mentioned. The Appellants argue that thus amounted to adopting a new approach other than what was adopted in SCN. Thus, it is argued that the adjudicating order travels beyond the scope of the show cause notice and is not maintainable.

8. The appellants also submit that the department has not produced any evidence regarding removal of clearance of inputs as such after taking credit or excisable goods manufactured using the raw materials allegedly found short. The whole demand is based on wrong determination of quantity of inputs received, final products removed as also errors in ascertaining physical stock available in the factory. They also submitted that the shortages have been arrived at considering

only supplies made to 3 customers namely BHEL, VATECH AND EMCO. They submit that there were many other customers to whom appellants had cleared finished goods and such goods have not been taken into account which has resulted in the conclusion in the impugned order.

9. They pointed out the following arguments in respect of shortage of 29,37,245 kgs of MS inputs:-

(a) *There are totally mistakes in the Annexure E-1 and E-3 to SCN depicting Appellant's clearance to BHEL. Further the list of supplies to BHEL is not complete.*

(b) *In computing the alleged shortage of 29,40,736 kgs of input steel, vide para 12 of the SCN, the output to BHEL (Sl No.3 (a) of the table) the figure has been wrongly taken as 11,79,243 on account of a totaling mistake in annex E-1 to SCN. The correct total of Annex E-1 to SCN is 24,16,659 kgs, however 5,31,778 kgs pertained to previous year, as such only 18,84,881 kgs pertained to 2000-2001. The Annexure E-1, E-2 and E-3 to SCN have been computer printed and the weights of finished goods supplies for the year 2000-2001, 2001-2002 and 2002-2003 (upto 20.12.2002) have been abstracted and totaled up. The appellants submitted details of totaling mistakes in SCN as also summary of the correct total weight of all the supplies by Appellant. These weights have been used in the reconciliation statements furnished by the appellants.*

(c) *Apart from supplies to BHEL, Vatech and Crompton (Transformers Divn), the Appellant supplied finished gods to CGELIN, Central Railways, N.E Railways, EMCO which have not been considered in the SCN/O-I-O.*

(d) Wastages and burning loss has not been accounted which varies between 2-3% of input material.

(e) On the face of record, Panchnama dt 20.12.2002 does not mention that the Central Excise officers took any stock of work in progress (WIP) i.e. steel contained in the jobs partially worked upon and lying at shop floor in various stages of manufacture. Also the panchnama did not consider quantity of cuts and material sent for job work u/r 57F(4) and lying with appellant's job worker (material with job worker). Thus, it is clear that purported calculation based on such incomplete data of raw material found short during the period is fundamentally and basically incorrect.

The ground for rejection of appellant's plea of non-inclusion of the WIP, off cuts and material with job worker (MWJW) in O-I-O by learned Commissioner, CE (vide para 28 of O-I-O page 50) that the said objection was raised later and not immediately after the panchnama dt 20.12.2002 or in reply dt 26.6.05 to SCN is totally flimsy and untenable for following reasons:-

(i) At the outset panchnama was not a statement which if incorrect had to be retracted at the earliest;

(ii) During the visit dt 20.12.2002, the Central Excise officers did never disclose the aim or purpose of taking stock of finished goods or waste and scrap. They did whatever they wanted. Neither appellant were aware of the aim and objective of the exercise and hence the relevance of weight of WIP, off cuts and MWJE could not and was not known to the appellant till after the date of issue of SCN.

(iii) Further, since the alleged cumulative shortage of 29,40,736 kgs of input MS was mentioned in the SCN merely as a corroborative factor. Hence in the

reply it was adequate to demolish the reliability of such evidence by exhibiting its qualitative weakness and unreliability, hence the question of quantitative and complete rebuttal of the ground newly found in the O-I-O, beyond the scope of SCN, did not arise.

10. The appellants have also a case that the quantum of demand has been wrongly worked out because of the wrong figures arrived for cost of input material namely steel. In this context, they make the following submissions:-

- *The demand in rupees has been inflated in O-I-O on account of taking a very wrong average figure of the cost of input material -Mild steel.*
- *In the SCN (and O-I-O) while working out the average price of steel and consequently the credit in rupees per kg of Steel vide (para 6 of SCN) average of only seven invoices has been taken. Out of seven, five invoices pertained to Appellant's own purchased steel for which the average price was Rs. 15 per kg whereas the balance two invoices constituting 2 kgs of total 7 kg i.e. more than 25% pertained to BHEL's free issued material. Apparently the cost of BHEL's free issued material which is normally of Boiler Quality Tested steel of high thickness and imported from abroad is Rs. 35 kg i.e. more than double of the appellant's own procured steel. Since BHEL's issued material did not constitute 25% of the total steel whereon appellant have taken credit as such, the computed average price of steel (input) and hence credit per kg worked out in the demand is highly distorted, incorrect and demand based there on not sustainable.*

11. They also submit that the list of demand is not reasonable and make the following submissions to buttress the above arguments.

The allegation of procuring steel on CENVATABLE invoice by payment through bank and disposing such steel as such, surreptitiously does not stand to reason and common sense for the following reasons:-

(a) The prospective buyers of such surreptitiously removed steel would not be in the organized sector of industry who would procure their inputs by payment through bank and only cenvatable invoice. Such transaction for obvious reasons are conducted through cash payments only.

(b) The buyers of such disposed steel would not get cenvat credit. Accordingly, unless the market value of such material claims a premium of 20-25% (allowing for a loss of credit @ 16%) no one in the open market would buy such steel. There is no evidence that appellant's procured steel (average value Rs. 14.65 kg) which was not abundantly available in market and claimed a premium of 20-25% in the open market.

(c) The very alleged modus operandi, entails payments by appellant of white money from bank account to authorized dealers of Sail or MP Laghu Udyog Nigam for material sold under cenvatable invoices while receipts towards alleged surreptitious removals of the very same input material as such would only be in cash, unaccountable in the appellant's financial operations. This would amount to conversion of white money into black money that too in a period between 2000 to 2002 when there was pronounced cash crunch as pointed by Appellant vide para 1 of their reply dated 26.8.05 to SCN.

(d) The alleged operation would involve a loss of working capital proportionate to the value of 29,40,736 kgs of steel which as per SCN figure would work out to be Rs.20.27 x 29,40,736 = 5,96,08,718/-. This would work out to be 2 crores loss to the appellant every year in their balance sheet which was totally unsustainable and does not reflect in their financial operation.

As pointed out in appellant's reply to SCN vide para 9, the value addition of appellant (being a sub-contractor of steel fabrication work, without their own designs/brand technical know-how) is around 47.9% which is normal for fabrication industry. However, if 29,40,736 kgs of input steel stood withdrawn from appellant's operation during the SCN period the value addition would jump to around 256% which is totally absurd and un-imaginable for a fabrication industry without any of their own design, technical knowhow or brand name.

12. The appellants also point out that similar show cause notice dated 21-06-05 issued to their Unit No. II in the jurisdiction of the same Commissionerate was dropped by the adjudicating officer in that case, vide order dated 18-12-05.

13. The Ld. A.R. submits that all the annexures that the appellants have now given before the Tribunal was not given to the adjudicating authority and hence are unverified evidence and hence cannot be relied upon. The stock of material as on the date of verification was agreed to by the appellant. Such stock was far too short of what should be been available as per the appellants' own records. The appellants were not able to explain the reason for shortage before the adjudicating authority. He also points out that the raw materials used by the appellants are a type on which there is substantial fraud in taking Cenavt credit. That is the reason for this demand. He also says that if there are any errors in calculations in the amounts confirmed, the matter can be sent for a de-novo adjudication.

14. After considering the arguments on both sides we find that the case made out is one of shortage as on 20-12-2002 of inputs on which Cenvat credit was taken. This situation, if true, could be on account of clandestine removal of inputs on which Cenvat credit was taken. The situation could also arise due to bogus credits on the basis of documents without receiving goods covered by such invoices. It could also be due to clandestine manufacture of final products using the impugned inputs and clearing such final products without payment duty. But revenue has not found any evidence of instances of any such activity. The SCN mentions only the first type of possibility and not the second and third type of possibilities.

15. We find that the whole case is made in a very casual manner. During stock taking or immediately thereafter the Revenue did not discuss with the appellants what their doubts were and seek clarification from the appellants. Thereafter they issued Show Cause Notice making a case of shortage of inputs based on the stock statements given by the appellants to the banks (para 4 of SCN). But the SCN had a fall back calculation based figures in balance sheet as on 01-04-2000 and receipts and issue thereafter as seen from paras 11 and 12 of SCN. When the obvious errors in the first approach were pointed out, the adjudicating authority adopted the latter method of determining the shortage. To this extent the argument of the appellant that duty demand is confirmed by adopting an entirely new basis is not correct.

16. It is seen that the method finally adopted in the impugned order is also faulty in as much as there are serious inaccuracies even in totaling of the work sheets. Further supplies made to all the customers were not taken into account. There are defects in the method adopted for arriving at weight of goods supplied to BHEL, their main customer. There are other issues like not taking into account the material lying as work-in-progress, material sent by them for job work etc. The argument that such material was never pointed out during stock taking is not a valid objection from Revenue because at the time of stock taking the reason for stock taking was not explained so that the appellants could point out errors due to such omissions. It is also not clear why the opening balance for the year 2000-01 is taken from balance sheet and thereafter the balance sheet figures of closing balance for that year and OB and CB for subsequent years are not taken note of and efforts made to point out discrepancies. The portion of work sheet showing clearances for 2000-2001 in Annexure E-1 does not show page-wise sub totals. The work sheet is split into different parts with new serial number 1 starting again and again. Even for such sub-sections, sub totals are not put. So verification regarding the claim ~~is~~ of mistake in totaling was very difficult. But we have found that the figures for the year 2000-2001 in Annexure E-1 was much more than the clearance shown in para 12 of the show cause notice for the year 2000-2001. On the whole the entire calculation gives the impression of a very raw method ~~of~~ was adopted by interpreting figures in the balance sheet and account books of appellants without taking the help of the appellants or an accounting professional, muddling through making

even totaling mistakes on the way. This type of case made by Revenue deserves to be dropped without further examination.

17. Further we note that as per para 12 of the SCN the total receipts of raw material was 63,72,064 kg. Revenue's case is that ~~it~~ out of this 29,37,245 kgs was removed as such. Then the question remains how all the works as per their accounts were executed by them. That is why the appellant is raising the issue that the Revenue's case suggests that the appellants were converting their accounted money into un-accounted money. That is to say the finding in the impugned order is to the effect that they had accounted raw materials but the accounted material was sold without accounting to generate unaccounted money. This is totally at variance with their financial position as reflected in their balance sheet. It is also submitted that they had paid total excise duty of Rs. 2,85,31,963/- during the impugned period and the total Cenvat credit taken was of Rs.2,15,62,497/-, showing payment of duty on value addition of about 32% i.e. [(28531963/21562497)*100-100]. If inputs involving duty element of Rs. 95,26,238/- is considered as clandestinely removed as inputs itself then the value addition becomes 137% i.e. [(28531963/(21562497-9526238))*100-100]. This according to them is absurd.

18. We have not been able to understand whether the arguments given in para 25 of the order is the arguments of the appellants or the findings of the adjudicating authority. Since this para figures under the heading "Discussion and Findings" before para 22, we consider that

para 25 gives the finding of the adjudicating officer. That being the case we are not able to understand the meaning of the sentence **"All these facts have also been admitted in the show cause notice."** appearing in the said paragraph. If the adjudicator has understood the allegations in the SCN as admission by the appellant then the adjudication order is not worth examining at all.

19. In the normal course when there are inaccuracies in adjudication, the Tribunal sends the case back for a de-novo consideration. But we are of the view that in this case the Revenue's case is without any substance and made by its own mistakes of numerous types and without an effort to understand the issues involved. Since we consider that this is a case made without the minimum diligence required, sending such matter for de-novo consideration will be another round of harassment for the appellants and most likely another round for wasting the time of the Tribunal also in a further litigation in second round. We also note that similar notice issued to Unit-II of the Appellant in the same jurisdiction has been dropped. On overall appreciation of the facts as brought out in the SCN

and reply of the appellants and for reasons stated above we consider it fit to set aside the impugned order.

20. So we set aside the impugned order and allow the appeal.

(Pronounced on 17/5/12)

(MATHEW JOHN)
Member (Technical)

(ARCHANA WADHWA)
Member (Judicial)

MPS*