IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 08/02/2017.
DATE OF DECISION : 17/02/2017.

Excise Appeals No. 52419-52432, 52437-52443 of 2015

[Arising out of the Order-in-Original No. ALW-EXCUS-000-COM-042, 026, 034, 041, 036, 028, 040, 032, 029, 037, 044, 025, 035, 043, 024, 031, 030, 038, 027, 039, 033-14-15 all dated 30/03/2015 passed by The Commissioner of Central Excise, Central Excise Commissionerate, Alwar.]

M/s Sarthi Rubber Industries Pvt. Ltd.]
M/s Meenakshi Strips Pvt. Ltd.]
M/s Mohit Metals Pvt. Ltd.]
M/s B.G. Steels Pvt. Ltd.]
M/s Anshul Strips Pvt. Ltd.]
Shri Giriraj Steels Pvt. Ltd.]
M/s Perma Engineering & Trading Co. P. Ltd.]
M/s Divya Aanchal Re-Rolling Pvt. Ltd.]
M/s Panar Strips Pvt. Ltd.]
M/s Poonam Strips Pvt. Ltd.]
M/s Radharaman Stainless Steel P. Ltd.] Appellants
M/s Active Toys Pvt. Ltd.]
M/s Gold Star Re-Rollers Pvt. Ltd.]
M/s Jyotika Strips Pvt. Ltd.]
M/s Northern Castings Pvt. Ltd.]
M/s Nirmal Enterprises]
M/s Kesri Steels Ltd.]
M/s Badri Vishal Steels Pvt. Ltd.]
M/s Amit Re-Rolling Pvt. Ltd.]
M/s Shri Laxmi Vijay Steels Pvt. Ltd.]
M/s ASP Enterprises]

Versus

CCE & ST, Alwar Respondent

and

Excise Appeals No. 52621-52622, 52679-52686, 52689-52692, 52752, 52755-52758 and 52775 of 2015

[Arising out of the Order-in-Original No. ALW-EXCUS-000-COM-025, 026, 027, 028, 029, 030, 031, 033, 034, 035, 036, 039, 044, 037, 042, 040, 032, 038, 041, 043-14-15 all dated

30/03/2015 passed by The Principal Commissioner, Central Excise & Service Tax Commissionerate, Alwar (Rajasthan).]

CCE & ST, Alwar   Appellant

Versus

M/s Active Toys Pvt. Ltd.]
M/s Meenakshi Strips Pvt. Ltd.]
M/s Amit Re-Rolling Pvt. Ltd.]
Shri Giriraj Steels Pvt. Ltd.]
M/s Pannar Strips Pvt. Ltd.]
M/s Kesari Steel Ltd.]
M/s Nirmal Enterprises]
M/s ASP Enterprises]
M/s Mohit Metals Pvt. Ltd.]
M/s Gold Star Re-Rollers Pvt. Ltd.]   Respondents
M/s Anshul Strips Pvt. Ltd.]
M/s Shri Laxmi Vijay Steels Pvt. Ltd.]
M/s Radharaman Stainless Steel Pvt. Ltd.]
M/s Poonam Strips Pvt. Ltd.]
M/s Sarthi Rubber Industries Pvt. Ltd.]
M/s Perma Engineering & Trading Co. P. Ltd.]
M/s Divya Aanchal Re-Rolling Pvt. Ltd.]
M/s Badri Vishal Steels Pvt. Ltd.]
M/s B.G. Steels Pvt. Ltd.]
M/s Jyotika Strips Pvt. Ltd.]

Appearance

S/Shri S. Jai Kumar and Kartik Jindal, Advocates – for the appellants/respondents.

Shri R.K. Manjhi, Authorized Representative (DR) – for the Respondent/appellant.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 51802-51842/2017 Dated : 17/02/2017

Per. B. Ravichandran :-

These are 21 appeals involving identical issues and hence are taken up for disposal together. The Revenue also filed appeals against impugned orders for non-imposition of penalties on the assessee/appellants.

2. The assessee/appellants are registered manufacturers of excisable goods – stainless steel patta/pattis. They have opted for payment of excise duty liability as per the scheme formulated under Notification No. 17/2007-CE dated 01/03/2007. The scheme envisages payment of excise duty based on number of cold rolling machines installed in the factory. The factories of all the assessee/appellants are located in Rajasthan.

3. Rajasthan State Pollution Control Board issued a ban on the operations of factories of assessee/appellants in February, 2013. The power and water supply was also disconnected. The closure of factories were intimated by the assessee/appellants to the jurisdictional central excise officers. The assessee/appellants also dismantled the cold rolling machines installed at their factories and informed the same to the central excise department. The ban on the factories was lifted by the Pollution Control Board in April, 2013. The assessee/appellants reinstalled the dismantled cold rolling machines and commenced operations with effect from 01/05/2013. Due intimation was filed with the jurisdictional central excise officers. From May 2013 onwards central excise duty was discharged in terms of the scheme. Proceedings were initiated against the assessee/appellants to recover central excise duty based on value of clearances during March to August, 2013 on the ground that they have failed to comply with the provisions

and conditions of the notification No. 17/2007-CE during the said period. The demands were adjudicated and the original authority confirmed the liability of duty as proposed in the notices. No penalty was imposed. Revenue filed appeals against such non-imposition of penalties.

4. The learned Counsels for the appellants contested the findings in the impugned orders mainly on the following grounds:-

(a) Notification 17/2007-CE is a comprehensive exemption notification which contained the procedure in detail. The notification itself contemplates various situations, covering the details from application to discharge a duty liability. In terms of para 2 (1) of the notification the appellants made application to avail the scheme of payment of fixed duty per cold rolling machine. The same was granted by the jurisdictional Superintendent of Central Excise ;

(b) the reliance placed by the Original Authority on the provisions of para 2 (3) to state that the manufacturer failed to avail the procedure contained in the said notification is factually incorrect. The appellants who opted for and were granted permission to avail the duty rates as specified in the notification have continued to be in the scheme but for the intervening two months during which the units were ordered to be closed by statutory State authorities which in any case is beyond the control of the appellant. There is no failure to avail the procedure. The factories of the appellants ceased to work during the period of closure ordered by the State Pollution Control Board and such closure and dismantling of machinery cannot be termed as failure to avail the procedure ;

(c) during the month of March and April 2013 the appellants did not pay any Central Excise duty because of closure of units and such non-payment cannot be termed as deliberate failure to follow the procedure. Para 2 (3) has no application to such situation. When there is no production of excisable goods no central excise duty liability will arise. The duty liability confirmed even when the factory is closed is against the provision of Section 3 of the Central Excise Act, 1944 which states that central excise duty is leviable on goods produced or manufactured in India. When there is no production or manufacture of excisable goods there can be no liability to pay duty ;

(d) the Original Authority had rejected the plea of the appellants for invoking the powers as per para 7 of the notification to condone any failure. The provision in the said paragraph clearly states that the JC or Additional Commissioner have power to apply the provision of the notification to a manufacturer who has failed to avail himself the special procedure or to comply with any condition laid down in this notification. The Original Authority simply recorded that no such request had been made to the Jurisdictional AC/DC. The Original Authority, being Commissioner of Central Excise, is well within his powers to examine the request of the appellant and to take a decision regarding applicability of the procedure in the notification to the facts and circumstances of the present case. His failure to record due reasons in this regard will make the order legally unsustainable.

5. The learned AR reiterated the findings in the impugned orders. It is further submitted that the appellant did not pay any

central excise duty in terms of Notification 17/2007-CE for the months March and April 2013. As such, they are not covered by the special procedure set out therein. This bars the appellants from availing the rate of duty as per the special procedure for further period upto August 2013 in terms of clear provision in para 2 (3) of the said notification. In support of the appeals filed by the Revenue against the impugned orders, the learned AR submitted that the Original Authority failed in following the correct legal provision while deciding on the penalty. The failure of the appellants to follow the special procedure and non-payment of duty as per the actual clearance of excisable goods, are violations which attract penalty under Rule 25 of Central Excise Rules, 2002. As such, the Original Authority has erred in not imposing penalty on the appellants.

6. We have heard both the sides and perused the appeal records. The relevant legal provisions of para 2 and 7 of the Notification 17/2007-CE are as below :-

> "2. **Application to avail special procedure.** - (1) The manufacturer shall make an application in the form specified in Appendix-I to this notification to the Superintendent of Central Excise, as the case may be, for this purpose and the Superintendent, may grant permission for the period in respect of which the application has been made.
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> (2) The application shall be made so as to cover a period of not less than twelve consecutive calendar months, but permission may be granted for a shorter period for reasons

> to be recorded in writing, by the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be.
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> (3) If at any time during such period the manufacturer fails to avail himself of the procedure contained in this notification, he shall, unless otherwise ordered by the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, be precluded from availing himself of such procedure for a period of six months from the date of such failure.
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> 7. **Power to condone failure to apply for special procedure**. - Notwithstanding anything contained in this notification, the Additional Commissioner, or as the case may be, the Joint Commissioner of Central Excise may, at his discretion, for reasons to be recorded in writing, and subject to such conditions as he may deem fit, apply the provisions contained in this notification to a manufacturer who has failed to avail himself of the special procedure, or to comply with any condition laid down in this notification.

The assessees/appellants are aggrieved by the confirmation of demand for differential duty for the period March to August 2013. The admitted facts of the case are that during March and April 2013 the Pollution Control Board of Rajasthan Government issued orders for the closure of manufacturing facilities of the appellants. The appellants dismantled the machinery and did not make any excisable goods during these two months. This fact is not disputed. However, the Original Authority held such non-payment of duty in terms of Notification 17/2003-CE during these two months will amount to failure of the assessee/appellants to avail the special procedure as stated in the said notification. Since such failure will attract consequences of ineligibility for payment of fixed central excise duty based on number of cold rolling machines, the same is not available to the assessee/appellant for six months. Accordingly, duty was confirmed in terms of actual clearance of the excisable goods based on value determined by the Adjudicating Authority.

7. It is very relevant to note that the assessee/appellant applied for permission to follow the special procedure in terms of the above notification. The same was granted by the jurisdictional officer of Central Excise. Nowhere in the proceedings before the Original Authority it is recorded that the assessee/appellant have opted out of the special scheme. Neither it is recorded that any of the deliberate action on the part of the assessee/appellant will indicate that they are not continuing in the said scheme. The central point of dispute is that due to forced closure of the unit by the State authorities, the assessee/ appellant could not manufacture or operate their machinery during March and April 2013. Such forced closure cannot be termed as a failure on the part of the assessee/appellant to avail the special procedure. The permission granted to the assessee/ appellant to avail the special procedure and all other circumstances which make them eligible for such concession is existing all along. The closure of units admittedly, beyond the control of the assessee/appellant, is not to be treated as a failure to comply with the provisions and conditions of the notification

during the period of forced closure of the units. The non-production of excisable goods during these two months can more appropriately termed as ceasing to work rather than failure to comply with the provisions.

8. We note that Hon'ble Rajasthan High Court in the case of **CCE, Jaipur – II vs. Jupiter Industries** reported in **2006 (04) LCX 0370**, examining the assessee's liability under compounded levy scheme during the period of non-operation of machines, held that 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. The Hon'ble High Court held that when there is an undisputed fact of no production during the material period no duty liability can be fixed on the assessee. We note that the Original Authority fell in error in distinguishing the said order of the Hon'ble High Court. He recorded that the case is not identical to the one decided by the High Court. The legal principle laid down by the Hon'ble Rajasthan High Court in **Jupiter Industries** (supra) is clearly applicable to the facts of the present case. For two months there is no operation of manufacture or production of excisable goods by the assessee/appellant. Applying the principle as annunciated by the Hon'ble Rajasthan High Court it is apparent that no procedure set out in a notification can over-rule the substantiative charging section in the Act. It is also relevant to note that while on the one side the Commissioner held that the Hon'ble Rajasthan High Court was dealing with a compounded

levy scheme under Rule 96 ZB and, hence, cannot be applied to be provision of Notification 17/2007-CE, on the other hand in the same order he relied on the decision of Hon'ble Andhra Pradesh High Court in **Sathavahana Steels & Alloys (P) Ltd. vs. Government of India** reported in **1999 (14) E.L.T. 787 (AP)** which is also on interpretation of same compounded levy scheme under Rule 96ZO and not dealing with the provision of Notification 17/2007-CE. It is apparent that the Original Authority followed dual approach in the same order without any justification.

9. We note that while the Original Authority emphasized on the provisions of para 2 (3) of the notifications, he simply brushed aside the request of the assessee/appellant to consider the circumstances of their closure and to use the powers available to the Jurisdictional JC/ADC in terms of the said notification to condone any failure and to apply the provision of said notification to determine the duty liability of the assessee/appellant. We note that the Original Authority should have examine the request of the assessee/appellant to invoke the provision of para 7 of the said notification and should have given his finding. In case he is not inclined to allow the special procedure to the assessee/appellant, reasons for the same should have been given. No such finding has been recorded by the Original Authority.

10. The issue can be looked into in another angle also. The show cause notices issued to the assessee/appellants are to demand differential duty for the period March to August 2013. For the period March and April 2013, admittedly, the assessee/appellant did not pay any duty. The rate of excise duty fixed per cold rolling machine is Rs. 40,000 per month + cess applicable. The duty demand for the whole period emanated because of assessee's non-payment of duty for March 2013 and April 2013 because of closure. Such closure was considered as failure to follow the special procedure. Suppose we consider a situation where even during such closure the assessee/appellant discharged the duty payable as per the special procedure, based on number of cold rolling machine, then the question of "failure" would not have arisen and the demand for subsequent 4 months also would not have also arisen. We have perused one of the sample demands. Assessee/appellant who has got six cold rolling machines installed has to discharge Rs. 2,47,200/- as central excise duty per month. The said assessee/appellant discharged the said duty for the period May to August 2013 as per the said rate. However, for March and April 2013 no duty was paid. This resulted in a demand of Rs. 1,32,38,252/-. If the assessee/ appellant paid the said Rs. 2,47,200/- for each month during March and April 2013 also then the whole demand will become unsustainable on the simple premise that the assessee/appellant continued to follow and discharge duty as per the special scheme. In other words, in case of payment of amount of about Rs. 5

lakhs as duty liability for two months, even though no manufacture happened during that period because of closure, the Revenue could not have taken the plea that there is a failure to follow the special procedure. Such non-payment of around Rs. 5 lakhs resulted in a demand of Rs. 1,32,38,252/- for the six months period, as stated above. We find the whole basis of demand is untenable if looked into in this angle that the assessee /appellant if paid an amount of rupees less than 5 lakhs for non-operating period he could have been construed to be following the special procedure and huge differential demand would not have arisen. As such, the presumption of the Revenue regarding "failure" of the assessee to follow the special procedure resulting in a differential demand for six months is not legally sustainable.

11. The Original Authority himself recorded that the assessee/ appellant themselves did not cease to work under the special procedure but ceased the work due to disconnection of power supply and sealing of DG set by the electricity department which was beyond control of the assessee. As such considering the facts and circumstances of the case he found that penalty under Rule 25 of Central Excise Rules, 2002 is not imposable. In such factual finding, we note that non-exercising power under para 7 is not legally sustainable. No reason or finding is recorded in this regard except that the assessee/appellant did not apply to the Jurisdictional AC/DC in terms of the said para. As already noted the Original Authority, being Commissioner of Central Excise, is competent to decide the issue as per the powers granted under

para 7, even during the course of adjudication. We note as per the facts recorded above, there is no case for denying the provisions of special scheme to the assessee/appellant.

12. In view of the above discussion and analysis, we find that the impugned orders confirming the differential duty are not legally sustainable. Accordingly, we allow these appeals filed by assessee/appellant by setting aside the impugned orders. The appeals filed by the Revenue for imposition of penalty are dismissed as the impugned orders are found to be unsustainable.

(Order pronounced in open court on 17/02/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

PK