IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Appeal No. E/1390, 1391 &1392/2007 EX[DB]

[Arising out of the common Order-In-Appeal No.03-04/2006-07 Dated 26.02.2007 passed by Com. Central Excise, Delhi-I, C.R. Building, I.P. Estate, New Delhi.]

M/s Mittal Overseas,
Sh. Sandeep Mittal, Proprietor,
A.S. Overseas. **…Appellant**

Vs.

C.C.E. Delhi-I **…Respondent**

Appearance:
Sh. Sh. A.K. Jain, Ld. Advocate for the appellant
Sh. Sh. G.R. Singh, Ld. AR for the respondent

CORAM:
Hon'ble Justice Mr. Dr. Satish Chandra, President
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Date of Hearing.23.11.2016
Date of decision.____03.03.2017__

Final Order No. 52102-52104 /2016

Per Ashok K. Arya:

1. The appellant namely Mittal Overseas(MO), Sh. Sandeep Mittal, Proprietor and A.S. Overseas (ASO) are in appeal against common order in original dated 26.02.2007 passed by Commissioner Central Excise, Delhi. Commissioner in the impugned order *inter alia* confirms the demand of Central Excise duty amounting to Rs. 1,35,42,251/-(Rs. One crore thirty five lakhs, forty two thousand, two hundred and fifty one only) along with the interest and equivalent penalty has also been imposed on the appellant No. 1, Mittal Overseas. The impugned order also confirms the recovery of Modvat/Cenvat credit of Rs. 39,17,366/- (Thirty nine lakhs, seventeen thousand, three hundred and sixty six) from M/s A. S. Overseas, the appellant no. 3 and equivalent penalty has also been imposed on the said appellant. Further, an additional penalty of Rs. 10 lakh has been imposed on Sh. Sandeep Mittal, proprietor of M/s A. S. overseas, Delhi.

1.1 The appellants have been represented by the Ld. Advocate, Sh. A.K. Jain and the Revenue has been represented by the Ld. AR, Sh. G.R.Singh.

2. The Revenue has confirmed the demand mainly on the basis of records recovered from the residential premises of S/s Sandeep Mittal, Manish Mittal. The Revenue confirms the demand based on the entries made in the said recovered records relating to production of Zink alloy ingots by Mittal overseas. Revenue confirms the demand against A. S. Overseas (ASO) after denying them the Modvat/Cenvat credit of inputs on the ground that M/s A. S. overseas did not have any facility to manufacture and sends the inputs to Mittal Overseas.

3. Based on the appeal memorandum and the written submissions the ld. Advocate for the appellants mainly submits as under:

A. Mittal Overseas:

i. Mittal Overseas (MO), a Sole Proprietary Concern of Mr. Sandeep Mittal- HUF, started manufacturing zinc alloy ingots from February 1998 onwards in a rented premises in Nangloi, Delhi with the help of a crucible of 250/- kgs, using copper, aluminum and zinc scraps and coal.

ii. On 09.11.2000, the factory of MO was visited by Central Excise officers. Everything was found in order, except that the entire available stocks of available raw materials as well as finished goods were seized.

iii. On 13.11.2000 the residential premises of Manish Mittal and Sandeep Mittal were raided which resulted in the recovery of records (6 spiral pads and 85 loose slips) belonging to the firm of Manish Mittal namely Durga Alloys dealing in zinc scrap, zinc ingots and zinc alloy ingots and also the records of MO from the respective residences of Manish and Sandeep respectively.

iv. Five statements of Manish Mittal were recorded in which he owned as well as clarified the entries from his firm's seized records.

v. However without disclosing these statements of Manish Mittal, a demand SCN was issued treating the entries of 10,91,483/- kgs (and which are in fact 2,88,163.370 kgs as certified by CA) in the records seized from Manish Mittal (owner of Durga Alloys) as being the clearances of zinc alloy ingots allegedly made from the factory of MO.

vi. On adjudication after the remand by the Tribunal, duty and penalty amounting to Rs. 1,35,42,251/- each was confirmed against MO by the CCE, apart from confiscating the seized raw materials (which the CE law does not permit) and the finished goods on the basis of retracted confessional statements of Sandeep Mittal, completely ignoring the absence of any allegation/evidence of MO having obtained any unaccounted huge quantities of raw materials (14,50,500/- kgs. of zinc, copper, aluminum, and 4,36,500/- kgs. of coke) and MO's having consumed diesel/electricity necessarily required for the manufacture of the alleged clandestine removals by MO, the capacity report given by an independent Chartered Engineer alongwith his affidavit, and also the seized private records and the information stored in the computer seized from the residence of Sandeep Mittal. CA's certificate certifying the actual sales figures ascertained from the seized records of Durga Alloys as being 2,38,163.370/- kgs. was also ignored.

vii. No raw material supplier and/or factory labour also supported the department's allegations.

B. <u>A. S. Overseas:</u>

i. A.S. Overseas (ASO), a partnership firm (Sandeep Mittal and Ajay Bansal Partners), also started manufacturing zinc alloy ingots from February, 1999 in a rented premises in Aman Puri about 2 Kms away from MO, with the help of a crucible of 500/- kgs, using copper, aluminum and zinc scraps and coking coal, after taking out a Central Excise License and also availing modvat credit.

ii. On 09.11.2000, the factory of ASO was visited by Central Excise officers, but the same was found closed/non-working. The department took a view that from April 2000 onwards ASO did not at all manufacture zinc alloy ingots but only issued sale invoices for the same. Therefore the modvat credit of Rs. 39,17,366/- availed during this period by ASO was disallowed and demanded from ASO also imposing equivalent penalty under Section 11AC, completely ignoring that there was no documentary basis to support this allegation of non-manufacture from April, 2000 onwards and that all the buyers of ASO were very much available to prove otherwise and that an amount of Rs. 5,85,000/- had also stood paid by ASO from their PLA, and that section 11AC does not apply to a case of wrong availment of modvat credit.

C. <u>Sandeep Mittal</u>

i. He has been imposed a penalty of Rs. 10,00,000/- under Rule 209A as a partner of ASO on which firm a separate penalty of Rs. 39,17,366/- has already been imposed and that too without any allegation of his having handled any goods physically which is a necessary requirement under Rule 209A as laid down by the Tribunal.

4. The ld. AR for the Revenue reiterates the findings given in the impugned order.

5. We have carefully considered the facts of the case and the submissions of all the appellants and the Revenue.

5.1 The impugned order confirms the demands and imposes penalties on three appellants namely M/s Mittal Overseas(MO), M/s A.S. Overseas (ASO) and Shri Sandeep Mittal, who is proprietor of the appellant no. 1 namely M/s Mittal Overseas and is also a partner in appellant no. 2, M/s A.S. Overseas. We shall discuss below the issues concerning these three appellants.

5.2 ***M/s Mittal Overseas (MO)*****:** the Revenue's main charge against M/s Mittal Overseas (MO) is clandestine removal for which the liability of C.Excise Duty Rs. 1,35,42,241/- exceeding the limit of SSI exemption benefit under Notification 8/2000 dated 01/2000 has been confirmed. The main evidence cited by the Revenue in support to sustain the charges against the appellant are as follows:

> **i.** The statement of Shri Sandeep Kumar Mittal, proprietor of Mittal Overseas.
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> **ii.** Entries in the loose papers and other records recovered from residential premises of Shri Manish Mittal and Shri Sandeep Mittal.

5.3 **M/s A.S. Overseas (ASO):** the charge against M/s ASO is taking modvat/cenvat credit of Rs. 39,17,367/- without receiving corresponding inputs. Main evidences cited by the Revenue to support the charge against M/s A.S. Overseas are:

> **i.** Statement of Shri Sandeep Kumar Mittal, the partner of M/s A. S. Ovearseas and proprietor of Mittal Overseas *inter alia* saying that there was no provision of electricity, water and telephone in A.S. Overseas.
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> **ii.** Shri Sandeep Mittal's statement is that all the raw materials purchased by all with name of M/s A.S. Overseas was received at M/s Mittal Overseas only.

iii. Shri Mittal's statement that entire production pertaining to A.S. Overseas were cleared on the invoices of Mittal Overseas.

iv. Sandeep Mittal's statement admitting diversion of raw material to M.O., purchased on account of ASO.

v. Shri Mittal's statement that Central Excise department was not informed about closure of manufacturing activity at M/s A.S. Overseas since April 2000.

vi. Transporter Shri Kuldeep Singh's statement that after March 2000 there was no loading/transporting of goods from M/s A.S. Overseas.

5.4 Shri Sandeep Mittal: Shri Sandeep Mittal has been adjudged the mastermind behind the evasion of duty of Central Excise of Rs.1,35,42,241.00 and wrong availment of Modvat/Cenvat credit of Rs.39,17,367.00 respectively by M/s MO and M/s ASO, where there are *inter alia* evidences against Shri Sandeep Mittal in the form of his own statements recorded on different dates and Panchnamas drawn on 09.11.2000 and on 13.11.2000. The charges against Sandeep Mittal are that in the capacity of **proprietor of Mittal Overseas (MO)** and also as **partner of M/s A.S. Overseas (ASO),** he has evaded excise duty. So, he has been imposed the penalty of Rs.10,00,000/-(Rupees ten lakhs) as partner of M/s A.S. Overseas under the law of Cerntral Excise.

6. After careful consideration of the evidences on record, we are of the considered view that the appellants namely M/s Mittal Overseas, M/s A.S. Overseas and Shri Sandeep Mittal do not have sufficient force in their pleadings submitted in their appeal memoranda, written submissions and the pleadings put forward by their Ld. Advocate. It has come out clearly that the appellant M/s A.S. Overseas were not carrying out any manufacturing activity in their factory. There is a Panchnama drawn to this effect on 09.11.2000 and Shri Sandeep Mittal, the appellant No. 3 also admits the same in his statement dated 9.11.2000.

6.1 Shri Sandeep Mittal in his statement also accepts that there has not been any other employee, other than partner, Shri Rajesh Goyal in the firm namely M/s A.S. Overseas, Delhi. When there is no employee working for the firm M/s A.S. Overseas, how can there could be any activity of manufacturing conducted by the said firm. In this regard we are in agreement with the findings of the Commissioner given in the impugned order in para 45 as under:

> 45. I have seen the Panchnama dated 09.11.2000 drawn at the premises of ASO. In the said Panchnama it has clearly been mentioned that the factory was closed. The locks were opened by Shri Sandeep Mittal. It is further recorded therein that he himself informed the visiting officers and the Panch Witnesses that no manufacturing activity was being carried out; that the furnace and dies were rusted; there was no stock of raw materials or finished goods. There was no office or furniture in the premises. The Panchnama has also been signed by Shri Sandeep Mittal. Further, these facts were duly corroborated by Shri Sandeep Mittal in his statement dated 09.11.2000. He has admitted that the factory of ASO was not functioning from April, 2000. He also stated that besides himself and Shri Rajesh Goyal, another partner in the firm, there was no other employee. This Statement was recorded at his premises and was not retracted for several days. The first retraction, as submitted by Shri Sandeep Mittal in their defence reply, is dated 14.11.2000 and relates to developments allegedly having taken place on the previous day. Therefore, the evidentiary value of this statement cannot be contested. Indeed there is sanctity and legal authority attached to the evidentiary value of a Panchnama and a statement recorded under Section 14 of the Central Excise Act, 1944 and mere and bland retraction cannot be allowed to erode that otherwise the

> whole architecture of quasi-judicial system will take an irreparable knock.
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> The conclusions thus emerge are that the factory of ASO was non-functional since April, 2000 and there were no employees in the firm besides the two partners.

6.2 Further, the Commissioner in the impugned order based on the Panchnama drawn on 09.11.2000, statements recorded of Shri Sandeep Mittal, partner of the firm M/s A.S. Overseas and based on private records namely notepads, kachcha pads and loose slips concluds in para 58 of the order that-

> *"M/s A.S. Overseas wrongly availed Modvat/Cenvat credit during period April 2000 to October 2000 amounting to Rs. 39,17,366/- since they had not manufactured any excisable goods in their factory during the material period."*

7. Considering the evidences mentioned in paras 48 and 49 of the impugned order and the discussions made in the impugned order in the discussions and findings part (in para 41 and onwards of the impugned order), we are in agreement with the impugned order in respect of the confirmation of charges and imposition of penalty against the appellant, M/s A.S. Overseas.

7.1 The Commissioner in the impugned order in respect of charges against the appellant namely M/s Mittal Overseas in its para 63 observes as under:

> 63. I now come to the aspect of extending benefit of exemption under Notification No. 8/2002-CE dated 01.03.2000 to MO and claimed by the noticee. I find that the normal tariff

rate during the year 2000-01 was 16% Ad-val. And ASO have paid duty on this tariff rate in the month of April, 2000 to October, 2000 as seen from their invoices and monthly returns submitted to the department. It, therefore, follows that they opted for payment of full rate of duty as provided in para 2(i) of the same. The said para is reproduced below:-

"2(i) A manufacturer has the option not to avail the exemption (i) contained in this notification and instead pay the normal rate of duty on the goods cleared by him. Such option shall be exercised before effecting his first clearances at the normal rate of duty. Such option shall not be withdrawn during the remaining part of the financial year."

As is evident from the foregoing ASO did not manufacture the goods at their premises and instead the same were manufactured at the premises of MO. The goods have not been manufactured as a matter of job work and as discussed herein above have been manufactured and removed clandestinely without payment of duty. Since the goods were manufactured at the premises of MO the duty liability is to be borne by them. In view of the fact that ASO had exercised the option supra the exemption on these goods is not admissible in view of overall scheme and conditions of the exemption Notification supra.

7.2 The impugned order further in case of the appellants M/s Mittal Overseas and M/s AMO, in paras 67 & 68, based on the evidences *inter alia* observes as under:

67. In view of the above, I come to the finding that the said M/s Mittal Overseas and M/s A.S. Overseas indulged in clandestine clearances and evaded payment of Central Excise duty as alleged in the Show Cause Notice. The findings for invoking extended period under proviso to Section 11A, liability to interest under Section 11AB and penalty under Section 11AC of the Central Excise Act, 1944 have already been given supra.

68. I now come to the case of goods detained and subsequently seized for which Show Cause Notice was issued on 02.05.2001.

The findings given for the duty demand for the past clearances mutatis-mutandis apply to this case. It is pertinent to mention that the notices (MO) in this case also deliberately did not submit the written reply. They were provided as many as seven opportunities by way of Personal Hearings but they did not appear. Their motive has already been discussed here in above.

7.3 In the case of Shri Sandeep Mittal, who is the proprietor of M/s Mittal Overseas and the partner in ASO, it is very clear that he knowingly and deliberately indulged in facilitation of evasion of duty and wrong availment of Modvat/Cenvat credit by the appellants, namely, Mittal Overseas and A.S. Overseas. In this regard the impugned order in para 62 observes as under:

> 62. I also find that Shri Sandeep Mittal is Proprietor in MO and the active Partner in ASO. Thus a single person was controlling the affairs of both the units. He alone masterminded the entire game plan of procuring raw material in the name of ASO and diverting the same to MO. I also find that MO was working under exemption under Notification no. 8/2000 and ASO was a unit registered unit sic with the department. The manufacturing of goods to be clandestinely removed was not done at ASO as there was possibility of getting caught. Furthermore, he has knowingly hoodwinked the department, and indulged in diversion of raw material and removal of goods, without payment of duty, which goods he knew were liable to confiscation. Therefore, he is liable to a penalty under Rule 173Q of the Central Excise Rules, 1944 read with Rule 26 of the Central Excise Rules, 2002. Since MO is a proprietorship firm, no separate penalty can be imposed on the proprietor. However, as partner of ASO he liable to penalty.

Based on our earlier discussions and for the reasons mentioned in the impugned order, we agree with the above findings of the impugned order. Therefore, the charges against Shri Sandep Mittal are sustained.

7.3.1 However, considering the totality of the facts and circumstances, the penalty imposed by the impugned order on the appellant Shri Sandeep Mittal of Rs. 10, 00,000/- (Rs. Ten lakh) is reduced to Rs. 1,00,000/- (Rs. One lakh only), when the appellant namely M/s Mittal Overseas, New Delhi and M/s A.S. Overseas, where Shri Sandeep

Mittal is proprietor and active partner, have been imposed equivalent penalties.

8. In the light of above discussions the impugned order is sustained except for the reduction in penalty from Rs. 10,00,000/- (Rs. Ten lakh) to Rs. 1,00,000/- (Rs. One lakh only) imposed on the appellant Shri Sandeep Mittal. In the result the appeals filed by M/s Mittal Overseas and M/s A.S. Overseas are rejected as without merits and the appeal filed by Shri Sandeep Mittal is partly allowed in above terms.

[Pronounced in open Court on0 3.03.2017__]

(Justice (Dr.) Satish Chandra)
President

(Ashok K. Arya)
Member (Technical)

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