**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. I**

**<u>DATE OF HEARING : 01/01/2018.</u>**
**<u>DATE OF DECISION : 13/02/2018.</u>**

**Excise Appeals No. 2001-2002 of 2012 and 51004 of 2015**

[Arising out of the Order-in-Appeal No. IND/CEX/000/APP/95-96/ 2012 dated 09/04/2012 and Order-in-Original No. 091/COMMR/ IND/CEX/2014 dated 15/12/2014 both passed by The Commissioner (Appeals), Central Excise, Customs & Service Tax, Indore.]

M/s Mittal Corps Limited ] Appellants
Shri Ashok Mishra, Authorized Signatory ]

Versus

CCE & ST, Indore Respondent

**<u>Appearance</u>**

Shri Hemant Bajaj, Advocate - for the appellants.

Shri R.K. Mishra, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
**Hon'ble Shri B. Ravichandran, Member (Technical)**

Final Order No. 50615-50617/2018 Dated : 13/02/2018

**<u>Per. B. Ravichandran</u> :-**

These three appeals are involving interconnected issues of Central Excise duty liability of the main appellant and penalties imposed on all the appellants.

2. The brief facts of the case are that Central Excise officers visited the factory premises of the main appellant on 13/10/2009 and conducted physical verification of the goods lying in stock and also verified the records maintained by the main appellant. Further investigations were conducted by recording statements of connected persons and also scrutiny of certain private records recovered during the visit. On completion of the investigation, proceedings were initiated against the appellants for demanding Central Excise duty on unaccounted stock/clearances of excisable goods, confiscation of unaccounted stock and for imposition of penalties under various provisions of Central Excise Act, 1944 and rules made thereunder.

3. Appeal numbers E/2001/2012 and E/2002/2012 is against order-in-appeal dated 09/04/2012 of Commissioner (Appeals-I), Indore. In this proceedings, the lower authorities held that there was excess unaccounted stock of stainless flats and MS billets valued at Rs. 2,05,56,680/- and there is a shortage of 262.784 M.T. of stainless billets. The lower authorities held that the excess unaccounted goods are liable for confiscation and accordingly upon confiscation of the goods, the same were allowed to be redeemed on payment of fine of Rs. 1,60,00,000/-. Penalties of Rs. 75,00,000/- and Rs. 50,00,000/- were imposed on the main appellant and Shri Ashok Mishra, Authorized Signatory of the main appellant under Rule 25/26 of the Central Excise Rules, 2002 respectively.

4. Elaborating the grounds of appeals against this proceeding, the learned Counsel for the appellants submitted that the goods in dispute are not liable for confiscation and no penalty can be imposed in the present case. It is submitted that the impugned order partly relied on evidence available on record including statements and documents produced by the appellant during investigation. The production slips for 11/10/2009 and 12/10/2009 were not available at the time of visit by officers on 13/10/2009. The records could not be updated as the concerned employees left the factory on completion of work. The presumption of the Department that no production took on these two days is not correct.

5. The stock position of SS flats on 13/10/2009 during the visit of officers is 820.060 M.T. The panchnama recorded stock of 819.240 M.T. Thus, there is hardly a difference of 1.820 M.T. Similarly, for MS billets, the difference was only 3.940 M.T. There was no excess stock and the delay in updating the statutory records cannot lead to the allegation of unaccounted stock. Thus, the learned Counsel submitted that there is no case for confiscation or penalty.

6. The learned AR reiterated the findings of the lower authorities. He submitted that when the officers visited the factory of the appellant on 13/10/2009, they verified the physical stock of available excisable goods. When the same was cross-

verified with the statutory records, there were substantial differences. The unit of the appellant was working round the clock and the reason adduced for non-availability of production slip and updation of RG-1 register is not acceptable.

7. We have heard both the sides and perused the appeal record. In these two appeals, the point of dispute is unaccounted stock of excisable goods available in the factory premises and irregular maintenance of records.

8. The admitted facts are that during the visit of the officers on 13/10/2009, there was more than 800 M.T. of SS flats found in the premises which were not accounted in the statutory records. The value of the goods were more than Rs. 2,00,00,000/-. Admittedly, the appellant's factory worked round the clock and had a standard process of accounting based on production slips on shift basis and having internal control mechanism for the same. The reason adduced by the appellant for non-accountal of such huge quantities of such manufactured products is not convincing. Further, the claim of the appellant that the stock verification was done by eye-estimation is also not acceptable. The panchnama prepared in the presence of witnesses was admitted to be true and correct by the authorized person of the appellant without any protest. In fact, the only defence of the appellant to reconcile the difference between the actual stock and the accounted stock is that production for the

days 11th and 12th October 2009 could not be entered in the statutory records. We are in agreement with the lower authorities that the appellants could not come up with any admissible reason for non-accountal of production claimed to have been made on 11th and 12th October 2009 till the visit of the officers on 13/10/2009. Even if the statutory records were not updated for any reason, the appellant could have produced the production slip or any other internal document to satisfactorily explain the difference. The details were presented much later. As such, we find no reason to differ with the finding of the lower authorities regarding confiscability of good and penalty on the appellants.

9. However, we note the violation under Rule 25 was limited to only non-accountal of excisable goods manufactured and stored by the main appellant and there was no allegation of clandestine removal. We note that the redemption fine imposed for redeeming the confiscated goods is on the higher side. A fine of Rs. 1,10,00,000/- on the value of Rs. 2,05,00,000/- is certainly on the higher side. We note that the said redemption fine can be reasonably fixed at 15% of value of goods. Accordingly, the redemption fine of Rs. 30,00,000/- will meet the end of justice. The penalties of Rs. 75,00,000/- imposed on the main appellant is also on the higher side. Considering the nature of offence alleged against the main appellant, we find the same as excessive, disproportionate to the contravention alleged. The same is ordered to be reduced to Rs. 10,00,000/-.

10. Regarding penalty of Rs. 50,00,000/- imposed on Shri Ashok Mishra, we note that the lower authorities did not establish the availability of the ingredients under Rule 26 for imposing such a huge penalty. Penalty under Rule 26 is leviable when any person who acquires possession of or in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation. The said rule also talks about penalty on any person who issues any other document or abets in making such document based on which ineligible benefit of credit is passed on to another person. We note that the main appellant is a limited company. The second appellant is an employee of the said company. He acted as a paid employee with no pecuniary benefit in the non-accountal or evasion of central excise duty. We hold that the Tribunal in various cases have been repeatedly holding that a paid employee acting in discharge of his duty as per directions of the controlling official cannot be held liable to penalty unless a specific role with a malafide intend for personal gain can be brought out with the evidences. No such evidence is brought in the present case. In fact, the Original Authority simply records that the second appellant is looking after day-to-day affairs of the main appellant and hence, rendered himself liable to penalty under Rule 26. We find such summary finding is without support of law. Accordingly, we set aside the penalty imposed on the second appellant Shri Ashok Mishra.

11. Appeal No. E/51004 of 2015 is against original order dated 15/12/2014 of Commissioner of Central Excise, Indore. In this proceeding, the allegation against the main appellant is that they have not accounted for actual production of SS billets in the stock register; have suppressed the actual production; have cleared 262.78 M.T. of SS billets found short without payment of duty. The proceeding against the main appellant concluded by the impugned order. The Original Authority confirmed Central Excise duty of Rs. 6,13,114/- on SS billets found short during physical verification on 13/10/2009. A further duty of Rs. 59,35,837/- was confirmed on the unaccounted production and clearance of SS flats and SS billets by the main appellant. Penalty of Rs. 65,48,951/- was imposed on the appellant under Section 11AC of the Central Excise Act, 1944.

12. The learned Counsel contesting the findings of the Original Authority submitted that on the first point of shortage of SS billets it is to be noted that the SS billets were used for the manufacture of SS flats by the appellant themselves and were not cleared clandestinely. The production slip for 11$^{th}$ and 12$^{th}$ October 2009 could not be produced as the same was not available with Shri Ashok Mishra. In the absence of any corroborative evidence of clandestine removal duty demand cannot be made only on the basis of shortage of stock found. Even otherwise the physical verification of stock was not made properly and it is only an estimation.

13. Regarding unaccounted production and clearance of SS billets, the learned Counsel submitted that the reliance placed by the Original Authority on the report to Direction and daily analysis of production report for the period 01/09/2009 to 11/09/2009 is not proper. The Original Authority selectively relied on the private documents and did not give consideration for the difference due to cutting loss. The Revenue relied on the fact that on many days the production quantity shown in the private record tallied exactly with the RG-1 register and wherever it is not tallied the private records are relied on. The learned Counsel submitted that the report of Shri Desai cannot be given much importance as no corroborative evidence to support the case of unaccounted production and clearance has been placed by the Revenue.

14. The learned AR opposing the appeal submitted that the Original Authority examined all the contentions of the appellant and arrived on his conclusion based on evidences.

15. Regarding shortage of SS billets, we note that the defence of the appellant relies on the documents of production and use for 11th and 12th October 2009. As already discussed in respect of the other appeals, the production or usage of excisable goods on these two days has not been categorically established before the visiting officers on 13/10/2009. This aspect has been discussed by us while upholding the finding on irregularity in the statutory

records. As such, the documents and supports purported to establish the production and captive use on these two days cannot be accepted on the face value. As noted by the Original Authority captive consumption of SS billets on 12/10/2009 has already been considered while accounting for the shortage on which demand is confirmed by the Original Authority. In the absence of any contrary evidence, we note that the findings of the lower authority cannot be interfere with. While in principle, we accept that the case of clandestine removal cannot be upheld only on the basis of shortage of excisable goods, it is imperative for the assessee to explain satisfactorily the non-availability of excisable goods which were produced and accounted for in their records. In the absence of satisfactorily explanation an inescapable conclusion as drawn by the lower authority regarding non-duty paid clearance of such accounted goods cannot be contested.

16. Regarding unaccounted clearance of SS billets and flats, we note that the Original Authority relied on a private note book maintained by Shri Desai, Chief Executive of the main appellant. Admittedly, the entries therein were hand written by him with elaborate details of production for the day, grade of billets, number of heats, average monthly production etc. The said report is meant for Director of the company. We are not convinced with the submission of the appellant regarding lack of authenticity of the records maintained by the Chief Executive in

his own hand writing. In fact, this aspect has been examined in detail by the Original Authority who arrived at his conclusion that the records maintained by Shri Desai are credible and are admissible as evidence to arrive at his conclusion. While noting that detailed evidence regarding actual clearance, receipt of money, transport details were not available in the present case, it cannot be denied that evidence of unaccounted excess production has been recorded and the same could not be rebutted effectively by the appellant. Shri Desai has also accepted the production as reported by him. When such is the case, the burden is on the appellant to establish that the said goods were never in existence or not clandestinely cleared. In this connection, it will be relevant to note the principle laid down by the Hon'ble Supreme Court in **CC, Madras and others vs. D. Bhoormull – 1983 (13) E.L.T. 1546 (S.C.)**. The Apex court observed that it is extremely difficult, if not absolutely impossible for the prosecution to prove the facts which are especially within the knowledge of the opponent or the accused does not obliged to approve them as parts of its primary burden. Considering the overall facts and evidences examined by the lower authority, we are of the considered view that the same cannot be varied by us in the absence of concrete contrary evidence. Accordingly, the appeal filed by the appellant is dismissed.

17. To sum up, appeal No. E/2001/2012 is partly allowed to the extent of reducing the redemption fine and penalty, as noted

above. Appeal No. E/2002/2012 is allowed and appeal No. E/51004/2015 is dismissed.

(Order pronounced in open court on 13/02/2018.)

**(Justice Dr. Satish Chandra)**
**President**

**(B. Ravichandran)**
**Member (Technical)**

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