IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT – IV

Excise Appeal No. E/51152/2018 [DB]

[Arising out of Order-in-Original No. RPR-EXCUS-000-COM-CE-013-015-2018 dated 23/01/2018 passed by the Commissioner of CGST & Central Excise-Raipur]

Jindal Steel & Power Ltd **...Appellant**

Vs.

C.C.E. & S.T.-Raipur **...Respondent**

Present for the Appellant : Mr. Amit Jain & Rahul Tangri,CA
Present for the Respondent: Mr. H.C. Saini, DR

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing : 11.09.2018
Pronounced on : _25/10/2018_

FINAL ORDER NO. _53158/2018_

PER: RACHNA GUPTA

Present is an Appeal against the Order of Principal Commissioner No. 1546 dated 23.01.2018. The facts relevant for the purpose are that the appellants i.e. M/s Jindal Steel & Power Ltd., Raigarh are engaged in the manufacture of various excisable goods and have been availing cenvat credit on duty paid inputs, capital goods and on the tax paid input services under the provisions of Cenvat Credit Rules, 2004 (CCR, 2004). A special audit under Section 14AA of Central Excise Act, 1944 was conducted by the Department. It was noticed that the appellants were clearing the excisable goods without issuing invoices as required under Rule 11 of Central Excise Rules, 2002. The excisable goods were rather got cleared on the internal document named as gate pass without preparing any commercial invoice or any excise invoice for such removal. The appellant therefore was alleged to be liable to pay Central Excise duty amounting to Rs. 2,31,77,659/- on the goods cleared without payment of Central Excise duty under unauthorised documents. The said demand was proposed vide the Show Cause Notice No. 1635 dated 14.06.2016. Subsequent Show Cause Notices dated 10.01.2017 and 21.02.2017 were issued proposing the demand for the total period w.e.f. June, 2011 to June, 2016. The Show Cause Notice in addition proposed the interest at the appropriate rate and the proportionate penalties. The said Show Cause Notices were adjudicated vide the Order under challenge vide which the demand for an amount of Rs. 1,05,61,836/- was dropped however, still a demand for Rs. 1,79,67,683/- in respect of clearances of goods under gate pass cum Challan was confirmed alongwith the impugned interest and the penalty. Being aggrieved is the present Appeal.

2. We have heard Mr. Amit Jain & Mr. Rahul Tangri, Ld. Advocates for the appellant and Mr. H.C. Saini, Ld. DR for the Department.

3. It is submitted on behalf of the appellant that the Principal Commissioner has not considered the documents produced by the appellants and has passed the Order merely based on assumptions and conjectures. Ld. Counsel has relied upon the following to impress upon that the demand based on assumption in absence of any positive evidence is not sustainable as far as the allegations of clandestine removal are concerned:

- **Oudh Sugar Mills Ltd. Vs. Union of India 1978 (2) ELT (J172) (S.C.)**
- **CCE, Delhi Vs. Biharji Manufacturing Co. Pvt. Ltd. 2015 (323) E.L.T. 106 (Delhi)** affirmed by Supreme Court in **Commissioner Vs. Biharji Manufacturing Co. Pvt. Ltd. 2015 (323) E.L.T. A23 (S.C.)**
- **CC, CCE & ST, Ghaziabad Vs. Auto Gollon Industries Ltd. 2018 (360) E.L.T. 29 (All.)**

There is no evidence that the goods removed under the cover of gate pass cum challan were manufactured by the appellants and were liable to Central Excise duty in the hands of the appellants. Confirmation of demand is alleged to be wrong. The Adjudicating Authority below has also confirmed the demand qua the goods with respect to which no cenvat credit was availed by the appellants. Such goods were actually removed as waste and scrap. The demand therefore is not sustainable. Otherwise also, the onus of proving that assesse has availed cenvat credit is on the Department. The Department has miserably failed to discharge the said onus. The Order still confirming the demand is therefore liable to be set aside. To this effect, the Ld. Counsel has relied upon the following authorities:

- **CC Vs. Auto Ignition Ltd, 2008 (226) E.L.T. 14 (S.C.)**
- **Union of India Vs. Hindustan Zinc Ltd. 2008 (225) E.L.T. 50 (Raj.)**
- **Triveni Engg. & Industries Ltd. Vs. CCE, Meerut 2010 (253) E.L.T. 311 (Tri. – Delhi)**.

With these submissions the Ld. Counsel has prayed for the Order confirming the partial demand of the Show Cause Notice to be set aside and for Appeal to be allowed.

4. While rebutting these arguments Ld. DR has submitted that the Principle Commissioner has discussed in detail all categories of the goods cleared by the appellants and it is on the basis of the speaking Order that certain demand has already been dropped. The demand confirmed is impressed to have no infirmity. Appeal is prayed to be dismissed.

5. After hearing both the parties and perusing the entire record, we are of the opinion that vide the impugned Show Cause Notices, the appellant was observed to have cleared following kinds of goods in addition to the goods manufactured by the appellants:-

(a) Non-cenvat availed goods (including waste & scrap obtained on dismantling of factory shed) cleared from the factory,

(b) Goods received for job-work,

(c) Goods sent for job-work,

(d) Transfer of goods within the same factory premises, from one division/ plant to another,

(e) Capital goods imported under EPCG sent for repairs.

6. During the special audit as was ordered under Section 14AA of the Excise Act, the Department noticed about appellants' clearing the above said goods without cover of excise invoices, resultantly, raised the impugned demand. Hence, the moot question to be adjudicated is as to whether the aforesaid goods are excisable or not whereupon the appellants were entitled to claim the cenvat credit. A part of the demand has already been dropped vide the Order under challenge. The Department is not in Appeal. Otherwise also, the demand as has been dropped is opined to have no

infirmity. The Order under challenge to that extent is held to have attained finality.

7. With respect to the demand confirmed vide the said Order, it is observed and held as follows:-

(i) **Demand on the goods as that of MS angle, MS beam, etc. used by the appellant for construction of civil structure foundation**

The adjudicating authority below has confirmed this demand on the ground that these items were not the wear and tear of factory shed. However, there is an apparent admission that the goods like MS angles, MS beams, etc. using which the civil structures like foundations and factory shed were made and that these structures were removed after dismantling those civil structures. There is the Chartered Accountant's certificate on the record which was produced before the adjudicating authority below as well. Perusal thereof shows that the appellant has not availed the cenvat credit on those MS angles, MS beams, etc. Otherwise also, these goods were not manufactured by the appellant and as such were not excisable in his hands. In the given circumstances, it was the onus of the Department to prove that the goods were manufactured by the appellant or that the appellant has availed cenvat credit thereupon but there is no such evidence on record. The Hon'ble Apex Court in Auto Ignition Ltd (supra) has held that onus of proof to availment of credit by the assesse lies on the Revenue and the demand in absence of said proof is not sustainable. It being an apparent fact that these goods were removed after being dismantled i.e. they were not treated as generated during the course of manufacture. It is appellants case that no cenvat credit was also availed on these goods. Department could not have proved otherwise. It becomes clear that note 8(a) of Section XV of Central Excise Tariff is not relevant to such operations and such items are not liable to duty even in accordance of Section 2(f) and Section 3 of the Central Excise Act, 1944. The Order confirming this demand is therefore liable to be set aside.

(ii) **<u>The goods sent and received by the appellant to/for job-work</u>**

The said demand has been confirmed vide the Order under challenge for want of evidence for the goods to have been received back/ sent back within 180 days of re-sending / receiving them for the job-work. Perusal of record shows that it bears the copies of challans from which it is very much evident that the goods were received back within 180 days after getting the job-work. With respect to the goods received by the appellant from principal manufacturers for job-work, Notification No. 214/86 comes to the appellant's rescue by virtue of which he is not liable for payment of duty on the jobworked goods. Otherwise also, the CA certificate is simultaneously certifying the factum of sending/ receiving goods on/for job-work within 180 days thereof. We are of the opinion that these documents are sufficient to hold that the demand has wrongly been confirmed by the authority below and thus is liable to be set aside.

(iii) <u>The capital goods imported under EPCG Licences which were sent out for repairs to JSPL, Raigarh on returnable basis</u>

This demand has also been confirmed for want of evidence of receiving the imported capital goods after repair and of non availment of cenvat credit on the said goods. However, perusal of record shows that challan for clearance of goods and EPCG license are enclosed herewith alongwith the already discussed CA certificate. Non appreciation of these documents on part of the Adjudicating Authority below is highly unappreciable. The documents once looked into, entitles the appellant as being free from the alleged liability. The demand is therefore set aside.

(iv) <u>Goods returned to the suppliers due to discrepancy or defect without availing cenvat credit</u>

Again the demand has been confirmed for want of any evidence. The CA certificate as repeatedly been impressed upon by the appellant even before the Adjudicating Authority and despite being very much available on the record is a sufficient document to prove the factum of non availment of cenvat credit on such goods and return thereof to the suppliers. There is otherwise no evidence of the Department to prove that these goods were otherwise excisable in the hands of the appellants. In absence of discharge of onus on part of the Department with the simultaneous presence of cogent evidence by the appellant which has miserably been unnoticed / ignored by the Adjudicating Authority below, we are of the opinion that the authority below has committed a blatant error while confirming the remaining demand as well. The goods for which demand has been confirmed though were cleared on the gate passes but there is ample evidence on record to show that these goods were not manufactured by the appellant and were such on which appellant had not availed any cenvat credit. Confirmation of demand is therefore opined unsustainable.

7. The Order under challenge is therefore set aside. Appeal stands allowed.

[Pronounced in the open Court on 25/10/2018]

(C.L. MAHAR) **(RACHNA GUPTA)**
MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**

D.J.