

IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066  
BENCH-SM

COURT - IV

**Excise Appeal Nos. E/50996/2018 [SM]**

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-284-17-18 dated 12/10/2017 passed by the Commissioner (Appeals), Central Excise & Service Tax, Raipur]

**Jitendra Somani**

**...Appellant**

**Vs.**

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

**...Respondent**

**Excise Appeal Nos. E/50997/2018 [SM]**

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-282-17-18 dated 12/10/2017 passed by the Commissioner (Appeals), Central Excise, Raipur]

**Baldev Alloys Pvt Ltd**

**...Appellant**

**Vs.**

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

**...Respondent**

**Excise Appeal Nos. E/51337/2018 [SM]**

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-283-17-18 dated 12/10/2017 passed by the Commissioner (Appeals), Central Excise, Raipur]

**Rajeev Kapoor**

**...Appellant**

**Vs.**

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

**...Respondent**

Present for the Appellant : Ms. Rinki Arora &  
Mr. Himanshu Bansal, Advocates

Present for the Respondent: Mr. S. N. Nunthuk & K. Poddar, DRs

**Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

**Date of Hearing/Decision: 03.12.2018**

**FINAL ORDER NO. 53394-53396 / 2018**

**PER: RACHNA GUPTA**

The present Order disposes of 3 Appeals originating out of the common Order-in-Appeals and pertaining to the Company and two Directors of the same Company.

2. Facts relevant for the purpose are that a Show Cause Notice No. 1164 dated 14.01.2016 was served upon the appellant Company

M/s Baldev Alloys Pvt. Ltd. on the basis of the intelligence gathered by the Department that the Company is engaged in procurement of unaccounted raw materials as well as clandestine manufacturing and removal of the finished goods/ MS billets. Following recoveries from assessee were proposed:

- (i) Central Excise duty of Rs. 25,52,486/- on the alleged quantities; removal of finished goods of 223.657 mt of sponge iron with the proposal of appropriating the said amount of Central Excise duty already paid through their cenvat ledger entry dated 14.12.2013 to be appropriated.
- (ii) An amount of Rs. 8,43,764/- equal to the proportionate cenvat credit involved in the quantities clandestine removal of inputs/ raw materials i.e. 2625.230 mt of coal and 151.495 mt of pig iron was proposed to be recovered with the proposal of appropriation of the said amount as shown in the debit entry dated 14.12.2013.
- (iii) An amount of Rs. 15,80,355/- equal to the proportionately cenvat credit involved in the short receipt of 16887.830 mt of duty paid coal was proposed to be recovered alongwith the proposal of appropriation of Rs. 10,73,750/- as was already paid by the appellant through their cenvat credit account vide the same debit entry of 14.12.2013.
- (iv) The said recoveries were proposed alongwith the interest at the appropriate rate and the penalties imposed under Section 11AC(1)(C) of Central Excise Act, 1944 (hereinafter referred to as the Act) and also under Rule 15(2) of the Cenvat Credit Rules, 2004 (hereinafter referred to as CCR 2004) read with Section 11AC of the Act.

The entire proposal was confirmed by Deputy Commissioner vide his Order bearing No. 15-41 dated 14/15.03.2017 alongwith the imposition of penalty of Rs. 49,76,605/- upon the Company and the penalty of Rs. 2 lakh each upon the Directors thereof (the appellants of the remaining two Appeals) was imposed. Being aggrieved Appeal was preferred before Commissioner(Appeals) who vide the impugned Order has confirmed the same. Being aggrieved the Company as well as its Directors are before this Tribunal.

3. I have heard Ms. Rinki Arora, Ld. Advocate for the appellant and Mr. K. Poddar, Ld. DR for the Department.

4. While submitting on behalf of the appellant Ld. Counsel has conceded for the confirmation of the total amount of Central Excise duty i.e. of Rs. 33,96,250/- (25,52,486 + 8,43,764) and that the same has already been paid. The Appeal has mainly been confined qua disallowing the availment of cenvat credit involved on short received quantity of 16887.830 mt of coal and the penalties imposed upon the Company and both the Directors thereof that though the Central Excise duty has not been contested here and has already been deposited but the fact remains is that the clandestine removal of the final product has been alleged merely on the basis of shortages detected at the time of visit of the officers and by observing that the fact of clandestine removal stands accepted by the partner of the unit and that there has been no retraction of the statement. However there is no evidence to prove the clandestine removal. The stock verification has been carried out in a presumption manner as is apparent from the Panchnama, the same is not admissible. Above all mere shortage of finished goods without evidence of clandestine removal cannot lead to inference of evasion of duty. The penalty imposed is therefore not sustainable. Ld. Counsel has relied upon the decision of Allahabad High Court in the case of **C.C.E Kanpur Vs. Meenakshi Castings 2011 (274) E.L.T. 180 (Allahabad)** and has also relied upon the decision of this Tribunal in the case **C.C.E. Meerut Vs. TST Pipes Ltd. 2014 (309) ELT 560 (Tri.-Del.)**. With respect to availment of cenvat credit it was held that factum of loss of iron ore during the process of washing of coal in the present case has not been considered. When the process is the part of manufacturing process cannot be denied the cenvat credit. Decision of Hon'ble Supreme Court in the case of

**CCE Chandigarh Vs. Pepsi Foods Ltd. 2010 (260) ELT 481(S.C.)** has also been relied upon. Finally submitting about the penalties as imposed upon the Company as well as the Directors, it is submitted that when the entire duty amount was deposited well before the issuance of SCN, the assessee were liable to pay only 25% of duty amount as penalty. The penalty amount as imposed upon Company is accordingly prayed to be reduced to 25% thereof. However, with respect of Directors, it is submitted that since no *mensrea* to evade duty is apparent on record, the penalty imposed upon them is also liable to be set aside. Appeal is prayed to be disposed of accordingly.

5. Ld. DR while rebutting these arguments has submitted that Commissioner(Appeals) has confirmed the Order of original adjudicating authority relying upon the entire evidence on record including the statements of various person recorded. Above all, the duty liability to the extent of Rs. 33,96,250/- was accepted by the appellant themselves. The same has rightly been confirmed. Similarly, the cenvat credit has also been rightly denied for non observance of appropriate procedure of sending of inputs to the job workers by the appellants. With respect to the imposition of penalty it is submitted that allegations of clandestine removal are the serious allegations. Once, the Central Excise duty on the observed shortage has been confirmed, the allegations of clandestine removal has been confirmed that too on the basis of appellants own admission, no more evidence is required for proving the intent of the appellant to evade the duty, no question of doing away or reducing the penalty as prayed by appellant at all arises. Appeal is accordingly prayed to be dismissed. It is submitted that Commissioner(Appeals) has rightly relied upon the decision of Supreme Court in the case of

**Union of India V. Dharmendra Textile Processors 2008 (231)****ELT 3 (SC)**

6. After hearing both the parties I observe and hold as follows:

In view of the amount of entire Central Excise duty to have already been paid and to have not been demanded back, the scope of the SCN has been reduced to adjudicate about availment of cenvat credit on the raw material and about imposition of penalty of equal amount as that of central excise duty on the Company and penalty of Rs. 2 Lakh each on 2 of the Directors thereof.

As far as the availment of cenvat credit is concerned, I observed that the appellant was sending raw coal to washeries for removal of impurities before being used in the manufacture of MS billets, the final product of the appellant. The job worker was discharging the service tax on the entire value. Department has denied the cenvat credit holding that the entire raw material has not been used in the final product as some part thereof being lost. The cenvat credit availment to the extent of loss has been denied. I observed that Department has conceded that had the washing process been undertaken by the appellant in its own factory, the entire credit would be available. Accordingly, I am of the opinion that denial of credit on raw coal is unjustifiable even in view of Rule 14 of CCR, 2004. I draw my support from the decision of this Tribunal in the case of **Lefarge India Ltd. Vs. C.C.E. Bilaspur 2017 (48) STR 466 (Tri.-Del.)** wherein it was held that when the assessee has taken credit of service tax paid by the washeries, the same would be available as credit to the service recipient. In a prior case of **Real Ispat and Power Ltd. Vs. C.C.E. Raipur 2016 (335) ELT 325** this Tribunal has held that when the coal was sent to washeries for processing thereof to be used in manufacture of final

product loss of weight due to removal of ash content, mud fines occurred due to the said washing process which is arising during the course of the manufacture of final product of the appellant. The credit thereof cannot be denied on the ground that quantity of raw material sent for job work was found short. Accordingly, I hold that the Order of Commissioner(Appeals) denying the cenvat credit for an amount of Rs. Rs. 8,43,764/- rather ordering for appropriating the already deposit amount of same value is not sustainable. Same is accordingly set aside.

7. Now coming to the plea of penalty upon the Company I observe that there is admission of noticed shortage in the statement of Mr. Gopal Bordya one of the office bearers of the appellant and that the said statement has nowhere been retracted but I simultaneously observe that there is no proper physical verification about the stock, raw material and the finished goods. As is apparent from panchnama the estimation is based on presumption. There is no other evidence except the statements and the acknowledgement therein though without any retraction to prove the alleged shortage. Above all, Mr. Gopal Bordya is the third person as far as the Company as well as its Directors is concerned. The allegations of clandestine removal are serious.

8. The law i.e. as to whether the third party records can be adopted as an evidence for arriving at the findings of clandestine removal, in the absence of any corroborative evidence, is well established. Reference can be made to Hon'ble Allahabad High Court decision in the case of **Continental Cement Company Vs. Union of India** - 2014 (309) ELT 411 (All.) as also Tribunal's decision in the case of **Raipur Forging Pvt. Ltd. Vs. CCE, Raipur-I** - 2016 (335) ELT 297 (Tri.-Del.), **CCE & ST, Raipur**

**Vs. P.D. Industries Pvt. Ltd.** – 2016 (340) ELT 249 (Tri.-Del.) and **CCE & ST, Ludhiana Vs. Anand Founders & Engineers** – 2016 (331) ELT 340 (P&H). It stand held in all these judgements that the findings of clandestine removal cannot be upheld based upon the third party documents, unless there is clinching evidence of clandestine manufacture and removal of the goods.

9. Once this is the situation, irrespective that the Central Excise duty as demanded stands paid, but the fact remains is that there is no evidence for alleged shortage. Mere statement as relied upon is highly sufficient. Also that the same has been paid well before the issuance of SCN. Resultantly, proviso to Section 11AC of the Act is applicable vide which the appellant was liable to pay the penalty only to the extend to 25% of the Central Excise duty involved. I draw my support from the decision of this Tribunal in the case of **KP Pouches Pvt. Ltd. Vs. Union of India 2008(228) E.L.T. 31 (Delhi)** wherein it was held that Section 11AC of the Act and its two provisos have to be given meaningful interpretation – “purpose of section and the provisos is to give a benefit to the assessee if he based they duty demanded within 30 days of the adjudication Order in that event assessee would be liable to pay only 25% of the duty amount by way of penalty.”

10. I also observe that the availment of cenvat credit is denied based upon Notification No. 214/86 however the said Notification has not been relied upon in the SCN. Otherwise also the Notification is applicable only to such activity which amounts to manufacture. Washing of coal is observed to be an intermediary process of purifying the raw material for manufacture of the final product. Otherwise also it was not invoked in the SCN. It is the settled law that the Department is not allowed to go beyond the SCN. In this

reason also reversal to the cenvat credit availment is not sustainable. I draw my support from the decision of Apex Court in the case **CCE, Bangalore Vs. Brindavan Beverages Pvt. Ltd. 2007(2013) ELT 487 (S.C.)**. It was held that SCN is foundation on which the Department has to build up its case. If the allegations in the SCN are not specific it will be sufficient to hold that the assessee was not given appropriate opportunity. In a prior adjudication of Supreme Court in the case **C.C.E. Customs Mumbai Vs. Toyota Engineering India Ltd. 2006(201) ELT 513** has held that the grounds which do not find mention in SCN Department cannot be allowed to travel beyond the SCN.

11. Now coming to the penalty as imposed upon The Directors, I observe that though the Directors have been alleged to have not disclosed the facts and alleged short receipt of input to the Department which came to the notice of Department only at the time of visit but in view of above discussions, the cenvat credit as was denied by the Department on the input of the appellant, has been allowed, no *mensrea* of tax evasion can be attributed to the appellant Directors. However, keeping in view that the alleged short payment of Central Excise duty since has been paid by them and has not been demanded back. I opine no infirmity in imposition of penalty upon the Directors. Order to that extent is upheld. Resultantly, all the three Appeals stand partly allowed.

[Operative part pronounced in the open Court]

**(RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

D.J.