CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court - I

Appeal No.	Appellant(s)	Respondent(s)	Impugned Order
E/340/2009	Annapurna Earcanal Ltd	CCCE & ST, Hyderabad - III	OIO: 28/2008 dated 26.11.2008, passed by CCCE, Hyderabad-III
E/341/2009	G. Raghu Rama Sharma	-do-	
E/342/2009	Durga Prasad Associates	-do-	
E/2022/2012	Annapurna Earcanal Ltd	CCCE & ST, Hyderabad - IV	Denovo OIO: 13/2012 dated 30.03.2012, passed by CCCE, Hyderabad-IV
E/2023/2012	Deepak Thorat	-do-	
E/2067/2012	Annapurna Earcanal Ltd	-do-	Denovo OIO: 14/2012 dated 30.03.2012, passed by CCCE, Hyderabad-IV
E/2068/2012	Deepak Thorat	-do-	
E/2069/2012	Annapurna Earcanal Ltd	-do-	OIO: 15/2012 dated 30.03.2012, passed by CCCE, Hyderabad-IV
E/2389/2012	Deepak Thorat	-do-	

Appearance:
Shri G. Shivadass, Advocate for the Appellant(s).

Smt. B.V. Siva Naga Kumari, Commissioner/AR & Shri V.R. Pavan Kumar, Superintendent/AR for the respondent(s).

Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 30.07.2018
Date of Decision: 24.09.2018

FINAL ORDER No. A/31104-31112/2018

[Order per: P.V. Subba Rao.]

1. These appeals involve the same issue and regarding the same appellants and hence are being disposed of together.

2. The appellant herein is a joint venture between an Indian company M/s Annapurna Electronics and Services Ltd and Spanish company M/s

Earcanal, Spain. They manufacture roll bond evaporator panels which are parts of refrigerators falling under chapter heading 8418.90 of the Central Excise Tariff. The appellant has four units – one at Malkapur, Nalgonda District which manufactures aluminium sheets from coils and supplies to their second and third units at Balanagar and Jeedimetla. The units at Balanagar and Jeedimetla undertake processes known as shearing, punching, welding, lid testing and painting of roll band sheets and supply to their fourth unit at Faridabad in Haryana which in turn undertakes some other processes and clears the goods to their customers. The units in Balanagar and Jeedimetla also sell goods to independent buyers in addition to clearing the goods to their unit at Faridabad.

3. The valuation adopted by these three units viz., AEL at Malkapur, Balanagar and Jeedimetla is as per Rule 8 of Central Excise Valuation Rules meant for captive consumption as they are transferring the goods to their own sister units. The officers of the department visited their unit at Malkapur and examined their cost sheets and found that they had only added the cost of material and process cost but did not add the royalty and technical knowhow fee which they were paying to their Spanish parent company and were also not adding notional profit of 15%. The officers requested the appellant at Malkapur unit to provide details of their cost supported by a certificate by a cost accountant. On 09.09.2003 they furnished cost sheet prepared by their cost accountant Mr. J.S.R. Durga Prasad (DPA for short) and showed the assessable value model wise at exactly the same price which was adopted in their original cost sheet, even after adding cost elements which were initially not included and 15% notional profit. The department doubted the accuracy of this cost sheet

because these values were the same as were reported earlier without taking into account the 15% addition as well as the cost of royalty which they were paying to their Spanish parent company; addition of these cost elements and notional profit should have enhanced the cost and it didn’t.

4. Therefore, the department appointed M/s DZR and company (Cost Accountants) to verify the cost of the products adopted by the appellant at Malkapur unit for the period 2002-06. M/s DZR finalised the cost audit report from which the department observed that the appellant had short paid duty on some clearances and accordingly issued show cause notice No.120/2006 dated 29.01.2007 for the period 19.09.2002 to March, 2006 demanding a duty of Rs.81,62,729/-. Since the goods are supplied by Malkapur to Jeedimetla and Balanagar units, show cause notices were also issued to these two units demanding duty based on the higher value of the goods received from Malkapur. The show cause notice issued to Balanagar unit was show cause notice No.70/2007 dated 04.10.2007 covering period from September, 2002 to September, 2006 and show cause notice issued to Jeedimetla unit was SCN No.21/2008 dated 31.03.2008 covering period from January, 2004 to March, 2006. Both these show cause notices also had an additional demand on account of credit of sales returns and credit on inputs used in job work. They also had demands on account of credit taken on rejected inputs. These inputs were received in the factory of manufacturer but were found defective and hence were not used in the process of manufacture. Show cause notices were also issued to Jeedimetla unit covering period April, 2006 to December, 2010 demanding duty on the ground of undervaluation. As far as the show cause notice No. 70/2007 dated 04.10.2007 issued to Balanagar unit and show cause notice No.

21/2008 dated 31.03.2008 issued to Jeedimetla unit are concerned, the first round of litigation has already passed and the impugned orders are Denovo Orders-in-Original passed by the learned Commissioner. The other show cause notices issued to Jeedimetla and the Malkapur units have been adjudicated and the Orders-in-Original have been passed by the Commissioner for the first time.

5. The learned counsel for the appellant took us through their process of manufacture in different units and explained that the demands in Jeedmetla and Balanagar units stem from the demands in Malkapur unit. He submits that since there was a difference between their cost audit report by their cost auditor DPA and the one by the department appointed cost auditor DZR, they approached another cost accountant M/s S.S.Zanwar and Associates (SSZ) to examine the cost of goods manufactured who certified that both reports were wrong and, in fact, the appellant had paid duty at a much higher assessable value than they should have. It is his submission that they had placed the report of SSZ before the learned Commissioner but the demand was confirmed only taking the cost in the audit report done by M/s DZR and penalties have been imposed. As far as their Balanagar unit is concerned, he submits that pursuance to the directions of the Hon'ble CESTAT vide Final Order dated 10.05.2005, learned Commissioner fixed final hearing on 02.03.2012. Meanwhile, they were informed by letter dated 01.03.2012 that the Director (Cost) of the department would visit their factory in respect of the cost of their products manufactured at Malkapur unit. The appellant therefore requested the learned Commissioner to postpone the date of hearing and it was postponed to 09.03.2012. It is his submission that despite repeated requests, the department had not

furnished the report of Director (Cost) to them nor was it relied upon by the Commissioner in the impugned Order-in-Original (denovo) while confirming the demand and imposing penalty. He further submits that they received a reply from the Addl. Commissioner vide letter dated 08.06.2012 that the report of the Director (cost) was not relied upon document with respect to the show cause notice and hence they need not be provided with the copy of the same.

6. Regarding the proceedings related to the Jeedimetla unit, learned counsel submits that demand was confirmed taking into account the alleged undervaluation in their Malkapur unit. The learned counsel appealed against the impugned orders on the following grounds:

(1) In their Malkapur unit, the assessable value was determined by the three different cost auditors who came to three different conclusions.

(2) Even if the report of cost auditor appointed by the department DPA is considered, it can be seen that there was excess payment in some clearances and short payment on account of other clearances. If all the clearances are taken together setting of the excess and short payments, there was a net excess payment of Rs.2,48,843/- and therefore no duty is required to be paid. In this regard, he places reliance on the following case laws:

a. Collector of Central Excise, Hyderabad Vs Divya Enterprises – 2003 (153) ELT 497 (SC)
b. Vinir Engineering Pvt Ltd Vs CCE, Bangalore – 2004 (168) ELT 34 (Tri-Bang)

c. Tilrode Chem Ltd Vs CCE, Bangalore – 2007 (264) ELT 306 (Tri-Bang)

d. Usha Martin Ltd Vs CCE, Jamshedpur – 2008 (231) ELT 426 (Tri-Kol)

e. Suzlon Energy Ltd Vs CCE, Vadodara – 2016 (339) ELT 87 (Tri-Ahmd)

f. Bajaj Tempo Ltd Vs CCE, Pune – 2004 (172) ELT 473 (Tri-Mum)

7. He would argue that it was submitted to the learned Commissioner during the hearing that SSZ had also submitted cost audit report which may also be taken into consideration. The learned Commissioner did not accept it on the ground that it was said to be provisional cost report and he had taken notional capacity of the factory instead of normal capacity. However, these two issues were clarified by SSZ and hence, the learned Commissioner had erred in not taking into consideration report of M/s SSZ.

8. The cost auditor DZR appointed by the department had erred in following ways.

(1) Adding the cost of shearing activity on to full sheet products.

(2) Apportionment of overheads on different commodities is not correct.

(3) Closing work-in-progress was not considered for calculating raw material consumed in 2002-03.

(4) The depreciation considered as fixed overhead is being absorbed by lower capacity utilization which is against the cost principles.

(5) The total scrap credit was given only to the sheared product which is not correct.

9. With respect to the Balanagar and Jeedimetla units, he submits that the learned Commissioner had erred in not providing them with a copy of the report of the Director (Cost) and in not considering the report of SSZ in calculating the differential duty. The learned Commissioner should have considered the report of Director (cost) which appears to have been available before him prior to the passing of the Order-in-Original.

10. The entire basis for demand in their Balanagar and Jeedimetla units is escalation of the cost of the value of their goods at Malkapur unit. Duty in terms of Rule 8 can be adopted in Jeedimetla and Balanagar units only if the entire production is cleared for captive consumption and not to independent buyers. In this case, they have also sold the goods to independent buyers. The learned Commissioner violated principles of natural justice in not giving them a copy of the report of the Director (Cost). The entire exercise is revenue neutral since their units in Jeedimetla and Balanagar would have got credit of any excess duty paid at Malkapur and similarly their own unit at Faridabad would have got credit of any excess duty paid in Jeedimetla and Balanagar units. Therefore, the entire exercise is more academic and department would not gain anything by this exercise. He relied upon the following cases:

i. Textile Corporation of Marathawada – 2008 (231) ELT 195 (SC)
ii. CCE, Jamshedpur Vs Jamshedpuram Beverages – 2007 (214) ELT 321 (SC)
iii. CCE Vs Indeos ABS Ltd – 2010 (254) ELT 628 (Guj)
iv. Jet Airways Ltd Vs CST, Mumbai – 2016 (44) STR 465 which was affirmed by the Hon’ble Apex Court in 2017 (7) GSTL 35 (SC).

11. The appellant is entitled for the credit of rejected materials because they have received the inputs and have taken into production but during the

process some defective materials are identified and reported as inward rejection and this fact has been confirmed by Mr. Deepak Thorat in his statement recorded by the excise officers. Rejection of material is a part of material control and is integral to the manufacture of final products as has been held by the Hon'ble Bombay High Court in the case of TATA Engineering ad Locomotives Company Ltd – 2010 (256) ELT 56 (Bombay). Extended period of limitation cannot be invoked in this case because it is a question of revenue neutrality as their own sister units can take CENVAT credit if any excess duty is paid. Therefore, no intention to evade payment of duty can be attributed to them. He relied on the following judgments:

i. Nirlon Ltd Vs CCE, Mumbai – 2015 (320) ELT 22 (SC)
ii. CCE, Chennai IV Vs Tenneco RC India P Ltd – 2015 (323) ELT 299 (Mad)
iii. MIRC Electronics Vs CCE, Thane-I – 2015 (318) ELT 682 (Tri-Mumbai)
iv. Alembic Ltd Vs CCE, Vadodara – 2014 (308) ELT 535 (Tri-Ahmd)
v. Mercantile and Industrial Dev. Co. Ltd Vs CCE, Ahmadabad – 2014 (313) ELT 553 (Tri-Ahmd)

12. No penalty can be imposed under Rule 26 on the ground that Mr. Deepak Thorat & Mr. Raghu Rama Sharma have failed to guide the unit in complying with the statutory provisions and mislead the department. There is nothing in the show cause notice or in the order to suggest that these individuals were personally and physically involved in removing and transporting the goods which are liable for confiscation. He lastly submitted that as the entire demand is unsustainable they are also not liable to pay interest and penalty proposed to be imposed upon them.

13. The learned Commissioner (AR) agreed with the facts of the case but contested the appeal on the following grounds:

(1) The concept of revenue neutrality does not form part of the statute. It is evolved by judicial decisions as a deviation from the statute apparently to meet the ends of justice in particular conditions and hence it is an exception and not a norm. If it has to be exercised it should be done with utmost caution on case to case basis.

(2) In matter of taxation the laws should be viewed and interpreted strictly. When there is contravention of the statutory provisions, it cannot be argued that since there is no loss of revenue to the exchequer, there is no clandestine removal or no evasion of duty, no suppression, no misstatement, no fraud, etc. If such a stand is taken, the entire provisions of the statute could be rendered meaningless leading to undesirable consequences.

14. She relied on the decision of the Five Member Bench of the CESTAT in the case of M/s Jay Yushhin Ltd Vs CCE, New Delhi – [2002-TIOL-126-CESTAT-DEL-LB] in which the criteria for accepting the contention of revenue neutrality have been laid down. In the instant case, assessee have opted to pay duty on the goods cleared to their sister concerns for captive consumption but had not followed relevant provisions viz., Rule 8 of Central Excise Valuation Rules, 2000 read with Sec. 4(1)(b), thereby leading to suppression of value of clearances and consequent short payment of duty spread over a large period of time with an intent to evade payment of duty. Therefore, the concept of revenue neutrality should not apply in this case. When the departmental officers visited the Malkapur unit, they found that the cost sheet did not include technical knowhow fee and royalty and 15% addition as required and therefore, there was suspicion that the duty was

not discharged correctly. The cost sheet provided by their cost accountant JSR retrofitted the same value by adding the elements missing in the original cost sheet. Thus they had deliberately changed the cost calculations to mislead the department so as to underpay the excise duty. Therefore, the department appointed DZR (Cost Accountants) who gave their cost audit report based on which the show cause notice was issued to Malkapur unit and consequently to the units at Balanagar and Jeedimetla also.

15. In this case, the only relied upon document as far as cost audit report is concerned was the report of M/s DZR. The appellant sought to cross examine and was provided an opportunity to do so before the learned Commissioner at the time of passing the Order-in-Original and M/s DZR explained their doubts and provided clarifications sought by them. The case laws cited by the appellant to seek adjustment of excess and short paid duties as well as on seeking revenue neutrality as a ground for not invoking extended period of limitation were on different facts. Therefore, neither the revenue neutrality applies in this particular case nor is the adjustment possible.

16. As far as the question of assessment is concerned it is done on each clearance and duty becomes payable on each clearance, although it is paid at the end of the month. If excess duty is paid on one consignment and short paid on another, the two cannot be set off against each other. The department will have to raise a demand under Sec.11A as applicable to recover the duty which is not paid or short paid. The assessee, on the other hand, is entitled to claim refund of duty paid in excess by following procedure prescribed under Sec.11B.

17. There is no provision in the Central Excise Act to set off excess and short paid duties. Such a concept is being evolved by the Judiciary and Tribunals in specific cases. There is no reason to apply such adjustment in this particular case.

18. In the case of Dharampal Satyapal – 2005 (183) ELT 241 (SC), the Hon'ble Supreme Court has clearly held that revenue neutrality in terms of the ability to claim proforma/Modvat credit against duty paid on final product does not establish the bonafides in a case and it cannot be a ground to question the invocation of larger period of limitation in the show cause notice by the department. Similarly, in the case of Crompton Greaves Ltd Vs CCE, Aurangabad – 2004 (177) ELT 1032 (Tri-Mumbai), it has been held that revenue neutrality cannot be a ground in invoking the extended period of limitation by alleging suppression of facts. In the case of Automotive Stampings and Assemblies Ltd – 2015 (5) TMI 374 (CESTAT-Mumbai), it has been held that "It is straight law, irrespective of any other factors as and when a manufactured good is cleared from the factory of the manufacturer he is bound to pay the correct duty leviable thereon, there is no explanation provided in the excise law that if buyer is entitled for the CENVAT credit, no duty is required to be paid. Therefore, we do not agree that merely because recipient of the goods are entitled for the CENVAT credit, it is a case of revenue neutrality. The availment of CENVAT credit is subsequent act and that cannot be basis for payment of duty in the clearance of the goods from the manufacturer factory." Learned Commissioner (AR) vehemently opposed the appeals and argued that they are liable to be dismissed on the above grounds.

19. We have considered the arguments on the both sides and perused the records. The facts of the case are not in dispute. The entire demands stem from the question of valuation of the goods in the Malkapur unit of the appellant. The appellant submitted a cost sheet which had some elements of the cost missing and when the department asked them to get a cost accountant's report, the cost accountant's report gave the same total value as the cost sheet even after adding these elements and therefore, the department felt it was manipulated and retrofitted to show a lower value. The department appointed another cost accountant, who gave a different cost report which forms the basis for the show cause notice. Two other events followed. First, the appellant got still another cost audit report (SSZ) which gave a still different report and it says both the earlier cost audit reports were wrong. In respect of their Jeedimetla and Balanagar units, the department had also asked the Director (cost) to examine the accounts and the same report of Director (Cost) was apparently available with the Commissioner before passing the denovo adjudication order. Copies of this report were not made available to the appellant on the ground that it was not a relied upon document. The appellant argues that they have been denied the principles of natural justice in not being provided with the copy of the same. As far as the show cause notice is concerned, it is a well established principle that the day the show cause notice was issued, the clock stops and only the allegations made in the show cause notice and only the documents which were relied upon in the show cause notice can be considered for subsequent adjudication proceedings. It is not open for the department to add additional documents which, in this case the learned Commissioner has correctly not done. We, therefore, find no infirmity in the department not providing them with the copy of the report of the Director

(Cost) as it was not a relied upon document in the show cause notice. As far as the report by M/s SSZ is concerned, it was also not relied upon document but it was used as defence by the appellant before the adjudicating authority and for the reasons recorded therein, he did not agree with the same.

20. As far as the concept of revenue neutrality is concerned, we agree with the department that it has to be carefully considered in each case, and there cannot be a blanket application of this concept so as to nullify the provisions of the Act itself. Simply because another company or another unit of their own assessee gets or would have got credit of Modvat/CENVAT it does not mean that tax liability on the assessee vanishes. If this argument is taken to the extreme, there is never any loss of revenue to the Government except at the stage of final products reaching the users because credit of every material will get set off against one another and in some way or other someone may get credit of the same. The scheme of taxation under the statute requires duty to be levied at various points and it has to be levied and paid and it cannot be escaped because somebody else or their own sister unit will get credit. In specific cases where the Courts and Tribunals have found that because there is no net gain to the appellant, there could not have been an intention to evade the payment of duty requiring the invocation of extended period under Sec.11A. Therefore, revenue neutrality is only acceptable to the extent where the intention to evade the payment of duty under Sec.11A is required and revenue neutrality could be one of the factors to determine whether or not such an intention existed with the assessee. We, therefore, in this case, agree with the department on relying solely on the report of the cost accountant appointed by them. However, it is the submission of the appellant that even going by this report, they have

not short paid duty if the values of all clearances made by them during the relevant period are taken into consideration because according to the report of M/s DPA, they have excess paid duty on some commodities and short paid duty on other. It is evident such a difference will occur when there was differences in the way they fixed costs, etc., are apportioned among different products. If this was the case where the goods were sold and not transferred to their own sister units, it needed to be examined whether in respect of each invoice where they have paid excess duty there was an element of unjust enrichment. If so, the assessee would not have been entitled to refund of the duty. In this case, the appellant had cleared the goods to their sister units and therefore the question of unjust enrichment does not arise. We further find that in terms of Central Excise Rules, 2000, although duty becomes payable on each removal in terms of Rule 4 of the Central Excise Rules, the payment is done under Rule 8 by 5th of the following month. The demand is on duty short paid or not paid which is a consolidated exercise. In this case, we find that since the department has opted to rely on the cost audit report of DPA, they should do so fully recalculating the duty payable on all clearances during the period. The figures submitted by the learned counsel before us would show that such a calculation would eliminate the demand because they have paid in excess of what would have been payable. We, therefore, find that the demand in respect of their Malkapur unit does not survive as far as the question of under-valuation is concerned. The demands in respect of the Jeedimetla and Balanagar units follow from the demand in Malkapur unit and hence will not survive either.

21. As far as the credit on rejected material is concerned, there is nothing on record to show that the material had not entered the factory of manufacturer or have not been taken into production process. This being a part of quality control of manufacture of final products as has been held by the Hon'ble High Court of Bombay in the case of TELCO (supra), we find that they are entitled to the credit on the rejected inputs. The credit on sales returns and credit of inputs used in job work have already been paid by the appellant and hence, need not be considered. In view of the above, we find that the demand on the Malkapur unit of the appellant does not survive because it has not taken into account fully the cost audit report of the department itself inasmuch as they have not taken the amount of duty paid in excess on some invoices but have selectively taken the duty short paid on other invoices. Consequently, the demands in the case of Jeedimetla and Balanagar units also do not survive. Since, the demands are liable to set aside the interest and penalties also do not survive. The appeals are liable to be allowed and we do so.

22. The appeals are allowed and the impugned orders are set aside.

(Pronounced in the Open Court on 24.09.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

Veda