

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
EAST REGIONAL BENCH : KOLKATA**

**Excise Appeal Nos.: E/75517/17, E/75603/17 & E/75629/2017**

(Arising out of the Order-in-Appeal No.53 & 55-56/HAL/2016 Dated-14/12/2016 passed by the Commissioner of Central Excise (Appeal-I), Kolkata)

- 1) M/s. Mittal Iron Foundry Ltd.
- 2) Sri Vijay Kumar Agarwal
- 3) Sri Satya Narayan Dey

...APPELLANT(S)

VERSUS

Commr.of Central Excise &  
Service Tax, Haldia

...RESPONDENT(S)

APPEARANCE

Sri B.N. Chattopadhyay, Consultant for  
Mittal Iron Foundry & Sri V.K. Agarwal &

Sri A.K. Bhattachariya, Consultant for  
Sri S.N. Dey

FOR APPELLANT(S)

Sri S. Guha, A.C. (A.R.)

FOR THE RESPONDENT(S)

**CORAM:  
SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER**

DATE OF HEARING: 26/12/2017  
DATE OF PRONOUNCEMENT:09.03.2018

FINAL ORDER NO.:FO/A/75309-75311/2018

**PER SHRI P.K. CHOUDHARY:-**

Briefly stated the facts of the case are that the appellant is engaged in the manufacture of CI Ingot Mould and Un-Machined CI Casting classifiable under Chapter 72 and 73 respectively of the Central Excise Tariff Act, 1985. The appellant availed Cenvat Credit on inputs/raw materials on Pig Iron amongst others. The Central Excise Officers of Directorate General of Central Excise Intelligence conducted a search operation on 22.05.2009 at the premises of one M/s. Shyamsons India – Proprietor – Shri Satya Narayan Dey. It has recovered an exercise book maintained by the proprietor. On enquiry at the premises of M/s. Shyamsons India and the documents recovered thereon and the statement of its proprietor, it appears that the appellant company M/s. Mittal Iron Foundry Private Limited received the duty paid inputs from M/s. Shyam Sons India. It was found that the proprietor of M/s. Shyam Sons India procured the goods from the manufacturer and diverted Pig Iron to some other places other than factory of such downstream manufacturers. The name of the appellant company was figured in the exercise book maintained by the proprietor of M/s. Shyam Sons India. Accordingly, the DGCEI summoned the director of the appellant company and recorded the statement dated 12.07.2012. A Show Cause Notice dated 26.07.2012 was issued to the appellant company, Shri Vijay Kumar Agarwal, Director of the appellant company and Mr. Satya Narayan Dey, proprietor of M/s. Shyam Sons India. It has been alleged that the

appellant company availed Cenvat Credit on the basis of the invoices issued by the manufacturer without bringing the inputs in their factory.

2. The Adjudicating authority confirmed the demand on wrongly availed Cenvat Credit of Rs. 9.69,053.00 along with interest and imposed penalty of equal amount of Cenvat Credit on the appellant company and also imposed penalty of equal amount of Cenvat Credit each on Shri Vijay Kumar Agarwal, the proprietor of the appellant company and Mr. Satya Narayan Dey, proprietor of M/s. Shyam Sons India. By the impugned order the Commissioner (Appeals) rejected the appeals filed by the appellants. Hence, the appellants filed these Appeals.

3. Heard both sides and perused the appeal records.

4. On perusal of the record I find that DGCEI Officers gathered information that some manufacturers procured the consignment of Pig Iron in their name, availed Cenvat Credit on the basis of the invoices issued by the manufacturer of Pig Iron but they did not receive the consignment at their factory and instead handed over the consignment of Pig Iron to one agent ,Shri Satya Narayan Dey, proprietor known as Satyababu/ Sottobabu or Satya Bengali. It has also recovered information that Shri Satya Narayan Dey purchased the Pig Iron in the name of downstream manufacturer and sold the same to the other parties at Dehi, Tughlaqabad in cash. Shri Dey lifted the materials to the places other than the factory of such downstream manufactures by arranging containers from CONTAINER CORPORATION OF INDIA LIMITED

(CONCOR) and sealing the same through his agent, prepare fake invoices and Road Challan for safe transport of the consignment upto CONCOR Terminal by means of heavy vehicle. It was found that Shri Dey maintained an Exercise Book in respect of such transactions and the name of the appellant company was found therein. On that basis DGCEI Officers recorded the statement of the director of the appellant company. Shri Vijay Kumar Agarwal, Director of the appellant company in its statement dated 12.07.2012 stated that they availed the Cenvat Credit during the period 2007-08 and 2008-09 on Pig Iron, which they procured from M/s. Tata Metalics Limited, M/s Ramswaroop LohaUdyog Limited and others. It is stated that they receipt the consignment of the Pig Iron accompanied with duplicate copy of the Central Excise Invoices which was duly recorded in their Cenvat Account and used in their final products and cleared on payment of duty. The DGCEI Officers showed the statement of Shri Satya Narayan Dey where the name of the appellant company was mentioned. Shri Vijay Kumar Agarwal in his statement dated 12.07.2012 stated that since they have no business or any transaction with Shri Satya Narayan Dey, they have nothing to comment on his statement and records maintained by him. It is seen from the Show Cause Notice that DGCEI Officers made enquiry to the transporter, CONCOR and various other places. The Assistant Supervisor of CONCOR, Amulya Kant Choubey in his statement \dated 28.06.2010 stated that 27.5 M.T. presently enlarged to 28 M.T. is the maximum weight of Iron & Steel Products that can be

contained in the CONCOR Container. It was found that most of the consignments are weighing 27MT. During the Investigation the statement of Shri Amulya Kumar Choubey was shown to Mr. Vijay Kumar Agarwal, Director of the appellant company who in his statement dated 12.07.2012 stated that the observation of Shri Amulya Kant Choubey is his own and they have no relation with Shri Choubey. The main contention of the appellant company is that they have received the goods at their factory accompanied with Central Excise Invoices. They entered the impugned goods in their Cenvat Account and also shown its consumption. The Department had not made any investigation against the Supplier of the goods. It is contended by the Learned Counsel for the appellant company and its director that they have paid the amount to M/s. Jay Balaji Industries Limited and M/s. **New Metalics Limited** by Account Payee Cheque and such purchase has also been reflected in the Bank Statement. They have also requested for Cross Examination which was denied by the Adjudicating authority.

5. The Case of the Revenue is that the consignment of Pig Iron weighing 27.5 M.T. under invoices of M/s. Balaji Industries Limited was loaded in the container of CONCOR Terminal, Kolkata. It is also stated that Shri Satya Narayan Dey had sold the goods by Cash. I find that the DGCEI Officers conducted search operation at various places. There was no material available on record of Recovery of any cash. The entire case

against the appellant is made out on the basis of statement of Shri Satya Narayan Dey and his exercise book.

6. The Ld. Counsel for appellant No. 3, Shri Satya Narayan Dey, Stated that the appellant did not issue invoice or any other document on the basis of which appellant No. 1, took in eligible benefit of availing CENVAT Credit under Cenvat Credit Rules, 2004. It is also submitted that there is no evidence in the Show Cause Notice to even remotely suggest that the appellant had any knowledge about CENVAT Credit taken and / or misuse of the same. It is further submitted that the appellant had no knowledge of the alleged misuse of the CENVAT Credit and he has not handed the goods and therefore, penalty under Rule 26 of Cenvat Credit Rules, 2004 cannot be imposed.

7. It appears from the Show Cause Notice, I that Shri S. N. Dey, the appellant no. 3 in his statement stated that he was conducting the Trading Business in a different manner which included Purchase and Sale of steel products in the name of Sam Sons India. Purchase and Sale of scrap and steel materials in the name of M/s. N. K. Lohar Udyog and in the name of fake unit M/s. Patwari & Sons and acting as Commission Agent of several customers, Brokers of Delhi by procuring Pig Iron on their behalf in cash. The said statements were shown to Shri Vijay Kumar Agarwal, appellant no. 2. He repeatedly said that he has no connection with the appellant no. 3. He has also stated that he has received inputs accompanied with Central Excise Invoice and duly recorded in their Cenvat Account. Shri S.N. Dey, had not produced any evidence to substantiate the relationship with

the appellant No. 1, except the mentioning of the name of the appellant No. 1, in his exercise book. In my considered view, the appellant No. 1 & 2 cannot be impleaded merely on the basis that the name of the appellant is mentioned in the notebook of appellant No. 3, unless, there is any corroborative evidence thereon. The case was made out against the appellant No. 1 & 2 on the basis of weight consignment of 27.5 M.T./ 28 M.T. as loaded in the container of CONCOR. It is revealed from the statement of appellant no. 3, the entire transaction was made in cash but the Investigating Officer did not recover any cash and other evidence from the appellant no. 1 company. Further records and documents as placed by the appellant no. 1 in support of the contention that the impugned goods were received by them and used in the manufacture of final product cannot be brushed aside merely on the basis of the statement of appellant no 3 and its exercise book. In any event, the weight of the consignments as mentioned in the invoices of the appellant cannot be construed that the said material are related to the consignment of the CONCOR.

8. I find that the Investigating Officer failed to recover any material from the appellant no. 1 and 2 in respect of non-receipt of inputs. It is significant to note that the appellant no. 3 stated that his trading business is related to the various persons but the appellant no. 3 could not produce any evidence in respect of alleged involvement of the appellant no. 1 & 2. It is noted that there is no document corroborating the consignment of Pig Iron having fixed weight of 27.5 M.T./28 M.T. loading in the container of Concord is related to the appellant's consignment. The appellant no. 1 & 2

stated that they have purchased the Pig Iron upon payment by cheque from the manufacturer. No enquiry was conducted with the manufacture of Pig Iron. So I do not find any force in the findings of the lower authorities against the appellant no. 1 and 2. The Hon'ble Calcutta High Court in the case of Commissioner of Customs (Preventive), West Bengal, Kolkata Vs. Ritu Kumar as reported in 2005 (12) LCX 0415 held that goods were purchased by making payment by Account Payee Cheque which was encashed, no evidence to prove such assertion as wrong, the burden was not discharged by the Revenue in the facts and circumstances of the case and such substantial question of law is answered in favour of the party.

9. The Learned Counsel for the appellant no. 1 and 2 referred various Case Laws as under:

(i). Rhino Rubbers Pvt. Ltd. Vs. Collector of Central Excise, Bangalore reported in 1996 (85) E.L.T. 260 (Tribunal).

(ii). Hindustan Coir Products Ltd. Vs. Collector of Central Excise, Meerut reported in 1996 (85) E.L.T. 263 (Tribunal).

(iii). Rutvi Steel & Alloys Vs. Commissioner of Central Excise, Rajkot reported in 2009 (243) E.L.T. 154 (Tri.-Ahmd.).

(iv). Kumar Trading Company Vs. Commissioner of Trade Tax, Lucknow reported in 2008 (230) E.L.T. 240 (All.)

(v). Sulekhram Steels Pvt. Ltd. Vs. Commissioner of Central Excise, Ahmadabad-II reported in 2011 (273) E.L.T. 140 (Tri.-Ahmd.).

10. In the case of M/s. Gontermmann Pipers (I) Limited & Another Vs. Commissioner of Central Excise, Kolkata – VII vide Order No.

FO/77772-77773/2017 dated 08.11.2017. In the identical situation allowed the appeal of the assessee. The relevant portion of the said decision is reproduced below

“10. Though I find that all the above decisions are fully applicable to the facts of the present case but a special reference can be made to the Tribunal’s latest decision in the case of Commissioner of Central Excise, Lucknow Vs. M/s. Premier Alloys Ltd. [2015 (7) TMI 1173-CESTAT, New Delhi] where in the Tribunal dealt with the supplies made by the same dealer M/s. M.K. Steels. The Revenue in that case refused to deny the credit to the assessee, based upon the result of the same investigations conducted at the end of M/s. M.K. Steels and on the basis of the same evidence relied upon by them in the present case. After taking into consideration the entire facts and circumstances, the Tribunal came to a finding that the assessee in fact in had received the goods covered under the disputed invoices in as much as Revenue has not brought any tangible evidence to prove non-receipt of the goods by the respondent.

The Tribunal further observed that the same investigation at the end of M/s. M.K. Steels were the subject matter of the Tribunal decision in the case of Juhi Alloys Ltd. Which stands upheld by the Allahabad High Court by observing so that the appeal filed by the Revenue in that case was rejected.

11. The facts of the above decision in the case of juhi Alloys Ltd. And M/s. Premier Alloys Ltd. Are fully applicable in the present case in as much as the same set of investigation conducted at the end of registered dealer M/s. Same set of

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investigation conducted at the end of registered dealer M/s. M.K. Steels are that subject matter of both the decision.”

11. Regarding the appeal filed by the appellant no. 3, the Learned Counsel for the appellant no. 3 argued the matter at length and also submitted Written Submission. It is submitted that the appellant no. 3 admittedly dealt with proper duty paying goods and in no way the duty paid character of the impugned goods would be altered. It is further submitted that there is no allegation in the Show Cause Notice that the appellant no. 3 knew at the time of handling the impugned goods or even afterwards before issue of Show Cause Notice that the appellant no. 1 would avail Cenvat Credit on the impugned goods.

12. It is submitted that no penalty can be imposed on the appellant no. 3 under Rule 26(2) of the Central Excise Rules, 2002 because the appellant did not issue any invoice or any other documents on the basis of which the appellant no. 1 availed the credit. Rule 26 of Rule 2002 provides penalty for certain offences. In terms of sub Rule (1) of Rules 26 any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, grouping, concealing, selling or purchasing or any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation shall be liable to penalty. Clause (ii) of Sub Rule (2) of Rule 26 states that any person, who issues any other documents or abates in making such documents, on the basis of which the user of the said Invoice or documents is likely to take or has taken ineligible benefits under the Act or the Rules shall be liable to penalty.

13. In the present case on perusal of the statement of the appellant no. 3 it is apparent on the face of record that the appellant no. 3 was engaged in a trading business on the basis of the documents of Cenvat Invoice to take any ineligible benefits to the manufacturer. Therefore, the contention of the learned Advocate on behalf of the appellant no. 3 cannot be accepted. Hence, the imposition of penalty is warranted. However, the quantum of penalty is excessive which is required to be reduced.

14. In view of the above discussion, the appeals filed by the appellant no. 1 and 2 are allowed. The penalty imposed on the appellant no. 3 is reduced to Rs.3,00,000/- and the appeal is disposed of.

(Pronounced in the open court on...09.03.2018...)

**(P. K. CHOUDHARY)**  
**MEMBER (JUDICIAL)**

T.K.