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

Excise Appeal Nos. 27 to 30/2007

(Arising out of the Order-in-Original No.09/COMMR/2006 dated-28 September 2006 passed by the Commissioner of Central Excise, Jamshedpur)

1) M/s. Tata Steel Ltd.
2) Sri Kanchan Roy
3) Shri R. Sankaran
4) Sri R.C. Nandrajog

...APPELLANT(S)

VERSUS

Commr. of Central Excise, Jamshedpur

...RESPONDENT(S)

APPEARANCE

Dr. Samir Chakraborty, Sr. Advocate &
Sri Abhijit Biswas, Advocate

FOR APPELLANT(S)

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

FOR THE RESPONDENT(S)

CORAM:

SHRI P.K. CHOUDHARY, JUDICIAL MEMBER
SHRI C.J. MATHEW, HON'BLE TECHNICAL MEMBER

DATE OF HEARING & DECISION: 12/03/2018

FINAL ORDER NO. : FO/76035-76038/2018

Per : C J Mathew

After hearing the submissions of Learned Senior Counsel for appellants, M/s. Tata Steel Ltd. and others, and Learned Authorised Representative, we are of the view that the matter can be disposed off on the basis of decisions of the Tribunal cited on behalf of the appellants to substantiate the claim that the principles of natural justice have been violated in the impugned proceedings.

2. M/s Tata Steel Ltd, a manufacturer of steel products, had in accordance with the practice prevailing then, been privileged to discharge duties of central excise by consolidated debit on clearances at the end of the day instead of debiting the duty liability for each consignment subject to maintenance of reconcilation statements of such debits. On audit, discrepancies were noticed for the period from January 1994 to February 1998 and duty of Rs.39,74,168/- computed on short-levied was deposited under protest on 17th December, 1997.

3. *Vide* show cause notice dated 12th August 1998, Rs 45,91,24,705.26 for the period from July 1993 to February 1998 was demanded. The impugned order no.09/COMMR/2006 dated 28th September 2006 of Commissioner of Central Excise, Jamshedpur confirmed demand of Rs.34,62,23,989.89 under section 11A of Central Excise Act, 1944, alongwith applicable interest thereon, while imposing penalty of Rs 13,10,18,286/- under section 11AC of Central Excise Act, 1944 and Rs 22,00,00,000/- under rule 173Q of Central Excise Rules, 1944 on the assessee and penalties of Rs.10,00,000/- each on three officials. Aggrieved by this order, the appellants are before the Tribunal.

4. Drawing attention to the adjudication order, it is the contention of Learned Senior Counsel that materials collected on verification ordered after conclusion of personal hearing has been used to their detriment without placing them on notice. The invoices for eleven months, supplied by the appellant, had been extrapolated for the entire period of demand and, that too, with a mere assertion that

> *'21. I observed that Tisco's defence in the instant case basically revolves around their claim that the SCN has exaggerated and generalized a few*

cases of omissions where Tisco Inadvertently failed to include somw of their 'issued invoices' in their Daily Recapitulation Statement to allege that a huge amount of duty was evaded by them. They claimed time and again that barring the few cases mentioned in the SCN, in all cases duty was appropriately paid by them. Accordingly, I am of the opinion that the first and foremost issue in my hand in the instant case is to decide the question of facts i.e. to decide as to whether or not duty was paid against the invoices, covered by the SCN, in respect of which Tisco has claimed that proper duty was paid by them barring a few cases cited in the SCN. I therefore consider it appropriate to examine the claim and contention of Tisco with reference to individual invoices in order to ascertain as to whether or not the said claim and contention of Tisco are correct and are based on documentary evidence. Accordingly, I have verified the defence submissions of Tisco with reference to each and every individual invoice with documentary evidence furnished by them. The defence submission of the notices in respect of individual invoices and my findings thereon are contained in the statement annexed hereto as Annexure-A which forms part and parcel of this adjudication order. Based on my findings, as indicted in Annexure-A, I have decided and mentioned the demand of duty liable to be confirmed, or as the case may be, dropped in the respective columns of the enclosed Annexure-A against the individual invoices. The month-wise demand amount liable to be confirmed and the demand amount liable to be dropped are summarized herein below.-

Month/Year	***Demand Confirmed***	***Demand Dropped***
1	***2***	***3***
July	*210292.04*	*296715*
August'93	*2427867.11*	*731500.77*
September'93	*551177.00*	*567620.36*
October'93	*610527.11*	*2889714.36*
November'93	*3570612.68*	*2415839.41*
December'93	*7810400.85*	*3866175.6*

January'94	*10120299.85*	*2032089.54*
February'94	*9370116.29*	*3107954.14*
March'94	*12898085.1*	*931942.77*
April'94	*6190349*	*2053439.77*
May'94	*9582303.72*	*4775896.54*
June'94	*5409452.05*	*2581959.62*
July'94	*3642310.77*	*3533011.88*
August'94	*3051123.97*	*2356478.65*
September'94	*5709564.91*	*2839564.15*
October'94	*1987507.52*	*788595.9*
November'94	*5122849.62*	*937429.58*
December'94	*4945229.53*	*2309366.18*
January'95	*2326112.45*	*1953198.23*
February'95	*2527539.64*	*483129.53*
March'95	*6080711.03*	*6276443.51*
April'95	*9154227.58*	*2586499.33*
May'95	*5628230.31*	*1050611.25*
June'95	*16362758.61*	*706855.03*
July'95	*7610304.17*	*0*
August'95	*6403656.67*	*0*
September'95	*6732696.33*	*0*
October'95	*5196020.66*	*312526.32*
November'95	*6288475.89*	*519674.85*
December'95	*5342491.85*	*0*
January'96	*11258235.88*	*207456.75*
Febuary'96	*4231272.29*	*33070.6*
March'96	*9777717.67*	*691727.38*
April'96	*1683526.5*	*331063.4*
May'96	*1931471.71*	*251241.45*
June'96	*3735356.3*	*277204.77*
July'96	*3242441.07*	*1032504.01*
August'96	*4764705.34*	*130547.9*

September'96(Upto 27/09/1996)	*1717681.99*	*389523.43*
Sub-total (A)	***215205703.1***	***56248471.96***
September'96(From 28/091996 to 30/09/1996	*46928.86*	*40178.93*
October'96	*5314295.26*	*912324.13*
November'96	*12038005.59*	*4962025.39*
December'96	*8987651.48*	*1183172.05*
January'97	*10342714.42*	*2155312.17*
February'97	*14173243.9*	*2677484.87*
March'97	*10908469.33*	*2311539.19*
April'97	*306208.95*	*1512796.43*
May'97	*6483476.54*	*5007231.17*
June'97	*5522152.12*	*8758619.17*
July'97	*5087418.89*	*5225215.62*
August'97	*7704284.25*	*5533371.92*
September'97	*5375317.15*	*4303644.46*
October'97	*4300513.46*	*3702708.37*
November'97	*6553036.62*	*1214366.89*
December'97	*6131973.76*	*6266235.84*
January'98	*4650266.39*	*886017.31*
February'98	*17092329.86*	*0*
Sub-total (B)	***131018286.8***	***56652243.91***
GRAND TOTAL [(A)+(B)]	***346223989.89***	***112900715.87***

It is thus evident from the above that a duty demand for a sum of ***Rs.34,62,23,989.89*** *(Rupees thirty four crore sixty two lakh twenty three thousand nine hundred eighty nine and paise eighty nine only) is liable to be confirmed and duty demand for a sum of* ***Rs.11,29,00,715.87*** *(Rupees*

> *eleven crore twenty nine lakh seven hundred fifteen and paise eighty seven only) is liable to be dropped. Held accordingly.'*

This, according to Learned Senior Counsel, is factually incorrect and submitted that the thirty invoices which did not find place in the reconciliation statement was presumed to be related to the goods that were cleared without payment of duty and this presumption was applied to the invoices listed in annexure to the show cause notice. It is his contention that duty liability had been discharged in all these 30thirty invoices.

6. Placing reliance on the decision of the Tribunal in *Thumbay Holdings Pvt Ltd. v. Commissioner of Central Excise, Mangalore [2011 (272) ELT 225 (Tri-Bangalore)* which held that

> *"….6.1 The ld. Counsel for the appellants had argued that assessable value was the transaction value. Transaction value was peculiar to each removal as determined under Section 4 of the Act and Valuation Rules. Arbitrary values worked out as average percentage cannot be applied to quantify the duty due. The impugned order has quantified the duty due based on formula worked out on the basis of slip and a couple of invoices. This was not permissible. We have given careful consideration to these arguments of the assessee. We are in agreement with the assessee on this point. We have already held that in order to quantify the duty due, transaction value has to be ascertained in respect of each removal. In the case of Cera Boards & Doors (supra), this Bench held in a similar case of undervaluation as follows :-*

> *"11.12 As regards the period after 1-7-2000 for valuation, the concept of 'transaction value' has been introduced. In the concept of transaction value, each transaction is important. Therefore, the transaction value is to be determined for the clearances after 1-7-2000. As far as the period after 1-7-2000 is concerned, the value for assessable purpose is the transaction value. The transaction value is the value for each transaction. The concept of transaction value is entirely different from the concept of normal value. While the normal value can be notional, the transaction value is the actual amount transacted in respect of the goods. Of course, under certain circumstances, the transaction value has to be determined in accordance with the Rules. Anyhow, we would not go into that. Suffice it to say that for all the clearances after 1-7-2000, the value has to be determined based on each-transaction. Therefore,*

> *the differential duty should be confined only to the evidences available on record. These are our two observations. Therefore, the Revenue's contention that uniformly for all the clearances, 70% should be added to the invoice value is not accepted. We reiterate our finding to say that for the period prior to 1-7-2000, the Commissioner has to decide' the normal price for each variety of goods and he can adopt the same for all the clearances. It does not mean that the invoice value has to be accepted. The normal price has to be determined based on the evidence available.*
>
> *11.13 As regards the period after 1-7-2000, the Commissioner has to go strictly by the transaction value and decide the short levy. After deciding the differential duty leviable on the basis of the above principles, the Commissioner can determine the quantum of penalty, etc.'*

it is the contention of Learned Senior Counsel that such inference is arbitrary and that quantification of liability due on each removal needs to be ascertained.

7. It is his further contention that reconciliation of the clearances would clearly demonstrate that there has been excess payment in certain cases and, with the admitted short fall in payment properly adjusted, the total duty liability would, if at all, be negligible. It is also submitted that the determination of the value is wrong in the absence of adjustments, a necessity considering the decision of the Tribunal in *Rashtriya Ispat Nigam Ltd. v. Commissioner of Central Excise, Visakhapatnam [2005 (191) ELT 1072 (Tri.-Bang.)* which held that

> *'3. The appellants are a Public Sector Undertaking producing a vide range of iron and steel products of different grades. They cleared the finished products from their factory to various branches/stockyards on payment of duty. The goods are sold at the branches/stockyards to the customers by raising delivery challan-cum-invoice. Due to various reasons, certain discrepancies are noticed in respect of quantities of goods dispatched from the factory and the quantities sold from the stock yards/branches. When the stockyard quantity is less than the quantity cleared from the factory, there is excess payment of duty by appellants. On the contrary if the stockyard quantity is more than the quantity cleared from the factory, there is short payment of duty. The appellant took up this matter with the local jurisdictional authorities and ultimately with the C.B.E.C. On this point the C.B.E.C. issued detailed circular dated 23-9-99 setting out the procedure to be*

adopted by all steel plants. Paras 2.4 & 2.5 of the Circular indicating the course of action to be taken by the assessee is reproduced below.

> *"2.4 A copy of the Plant-wise/Tariff Head-wise account as well as the statement of Excess/Shortages based on Wagon Close indicator or similar indicator, relating to a financial year, will be submitted by the stockyards/depots to their Jurisdictional Deputy/Assistant Commissioner of Central Excise by 31st May of the subsequent financial year. A summary of the position for all the Stockyards/Depots would be made plant-wise and sent to the respective plants for submission to the plants Jurisdictional Range office within 45 days (i.e. by 15th July). In case there is any net excess quantity, the plants will make the excise duty payment at the rate of duty existing on the last day of that financial year or that the highest rate prevalent during the year under consideration indicating inter alia the payment pertaining to each stockyard/depot, to their Jurisdictional Excise authorities by 30th July through TR-6/PLA. However, in respect of products where there is a net shortage, no refund claim would be made by the plants. The net shortages, including the duty receipt balance, will be carried forward by the stockyards/depots for adjustment against the excess of subsequent years of the same Tariff Head.*
>
> *2.5 As the differential duty, if any, is being paid at the end of the year as above, the Modvat availment by the customers who buy from the stockyards/depots will be as per the invoice of the stockyards/depots only. In other words, no further Modvat credit to the buyers will be allowed on account of payment of such differential duty."*

4. Be that as it may, the Revenue proceeded against he appellants by issue of show cause notice dated 26-4-1999 for the period from 1994 to 1998 on the ground that the appellants cleared excess stock from the factory. The demand is purely based on difference between the quantity cleared from the depot and that from the factory. In other words the Revenue has taken into account only the excess and no allowance has been given to the shortage contrary to the spirit of Board Circular. As regards shortage, the adjudicating authority states that the appellants have not produced any evidence to show that any pilferage or transit loss occurred. The adjudicating authority demanded duty on the excess on the assumption that excess goods had been cleared by the appellants from the factory and the appellants had collected duty on them. In that case, he should have taken into account the shortages and followed the procedure as per Board's circular in arriving at the net duty payable. He has not done that. We also do not find any justification for invocation of longer period. In this case, the appellants themselves have taken up the matter with the Govt. of India regarding the practical difficulties in the accounting system of excess/shortage. Under these circumstances, by no stretch of imagination, one can hold that the appellants removed excess *goods with intention to evade payment of duty. Hence longer period under Section 11A cannot be invoked. The adjudicating authority further has ignored Board's circular totally on the ground that the Board's Circular of 1999 cannot be extended to earlier period.*

5. The approach of the Commissioner is totally negative. A circular detailing the procedure to solve certain practical accounting problems is issued at a highest level by the Central Board of Excise and Customs. When such a circular was issued on the initiative of the appellants, the adjudicating authority was not correct in ignoring the same. The appellants have stated that while the duty demanded on the alleged excess quantity of Rs. 36,269.415 MT is Rs. 4,82,79,280/-, the duty paid on shortage is Rs. 6,51,55,344/-. In other words, the appellants have paid duty of Rs. 1,68,76,064/- in excess. If the principle enunciated in Board Circular is followed, the appellants would be entitled to carry forward the excess payment. In view of our observations, there is no justification for imposing any penalty. We hold that the Board's circular is applicable even to the present case and the excess and shortage have to be adjusted. Therefore, we set aside the order and remand the matter to the original authority for applying Board circular and determine the liability. In case there is excess payment of duty, the same should be carried forward for the subsequent year. Thus we dispose of this appeal by way of remand.'

8. Learned Authorised Representative contends that there is no provision in law for adjustment of excess duty paid against dues. The appellant had not exercised its option to claim refund of excess tax paid and was liable to make good any short fall any short fall in duty paid. Furthermore, it is his contention that the adjudicating authority has rendered detailed findings after thorough scrutiny of all the documents, returns and challans furnished by the appellant.

9. We are not entirely convinced with the arguments of Learned Authorised Representative. Considering the decisions of the Tribunal *supra*, we take the considered view that the adjudicating authority has failed to discharge its responsibility of ascertaining the tax liability, the special privilege of daily discharge of tax liability arising out of the specific peculiarities in the manufacturing process and sanctified by instructions/circulars of Central Board of Excise and Customs, indicates the intention to deviate from the normal practice of duty liability. It is in

this context that the decisions cited *supra* must be seen and the principles laid down therein should have been complied with by the adjudicating authority. The principles laid down in *re Thumbay Holdings Pvt Ltd.* was not available to the adjudicating authority thus depriving him of judicial decorum. The failure to afford adjustments of excess against short fall is attributable to insufficient assistance in the adjudication proceedings. Therefore, the adjudicating authority must be given an opportunity to conform to judicial decisions.

10. To enable such rectification, we set aside the impugned order and direct the adjudicating authority to evaluate the submissions made by the appellants and the applicability of the cited judicial pronouncement to determine the liability, if any, afresh. Appeals are allowed by way of remand.

(Operative part of the order pronounced in the open Court)

Sd/- Sd/-

(P.K. CHOUDHARI) (C.J. MATHEW)
JUDICIAL MEMBER TECHNICAL MEMBER

k.b/-