IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Date of Hearing & Decision: 11/07/2018

Excise Appeal No. E/287/2007 & 482/2009

(Arising out of Order-in-Appeal No.04/JSR/CEX/APPEAL/2007 dated 28.03.2007 & 36/Commissioner/2009 dated 15.05.2009 passed by the Commissioner(Appeals), Central Excise & Service Tax, Ranchi & Commissioner of Central Excise & Service Tax, Jamshedpur)

CCE-JSR
Usha Martin Ltd. **Applicant (s)/Appellant (s)**

vs.

Usha Martin
CCE-JSR. **Respondent (s)**

Appearance:

Shri H.S. Abedim, AC(AR) & Shri A.K. Bisbas, Suprt.(AR), for the Appellant (s)
Shri S. Chatopadhy, SR, Advocate, Shri G.K. Mundhra for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Final Order No.FO/A/77186-77187/2018

Per Shri Bijay Kumar

1. Both these appeals are being disposed of by this common order as the issue involved in these appeals are identical.
2. This appeal is filed by the Revenue against the Order-in-Original No. 04-JSR-CES-APL/2007 dated 28/03/2007, the appeal is filed on the following grounds;
   - That the Commissioner (Appeal) has failed to appreciated that in the present case the imposition of penalty is quite distinguishable from Rashtriya Ispat Nigam's case. Firstly, it is said on the grounds of

appeal that Hon’ble Supreme Court has not decided on the merits of the case and also the Rashtriya Ispat Nigam case did not alleged suppression, misstatement, under-valuation etc. In view of above two are the categorically distinguishable from where there is suppression etc., and other having no such ingredients, and therefore, the rationale of judgment cannot have a general application.

- That Commissioner (appeal) has failed to appreciate that the adjudicating authority has confirmed the demand under section 11 A(2) of the Central Excise Act, 1994(hereinafter referred to as ‘Act’) by holding that assessee have wilfully suppressed/mis-declared the relevant fact from the Department with intend to evade the payment of duty which attracted the provision of Section 11A of the Act.

3. The relevant fact of the case, are that the respondent is having factories at Jamshedpur and Ranchi;

   (a) Usha Alloys and Steel Divisions, Gamariaya, Jamshedpur (for short first factory) where the respondent manufactures steel billets and steel wire rods of different varities

   (b) Straight bar and Wire Mill Division, Gamaharia, Jamshedpur (in short second factory) where the respondent manufactures straight bar and rods.

For the manufacture of final products of the second factory, steel billets and wire rods manufactured at respondent first factory are inputs.

(c) Wire and Wire Rope Division (in short third factory) Tatisilwadi, Ranchi, wherein the respondent manufacture wire, standard wire, wire rods and wire sling.

For manufacture of final product of this third factory wire or rods manufacture at the respondent's first factory are inputs.

4. Section11 AC of Central Excise, 1944 (for short Act) is quasi-criminal provision which stipulates that when the duty has not been levied or not paid or has been short levy or short paid by reason of fraud, collusion, wilful mis-statement and suppression of fact or contravention to any of the provisions of the Act or the Rules with intend to evade the payment of duty the person liable to pay the duty is also liable to pay the penalty equal to duty so determined.
5. In this case, the Adjudicating Authority has concluded that respondent of having guilty of suppression of the material fact and the value of the excisable goods with intend to evade the payment of duty and accordingly invoked the extended period for limitation under Section 11 A of the Act, and rightly adjudged equivalent penalty under Section 11 AC of the Act and imposed interest also under Section 11AB of the Act. Reliance was also placed on the decision of Hon'ble High Court of Madhya Pradesh in case of

M/s Shah Machine Tools Pvt. Ltd, vs. Commissioner of Central Excise, [2006 (203) ELT, 15 (MP.)] wherein it is held that once it is noticed that the duty as required was not paid at the time of clearing the goods, and was they paid later point of time and in such case the default occurred, thereby attracting Section 11 AC ibid. Reliance was also placed in the case of ***Commissioner of Central Excise New Delhi. Vs. Mechino Montel***, reported in 2006(202) ELT 398(P & H).

6. Further the Commissioner (Appeal) erred in holding the interest is no leviable in the instant case by placing reliance in the case of ***Insulator and Electrical Company vs. CCE, Bhopal*** 2006[(2002) ELT 734 (TRI-DEL)]
7. In view of the above, it was said that impugned order is required to be set aside and order by the Ld. Adjudicating Authority be upheld.
8. All the factories were separately registered with Central Excise Authorities and the final products from the said factories were being cleared on payment of Central Excise Duty under cover of Central Excise invoice. Steel billets and wire rods manufactured by the first factory were cleared by the respondent inter alia, to its independent wholesale buyers or to its depot. A part of the of the said billets and wire rods manufactured at the first factory was also being transferred by way of inter-unit transfer to second and third factory on payment of Central Excise Duty. When the goods are received by the second and third factories, whatever duties were paid at the first factory was being availed by way of Cenvat Credit at respective

receiving factory. The final product of the second and third factory were being cleared on payment of duty after availing the Cenvat Credit on said inputs which have been procured from the first factory. Regarding the inter-unit transfer of the input, respondent had followed the system of 'transfer price' which was more or less equivalent to prevailing market price at or about the time of removal. This fact was known to the Department as units had been visited by the Central Excise officers and AG Audit teams, who have not objected the method being adopted by the Respondent. The dispute arose after the Circular No. 692/2008/CS inter alia classifying the assessable goods captively consumed has to be determined in accordance with the Cost Account Standard (CAS-4), after the insertion of the new Section 4 with effect from 1st July, 2000.

9. Against this background, we heard Ld. AR on behalf of the Revenue and Ld. Advocate on behalf of the respondent. Ld. AR reiterated the grounds contained in the appeal memorandum.

10. Ld. Advocate has submitted that the respondent paid the duty on the said inter-unit transfer in accordance with the law and there was no short levy or short payment of duty. The said goods manufacture by the respondent's first factory were also being sold to the independent buyers and the respondent has adopted the same price of inter-unit transfer of the goods to their other units. In such a situation relying on the decision of Hon'ble Larger Bench of this Tribunal in case of ***Ispat Industries Pvt. Ltd. CCE***

reported in 2007(209) ELT 185 (TRI-LB)] Rule 8 of the CE Valuation Rule did not have any application. Further reliance was placed on the decision of ***Steel Complex Ltd. vs. CCE*** 2004(171) ELT 255(Tri-Bang) & ***Commissioner vs. Steel Complex Ltd.*** 2015(321) ELT A 138(S.C.). In this case while dismissing the appeal, by the Department the Hon'ble Supreme Court has held;

> *"After hearing learned counsel for the parties, we are of the opinion that Rule8 of the Central Excise Rule,2000, which was prevailing at that time will have no application in the present case, where the goods are only partly sold under ex-factory basis and partly cleared for capitation consumption.*
> *We are, therefore, not inclined to interfere, on this ground alone, with the order passed by the Customs, Excise & Service Tax Appellate Tribunal. The appeals are, therefore, dismissed."*

11. The respondent paid the differential duty which was legally payable and the objection raised by the Department will result into Revenue Neutral situation. Such payment was made by the appellant in order to avoid dispute and litigation which did not mean that assessee paid any short levy or short payment by accepting any wrong committed by them. Reliance was further placed on the decision of Hon'ble CESTAT in case of ***Anglo French Textile vs. CCE 2018(360) ELT 1016(Tri.-Chennai).*** This decision of Tribunal was upheld by Hon'ble Supreme Court in case of ***Commissioner vs. Anglo French Textile-***2018(366) ELT 301(SC), wherein it has held that the transfer of goods to the sister unit from the appellant will have a Revenue neutrality. It has also stated that when the demand itself is not sustainable

there is no question of imposing any penalty and the reliance was placed on the following decisions;

(i) ***C.C.E. vs. Subray Catal Chemical Pvt. Ltd. 2010(261) ELT 1170(Tri-Ahmd)***
(ii) ***Gujrat Narmada Fertilizers Co. Ltd. vs. C.C.E. 2010(262) ELT 829(Tri.-Ahmd)***
(iii) ***C.C.E. & C. Vs. Gujrat Narmada Fertilizers Co. Ltd.-2012(285) ELT 336(Guj)***

12. The Department in this case entertained a view that the pricing of the goods which were sold to their sister unit on payment of Central Excise Duty, after the introduction of Central Excise valuation Rule with effect from 1^{st} July, 2000, would be under CAS 4 method. In this case it is on record that appellant has also sold the same goods to the independent buyer also on the same price, and therefore, we find there is non applicability Rule 8 of the Central Excise Valuation Rules, by adopting the CAS 4 method. Reliance is placed on the decision of Ispat Industries (supra). We also find that the issue is further upheld in the case of Steel Complex Ltd. (supra)also. We also find that the issue is completely Revenue neutral as the transfer of the goods from one of their sister units is on payment of duty to the sister unit by availing the input tax credit to the same amount. In such a situation relying on the decision of ***Anglo French Textile*** which has the approval of Hon'ble Supreme Court the demand is not sustainable. As the demand is not sustainable there is no question of

levy of any interest and penalty and accordingly we dismiss the appeal filed by the Department.

13. The appellant has also filed the another appeal being aggrieved by the Order No. 136/Commr/2009 dated 15/05/2009, wherein the demand of Rs. 2,61,36,683/- along with penalty and interest has been confirmed against the appellant on the ground that they have not correctly discharge the duty on the inter-unit transfer of the goods to their various sister units. Under the provisions of Act, 1944 for the period from April, 2003 to February, 2008.

14. The fact of the case is that the appellant have got the two factories at Jamshedpur Usha Alloys & Steel Division (first factory) where they manufacture steel billets and steel wire rods of the different verities and the Straight Bar and Wire Mill Division (second factory) where the appellant manufacture Straight Bar and Wires. For the manufacture of final product by the second factory, steel billets and wire rods manufactured at the appellant's first factory are the inputs. After 1st July 2000, the dispute arose between the Assessee and the Central Excise Authority about the system of determination of assessable value of inter-unit transfers. The Appellants were of the view that Rule 8 of the Central Excise Valuation (determination of price of excisable goods) Rules 2000 (in short valuation Rule) can apply on the entire production being used captively and not in case were part of the production being used a part of the production being

cleared sold to the input buyer Before this dispute arose the appellant used to pay Central Excise duty on the value adopted for the inter unit transfer in accordance with the value as prevalent for the independent buyers. The first unit used to clear the goods on payment of duty and the second unit used to take credit of equivalent amount the final product of the second factory was being cleared on payment of applicable rate of duty. Department, however, the system of valuation was objected upon by the Department in view of Rule 8 of the Valuation Rule. In order to avoid the further litigation with the Department the assessee paid the differential amount of duty as demanded by the Department on account of the fact that the same amount was paid as Cenvat Credit to second unit. The respondent was visited with the Show Cause Notices demanding the duty along with the interest and penalty and the same was confirmed by the Adjudicating Authority. It is the submission of the Ld. Advocate on behalf of the appellant that the issue is no more res-integra in view of the decision of Hon'ble Cestat in case of ***Steel Complex Ltd. vs. CCE*** has been upheld by Hon'Ble Supreme Court is referred below;

> "*In the grounds of appeal, it is contented that the market prices were lower than the value determined on the basis of cost of production as per Rule 8 of the Valuation Rules and that this fact is contrary to the assessee's submission that the market prices were higher than the value determined as per Rule 8 of the Valuation Rules. Thus, the assessee has resorted to mis-statement of facts and suppression of assessable value of their finished goods in order*

to avoid payment of proper duty of Central Excise thereon. The Respondent submits that the ground is totally misconceived and untenable. Ever since coming into force of the Valuation Rules on 01.07.2000 and even prior thereto, the Respondent paid duty on the basis of market price and this was never objected to by the Department because it was higher than the duties payable on the basis of cost of manufacture. The differential duty cropped up because the cost of manufacture itself, even for past clearance, as determined on the basis of the Board's Circular dated 13.02.2003 was higher than the cost calculation earlier. The said Ground of Appeal is also contrary to the finding of the Additional Commissioner that "it is immaterial as to whether the transaction value of the finished goods in such cases was lower or higher to the market prices"

15. The Commissioner (Appeal) has erred in totally by ignoring the aforementioned judgment which was in favour of the appellant. No reason has been given by the Adjudicating Authority to hold the valuation of the said inter unit transfer was required to be done under Rule 8 of the Valuation Rules the appellant had paid the differential duty, which was not legally payable on audit, objection raised by the Department in view of the revenue neutral situation. Such payment made in order to avoid dispute and litigation, and did not mean that there was any short levy or short payment. In the circumstances, it was submitted that the instant case there was absolutely no necessity or justification of invoking the proviso of Section 11 A or the provision of Section 11 AC of the Act for confirmation of demand imposition of penalty. Similarly, there was no need for payment of

any interest as the demand of duty itself is not sustainable. The reliance was placed on the following case laws;

(i) ***C.C.E. vs. Subray Catal Chemical Pvt. Ltd. 2010(261) ELT 1170(Tri.-Ahmd).***

(ii) ***Gujrat Narmada Fertilizers Co. Ltd. vs. C.C.E. 2010(262)ELT 829(Tri.-Ahmd).***

(iii) ***C.C.E. & C. vs. Gujrat Narmada Fertlizers Co. Ltd.-2012 (285) ELT 336 (Guj).***

16. On the other hand Ld. AR has reiterated the ground contained in the impugned order and such as the appellant has himself paid the duty, the Adjudicating Authority has rightly imposed the penalty and interest on the account of short levy of the duty.

17. We have heard the parts and parties the appeal record.

18. The issue involved in this case is regarding the valuation adopted by the appellant in case of inter unit transfer of the goods as to whether under Rule 8 of the Valuation Rule or any provision of Section 4 (a) of the Act. It is held in the case of ***Ispat Industry*** (supra) that the Rule 8 of the Central Excise Valuation Rule is applicable only in case where the entire production is being transfer to their sister units. On the other hand there is no sale to the independent buyers. Where there is the sale to the independent buyers the Valuation is required to be confirmed under the provisions of the Section 4 (a) of the Central Excise Act and not under valuation Rule. This issue has been resolved by the decision of Larger Bench of the Tribunal which has been confirmed by the Supreme Court, and therefore, is binding on the Adjudicating Authority. This aspect has not been considered

ignorantly by the Adjudicating Authority. We find that the assessee has paid the duty only on the account of fact the payment of duty by the first unit is available as the Cenvat Credit to the other unit and emerging into the Revenue Neutral situation. In such a case there is no scope of payment of any imposition of any penalty under Section 11AC of the Act or interest under 11AB of the Act. Reliance was placed on the following decisions;

(i) C.C.E. vs. Subray Catal Chemical Pvt. Ltd. 2010(261) ELT 1170(Tri.-Ahmd).

(ii) Gujrat Narmada Fertilizers Co. Ltd. vs. C.C.E. 2010(262)ELT 829(Tri.-Ahmd).

(iii) C.C.E. & C. vs. Gujrat Narmada Fertlizers Co. Ltd.-2012 (285) ELT 336 (Guj).

19. In view of above, we set aside the impugned order and allow the appeal with consequential relief if any.

20. As a result, Appeal No. E/287/2007 is dismissed and Appeal No. E/482/2009 is allowed.

(Operative part of the order pronounced in open court)

Sd/ Sd/

(P.K.Choudhary)
MEMBER(JUDICIAL)

(Bijay Kumar)
MEMBER(TECHNICAL)

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