IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal Nos. E/414-416/2007

Arising out of Order-in-Original No. 18/Commr./2006 dated 21.11.2006 passed by the Commissioner of Central Excise, Jamshedpur.

Commissioner of Central Excise, Jamshedpur

…Appellant (s)

Vs.

1. M/s Tisco Growth Shop,
2. M/s Nilachal Iron & Power Ltd
3. Shri R. K. Agarwal

…Respondent (s)

Appearance:
Shri D. Halder, A.C. (AR) for the Appellant (s)
Dr. S. Chakraborty, Sr. Advocate & Shri A. Biswas, Advocate & Shri S. Mohapatra, GM (Tax) for the Respondent(s)

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/Decision: - 17.07.2018

ORDER No…FO/A/77203-77205/2018

Per Shri P.K. Choudhary:

In terms of Order-in-Review No. 01/2007 dated May 30, 2007 passed by the Committee of Chief Commissioners, the instant appeals have been preferred by the Revenue against the Order-in-Original No. 18/Commr/2006 dated November 21, 2006 passed by the Commissioner of Central Excise, Jamshedpur. By the said Order, the Commissioner dropped the proceedings against the

Respondent/Assessee initiated by a Show Cause Notice dated October 18, 2005 issued by the Additional Director General, DGCEI, Kolkata.

1.0 The facts of the case, in brief, are :

(i) Nilachal Iron & Power Ltd. ("NIPL"), in order to set up and install a 350 TPD capacity Coal Based Sponge Iron Plant entered into a contract with TISCO Growth Shop ("TGS") in 2002. The contract was effective from July 1, 2002.

(ii) Under the said contract TGS undertook the responsibility of providing assistance in engineering designs, site work, fabrication and erection and other connected activities right from the beginning to the commissioning stage and trial running of the factory.

(iii) Subsequently, NIPL placed the following two orders on TGS for getting certain items produced on conversion basis for manufacture of DR Plant equipments, Drive system, Waste Gas handling system, etc. for further use and fabrication along with other items needed for the setting up of the Sponge Iron Plant.

(i) NIPL/PROJECT/02/A/02-03 dated 29.10.2002;

(a) Manufacture and supply of DR Plant items as listed below based on the manufacturing drawings. Support station assembly with base frames for Kiln.

(a) Kiln shell with tyres.

(b) Support station assembly with base frames for cooler

(c) Cooler shell with tyres

(ii) NIPL/PROJECT/02/B/02-03 dated 04.11.2002.

(a) Manufacture supply of Drive system waste gas handling system and other auxiliaries as listed below based on the manufacturing drawings.

i) Girth gear, Inlet/outlet for Kiln

ii) Girth gear, inlet/outlet hard for cooler

iii) Kiln cooler transfer hood

iv) After burning chamber

v) Dust setting chamber

vi) Emergency stack

(iv) In the aforementioned two Purchase Orders it was agreed that all raw materials, including fasteners, will be supplied by NIPL to TGS, which included steel plates, angles, channels, pipes and rods etc. and other components needed for the processing and fabrication of the equipments.

(v) NIPL, by a letter dated November 13, 2012 requested the Commissioner of Central Excise, Jamshedpur, for permission to work under rule 4(5) of the Cenvat Credit Rules, 2002, read with the Notification No. 214/86-CE dated March 25, 1986 for the fabrication of the goods under the said Purchase Orders, who directed NIPL to contact the jurisdictional Divisional Office for the relevant permission.

(vi) NIPL by a letter dated November 21, 2002 informed the jurisdictional Deputy Commissioner of Central Excise, Jamshedpur about the setting up of the said factory and gave the required declaration and undertaking under Notification No. 214/86-CE for sending goods after taking Modvat Credit thereon for job work to TGS whereafter they would be returned to NIPL and used in or in relation to manufacture of final product in the said factory.

(vii) Thereafter NIPL sent various inputs to TGS for fabrication of certain components on job work basis under the provision of Rule 4(5)(a) of the Cenvat Credit Rules, 2002 read with the said Notification and on return of the same, NIPL carried on further processing thereon to make them into complete products and thereafter used the same in setting up the plant, as a part or accessory or component thereof.

(viii) Show cause notice dated October 18, 2005 was issued by the Additional Director, DGCEI, Kolkata Zonal Unit, alleging that during the period 01.11.2002 to 31.03.2004, TGS had cleared kiln and cooler and accessories thereof from its factory to NIPL without payment of central excise duty by way of availing ineligible benefit of Notification No. 214/86-CE dated 25.03.1986, as amended, and therefore contravened Rules 4, 5, 6, 8 and 12 of the Central Excise

Rules, 2002 and Section 4 of the Central Excise Act read with Rule 6 of the Central Excise (Valuation) Rules, 2000. The show cause notice proposed recovery of central excise duty of Rs.1,67,09,674/- from TGS under the First Proviso to Section 11A of the Central Excise Act read with Rule 25 of the Central Excise Rules.

(ix) The Show Cause Notice further proposed denial of Cenvat credit availed by NIPL on the inputs sent to TGS for the manufacture of Kiln and Cooler.

(x) The Show Cause Notice also proposed imposition of penalty on Shri R.K. Agarwal, Managing Director of NIPL under Rules 13 and 15 of the Cenvat Credit Rules and Rule 26 of the Central Excise Rules for devising the modus operandi, as alleged by the Department.

(xi) The Commissioner, vide the impugned order, dropped the demands and penalties proposed in the Show Cause Notice. Hence, the present appeals before the Tribunal.

2. It has been contended on behalf of the Revenue that:

(i) Inputs, on which the credit has been availed and which went into manufacture of capital goods, have been used in the manufacture of dutiable finished goods cleared from the factory. The adjudicating authority has erred in holding that the finished goods in the instant case is sponge iron, whereas the finished goods are 'Kiln' and 'Cooler' and no duty has been paid on its clearance.

(ii) The adjudicating authority has erred in misinterpreting Notification No. 214/86-CE and Board Circular No. 106/22/97-C.E. dated March 20, 1997. Exemption from payment of duty is granted to the job worker vide Notification No. 214/86 with respect to the goods used for manufacture of final products which are subsequently cleared on payment of duty from the premises of the principal manufacturer. In the instant case, TGS have manufactured Kiln and cooler on job work basis from the inputs supplied by NIPL and have cleared the same in CKD condition without payment of duty and have used the same for setting up of Sponge Iron Unit of NIPL.

(iii) The fact that such manufactured goods are further subject to exemption under Notification No. 67/95 and do not suffer duty at any stage was well known to TGS; they have escaped from payment of central excise duty by misusing exemption notification no. 214/86. Furthermore, the simultaneous availment of benefits under exemption notification nos. 67/95 and 214/86 for a commodity manufactured and cleared is not authorised by any provision of the Act or Rules or backed by judicial pronouncements.

(iv) The terms of contract between NIPL and TGS were on principal to principal basis and contrary to the finding of the adjudicating authority that the principal manufacturer is always liable to discharge central excise duty. Rule 4(6) of Cenvat Credit Rules, 2004 clearly stipulates that the products may be cleared from the premises of job worker on payment of duty subject to conditions as may be imposed in the interest of Revenue by the jurisdictional Commissioner of Central Excise.

3. On behalf of the respondent assessee it was submitted that:

i) It is incorrect that after removal of the subject goods from TGS's factory to NIPL site, no further manufacturing activity was carried out except for erection and installation. The job work activities done at TGS's factory were only to the extent of fabrication and manufacturing parts of major assemblies and not complete manufacturing of different components. The said components supplied by TGS were not capable of producing the completed kilns or coolers. At the NIPL site, kiln was refractory lined and fitted with burners, blowers, motors, piping, cabling, etc. The same was the case for coolers. Further, as acknowledged in the show cause notice, the said goods which would have finished dimensions of 4.2 meter x 72 meter and 3.6 meter x 42 meter respectively were impracticable to be manufactured at TGS's factory and it would have been impossible to transport the same in one piece to the NIPL site. Hence, they were removed segment wise from TGS's factory to NIPL site where they were assembled into final shapes of kiln and cooler for which, inter alia, 'structural fabrication' was carried out at the NIPL site. Such structural fabrication at site, as held by the Larger Bench of this Tribunal in **Mahindra & Mahindra Vs. Commissioner of Central Excise [2005 (190) ELT 301 (T-LB)** amounts to manufacture of excisable goods.

ii) In cases where several processes are required to be carried out at the premises of the raw material supplier, the benefit under Notification No. 214/86-CE and Rule 4(5) of the Cenvat Credit Rules is available as held in:

(a) **Sunco Rubber Ltd. Vs. CCE [2004 (176) ELT 223 (T)]** affirmed by the Madras High Court in **CCE Vs. Sunco Rubber Ltd. [2008 (228) ELT 27 (Mad)]**

(b) **Eveready Industries Ltd. Vs. CCE [2005 (186) ELT 570 (T)]**

(iii) In any event it is settled law that job worker is not liable to pay duty even if there is manufacture of excisable goods while carrying out job work with raw materials supplied to it.

(iv) Further, in view of the fact that declarations as required under Notification No. 214/86-CE were filed by NIPL, TGS as job worker cannot be considered as manufacturer of kilns and coolers and hence there can be no demand of duty on TGS, as held in the case of **Excel Corrugated**

Boxes (P) Ltd. Vs. Commissioner of Central Excise [2005 (182) ELT 485 (T) affirmed in **CCE & Cus Vs Excel Corrugated Boxes (P) Ltd. [2009 (237) ELT 454 (Ker)]**.

(v) The contention that since the goods were not used in or in relation to manufacture of any final product by NIPL but was captively used as a part of the plant being set up, the benefit under Notification No. 214/86-CE was not available is contrary to the notification itself which does not exclude machines, machinery, plants, equipments etc. There being no dispute that kiln and coolers are intrinsic parts to this Sponge Iron plant set up by NIPL, which was used for manufacture of dutiable sponge iron by NIPL once the plant was set up, exemption under the said Notification was available. In this respect reliance was placed upon -

(i) **Flex Engineering Ltd Vs. CCE [2004 (178) ELT 853 (T)]**

(ii) **Mech Form Vs. CCE [2014 (309) ELT 492 (T)]** affirmed by Supreme Court in **Commissioner Vs. Mech Form [2015 (320) ELT A 180 (SC)].**

4. Heard both sides and perused the appeal records.

5. We find that there are three issues to be decided in the instant case:

i) Whether Cenvat credit availed by NIPL on the inputs sent to TGS, which were used in the manufacture of final products, was available to NIPL.

ii) Whether TGS was liable to pay duty on the goods cleared by them to NIPL after job work.

iii) Whether the Department was correct in imposing penalty on Shri R.K. Agarwal.

6. On careful perusal of the contract dated 2nd July, 2002 between NIPL and TGS, related Purchase Orders, the relevant records and the show cause notice, we find that in the instant case there is no dispute that structural fabrication was carried out on the goods supplied by TGS at the site of NIPL. Such structural fabrication, as held in the case of **Mahindra & Mahindra Vs. CCE (supra)** by the Larger Bench of this Tribunal amounts to "manufacture" within the meaning of Section 2(f) and Section 3 of the Central Excise Act. We also find that there is a specific finding of the Commissioner in the impugned order that the kiln and cooler did not attain the shape of a final product at the factory of TGS. It has been submitted that it was not possible to manufacture the said goods at one place and that the final product was obtained only at the premises of NIPL. It has also been submitted that by applying the ratio of the decision of the Hon'ble Madras High Court in the case of **CCE Vs. Surco Rubber Ltd. [2008 (228) ELT 22 (Mad)]**, TGS cannot be held to be liable to pay duty on the said kiln and cooler, the same not having attained the shape of fully manufactured goods at its premises.

7. We find that it is not in dispute that the kiln and cooler in question are capital goods, used in the manufacture of final product, namely, sponge iron. The raw material on which NIPL has availed Cenvat credit are inputs, used in the manufacture of the abovementioned

capital goods. From the Show Cause Notice it is apparent that the kiln and cooler were capital goods to be used in the NIPL factory for the manufacture of the final product. Even otherwise, as per Rule 2(k) of the CCR, inputs include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. Therefore, we are of the view that NIPL was eligible to avail the disputed Cenvat credit.

8. Regarding the liability of payment of duty on TGS on the manufacture of the said capital goods, it is an admitted fact that NIPL, being the principal manufacturer in the instant case, had undertaken to discharge the duty liability harnessed on TGS by way of a declaration made before the jurisdictional Central Excise officer as per Notification No. 214/86-CE. The goods cleared by TGS after job work were dutiable goods and as per the decision of the Larger Bench of this Tribunal in the case of **Thermax Babcock and Wilcox Ltd. v. CCE, Pune-I** reported in 2017-TIOL-4390-CESTAT-MUM-LB, it is only by way of Notification No. 214/86-CE that the liability to pay duty is shifted from the job worker to the principal manufacturer. Since, there is no allegation or finding to the effect that the principal manufacturer in the instant case had not complied with any condition of the said notification, the benefit of the Notification was available to them. Therefore, TGS was not liable to discharge duty on the goods manufactured by them. Since, the liability of payment of duty on NIPL is not the subject matter of the Show Cause Notice in the instant case, we refrain from making any observation to that extent.

9. We find that since the demands against NIPL and TGS are liable to be dropped, the penalty imposed on Shri R.K. Agrawal cannot sustain.

10. In view of the above discussion, we find no infirmity with the impugned order of the Commissioner and therefore uphold the same and dismiss the appeals filed by the Revenue.

(Operative part of the order already pronounced in Open Court)

(Bijay Kumar)	**(P. K. Choudhary)**
Member (Technical)	**Member (Judicial)**

Tushar Kr.