

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

**Appeal No. E/200/2010**

Arising out of Order-in-Original No. 112/Commr./Bol/09 dated 18.12.2009 passed by the Commissioner of Central Excise, Bolpur.

M/s S.A.I.L.

....Appellant (s)

**Vs.**

Commissioner of Central Excise, Bolpur.

...Respondent (s)

Appearance:

Shri Ravi Raghavan, Adv. & Ms. S. Mundhra, C. A. & Shri D. Sen  
Advocate for the Appellant (s)

Shri A. Roy, Suptd. (AR) for the Respondent(s)

**CORAM:**

**HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)**

**HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)**

Date of Hearing/Decision: - 17.12.2018

Order No. FO/A/77328/2018

**Per Shri P. K. Choudhary:**

The instant appeal has been filed by the assessee against the adjudication order dated 18.12.2009 passed by the Ld. Commissioner, Central Excise, Bolpur, wherein he has confirmed the demand of central excise duty of Rs.11,99,970/- with equivalent penalty under Section 11AC of the Central Excise Act, 1944 and applicable interest for the period from December 2003 to March 2008.

2. Briefly stated, the facts of the case are that the assessee is engaged in the business of manufacture of iron and steel items on which central excise duty is being paid. In the impugned period, it was

observed that the assessee, apart from selling goods to independent buyers, had also cleared goods for erection of structural items on which it paid central excise duty on the basis of price applicable in case of goods cleared to unrelated buyers which is on record. Show Cause Notice dated 18.12.2008 was initially issued by invoking extended period of limitation to raise demand of central excise duty of Rs.98,03,109/- arrived at by applying the provision of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 ('Valuation Rules') in terms of which the value of excisable goods would be 110% of the cost of production of subject goods. In the course of adjudication, the Ld. Commissioner in para 6.4 of the impugned order appreciated the submissions made by the appellant that since the price of goods sold to independent / unrelated buyers were available, Rule 8 of the Valuation Rules could not be applied as held by the Larger Bench of the Hon'ble Tribunal in the case of Ispat Industries Ltd. vs. Commissioner of Central Excise, 2007 (209) E.L.T. 185 (Tri-LB) which case has been accepted by the Revenue and had attained finality as no further appeal has been preferred by them. However, while accepting the ratio of the above decision in Ispat Industries case (Supra), the Department took a complete new stand that in such case, the provisions of Rule 4 of the Valuation Rules becomes applicable in terms of which the value of excisable goods would be the value of such goods sold by the assessee for delivery at any time nearest to the time of removal of goods under assessment as was relevant during the material period. The Ld. Commissioner, on the basis of report submitted by jurisdictional Divisional Officer,

recalculated the duty amount on the principle that wherever the assessee had paid duty not less than the duty payable on the basis of value of sales effected to unrelated buyers, no further duty was payable. Wherever they had paid duty less than the duty payable on the basis of Rule 4, the differential duty was held to be liable which amounted to Rs.11,99,970/-. On the basis of said observations, the Ld. Commissioner confirmed the duty demand of Rs.11,99,970/- and imposed equal penalty on the ground that there was suppression on the part of the assessee. The remaining duty amount proposed in the Show Cause Notice was dropped.

3. Shri Ravi Raghavan, Ld. Advocate, appearing on behalf of the appellant submitted that the Show Cause Notice (SCN) proposed demand of excise duty only on the basis of Rule 8 of the Valuation Rules. No reference or proposal was made to Rule 4 of the said Rules to raise the duty demand. However, in the adjudication order, the Ld. Commissioner while accepting that Rule 8 was not applicable chose to confirm demand under Rule 4 which was never proposed in the Show Cause Notice and therefore the Adjudicating Authority has travelled beyond the scope of allegations made in the Show Cause Notice. He emphasised that it is a settled legal position in view of the Hon'ble Apex Court's decisions in the following cases that when the very basis of demand which was not proposed in the Show Cause Notice, the same cannot be applied for confirming the demand in the final adjudication order :

- Hindustan Polymers Co. Ltd. vs. Commissioner of Central Excise, Guntur 1999 (106) E.L.T. 12 (SC)

- Commissioner of Central Excise vs. Gas Authority of India Ltd. 2008 (232) E.L.T. 7 (SC)
- Commissioner of Central Excise vs. Brindavan Beverages (P) Ltd. 2007 (213) E.L.T. 487 (SC)
- Commissioner of Central Excise, Nagpur vs. Ballarpur Industries Ltd 2007 (215) E.L.T. 489 (SC)

As apart from the above submissions on merits, the Ld. Advocate also contested the demand on time bar inasmuch as the issue involved valuation and interpretation of legal provisions. He also contended that the law settled by Larger Bench in Ispat Industries Ltd (Supra) was available to the Department at the time of issuance of Show Cause Notice and therefore, the demand under Rule 8 was otherwise not sustainable. He also submitted that even if duty is held to be payable, the same would be available as CENVAT Credit and hence, the situation would be completely revenue neutral and therefore, imposition of penalty is not justified.

4. The Ld. Departmental Representative (DR) submitted that the Ld. Commissioner while accepting the legal principles as laid down by the Larger Bench of the Tribunal in Ispat Industries Ltd (Supra), has already set aside the demand under Rule 8, but however, the assessee cannot be absolved from the duty liability under Rule 4 of the Valuation Rules as has been held by the Larger Bench in the above referred case. Accordingly, the Ld. D.R. supported the findings made by the Ld. Commissioner and prayed to confirm the duty demand as ascertained in the adjudication order.

5. Heard both sides and perused the appeal records.

6. The issue relating to correct value of excisable goods removed by the assessee for use in erection of structural items is not in dispute inasmuch as the law, as was prevalent during the material period, has been clearly settled by the Larger Bench as has been accepted by both sides. The only issue to be decided whether the assessee can be made liable to pay the differential duty under Rule 4 of the Valuation Rules, as has been ascertained in the impugned adjudication order which was never proposed in the Show Cause Notice.

7. We find that the Hon'ble Supreme Court in Hindustan Polymers Co. Ltd (Supra), has made a specific observation in para 6 of the said order that the Tribunal, in the desire to do complete justice, should not have passed the order which proceeded upon a basis that is altogether different from that of the demand proposed to the appellant. In the facts of the said case, the Show Cause Notice proposed duty under the erstwhile residuary Tariff Item 68. The Tribunal while accepting the submissions of the assessee arrived at the conclusion that the goods were not classifiable under Tariff Item 68, but under Tariff 15A and accordingly ordered for payment of duty for normal period of limitation. The Apex Court, accordingly held in the said case that having come to the conclusion against the Revenue, the appropriate order for the Tribunal to have passed was to set aside the demand and leave it open to the Revenue to proceed against the assessee as permissible under the law. Further, the Apex Court in Gas Authority of India Ltd (Supra) has also held that the Show Cause Notice is a foundation of a demand under Central Excise Act and in case the

adjudication order proceeds in the line contrary to the Show Cause Notice, the same deserves to be quashed. Moreover, in the very issue pertaining to valuation of excisable goods, the Hon'ble Supreme Court in CCE vs. Ballarpur Industries (Supra), while setting aside the first Show Cause Notice which was barred by limitation, categorically observed in para 21 of its order that since Rule 7 of the Valuation Rules was not invoked in the second and third Show Cause Notices impugned therein, demand could not sustain for the reason that the Show Cause Notice is the foundation in the matter of levy and recovery of duty, interest and penalty and if Rule 7 was not at all invoked in the Show Cause Notice, it would not be open to the Commissioner to invoke the said Rule.

8. In the instant case before us, the Ld. Commissioner while confirming the duty demand chose to invoke Rule 4 of the Valuation Rules which was never proposed in the Show Cause Notice dated 18.12.2008. We have carefully examined the said Show Cause Notice wherein the central point for proposing demand was the cost audit report relied upon to invoke Rule 8 of the Valuation Rules with the allegation that the assessee has paid duty much lower than the one payable by ascertaining the value of 100% of the cost of production. No whisper or murmur was made in the whole Show Cause Notice regarding the applicability of Rule 4 in the given case of the assessee. The case of the department surrounds to a narrow compass that the demand stands legally payable under Rule 4 if not under Rule 8 of the Valuation Rules. Be that so as it may, in view of the legal principles settled by the Apex Court in the matter of levy of central excise duty,

when the very provisions of Rule 4 was not referred to in the Show Cause Notice, the demand confirmed by invoking the said Rule 4 cannot sustain and has to be rightly set aside in the interest of justice.

9. In view of the above factual and legal position and having regard to the law as laid down by the Apex Court referred above, we set aside the entire duty demand, interest and penalty by allowing the appeal with consequential relief as per law.

(Dictated and pronounced in the open court.)

**(V. PADMANABHAN)**  
**MEMBER (TECHNICAL)**

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

Tushar Kr.