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

Excise Appeal No.396 of 2009

(Arising out of Order-in-Original No.25-27/Denovo/Commr./Bol/09 dated 07.01.2009 passed by Commissioner of Central Excise, Bolpur)

M/s SAIL
Durgapur Steel Plant, Durgapur-713203

Applicant

VERSUS

CCEx., Bolpur
Adjudication Cell, SIAN, Bolpur, Birbhum, W.B.-731204

Respondent

Appearance:

Dr.Samir Chakraborty, Sr.Advocate and Shri Abhijit Biswas, Advocate for the appellant
Shri K.Chowdhury, Authorized Representative for the Appellant

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

FINAL ORDER NO.76808/2019

DATE OF HEARING : 06.08.2019

DATE OF PRONOUNCEMENT : 26th November, 2019

PER P.K.CHOUDHARY :

The facts of the case in brief are that the appellant, Steel Authority of India Ltd., has an integrated steel plant situated at Durgapur in the State of West Bengal, having more than 2 million ton iron and steel manufacturing capacity. It consists of several plants, like coal washery, coke oven, oxygen plant, various chemical plants, power plant, water treatment plant, etc., besides the large core areas of iron and steel plants right from coke oven batteries, blast furnaces, steel melting shops with L.D. converters, to various finishing rolling mills along with Centralised Engineering Shop, Wheel and Axle plant, etc. The integrated steel plant operates with large number of heavy and sophisticated machineries, for which about more than two lakhs of spares are required to be maintained. The Central Engineering Maintenance Shop (in short, "CEM") manufactures various emergency spare parts for captive use, i.e., repair and maintenance of plant and machineries installed, which are also large in number. Such spare parts are manufactured on emergency basis along with some routine items. The plant also has a big foundry for manufacture of regular ingot moulds, bottom plate, along with various casting items like iron castings, steel castings, copper castings in the process of manufacturing spares, which are used captively.

2. The captive workshops and plants from where finished products are sold are integrally related. Blooms, billets, ingots, pig iron, etc., are used in the said workshops for manufactures of various stores and spares which are ultimately used for repair and maintenance of the machineries installed in the various plants in the factory.

3. In respect of pig iron, bloom, billet etc. used for the purpose of repair and maintenance of the machineries installed inside the plants after converting them into various stores and spares, the appellant avails exemption under Notification No. 281/86-CE dated April 24, 1986 (in short, "the said Notification"). Duty is paid on the final products manufactured in the integrated steel plant at the terminal stage i.e. when ultimately cleared from the factory in accordance with Rule 9 of the erstwhile Central Excise Rules, 1944 and the Central Excise Rules, 2002.

4. On February 26, 1991 a show cause notice was issued by the Collector of Central Excise, Bolpur Collectorate, Bolpur alleging that structural parts, pipes, spares manufactured internally by the appellant were removed for captive and/or for home consumption without payment of central excise duty, availing the benefit under the said Notification, though not eligible under, during the period

March 16, 1987 to March 15, 1989, thereby evading central excise duty amounting to Rs. 2,98,42,382.53.

5. Thereafter, on March 26, 1991 and August 2, 1991 two more show cause notices on the same issue and on same allegations were issued covering the periods February 28, 1986 to March 15, 1987 and March 16, 1989 to March 15, 1990 demanding central excise duties amounting to Rs. 2,98,42,382.53 and Rs. 1,28,68,859.78 respectively.

6. On March 13, 2007 personal hearing in connection with the proceedings under the subsequent two show cause notices were held by the Additional Director General, DGICCE, Kolkata on March 21, 2007/March 22, 2007/March 23, 2007 at Kolkata, to whom the cases were assigned. Thereafter on March 30, 2007 an adjudication order was passed by the Additional Director General, DGICCE, ERU, Kolkata confirming a total duty demand of Rs. 4,27,11,242.31 under the two show cause notices and imposing penalty of equivalent amount upon the appellant. Appeal preferred by the appellant against the said order dated March 30, 2007, being EA 376/2007, was disposed of by the Tribunal by an Order No. M-263/S-774/A-953/KOL/08 dated September 22, 2008, allowing the appeal, setting aside the impugned order and remanding the matter to the jurisdictional Commissioner to decide afresh, within the period specified in the order.

7. Thereafter personal hearing was held by the Commissioner of Central Excise, Bolpur in proceedings under all the three show cause notices, whereupon a common adjudication order was passed by the Commissioner on January 7, 2009, confirming a total duty demand of Rs. 5,49,77,939.34 under Rule 9(2) of the erstwhile Central Excise Rules, 1944 read with the Proviso to Section 11A(1) of the Central Excise Act, 1944 (in short, “the Act”) against the appellant. Equivalent amount of penalty was also imposed upon the appellant under Rule 173Q(1)(a), (b) and (d) of the Central Excise Rules, 1944 (in short, “the said Rules”).

8. Being aggrieved thereby, the instant appeal has been preferred by the appellant.

9. The three grounds on which the benefit under the said Notification has been denied by the Commissioner are as follows:

(a) The goods were used in structures and parts thereof and not used as parts of machinery and hence benefit under the said Notification is not available to such goods. This has been elaborated in para 3.3 of the order (referred to as "1st category" in the order).

(b) Such goods were not coming within the purview of repair or maintenance as specified in the said Notification to attract the benefit thereof, in as much as they were meant for replacement of complete machinery and/or were too extensive and elaborate in nature to be covered by the term "repair or maintenance". This has been elaborated in para 3.4 of the order (referred to as "2nd category" in the order).

(c) Some goods were cleared outside the factory to different parties surreptitiously without payment of duty and that there was no scope for availing exemption under the said Notification in respect thereof. This has been elaborated in para 3.5 of the order (referred to as "3rd category" in the order).

10. Dr. Samir Chakraborty, Senior Advocate, appearing on behalf of the appellant, submitted as under:

10.1 As regards the 1st category goods, from the said Notification it would be seen that the excisable goods exempted thereunder are those which are intended for use in the factory of manufacture thereof "for repairs or maintenance of machinery installed therein". The words "repairs" or "maintenance" have been used disjunctively in the said

Notification. Therefore excisable goods which are intended for use in the factory for, inter alia, “maintenance” of machinery installed therein come within the purview of the said Notification and are entitled to exemption thereunder. In the instant case there is or can be no dispute that, inter alia, the steel melting shop comprises of several machinery which are required for the purpose of manufacture of goods by the appellant and, hence, the requirement of the said Notification is satisfied.

10.1 In respect of the pipelines, they form a part of machinery installed in the factory. The pipes, there is no dispute, have been installed in the factory and function as a part of the machinery in the manufacturing process or processes involved for manufacture of excisable goods in the factory. These pipelines are used for transportation of, inter alia, cooling elements for cooling of the machinery or refractories therein. In the absence of such pipelines and consequent inability to supply the cooling elements, the machine or machinery cannot function properly and in some cases would stop functioning after a point of time. These pipelines are therefore necessary not only to control the temperature in the machines, but also are necessary for “maintenance” of the machineries. As such, the excisable goods used for repair or maintenance of these pipelines, such as pipes, are also eligible to exemption under the said Notification.

10.2 As regards the 2nd category of goods, the finding that in any of the subject goods were meant for or used for replacement of complete machineries is erroneous and contrary to records. Neither the show cause notices nor the impugned order has identified any such machinery which had been completely replaced with the subject goods involved. In the absence of any such material being disclosed, this finding has no substance or merit whatsoever. On the contrary, from Annexure “A” to the show cause notice, containing list of the subject goods involved and their respective uses as detailed by the senior officers of the appellant company in their statements recorded under Section 14 of the Act, which has evidentiary value as per the settled principle, it is conclusively evidenced that there is not a single case of replacement of entire/complete machinery installed in the factory by the use of the subject goods. The finding of the Commissioner that replacement of deck plate in the ingot casting car ("IC Car") (also known as Ladle Transfer Car) did not amount to use of the subject goods (deck plate) in the repair of the IC Car since the said deck plate gave the IC Car its essential character and therefore tantamounted to replacement of the whole machinery is erroneous and untenable. IC Car is similar to a railway wagon but with a steel deck and no side walls used for movement of hot ingots from steel melting shop to the rolling mills area for further processing. During the course of this movement the plate on which the ingots are placed, known as deck plate in technical terminology, get worn out. There are occasions when such plates become so damaged that by ordinary repairing process like welding etc. they cannot be repaired and requires to be replaced by a deck plate fabricated by the appellant. Such replacement of any worn out spare parts of the IC Car, classifiable under Heading No. 8454 of Central Excise Tariff, is fully covered by the said Notification and eligible to exemption thereunder.

10.3 In so far as the 3rd category goods are concerned, from the annexures to the show cause notices wherein according to the Commissioner detailed particulars of such goods and their alleged removal are contained, it would be seen that most of these goods were repair or machinery work or machining work carried out in machinery supplied by companies like Alloy Steel Plant, Durgapur Projects Ltd. and Durgapur Cement Works Ltd. Such repair works carried out by the appellant on agreed charges therefor did not result in manufacture of any new excisable goods and, hence, the question of payment of duty thereon could not and did not arise. In the premises, the appellant did not avail benefit of the said Notification in respect thereof. In respect of the other items, they were, inter alia, steel cots, handle set and bolts, side posts and middle posts for boxing arenas, press stand and other such sports materials for the stadium in the Steel Township, which were assembled from used and damaged materials. They were also goods on which no central excise duty was payable. Hence, the question of availment of exemption under the said Notification could not and did not arise in respect of these goods also. Therefore, the demand covering these items, amounting to a total of Rs. 1,90,707.48, is illegal, invalid and untenable. However, in order to avoid any dispute on these items cleared to outside parties as referred to in the show cause notices, the appellant, vide challans dated February 28, 1991 and April 10, 1991, deposited a total sum of Rs. 1,48,736/- (out of the said demand of Rs. 1,90,707.48). This has, however, not been considered, although copies of the relevant challans were filed before the Commissioner and form a part of record of the present proceeding.

10.4 In any event, the demands covered by the two show cause notices dated February 26, 1991 and March 26, 1991 are barred by limitation, the show cause notices having been issued beyond the prescribed period of 6 months. From the correspondence between the Department and the appellant in October 1989, on record of the present proceedings, it would be evident that the concerned Central Excise authorities were fully aware of the fact that the appellant was claiming benefit of the said Notification in respect of those products manufactured within the factory and used in the factory for repair and maintenance of machinery, including those alleged in the show cause notice. Moreover, from Sl. No. 2, Annexure “B” of the show cause notice dated February 26, 1991 itself it would be seen that under cover of a letter dated April 25, 1990 the appellant had submitted to the jurisdictional Central Excise authorities a list of goods manufactured by the appellant in the Central Engineering Shop (the workshop) during the year 1989-90. As such, on April 25, 1990 itself (the letter having been received on the same date), the concerned Central Excise authorities were in knowledge of the complete list of goods manufactured in the workshop and utilised in the factory availing exemption under the said Notification. As such, the finding in the impugned order that there was suppression of facts on the part of the appellant without even referring to these correspondences and without disclosing any material in support thereof is untenable and unsustainable.

10.5 Further and in any event, in so far as the proceedings under the show cause notice dated March 26, 1991 and the duty demand of Rs. 2,98,42,382/- covered thereby is concerned, the same is in any event barred by limitation on application of the principles laid down by the Apex Court in, inter alia, the cases of Nizam Sugar Factory Vs. Collector of Central Excise, 2006 (197) ELT 465 (SC) and ECE Industries Ltd. Vs. Commissioner of Central Excise, 2004 (164) ELT 236 (SC).

10.6 In the premises abovestated there being no contravention by the appellant of any provision of the Act or the said Rules, no penalty is imposable upon the appellant and the contrary finding of the Commissioner is patently erroneous and untenable. The imposition of penalty upon the appellant under Rule 173Q of the said Rules is without the condition precedent therefor being satisfied and, hence, illegal, invalid and bad.

10.7 Further and in any event, the extended period of limitation being not applicable in the instant case, for the reasons abovestated, no penalty is imposable upon the appellant under Rule 173Q of the erstwhile Central Excise Rules, 1944, as held by the Apex Court in the cases of P&B Pharmaceuticals (P) Ltd. Vs. Collector of Central Excise, 2003 (153) ELT 14 (SC), Nagpur Alloy Castings Limited Vs. Collector of Central Excise, 2002 (142) ELT 515 (SC) and Pahwa Chemicals Pvt. Ltd. Vs. CCE, 2005 (189) ELT 257 (SC). As such, for this reason also, the penalty imposed upon the appellant by the impugned order is contrary to law, untenable and unsustainable.

11. On behalf of the Revenue, the Ld. A.R., Mr.K.Chowdhury, reiterated the findings of the Commissioner. Drawing attention particularly to paragraphs 3.3, 3.4 and 3.5 of the order it is contended that the benefit under the said Notification had been rightly denied to the appellant.

12. Heard both the parties and perused the appeal records.

13. For better appreciation of the case, Notification No. 281/86-CE dated April 24, 1986 is as follows:

> "In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts all excisable goods manufactured in a workshop within a factory and intended for use in the said factory or in any other factory of the same manufacturer, for repairs or maintenance of machinery installed therein, from the whole of the duty of excise leviable thereon which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986):
>
> Provided that where such use is in a factory of a manufacturer, different from his factory where the goods have been manufactured, the exemption contained in this notification shall be allowable subject to the observance of the procedure set out in Chapter X of the Central Excise Rules, 1944."

14. In "BLACK'S LAW DICTIONARY" (10th Edition), the word "maintenance" has been defined to mean "the care and work put into property to keep it operating and productive; general repair and up keep", whereas the word "maintain" means "to care for (property) for purposes of operational productivity or appearance; to engage in general repair and up keep". Hence, providing appropriate structures to install and/or house a machine or machinery in order that the same

can operate and be in a state of operation and thus be of productive nature also forms a part of maintenance of machine or machinery installed in the said steel melting shop. The statements of the appellant's officers recorded under Section 14 of the Act, which have not been controverted, regarding user of the goods establishes that in the instant case such is the case and that none of them were used for replacement of complete machineries. On perusal of the materials on record we are of the opinion that replacement of the deck plate did not amount to replacement of the IC Car contrary to the Commissioner's finding. Replacement of the worn out deck plate merely amounts to repair of the IC Car, irrespective of the fact that it is a primary part thereof. We are also in agreement with the contention of the appellant regarding user of the other excisable goods, required for the structurals, including repair/replacement thereof. From the use of the pipelines, we are also in agreement with the contention of the appellant that the said pipelines are necessary for maintenance of the machineries.

14.1 Further, the term "machinery" in Notification No. 281/86-CE is not confined to a single machine but extends to a machine and group of machines to perform useful function. Steel melting shop comprises of a group of machines which together perform to produce the final product therein, as held by the Supreme Court in *Collector of Customs Vs. United Electrical Industries Ltd., 1999 (108) ELT 609 (SC)*. All goods manufactured in workshop in the appellant's factory used for repair or maintenance of such machines in a Steel Melting Shop are therefore eligible to exemption under the said Notification.

14.2 Hence, the steel melting shop which comprises of a furnace along with other machineries/structures installed therein are fully covered by Notification No. 281/86-CE.

14.3 We therefore hold that the parts used for repair and maintenance of the machines, structurals and pipelines, covered in the

1st category, including replacement of parts thereof are entitled to benefit under Notification No. 281/86-CE and the appellant has correctly availed the exemption thereunder.

15. In respect of the goods under the *2nd category* we find that there has been replacement of the worn out or damaged or defective parts with the subject goods. Such replacement of parts is fully covered by the term "repair" in the said Notification. This has been held by the Tribunal in the case of *A.S. Moloobhoy & Sons Vs. Commissioner of Customs, 2012 (276) ELT 399 (T), paras 3 to 6*, while interpreting a similar notification. Applying the same we are of the view that the appellant has correctly availed benefit under Notification No. 281/86-CE in respect of the goods covered under this category.

16. Further the issues involved are no longer res integra. A large number of decisions of the Tribunal, including this Bench, have interpreted the provisions of Notification No. 281/86-CE and have arrived at conclusions which support the case of the appellant. They apply to the instant case on the facts as observed above. Some such decisions are:

(i) *Collector of Central Excise Vs. SAIL, 1998 (103) ELT 298 (T-Kol)*

(ii) *Ipitata Refractories Ltd. Vs. Collector of C.Ex., 2001 (137) ELT 1109 (T-Kol)*

(iii) Tata Iron & Steel Co. Ltd. Vs. Commissioner of C.Ex., 2006 (201) ELT 87 (T)

– In para 11 of the order it has been observed as follows:
"11. The exemption granted under this notification extends to 'all excisable goods' manufactured in a workshop within a factory which are intended for use in that factory or any other factory of the same manufacturer. The benefit accrues on the basis of such excisable goods being 'intended for use' and not on the

> *basis of actual user though non user may entail other liability. These goods are manufactured for repairs or maintenance of machinery installed in the same factory or the other factory of the same manufacturer, so that a nexus between the machinery installed and the goods manufactured which are intended for use for repairs and maintenance of such machinery, is required by the notification. In the present case, there is a clear nexus between the excisable goods which are manufactured in the workshop of the appellant, namely growth shop and the machinery installed in the other factory of the appellant, namely locomotive and rolling stock. The show cause notice itself, as noted above, proceeded on the footing that the spare parts listed in the annexure to the show cause notice were meant for use for repairs and maintenance of locomotive and wagons. Therefore, once it is held that locomotive and rolling stock are 'machinery installed' within the meaning of this notification, the entitlement of the appellant to the benefit of this notification becomes obvious.*"

16.1 We also find that in respect of the subsequent periods, i.e., July 1992 to October 1992 and March 1993 to August 1993, by an *<u>Order-in-Appeal No. 95/Bol/2004 dated June 24, 2004</u>* the Commissioner (Appeals), Central Excise, Kolkata, allowed the appeal filed by the appellant against an order dated July 16, 2003 passed by the Joint Commissioner of Central Excise, Bolpur holding that bloom, billets, rounds, bars, angle, channels and joists falling under Chapter 72 of the Central Excise Tariff when after converting them into suitable stores and spares are used in repairs and maintenance inside the factory by the appellant were eligible to exemption under the said Notification. In coming to the said decision the Commissioner (Appeals) relied upon the decision of the Tribunal in *CCE, Jamshedpur Vs. Steel Authority of*

India Ltd., reported in 1998 (103) ELT 298 (T). This decision has been accepted by the Department, no appeal having been preferred therefrom. To similar effect is the *Order-in-Original No. 62-71/MP/Commr/2004 dated September 30, 2004* passed by CCE, Ranchi in the case of the appellant's Bokaro Steel Plant. The said decisions have not been appealed against and hence have become final.

17. In that view of the matter we hold that the appellant is eligible to benefit under the said Notification in respect of the goods covered under both the 1st and 2nd categories and the contrary findings of the Commissioner in the said order is unsustainable.

18. In respect of the *3rd category* of goods we find that the appellant has already, more than 28 years back, in February and April 1991, deposited Rs. 1,48,736/- out of the demand of Rs. 1,90,707/-, although contending that most of the goods are of such nature, e.g., steel cots, handles, press stand, sport materials, etc., on which no central excise duty was payable and hence no exemption under the said Notification was availed. Considering the smallness of the amount involved and the fact of deposit of most of the demand by the appellant in the year 1991, we are not inclined to go into this dispute any further, while holding that the payment as abovestated made by the appellant settles the issue.

19. We also find that the demands covered by the show cause notices dated 26.02.1991 and 20.03.1991 are barred by limitation, the show cause notices having been issued after 6 months from the respective relevant dates, prescribed under Section 11A(1) of the Act. We are in agreement with the contention of the appellant that in the facts and circumstances evident from record, there can be no application of the extended period of limitation in the instant case. Further, the Commissioner and the Deputy Commissioner, as well as the jurisdictional Commissioner (Appeals) have dropped the show

cause notices/demands of duty in respect of similar goods, upon accepting the appellant's contentions on the self same/similar issues involved herein for subsequent periods, which orders have been accepted by the Revenue. In such circumstances, there can be no dispute that the appellant had acted on bona fide belief. Hence, there can be no allegation of suppression of any material fact or wilful misstatement on the part of the appellant. In such a case there can be no invocation of the extended period of limitation as per the Proviso to Section 11A of the Act.

20. In view of the above the penalty imposed upon the appellant is also unsustainable.

21. We therefore allow the appeal and set aside the impugned order of the Commissioner to the extent above stated.

(Pronounced in the open court on 26th November, 2019)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(Bijay Kumar)
Member (Technical)

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