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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.10 of 2011

(Arising out of Order-in-Original No.60/Commr./BOL/10 dated 06.10.2010 passed by Commissioner of Central Excise, Bolpur.)

M/s. Jai Balaji Industries Limited
(Banskopa, P.O.-Rajbandh, Durgapur-713212, Dist: Burdwan, West Bengal.)

...Appellant

VERSUS

Commissioner of Central Excise, Bolpur

.....Respondent

(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

APPEARANCE

Shri A.K.Prasad, Advocate & Shri S.Mohapatra, General Manager(Taxation) for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75802/2021

DATE OF HEARING : 26 August 2021
DATE OF DECISION : 07 December 2021

P.K. CHOUDHARY :

Briefly stated the facts of the case are that M/s Jai Balaji Industries Ltd (Unit-IV) located in Banskopa, P.O. Rajbandh, Durgapur-713212, West Bengal, (hereinafter referred to as 'the appellants') are a mini integrated steel plant and are, *inter-alia*, engaged in the manufacture of Sponge Iron, Pig Iron, Iron Billets, Silica Manganese and Ferro-Manganese. They were duly registered with Central Excise during the period of dispute. The appellants also manufacture M S Rounds/TMT bars classifiable under Tariff item

72131090 of the erstwhile Central Excise Tariff. The present dispute is in respect of TMT Bars.

2. The department was of the view that in respect of goods transferred to the consignment agents, the appellants had not determined the assessable value correctly in terms of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereafter, the Valuation Rules, 2000) and, accordingly, Show Cause Notice No 42/Commr/BOL/09 dated 16.10.2009 was issued to the appellants demanding differential duty of Rs.4,57,03,268/- along with interest covering the period 1.4.2005 to 31.12.2008. Penalty was proposed under section 11AC of the Central Excise Act, 1944.

3. A second show cause notice No 57/Commr/BOL/09 dated 31.12.2009 was also issued covering the subsequent period January 2009 to August 2009 on the same issue, demanding a further amount of Rs 57,22,992/-.

4. In the show cause notice there is also an allegation that the appellants had not included the transportation cost while determining the assessable value of goods sold from the premises of the consignment agents and there has been a consequent short levy.

5. In their replies to the show cause notices the appellants raised a number of issues both on facts and on law points.

6. The appellants submitted that they sell more than 50% of their production of TMT bars to independent buyers at their factory gate itself. A good quantity of TMT bars is also stock-transferred to consignment agents located at different locations, for onward sale. The breakup of such sale or transfer is as below:-

(a) Period covered in the 1st show cause notice No. 42 dated 16.10.2009 (Quantities in MT)

Period	Direct parties	Consignment Agents	Sister Units	Related parties	Captive Consumption	Total
2005-06	103281.12	17285.47	328.71	-	43.09	120938.39
2006-07	75764.56	38584.50	3292.06	5272.56	3004.63	125918.31
2007-08	117603.41	70396.99	4206.05	-	2111.13	194317.58
2008-09 (Dec 08)	62334.66	46048.32	1205.83	204.95	601.41	110395.17
Total	358983.74	172315.28	9032.65	5477.51	5760.26	551569.44

(b) Period covered in the 2nd show cause notice no 57 dated 31.12.2009(Quantities in MT)

Period	Direct parties	Consignment Agents	Sister Units	Related parties	Captive Consumption	Total
2008-09(Jan 09-March 09)	32170.07	13858.79	435.97	42.29	22.95	46530.07
2009-10(April 09 to Aug 09)	43748.17	24729.15	1508.18	31.66	159.33	70176.49
Total	**75918.24**	**38587.94**	**1944.15**	**73.95**	**182.28**	**116706.56**

7. In respect of goods sold to independent buyers at the factory gate, the appellants were paying duty on the transaction value in

terms of Section 4(1)(a) of the Central Excise Act, 1944. In respect of goods stock-transferred to different consignment agents, the duty was being discharged on value determined in terms of Rule 7 of the Central Excise Valuation Rules, 2000, i.e at the price charged for identical goods sold from the consignment agents' place at the same time or at the time nearest to the time of removal of such goods from the factory. In respect of the goods transferred to sister unit for captive consumption, the duty was being paid on value of such goods sold to unrelated buyers at the factory gate.

8. The learned Adjudicating authority (Commissioner), did not accept the submissions of the appellants and, vide Order-in-Original No 60/Commr/BOL/10 dated06.10.2010 (the impugned Order), confirmed the full demand of Rs 5,14,26,260/- covered by the two show cause notices, along with interest. He also imposed equivalent penalty under section 11AC of the Central Excise Act, 1944.

9. The appellants are now before us in appeal against the said impugned Order.

10. Following submissions have been made by the appellants:-

10.1 The Annexures to the show cause notice dated 16.10.2009 do not provide any information as to from where they have got the details of the sale price at the consignment agents' end and the corresponding price at the factory gate on the same date and at or about the same time. Details which have been given in the 2nd show cause notice are not available in the first show cause notice. In other words, the demand raised and the charges made in respect of the first show cause notice are unsubstantiated.

10.2 Annexure C to the first Show Cause Notice is unwarranted as there is no separate demand of duty on account of freight charges.

10.3. In respect of the second Show Cause Notice covering the period from January 2009 to August 2009, it may be seen from the

Annexures that only the invoices issued by the appellants have been taken into consideration and there is no mention of the corresponding sale invoices issued by the consignment agents in respect of the goods transferred to them by the appellants. As an illustration, invoice number 9874 dated 23.01.2009 recorded at page 56 of the Appeal may be referred to. A copy of the said invoice raised by the appellants may be seen at page 416 of the Appeal. In fact, the values adopted by the department for sale at the end of the consignment agent is uniform for the whole of the month of January 2009 and has been taken as Rs 34,663.46 per MT. This is clearly not permissible even as per Rule 7 of the Valuation Rules, 2000.

10.4 Rule 7 of the valuation Rules is not applicable since it can be invoked only if the goods are not sold from the ‘place of removal’ but from some other place. As per definition of ‘place of removal’ the premises of a consignment agent is also a ‘place of removal’. Thus, if goods sold from the premises of a consignment agent are goods sold from ‘the place of removal’ then rule 7 cannot apply. Thus, the whole basis of the demand is misplaced.

10.5 Rule 4 of the Valuation Rules, 2000, is the appropriate Rule applicable in the instant case since the goods removed to the premises of the consignment agent are not sold at the ‘time of removal’ but at a later point of time. As per the definition of ‘time of removal’ it can only refer to the time of removal from the factory.

10.6 The starting expressions of Rule 7 and Rule 8 of the Valuation Rules 2000, during the relevant period, are identical. It has already been held by the Larger Bench of this Tribunal in the case of Ispat Industries Ltd vs Commissioner of Central Excise, Raigad [2007(209)ELT185(Tri-LB)] that if an assessee does not remove *all its goods* for captive consumption, Rule 8 will not apply and valuation will have to be done under Rule 4 on the basis of transaction value of sale of goods at the factory gate to unrelated buyer. On the same analogy, Rule 7 cannot apply if *all the goods* are not transferred to consignment agents. Since the appellants have substantial sale at the factory gate to independent buyers, the same value will apply to goods transferred to consignment agents also. The following judgments may be referred to:-

(a) Steel and Metal Tubes(I) Ltd vs CCE, Meerut-II [2017(358)ELT1193(Tri-All)

(b) Bharat Petroleum Corporation Ltd vs CCE Chennai[2010(261) ELT 695(Tri-Chennai)

10.7 By applying Rule 4 of the Valuation Rules, 2000, the appellants have demonstrated in their reply to the show cause notice that they have paid more duty than that was legally payable.

10.8 In any case, if Rule 7 is not applicable, Rule 4 cannot be invoked now since that was not invoked in the show cause notice.

10.9 Rule 7 of the Valuation Rules, 2000, was introduced in the year 2000 and has remained unchanged since then. Even though the definition of '*place of removal*' was amended with effect from 14.05.2003, no amendment was done to Rule 7 thereby creating an anomaly. In any case, because of the said anomaly or otherwise, Rule 7 cannot be invoked in the instant case.

10.10Bulk of the demand is time barred. There is no ground for invoking the extended time limit. The only ground for invoking the extended time limit is that the appellants did not inform the department of their marketing pattern (para 14 of the impugned order). It is submitted that no provision of Central Excise law requires an assessee to inform the department of their marketing pattern. [Gammon Far ChemsLtd.Versus Collector Of Central Excise, Bangalore 1994 (71) E.L.T. 59 (Tribunal) affirmed by the Supreme Court in 2003 (152) E.L.T. 28 (S.C.)]. This aspect is examined by the department at the time of Audit, which was done in this case.

10.11The appellants' premises were subjected to EA-2000 audit as well as CERA audit a number of times during the relevant period and the pattern of sale or clearance of goods of the appellants was scrutinised and no discrepancies noticed. Sample copies ofAudit queries and Audit Memos have been enclosed as Annexures E to H of the Appeal. As per the Audit manual of the department relating to EA-2000 Audit one of the things done in "desk review" is to examine the marketing/sale pattern of an assessee. [Refer Serial Number 10 of Circular No. 514/10/2000-CX, dated 16-2-2000]. Hence, it cannot be said that the department was unaware of the sale of goods through consignment agents and that the appellants had deliberately concealed this information from the department.

10.12The appellants have paid duty as per their *bona fide* knowledge of law. Everything was recorded in their books. There was no deliberate attempt to either suppress any facts or to misstate anything with intent to evade duty [Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay -1995 (78) E.L.T. 401 (S.C.),Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut -2005 (188) E.L.T. 149 (S.C.),Easland Combines, Coimbatore v. The Collector of Central Excise, Coimbatore - 2003 (152) E.L.T. 39 (S.C.),Uniworth Textiles Ltd. v. Commissioner — 2013 (288) E.L.T. 161 (S.C.)]. Hence, the demand, if any, could be raised for the normal period only.

10.13The show cause notice dated 16.10.2009 was received by the appellants on 03.12.2009. Since there is no ground for invoking the extended time limit, the normal period of one year from 'the relevant date' will apply. The ER-1 returns for the month of October 2008 were filed by the appellants in November, 2008. Hence, demand for the period prior to November 2008, is time barred.

11 The learned Authorized Representative for the Respondent Revenue made the following submissions:-

11.1 The point that the demand and the charges made in the show cause notices have not been substantiated, was not raised by the appellants before the adjudicating authority and hence, cannot be raised now;

11.2 Rule 7 has been correctly applied to demand duty in respect of goods transferred to the consignment agents;

11.3 Even if there are sales to independent buyers at the factory gate, the goods transferred to the consignment agents will be valued as per Rule 7 of the Valuation Rules, 2000. He relied on the decision of the Tribunal in the case of Spice Systems Ltd.Vs Commissioner of Cus. & C. Ex., Noida [2011(272)ELT82(Tri- Del)].

12. Heard both sides through video conferencing and perused the appeal records.

13. At the time of hearing, a query was raised by the Bench to the learned counsel for the appellants as to how he proposes to reconcile his submissions on points of law viz-a-viz the provisions of section 4(1)(a) of the Central Excise Act, 1944, which states that value has to be determined "*on each removal of the goods".*

14. The learned counsel responded by referring to the decision of the Larger Bench of the Tribunalin the case of Ispat Industries Ltd vs Commissioner of Centra Excise, Raigad (supra) wherein it has been held that Rule 8 of the Valuation Rules, *2000*, would apply only when *<u>all the goods</u> of the assessee are captively consumed.* While holding so the Larger Bench had overruled the decision of the Division Bench of the Tribunal in the case of BOC (I) Ltd. v. CCE 2004 (168) E.L.T. 478 wherein the Division Bench had relied on CBEC Circular No. 643/34/2002-CX dated 1-7-2002 on this issue. Serial Number 5 of the Circular dated 01.07.2002 is relevant wherein the Board had clarified as under:

5.	How will valuation be done in cases of **captive consumption** (i.e. consumed within the same factory) including transfer to a sister unit or another factory of the same company/firm for further use in the manufacture of goods ?	For captive consumption in one's own factory, valuation would be done as per rule 8 of the Valuation Rules i.e. the assessable value will be 115% of the "cost of production" of the goods. If the same goods are partly sold by the assessee and partly consumed captively, the goods sold would be assessed on the basis of "transaction value" [provided they meet the conditions of Sec. 4(1)(a)] and the goods captively consumed would be valued as per Rule 8 of the Valuation Rules. This is because, as per new Section 4, transaction value has to be determined for **each removal.** Where goods are transferred to a sister unit or another unit of the same company valuation will be done as per the proviso to Rule 9.

15. The learned counsel for the appellants submitted that the Board's Circular had clarified that where goods are partly cleared to independent buyers at the factory gate and partly captively consumed, the goods cleared to independent buyers would be valued as per section 4(1)(a) of the Central Excise Act, 1944, and the goods captively consumed would be valued in accordance with Rule 8 of the valuation rules, on the ground that value had to be determined *for each removal*. Despite this clarification which was upheld by the Tribunal in the case of BOC(I) Ltd (supra), the Larger Bench, in the case of Ispat Industries (supra) differed with this line of argument and overruled the decision of BOC(I)(supra).

16. The learned counsel also referred to the decision of Hon'ble Gujarat High Court in the case of Commissioner of Central Excise, Bhavnagar vs Ultratech Cement Pvt Ltd [2014 (302) ELT334(Guj)] wherein not only was serial number 5 of Board's Circular No. 643/34/2002-CX dated 01.07.2002 discussed but ratio of the Larger Bench decision in the case of Ispat Industries (supra) was also upheld.

17. He also clarified that no doubt valuation had to be done *for each removal* of goods from the factory gate, but for each such removal the appropriate valuation rule has to be applied. He submitted that *for each removal* of goods to the consignment agent Rule 7 of the Valuation Rules, 2000, could only be invoked if the appellants did not have any sale of their goods to independent buyers at the factory gate. Since the appellants did have large sale/clearances of the goods to unrelated buyers at the factory gate, Rule 7 of the Valuation Rules, 2000, could not be invoked in respect of any removal of goods to the premises of the consignment agents.

18. Heard both sides through video conferencing and perused the appeal records.

19. Instead of getting into the pleadings of the appellant on the quantification part, we agree with the submission of the learned counsel that Rule 7 of the Valuation Rules, 2000, will apply only where an assessee does not sell any goods to unrelated buyers at the factory gate *but transfers <u>all their goods</u> to their consignment agents.* In this regard it will be useful to examine the provisions of Rules 7 and 8 of the Valuation Rules, 2000, during the relevant period, as they use the same starting expression. The provisions read as under:-

> ***Rule 7. Where the excisable goods are not sold by the assessee*** *at the time and place of removalbut are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to*

> *the time of removal of goods under assessment.(emphasis supplied)*
>
> ***Rule 8**. **Where the excisable goods are not sold by the assessee** but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the cost of production or manufacture of such good(emphasis supplied)."*

20. The expression " *Where the excisable goods are not sold by the assessee*" came to be examined by the Larger Bench of the Tribunal in the case of **Ispat Industries** (supra) and it was held as under:-

> *"5. We have considered the rival submissions and are of the view that the assessee is correct in contending that provisions of Rule 8 would apply only in a case where its entire production of a particular commodity is captively consumed. This is evident on a plain reading of Rule 8 of the valuation rules, which reads as under*
>
> > *"**Where the excisable goods are not sold** by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the cost of production or manufacture of such goods" (emphasis supplied).*
>
> *If the intention was not to restrict the applicability of Rule 8 to cases where the entire production was being captively consumed, the Rule would have simply stated "where excisable goods are consumed by an assessee himself or on his behalf in the manufacture of other articles" instead of preceding the above expression with the words "**where the excisable goods are not sold**". This view is also supported by the judgment of the jurisdictional High Court in the case of Indian Drug Manufacturers Association v. Union of India, wherein the Court held that Rule 8 applies in a situation where goods are not sold but are cleared 'exclusively' to be used in consumption or for manufacture of other articles......."(emphasis supplied)*

21. This decision of the Larger Bench was relied upon by the Tribunal in the case of **Bharat Petroleum Corporation Ltd** (supra) to hold that Rule 7 of the Valuation Rules, 2000, which uses the same expression " *where excisable goods are not sold*..", can be invoked only where there are no sales of the goods at the factory gate *and all the goods of the assessee are transferred to consignment agents.* If the assessee's excisable goods are also sold at the factory gate, Rule 7 will not apply.

22. This decision of the Tribunal in the case of **Bharat Petroleum Corporation Ltd** (supra) was subsequently relied upon by the Tribunal in the case of **Steel and Metal Tubes(I) Ltd vs CCE, Meerut-II** (supra) to hold the view that Rule 7 of the Valuation Rules, 2000, will not apply if the assessee has some sales of their excisable goods at the factory gate. Relevant portion is reproduced below:-

> *"3. Heard learned counsel for the appellant Shri Rajesh Chhibber. He submits that in the impugned Order-in-Appeal, it has been observed that the appellant is selling their product partly at factory gate; and partly through consignment agents by stock transferring the goods on payment of duty. The learned counsel also submits that he has paid the duty at factory gate and differential duty is also paid by him as per the assessment Order. He has submitted that provisions of Rule 7 of Central Excise (Valuation) Rules, 2000, are not squarely applicable in the instant case as Rule 7 is exclusively for the circumstances where all the goods are transferred to a depot and not where the goods are partly sold at factory gate. Ld. Counsel relied on the ratio laid down in the case of Bharat Petroleum Corporation Ltd. v. Commissioner of Central Excise, Chennai, 2010 (261) E.L.T. 695 (Tri.-Chennai).*
>
> *4. On the other hand, learned DR, Rajeev Ranjan, Joint Commissioner, has relied on the impugned order.*
>
> *5. Having considered the rival contentions, we note that the ratio laid down by the Tribunal in the case of Bharat Petroleum*

> *Corporation Ltd. v. Commissioner of Central Excise, 2010 (261) E.L.T. 695 (Tri.-Chennai) is squarely applicable in the instant case as facts and circumstances are identical. Accordingly, when the goods are not sold at the factory gate but removed exclusively to a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold, the Rule 7 is applicable.*
>
> *6. In the instant case, it is evident that the goods were partly sold at factory gate and duty was paid. Remaining goods were transferred to the Depot. Therefore, Rule 7 of Central Excise (Valuation) Rules, 2000, is not applicable in the instant case. Hence, we set aside the impugned order and allow the appeal and with consequential relief, if any, as per law."*

23. The above decisions of the Tribunal relying on the ratio of the Larger Bench decision in the case of Ispat Industries (supra) have been accepted by the Government also by prospectively (wef 01.12.2013) amending Rule 8 vide Notification No.14/20017-CE(NT) dated 22.11.2013, as under:-

> *"RULE 8. Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value of such goods that are consumed shall be one hundred and ten per cent of the cost of production or manufacture of such goods."*

24. We also agree with the learned counsel of the appellants that the expression "*Where the excisable goods are not sold by the assessee"* appearing in both Rule 7 and Rule 8 of the Valuation Rules, 2000, will have the same meaning and the ratio of the decision of the

Larger Bench in the case of Ispat Industries (supra) in the context of Rule 8, will also apply to Rule 7 of the Valuation Rules, 2000, as rightly held by the Tribunal in the cases of (i) **Bharat Petroleum Corporation Ltd** (supra) and (ii) **Steel and Metal Tubes(I) Ltd vs CCE, Meerut-II (supra).**

25. The decision in the case of **Spice System** (supra) cited by the learned Authorised Representative is clearly distinguishable. The period involved in the case was July, 1999 to September, 2001. For the period wef 01.07.2000 (i.e after the introduction of new section 4 and the new Valuation Rules, 2000) the Division Bench of Tribunal held that for goods transferred to consignment agents/depots valuation was required to be done under Rule 7 of the Valuation Rules, 2000, on the ground that the premises of the consignment agent was not considered as a " place of removal". However, it is a matter of record that in the present case the period involved is post 14.05.2003 when the definition of 'place of removal'has been amended to include the premises of consignment agent/depot also. Therefore, since the decision in the case of Spice System (supra) was delivered in the context of law prevailing at that point of time its ratio cannot be applied to the present case when the law has changed. Further, the ratio of the Larger Bench decision in the case of **Ispat Industries** (supra) [which has been endorsed by Hon'ble **Gujarat High Court** in the case of **Commissioner of Central Excise, Bhavnagar vs Ultratech Cement Pvt Ltd**], was not brought to the notice of the Bench in the case of **Spice Sytems** (supra) and hence, it was not considered.

26. In view of the above, we do not consider it necessary to examine the other issues raised by the appellants.

27. The Appeal is, accordingly, allowed by setting aside the impugned Order.

(Order pronounced in the open court on 07 December 2021.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(RAJU)
MEMBER (TECHNICAL)

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