

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.631 of 2012

(Arising out of Order-in-Original No.CCE/BBSR-II/NO-37/COMMISSIONER/2012 dated 28.06.2012 passed by Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-II.)

M/s.Hindalco Industries Limited

(Hirakud Complex, Hirakud, Dist.-Sambalpur, Orissa.)

...Appellant

VERSUS

Commissioner of Central Excise, Bhubaneswar-II

.....Respondent

(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007, Orissa.)

APPEARANCE

Shri Rahul Tangri & Shri Dipankar Majumdar, both Advocates for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Revenue

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

HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 75416/2023

DATE OF HEARING : 9 May 2023

DATE OF DECISION : 16 May 2023

Per : K. ANPAZHAKAN :

M/s. Hindalco Industries Ltd., Hirakud Complex (hereinafter referred to as 'the Appellant') are engaged in the activity of manufacturing and clearance of aluminium ingots and aluminium coils falling under chapter 76 & 38, respectively of the First Schedule of Central Excise Tariff Act. Apart from the Hirakud Unit, the Appellant are having their other units viz., Muri, Belgaum, Mauda, Taloja, Belur etc. There is inter unit transfer of goods between these units in the course of such manufacturing activity. In the present case, the Muri and Belgaum units stock transferred the goods calcined alumina to their Hirakud Unit (the Appellant) on payment of duty for usage in the

manufacture of their final products namely aluminium ingots and coils. These goods are further stock transferred by the Appellant to Mauda, Talaja and Belur Units on payment of duty. In the said units, the aluminium ingots and coils are further processed and the final product i.e. Aluminium Sheets and foils, are manufactured and cleared on payment of central excise duty.

2. During the period April 2009 to March 2010, the Hirakud Unit cleared aluminium ingots and coils to the said sister units upon payment of excise duty, on the basis of 110% of the estimated cost of production (as per the previous year's CAS-4 statements adjusted for inflation and forecast of price increase in the current year). At the end of the year, when the final cost of production was worked out for the FY 2009-10, it emerged that the Appellant had on an overall basis, paid excise duty on the value which is much more than 110% of the cost of production. Thus, the Appellant was of the view that they were not liable to pay any differential liability.

3. However, the department noticed that if the final CAS-4 figure is applied for every month of the year 2009-10, there would be short payment of duty in the months of :

- December 2009 to March 2010 for ingots; and
- February 2010 to March 2010 for coils

4. For the remaining months of the year, since the duty payment was in excess vis-à-vis the value as per the final CAS-4 figure, the same was ignored by the Department. Thus, for the specific months where the payment was short, the department alleged that Appellant had not determined assessable value of the cleared goods as per Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as 'Valuation Rules') read with Section 4(1)(b) of the Central Excise Act, 1944. It was also alleged that the Appellant resorted to suppression, wilful misstatement of material, facts and contravention of various provisions of the Central Excise Act and Rules made thereunder with the intent to evade payment of Central Excise duty.

5. Accordingly, a show cause notice dated 05.09.2011 was issued to the Appellant demanding central excise duty amounting to Rs.62,63,509/- for the period December 2009 to March 2010 under the proviso to Section 11A(1) of the Central Excise Act, 1944 along with interest under Section 11AB of the Central Excise Act and penalty under Section 11AC was also proposed. Extended period of limitation was invoked in the show cause notice by alleging suppression with an intent to evade payment of duty at the Appellant's end. The entire demand proposed in the show cause notice was beyond the normal limitation period of limitation of one year.

6. The said show cause notice was adjudicated vide the impugned order dated 28.06.2012 wherein it was observed as under:-

- The adjustment of excess paid duty with short paid duty is not permissible since the assessments are final and also because there is no statutory provision allowing for the same.
- The statute nowhere provides for any concept of revenue neutrality as an argument to not comply with the provisions of law. Short payment of duty cannot be waived in the guise of revenue neutrality.
- The Appellant had intentionally suppressed information from the department and had intentionally short paid the duty and therefore, extended period of limitation was rightly invoked in the show cause notice. It was also held that penalty imposed was also in accordance with law.

7. The Appellant being aggrieved by the above stated impugned order preferred the present appeal before this Tribunal on the following grounds :-

7.1 The Appellant submits that during the relevant period excess duty of Rs.34,45,235/- was paid in respect of coils and Rs.2,05,16,847/- in respect of ingots. However, in spite of the conspicuous excess payment of duty much more than the alleged short payment of duty in the impugned order, the impugned order has not adjusted the same and

has erroneously confirmed the demand by totalling the short payments alone and ignoring the excess payment of duty made by the Appellant.

7.2 The Appellant submits that it is a settled principle of law that in cases where both excess and short payment of duty exists for any particular period, adjustment of duty must be allowed and any duty if further remains unpaid can only be demanded. They submitted that ignoring the duty paid in excess and raising a demand only in respect of cases where duty has been short paid shall lead to situation where excess and undue duty would be retained by the government which is in violation of the mandate of Article 265 of the Constitution of India.

7.3 The Appellant submits that adjustment of duty has been allowed all along by various judicial forums in the judgments listed hereunder, in the context of identical matters involving CAS-4 valuation, matters involving provisions assessment, matters involving SSI exemptions etc.,

- a. Pr.Commr. of CGST & CE Vs. Godrej Consumer Products Ltd. 2019 (367) ELT 985 (MP);
- b. M/s.Finolex Industries Ltd. v. Commissioner of Customs-Pune [2023 (5) TMI 306-CESTATMUMBAI]
- c. Jindal Steel & Powers Ltd. v. CCE, Raipur 2016 (342) ELT 253 (Tri.-Del.);
- d. Suzlon Energy Ltd. v. CCE & ST Vadodara 2016 (339) ELT 87 (Tri.-Ahmd.);
- e. Vinir Engineering Pvt.Ltd. v. CCE, Bangalore 2004 (168) ELT 34 (Tri.-Bang);
- f. Angadpal Industries Ld. V. CCE, Thane-II 2012 (280) ELT 542 (Tri.-Mum);
- g. Toyota Kirloskar Auto Parts Pvt.Ltd. v. CCE, LTU Bang. 2012 (276) ELT 332(Kar.);
- h. Hindustan Zinc Ltd. v. CCE, Jaipur 2016 (336) ELT 328 (Tri.-Del.);
- i. Essar Steel India Ltd. v. CCE, Raipur 2017 (345) ELT 139 (Tri.-Del.);
- j. Sangam Spinners v. CCE, Jaipur-II 2016 (344) ELT 623 (Tri.-Del.)

7.4 The Appellant submits that the entire issue is revenue neutral in nature as any duty charged on the invoices based on which goods are cleared, the other unit of the Appellant was eligible for claiming CENVAT Credit on the same. Further, duty paid by the other units through PLA was much more than the differential demand of duty in the present case. Thus, even if the short payment alleged in the present case was paid by the Appellant during the relevant period, the recipient unit of the appellant would have correspondingly paid lesser duty from PLA during the same period. Accordingly, the situation is totally revenue neutral.

7.5 Thus, when the entire issue is revenue neutral in nature, there is no loss to revenue to the exchequer. In support of this argument, the Appellant relies upon the following decisions:

- a. CCE, Pune Vs. Coca-Cola India Pvt.Ltd., 2007 (213) ELT 490 (SC);
- b. CCE & C, Vadodara-II Vs. Indeos Abs Ltd. 2010 (254 ELT 628 (Guj.), affirmed by the Hon'ble Supreme Court in [2011 (267) ELT A155 (SC)].

8. The Appellant further submits that SCN dated 05.09.2011 relating to the period December 2009 to March 2010 is beyond the period of one year and hence time barred. They stated that extended period of limitation can be invoked only in cases of suppression, misstatement, fraud, collusion etc. at the assessee's end, with the intent to evade payment of duty. In this case, the department has not furnished any evidence as to how the Appellant suppressed any facts. The entire demand has been raised from the records periodically submitted by the Appellant before the Central Excise Authorities. Therefore, the demand cannot be sustained on the allegation of non-submission of information which is not even required to be submitted as per law. This view is supported by the following decisions:

- a. Apex Electricals v. Union of India [1992 (61) ELT 413 (Guj.)];
- b. Prolite Engineering Co. v. UOI 1995 (75) ELT 257 (Guj.)]

9. The Appellant further submits that in cases which are revenue neutral in nature, there cannot be any intent to evade payment of duty. Thus, extended period of limitation cannot be invoked in such cases. This view is supported by the following decisions:

a. Daman Ganga Board Mills Pvt.Ltd. v. CCE, Daman, Vapi [2012 (276) ELT 532(Tri.Ahmd.)];

b. Rajasthan Udyog v. CCE, Jaipur [2012 (279) ELT 410 (Tri.-Del.)]

10. In light of the above submissions, the Appellant stated that the impugned order is bad in law and is not sustainable. Further, as no demand can be sustained against the Appellant, no penalty and interest can be imposed. Thus, penalty imposed and the interest demanded vide the impugned order are liable to be set aside.

11. The Ld.Authorized Representative for the Department reiterated the findings of the Adjudicating authority in the impugned order.

12. Heard both sides and perused the appeal records.

13. We find that the Appellant has cleared their finished goods on stock-transfer basis to their sister units. They have paid excise duty on the basis of 110% of the estimated cost of production by adopting previous year's CAS-4 adjusted for inflation for increase in the current year. The Department noticed that the Appellant has short paid duty in the months of December 2009 to March 2010 for ingots and February 2010 to March 2010 for coils. Accordingly, the differential duty of Rs 62,63,509/- has been demanded vide show cause notice dated 05/09/2011 and the demand has been confirmed by the Adjudicating authority vide the impugned order dated 28/06/2012.

14. The Appellant stated that on many months they have paid duty in excess of the duty payable as per CAS-4 Certificate issued at the end of the year. Only for few months there was a short payment of duty. If the excess paid duty is adjusted with the short payment then overall there was an excess payment of duty and hence there is no demand liable to be confirmed. The Appellant stated that they have brought the excess payment to the notice of the Adjudicating authority. However, the Adjudicating authority refused to adjust the excess payment against the short payment. They have cited various decisions in support of their case that the short payment of duty can be adjusted against excess paid duty, some of which are as follows:-

a. Pr.Commr. of CGST & C.EX. Headquarters Bhopal v. Godrej Consumer Products Ltd. [2019 (367) ELT 985 (MP) – wherein it has been held as under:-

7. *The Tribunal while relying on the decision in Jindal Steel & Power Ltd. v. Raipur-1 - [2016 \(342\) E.L.T. 253](#) (Tri. - Delhi) and Essar Steel India Ltd. v. CCE, Raipur - [2017 \(345\) E.L.T. 139](#) reversed the order, holding :*

"7. We have considered the submissions made by both sides. The goods have been cleared by the appellant to their own sister unit located in tax exempted areas. Consequently, the appellant is required to pay excise duty on goods so cleared. The basis of valuation is also required to be done in terms of Rule 8 of the Central Excise Valuation Rules, 2000 following the Cost Accountant Standards (CAS-4). It is not in dispute that valuation has been done properly as per CAS-4. However, such valuation has been done on the basis of CAS-4 certificate prepared on the basis of annual cost of production. The appellant has paid duty on a month to month basis on the basis of the cost of the goods for the previous month. When the valuation is finalised on an annual basis, there has been short payment of duty in some months as well as excess payment in other months. The appellant has already paid the excess duty wherever the value as per CAS-4 is more than the value adopted for payment of duty, but after adjusting the excess paid duty in other months. Such adjustment has not been permitted by the adjudicating authority even in the de novo adjudication.

8. We are of the view that the stand taken by the adjudicating authority is untenable. An identical issue has been considered by the Tribunal in the case of Essar Steel India (supra), in which the Tribunal observed as follows :

"5. We have heard both the sides and perused appeal records including written submission. The admitted facts of the case are that there is no sale of iron ore concentrate by the appellant and clearance to sister unit for further use is subjected to excise

duty and valuation for such duty has to be worked out in terms of Rule 8 of Valuation Rules, 2000. The central point of dispute is the frequency of periodicity of costing in terms of CAS-4. The appellants followed different value during the same financial year based on revision of costing within the year more than once. The Revenue contended that the costing should be annual basis and, hence, during whichever month the value happens to be less than the average annual cost, duty was confirmed.

6. First, we consider the appellant's plea regarding the transaction value arrived at based on costing should be at the time of removal. It was submitted that the scheme of things for excise duty purposes in terms of Section 4 and Rules made thereunder and Central Excise Rules, the duty liability based on self-assessment has to be discharged at the time of removal of goods when the invoices are prepared. The legal position as submitted by the appellant cannot be contested. However, it is an admitted fact that the appellants themselves did not follow costing to arrive at deemed transaction value for each clearance. They have considered a period of many months and worked out the costing, in terms of CAS-4 for that period and paid duty. Thereafter, they revised said costing when there are changes in raw material cost. That being the case, we find that the reliance placed by the appellant on the principle that time of removal is relevant and, hence, annual costing is not tenable, is unsustainable. The fact remains that while the duty liability has to be discharged at the time of removal of excisable goods in a situation where there is no sale transaction and known value, the deemed transaction value has to be constructed based on costing method which necessarily will involve an averaging of cost for a period, considering all the parameters. It is neither the case of the appellant nor there is such an approved standard for arriving at cost of excisable goods for each individual clearance.

7. Now, the question remains when at the time of each clearance of excisable goods for captive consumption the exact

transaction value could not be arrived at the relevant time the duty has to be paid on a provisional basis and upon arriving at the costing applying CAS-4 and the assessable value in terms of Rule 8 of Valuation Rules final determination of duty liability has to be made. In the present case, admittedly no provisional assessment was resorted to by the appellant. Hence, the determination of actual cost much later on the clearance resulted in certain adjustments and payments by the appellant.

8. The appellants referred to guidelines issued by the institute of Cost & Works Accountants of India on CAS-4. We have perused the same. Para 8 deals with periodicity of CAS-4 Certificates. The guidelines state that the frequency of revising the certificate of cost of production will depend upon the significance in the changes in the cost due to various factors like input cost fluctuations, changes in the employee cost and other expenses. It further notes that where goods are cleared on cost of production worked out as per the audited accounts of the previous audited period, it is advisable to prepare a fresh certificate of cost of production based on the audited accounts of the period for which the goods are cleared and the differential duty is paid or taken credit of as the case may be. In such circumstance, it is advisable to compute the actual material cost as per the issue valuation adopted by the assessee for material issues. Further, in the FAQ on CAS-4 the ICAI clarified that cost determination of a product is always for a period and computed on the basis of actual accounts of the company. The costs so determined should be actual cost reconciled with the audited accounts of the company after the accounts for the period is audited.

9. On perusal of the guidelines by the ICAI, we find while arriving at costing based on CAS-4 the correct method will be to determine the same based on actual audited data as per the accounting year of the company. To that extent we find the CAS-4 cost price arrived at on annual basis by the Revenue is correct procedure.

10. The next issue for decision is on the quantification of differential duty. Even though there is no provisional assessment in the present case, the duty determination on the inter-unit transfer is made on annual costing. As such when the Department arrived at cost on annual average basis the duty liability, excess or shortage has also to be determined on such basis. It is not tenable while for arriving at per unit duty liability the whole year data is considered for costing, for total duty liability only months when short payment was noticed were considered. In other words when CAS-4 based annual costing formed basis for arriving transaction value, the overall duty liability/short payment should be arrived at after considering duty already paid during that year on such goods. We find the reasoning given by the Original Authority against adjustment of already paid duty as untenable. Section 11B has no application in such situation, when the appellants duty liability is determined on annual CAS-4, the duty already paid during said period has to be adjusted. The question of unjust enrichment has no relevance here. There is no refund considered here. The point that the duty paid in excess in certain months has been availed as credit by sister unit hence, cannot be adjusted towards short payment also not tenable. The demand arose based on annual costing. Such cost price in terms of Rule 8 will apply to all clearances made during the relevant year. Admittedly, duty already discharged has to be considered for arriving at overall short payment. Selectively applying the said cost price only for months when the clearances were below such cost price is not legally sustainable.”

10. The appellant has claimed that they have already paid the short-paid duty payable after deducting adjusting the excess. The adjudicating authority is directed to verify the same and recover only the differential, if any, after such adjustment.”

b. M/s. Finolex Industries Ltd. v. Commissioner of Customs-Pune [EA-1540/2012 Order No.A/85967/2022-CESTAT MUMBAI] – wherein it has been held as under:-

"4.3 Undisputedly Appellants submitted the CAS-4 certificates along with their ER-1 returns. The CAS-4 certificate mentions that valuation was done on the basis of previous year's figures and adjustment on account of inflation was done. They had adopted the above method of valuation since July 2000 when Valuation Rules, 2000 were introduced. As per chapter 6.8 of ICWAI guidelines, the cost of production can be determined on the basis of previous quarterly result also. The Appellants have appropriately taken cost figures of the previous month's CAS-4 certificates as a basis to arrive at the cost of production of each month. There was no objection whatsoever by the department at any point of time. For the first time in February 2008, during the course of audit for the period April 2006 to March 2007, this practice was objected and the Appellants were asked to re-determine cost of production on the basis of final annual CAS-4 of April 2006 to March 2007."

14. We observe that decisions cited above are squarely applicable in the case of the Appellant. When excess paid duty is adjusted against the short payment that net result is that there is no short payment by the Appellant. The Adjudicating Authority failed to do this adjustment. Demanding duty only on the short payment, ignoring the excess payment is bad in law. Accordingly we hold that the demand confirmed in the impugned order is not sustainable.

15. The Appellant has argued that the entire exercise is revenue neutral as the duty paid by them will be available as credit for their sister unit. We agree with this view of the Appellant. The duty paid by the Appellant would be available as credit to their sister unit. This the entire exercise is revenue neutral. In support of their argument the Appellant cited the following decisions:-

a. Commissioner of C.Ex., Pune v. Coca-Cola India Pvt.Ltd. [2007 (213) ELT 490 (S.C.)]

Classification of goods - Revenue neutrality - Classification of non-alcoholic beverage bases/concentrates manufactured by assessee which are supplied to bottlers, who in turn use the same as raw material in manufacture of beverages - Excise duty payable on beverage bases/concentrates and Modvat credit availed under Notification No. 5/94-C.E. (N.T.) is identical hence, consequences of payment of excise duty after availing

Modvat credit was revenue neutral - In view of such stand being taken by assessee, appeals dismissed leaving question of law open. [paras 6, 7]

b. Commr. of C.Ex. & Cus., Vadodara-II v. Indeos ABS Limited [2010 (254) ELT 628 (Guj.)]

Demand - Undervaluation - Revenue neutrality - Tribunal disposed of appeal holding that since goods cleared to sister concern, whatever duty payable available as credit to own unit (sister concern) hence entire exercise revenue neutral - Grievance now that undervaluation not considered by Tribunal - *HELD* : Grievance acceptable if ultimate exercise benefited Revenue by collection of duty - No such benefit accrues to exchequer - Tribunal chosen not to determine academic issue - No legal infirmity in impugned order of Tribunal - Sections 4 and 11A of Central Excise Act, 1944. - *If the Tribunal has chosen not to determine an academic issue, it is not possible to state that any legal infirmity exists in the impugned order of the Tribunal.* [para 4]

16. We find the above decisions are squarely applicable to the Appellant. As the entire exercise would be revenue neutral, there is no loss of revenue to the exchequer.

17. In view of the above discussion, we hold that the demand confirmed in the impugned order is not sustainable. Since the demand itself is not sustainable, the interest demanded and the penalty imposed against the Appellant in the impugned order is also not sustainable.

In view of the above, we set aside the Impugned Order and allow the Appeal filed by the Appellant.

(Order pronounced in the open court on 16 May 2023.)

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

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)