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

Ex.Appeal Nos.349/07 & 35/08

(Arising out of Orders-in-Original Nos.06/Commr./2007 dated 20.03.2007 & 11/Commr./2007 dated 09.10.2007 passed by the Commissioner of Central Excise & Service Tax, Jamshedpur)

M/s Tata Steel Ltd.

Applicant (s)/Appellant (s)

Vs.

CCEx, Jsr.

Respondent (s)

Appearance:

Dr.Samir Chakraborty, Sr.Advocate and Shri Abhijit Biswas, Adv. for the Appellant (s)
Shri A. Roy, Supdt. (AR) for the Revenue

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing : 22.01.2019
Date of Decision : 22.01.2019

ORDER NO.FO/75211-75212/2019

Per Bench :

The present two appeals have been filed against the Orders-in-Original Nos.06/Commr./2007 dated 20.03.2007 & 11/Commr./2007 dated 09.10.2007. Since the issue involved is identical, both the appeals are taken up for decision through this common order.

2. Brief facts of the case are that the appellant is engaged in the manufacture of various iron and steel products at their integrated Steel Plant situated at Jamshedpur. In addition to clearance of their final products on payment of duty to their buyers, a part of the goods

manufactured, such as, billets, ingots. TMT bars etc. were diverted for captive consumption for construction activities within the factory as well as TO their captive mines. Such clearances for captive consumption were made on payment of duty on the basis of assessable value of the goods determined in terms of Central Excise (Valuation) Rules, 2000. The appellant determined the assessable value on the basis of Rule 8 read with Provisio to Rule 9 of the Valuation Rules. This Rule provides for the determination of assessable value on the basis of the cost of production of the goods with addition of 10% notional profit. The Department, however, was of the view that the valuation adopted by the appellant was incorrect. They were of the view that the valuation is to be determined in terms of Rule 4 of the Central Excise (Valuation) Rules, 2000, which provides for adopting the value of identical goods cleared to independent buyer. On these lines, differential duty payable by the appellant was demanded for clearances made during the period June, 2004 to March, 2006 by issue of show-cause notice dated 02.08.2006. It is noted that this show-cause notice was issued by invoking extended period of limitation. For clearances made for the subsequent period i.e. April to September, 2006, a subsequent show-cause notice dated 22.03.2007 was issued. Proposals made in both the show-cause notices, were confirmed by the adjudicating authority by issue of separate impugned orders which are under challenge in the present two appeals.

3. The appellant is represented by Dr.Samir Chakraborty, ld.Sr.Advocate along with Shri Abhijit Biswas, ld.Advocate and Revenue is represented by Shri A.Roy, ld.D.R.

4. The arguments advanced on behalf of the appellants are summarized below :

(i) The ld.Sr.Advocate submitted that the dispute essentially is one of determination of value of goods manufactured by the appellant, but captively consumed for activities other than further manufacture. Untill May, 2004, the appellant was adopting to value for such captive consumption on the basis of value of comparable goods manufactured by the appellant and cleared to its customers. The appellant changed this valuation practice for the subsequent period on the basis of the decision of the Tribunal in the case of BOC India Ltd. Vs. CCEx., Jamshedpur reported in 2004 (168) ELT 478 (T). This decision provided for valuation on the basis of Rule 8 in case of transfer of goods to the sister unit.

(ii) The ld.Sr.Advocate further submitted that the issue of valuation has since been decided against the appellant in subsequent decisions of the Tribunal. The Larger Bench of the Tribunal in the case of Ispat Industries Ltd. Vs. CCEx., Raigad reported in 2007 (209) ELT 185 (Tri.-LB), has held that when clearances to independent buyers are available for part of the goods manufactured and cleared, the same may be adopted for the goods captively consumed. This Larger Bench decision has been followed in subsequent decision of the Tribunal, such as, (a) CCEx., Aurangabad Vs. Sterlite Optical Technologies Ltd. : 2018

(359) ELT 723 (Tri.-Mumbai) and (b) Ultratech Cement Pvt. Ltd. Vs. CCEx., Bhavnagar : 2013 (295) ELT 470 (Tri.-Ahmd.).

(iii) The ld.Counsel also submitted that even though the issue is decided against the appellant, they will be entitled to the benefit of time bar inasmuch as the issue was within the knowledge of the Department. The appellant had intimated the jurisdictional Deputy Commissioner through their letters dated 8th December, 2005 and 15th December, 2005, about the clearances of steel materials captively for repair and maintenance and civil construction purposes inside the factory as well as mines. In any case, he submitted that the benefit of time bar has also been extended by the Tribunal in the decisions already cited. He submitted that the demand made initially in the show-cause notice dated 02.08.2006, will be partly hit by time bar.

5. The ld.D.R. for the Revenue justified the impugned orders. He further pressed that the adjudicating authority was justified in invoking extended period of limitation for the first show-cause notice in August, 2006. He submitted that the request for provisional assessment was made by the appellant only in December, 2005 for clearance already made from June, 2004. Even after such request for provisional assessment was rejected by the Deputy Commissioner, the appellant continued to adopt the same basis of valuation in terms of Rule 8. Accordingly, he submitted that the demand may be upheld for the full period.

6. We have heard both sides at length and perused the records.

7. The issue for decision in the present case is valuation to be adopted for various goods manufactured by the appellant, but captively consumed for use within the factory as well as captive mines for various activities, such as, construction, repair and maintenance activities. The appellant cleared such goods for captive consumption after payment of duty on the assessable value determined in terms of Rule 8 of the Central Excise Valuation Rules, 2000. This involved the computation of value on the basis of 110% of the cost of production of the goods ascertained on the basis of CAS-4 specification. However, the Department was of the view that the clearances to independent buyers were available on record for the period of dispute and as such, such value can be adopted for the clearances made captively. We find support for the view adopted by the Department in various decisions of the Tribunal. In particular, we refer to the decision of the Larger Bench of the Tribunal in the case of Ispat Industries Ltd. (supra). The Larger Bench's observations are reproduced below :

> "***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*
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> *"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. We also agree with the contention of the assessee that Rule 8 will apply only in two situations, (a) where the goods are consumed by him in the same factory (captive consumption) or (b) where such goods are transferred to another factory for consumption in the manufacture of other articles on behalf of the assessee. In this case, it is not the case of the revenue that the goods were transferred to other units for manufacture of other articles on behalf of the assessee/appellant, i.e. the Dolvi Unit. We agree with the assessee's contention that the expression 'assessee', wherever it appears in the Central Excise Rules, applies to a particular factory, which is why different units belonging to one company are separately registered and separately assessed to duty. Since the assessee in the present case is the Dolvi plant and it is not the revenue's case that the other three units of the company to whom HR coils were transferred were undertaking further manufacturing operations on behalf of the Dolvi Unit, the provisions of Rule 8 will not apply. We, therefore, hold that Rule 8 is inapplicable in the instant case.

6. *We also note that in the present case the application of Rule 4 is being disputed by the Revenue not on the ground that the said rule is inapplicable to the present case but on the ground that a more specific provision in Rule 8 is available to enable determination of the assessable value. As discussed above, the provisions of Rule 8, in our view, are not applicable to the present case and therefore the value determined by the assessee under Rule 4 deserves acceptance.*

7. *We also agree with the submission of the assessee that even if both the rules, i.e. Rule 4 and Rule 8, were applicable, it would only be logical to read and apply the various rules in the Central Excise Valuation Rules in a sequential manner. Though the Central Excise Valuation Rules, 2000 do not specifically prescribe such sequential application of various rules, the same, in our view, is the only reasonable way to read these rules. Any other interpretation would only lead to confusion and chaos. Since the applicability of Rule 4 is not really in dispute, there was no need to look further and regardless of the applicability or otherwise of Rule 8, the assessable value should have been determined in terms of Rule 4 of the Valuation Rules."*

8. The ratio of the Larger Bench's decision has been subsequently followed by various Benches of the Tribunal. As such, we are of the view that during the disputed period, the valuation is required to be adopted in terms of Rule 4 ibid, on the basis of value of clearances to independent buyers. Accordingly, the issue is decided on merit in favour of the Revenue.

9. The appellant has made a strong plea for grant of benefit of time bar. It is on record that the appellant has kept Department informed about their proposal for captive clearance of goods manufactured for

purposes of civil constructions, repair and maintenance etc.. They have done so by means of a letter in December, 2005. It has also been pleaded that the appellant was guided by the earlier decision of the Tribunal in the case of BOC (India) Ltd. (supra), where the Tribunal held that the valuation of the goods had to be done on the basis of Rule 8. The different view came to be taken by the Larger Bench of the Tribunal in the case of Ispat Industries (supra) subsequently. As such, we are of the view that the Department will not be justified in alleging suppression against the appellant and invoking extended period of limitation. As such, the demand raised by the show-cause notice dated 02.08.2006, is to be restricted, to normal period of time limit. The second show-cause notice dated 22.03.2007, is within time.

10. In the facts and circumstances of the case, we find no justification for imposition of penalty, which is set aside.

11. In the result, the appeals are partly allowed.

(Dictated and pronounced in the open court.)

Sd/ Sd/

(P.K.Choudhary)
Member (Judicial)

(V.Padmanabhan)
Member (Technical)

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