CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Excise Appeal No. 51 of 2011

(Arising out of Order-in-Original No. 75/2010/C dated 16.08.2010 passed by Commissioner of Central Excise & Customs, Nagpur)

M/s Sanvijay Rolling & Engineering Limited .....**Appellant**
B203-206, MIDC Indl. Area,
Butibori, Distt. Nagpur

VERSUS

Commissioner of Central Excise, Nagpur .....**Respondent**
Telangkhedi Road, Civil Line,
Post Box No. 81, Napur-440001

Appearance:

Shri Rajesh Ostwal, Advocate for the Appellant
Ms. Anuradha Parab, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86444 / 2021

Date of Hearing: 09.03.2021
Date of Decision: 08.07.2021

Per: S.K. MOHANTY

This appeal is directed against the impugned order dated 16.08.2010 passed by the learned Commissioner of Central Excise & Customs, Nagpur. Vide the impugned order, the adjudicating authority has confirmed the Central Excise duty demand of Rs.1,15,88,715/- along with interest and also imposed equal amount of penalty on the appellant.

2. Briefly stated, the facts of the case are that the appellant is engaged in the manufacture of M.S. Blooms, M.S. Billets etc, falling under Chapter sub-heading No. 72071920, 72189990 and 72071990 of the schedule to the Central Excise Tariff Act, 1985. The appellant manufactures the said goods in its factory situated

at MIDC Industrial Area, Butibori (for short, referred to as 'unit-B2'). The goods manufactured in the said factory are cleared to the appellant's other units located at Nagpur for further use/utilization in the manufacture of dutiable final products. The appellant also effects sale of its products to the independent buyers. During scrutiny of appellant's statutory records, the department observed that all the manufacturing units including Unit-B2 are belonging to one corporate entity and as such, the different manufacturing units managed and controlled by the appellant are related and to be considered as inter connected undertakings in terms of the provisions of Section 4(3)(b) of the Central Excise Act, 1944. Thus, the department has held that the valuation of goods cleared from the appellant's unit at B2 to its other manufacturing units should be done under Section 4(1)(b) *ibid* read with Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. It has further been observed that during the disputed period, the appellant had short paid Central Excise duty in respect of the clearances made to its other units in comparison to the duty paid with regard to the goods sold to its independent buyers. On the above backdrop of issue, show cause proceedings were initiated by the department, seeking for recovery of the short paid duty amount from the appellant. The proposals made in the show cause notice were confirmed in the impugned order. Hence, the appellant has preferred this appeal before the Tribunal.

3. The learned Advocate appearing for the appellant submitted that substantial quantity of the finished goods manufactured at Unit B2 were used by the other units for further manufacture of the value added products and a negligible quantity was sold to the independent buyers. Thus, he submitted that the assessable value of the goods manufactured by the appellant should appropriately be determined on the basis of the price at which the other units were purchasing the identical goods from independent manufacturers. He further submitted that determination of assessable value under Rule 4

ibid cannot be considered as legal and proper. The learned Advocate also submitted that the entire exercise done in this case is revenue neutral inasmuch as whatever excess duty leviable on the goods cleared from the appellant's unit-B1 would be available as Cenvat credit to the other units. The learned Advocate also submitted that the proceedings initiated by the department for confirmation of the adjudged demands are barred by limitation of time inasmuch as the notice was issued beyond a period of one year from the relevant date. In this context, he has relied upon the judgment of Hon'ble Supreme Court in the case of Nirlon Limited Vs. CCE – 2015 (320) ELT 22 (SC), the Hon'ble Madras High Court judgment in the case of CCE Vs. Tenneco RC India – 2015 (323) ELT 299 (Mad.) and the decision of this Tribunal in the case of Rallis India Limited Vs. CCE – 2016-TIOL-1699-CESTAT-MUM, to substantiate that the show cause proceedings are barred by limitation of time and as such, the adjudged demands cannot be confirmed on the appellant.

4. On the other hand, the learned AR appearing for the Revenue reiterated the findings recorded in the impugned order. She further submitted that since the appellant had cleared the goods to its other manufacturing units, within the same management, the valuation of goods should appropriately be done under Rule 4 *ibid* and that since the Duty liability was discharged on such clearances at a lesser value, the appellant is liable to pay the differential short paid duty amount. To strengthen the case of Revenue, the learned AR has relied upon the decision of the Larger Bench of this Tribunal in the case of Ispat Industries Vs. CCE – 2007 (209) ELT 185 (T-LB). With regard to the prayer made by the appellant on limitation and revenue neutrality aspect, she submitted that the appellant had suppressed the material particulars with regard to valuation of the excisable goods and therefore, the *proviso* appended to Section 11 A of the Central Excise Act, 1944 should rightly be available to the department for recovery of the short levy/ short

paid duty amount from the appellant. She has relied upon the judgment of Hon'ble Gujarat Court in the case of Commissioner of C. Ex., Surat-I Vs. Neminath Fabrics Pvt. Ltd. – 2010 (256) ELT 369 (Guj.) and the decisions of this Tribunal in the case of Collector of C. Ex., Aurangabad – 2001 (132) ELT 103 (Tri.-Del.) and ChemFab Alkalis Ltd. Vs. Commissioner of C. Ex., Pondicherry – 2010 (251) ELT 264 (Tri.-Chennai) to support the case of Revenue that the show cause proceedings are not barred by the limitation of time.

5. Heard both sides and perused the records.

6. It is an admitted fact on record that during the disputed period, the appellant had sold the excisable goods manufactured by it to the independent buyers and also stock transferred the same to its other manufacturing units for use/utilization in the further manufacture of value added products. The appellant in this case, had not disputed the fact that all the units belonging to it are inter connected/related and managed by one corporate entity. Thus, under such circumstances, the adjudicating authority finds that the valuation provisions contained in Section 4 (1) (b) *ibid* read with Rule 4 *ibid* should be applicable for determination of the duty liability. However, on perusal of the impugned order, we find that the adjudicating authority has not specified as to why recourse to Rule 4 is required. Also, the authority has not specifically discussed as to why the fact of existence of sale of the same goods by the appellant to independent buyers and as to why value adopted in such cases cannot be made applicable to the sale to sister concern. He has not also discussed about the difference in price claimed from the other units. Further, there is no discussion as to whether all other parameters prescribed in Rule 4 *ibid* have also been considered. Hence, in absence of proper substantiation based on the material facts of the case, it is neither proper for the adjudicating authority to come to a conclusion and at the same

time not possible to determine the true value of the impugned goods for ascertainment of the correct duty liability.

7. The period of dispute involved in this case is from April' 2006 to March' 2007. By invoking the *proviso* appended to Section 11A *ibid*, the department had issued the show cause notice to the appellant, seeking for recovery of the adjudged demands. Insofar as recovery of short/non-levied or non-payment of duty is concerned, the said statute mandates that the Central Excise officer shall issue the show cause notice within one year from the relevant date on the person, requiring him to show cause as to why the duty amount shall not be recovered. The period of one year is prescribed for effecting recovery in the normal circumstances. Whereas, in the case of non-levied/paid, short levied or short paid of the appropriate duty liability, owing to the reason of fraud; or collusion; or willful mis-statement; or suppression of facts etc., the period of issuance of the show cause notice has been extended up to a period of five years under the proviso clause appended to Section 11A ibid.

7.1 We have examined the case records. We find from Annexure-D appended to the appeal memorandum that the office of the Accountant General (Audit-II), Nagpur had verified the records maintained by the appellant during the disputed period 2006-07 and 2007-08 and vide note dated 30.11.2007 had informed the jurisdictional Range Superintendent, in-charge of the factory of the appellant that the duty amount had not been paid or short paid in terms of Rule 8 *ibid*. Further, vide the said note; the audit wing had also confirmed the fact that during the disputed period, the appellant had prepared the cost sheet as per CAS-4 guidelines, reflecting the material particulars regarding clearance of excisable goods to the sister's unit. Further, the letter dated 31.05.2007 annexed at page 305 in the appeal records also demonstrates the fact that for the purpose of audit under the EA-2000, the department had sought for submission of desired documents, which were duly complied with by the appellant. The impugned order at page 32 has also acknowledged the fact that the books of accounts with regard to the present dispute were examined and verified by the audit wing of both the aforementioned departments. However, the present show cause proceedings were initiated by the department vide notice dated 15.03.2010, alleging that the appellant had suppressed the material particulars regarding non-observance of the procedures laid down under Rule 8 *ibid* and thus, it is liable to pay the differential duty under the *proviso* to Section 11A *ibid*. On perusal of the relevant records, we are convinced that the appellant had informed the department regarding the *modus-operandi* adopted by it in sending the disputed goods to its sister's units and also reasonably believed that the valuation provisions contained in Rule 8 *ibid* should be available for such transactions. Thus, under such circumstances, the rigor itemized in the *proviso* clause under Section 11A should not be available to the department and accordingly, the demand, if any, should only be confined to the normal period of one year. In the present case, since the period of dispute is from 2006 to 2008 and the show cause notice was issued on 15.03.2010, we are of the considered view that confirmation of the entire adjudged demands are barred by limitation of time as per the aforesaid statutory provisions and as such, the impugned proceedings are not maintainable *on the ground of limitation alone.* Further, we find that the principle or doctrine of revenue neutrality is applicable in the case in hand inasmuch as the higher duty amount payable by the appellant under Rule 4 *ibid* would be available to the sister's unit as Cenvat credit. Furthermore, we also noticed from the available records that the department was in doubt with regard to applicability of the proper valuation rules to the facts of the present case. This is evidenced from the show cause notice, where the proposals were made to confirm the duty demand by considering the provisions of Rule 8 *ibid*; whereas, the impugned order has confirmed the demand for contravention of the provisions of Rule 4 *ibid*. Hence, under such circumstances also, it cannot be said that there is element of *mens-rea* on the part of the appellant in defrauding the Government revenue and thus, the extended period of limitation, in our considered view was not available to the department for initiation of the show cause proceedings.

7.2 We find that the case laws relied upon by the learned Advocate support the case of the appellant that the extended period of limitation cannot be invoked in the circumstances, when the department was fully aware of the manufacturing activities and the information regarding sale of goods to different category of manufacturers were already in knowledge before hand. In the case of Nirlon Ltd. Vs. Commissioner of Central Excise, Mumbai (supra), the Hon'ble Apex Court have ruled that something done with *bona fide* belief, without involvement of any mala fide intention to defraud the Government revenue, the proviso to Section 11A(1) ibid cannot be invoked. Further, it has also been held that when the entire exercise was revenue neutral, the appellant could not have achieved any purpose to evade the duty. Thus, in absence fulfillment of the ingredients mentioned in the *proviso* clause to Section 11A *ibid*, confirmation of the adjudged demands in the impugned order will not stand for judicial scrutiny. The issues decided in the case laws relied upon by the ld. AR for Revenue are distinguishable from the facts of the present case. In the case of Neminath Fabrics Pvt. Ltd. (supra), the respondent had admitted shortage of the finished products and illicit clearance thereof without issuance of Central Excise invoices, without payment of Central Excise duty. Appreciating the evidence, it was held by the Hon'ble Gujarat High Court that when suppression stands admitted and proved the proviso to sub-section (1) of Section 11A ibid would stand attracted. In the case of Tigrania Metal & Steel Industries (supra) and Chemfab Alkalis Ltd. (supra), this Tribunal has held that when the Department officers were not aware of the facts, which were intentionally suppressed by the assessee, mere conducting the audit cannot prevent the departmental action in not issuing the show-cause notice by invoking the extended period of limitation.

8. In view of the foregoing discussions, we do not find any merits in the impugned order insofar as it has confirmed the adjudged demands by invoking the extended period of limitation contained in the *proviso* appended to Section 11A *ibid*. Therefore, the impugned order is set aside and the appeal is allowed in favour of the appellant on the ground of limitation.

(Order pronounced in the open court on 08/07/2021)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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