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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.77116 of 2019

(Arising out of Order-in-Original No.03/COMMR/BOL/19-20 dated 28.05.2019 passed by Commissioner of Central Goods & Services Tax Commissionerate, Bolpur.)

M/s. BST Infratech Limited
(Formerly Known as M/s.Baba Strip & Tubes Limited)
(Jamuria Industrial Area, Mondalpur, Jamuria,
Distt.Burdwan, West Bengal-713336.)

...Appellant

VERSUS

Commissioner of CGST & Excise, Bolpur Commissionerate

.....Respondent

(Nanoor Chandidas Road, Sian, Bolpur,
Distt.Birbhum (WB)-731204.)

WITH

Excise Appeal No.77215 of 2019

(Arising out of Order-in-Original No.06/COMMR/BOL/19-20 dated 26.06.2019 passed by Commissioner of Central Goods & Services Tax Commissionerate, Bolpur.)

M/s. Manbhum Ispat Private Limited
(Formerly Known as M/s.Baba Smelters Private Limited)
(Plot No.F-5, Mongolpur Industrial Estate, Mongolpur,
Raniganj, Bardhaman, West Bengal-713347.)

...Appellant

VERSUS

Commissioner of CGST & Excise, Bolpur Commissionerate

.....Respondent

(Nanoor Chandidas Road, Sian, Bolpur,
Distt.Birbhum (WB)-731204.)

APPEARANCE

Shri Sudhir Malhotra, Advocate for the Appellant (s)
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75651-75652/2020

DATE OF HEARING : 16 October 2020
DATE OF DECISION : 01 December 2020

P.K.CHOUDHARY :

The above captioned appeals have been filed by M/s BST Infratech Limited (Formerly Known as M/s Baba Strip & Tubes Ltd.), Jamuria Industrial Area, Mondalpur, Jamuria, Distt. Pashchim Burdwan, West Bengal and M/s Manbhum Ispat Private Limited (Formerly Known as M/s Baba Smelters Pvt. Ltd.), Plot No. F-5, Mongolpur Industrial Estate, Mongolpur,P.O. Raniganj,Dist : Pashchim Bardhman, West Bengal against Orders-in-Original No. 03/Commr/BOL/19-20 dated 28.05.2019 issued under CNo. V(15)/54/ Adj/ASN-II/CGST/Bol/18/285 dt. 07.06.2019 and Order-in-Original No. 06/Commr/BOL/19-20 dated. 26.06.2019 issued under CNo. V(15)102/ Adj/ ASN-I/CGST/Bol/18/426 dated 04.07.2019 respectively, both passed by the Commissioner, CGST Commissionerate, Bolpur

2. The learned Counsel for the appellants submits that issue involved in both the appeals is identical though Orders-In-Original are different and states that the same can be disposed off by a common order. The learned Authorized Representative of the department agreed with the contention of learned Counsel. Both the appeals are taken up together with the consent of both the parties for passing a common order.

The facts as culled out in brief are:-

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3. The appellant are engaged in the manufacture of different items of Iron & Steel classifiable under tariff chapter 72 & 73 of Central Excise Tariff Act, 1985 . They are holding Central Excise Registration and availing CENVAT Credit in respect of inputs used in the manufacture of their final products.

4. A show Cause Cum Demand Notice No. 04/Commr/BST/DGP Audit/2018 dt. 06.04.2018 was issued to the appellant under CNo. V(15)264-SCN/BST/tech/DGP Audit/2018/3808 dt. 09.04.2018 alleging that:

i) during the course of audit conducted from 28.04.2015 to 01.05.2015, for the period 2013-14 by the department at appellant's factory premises, it was observed that the appellant company was an ISO certified company for quality and production and they were exporting to SEZ, also exporting under letter of undertaking (LUT) and clearing for domestic consumptions. As per ER-5 returns, submitted by the appellant, the input output ratio for the year 2013-14 was 87.72% only.

ii) the appellant were clearing the same finished goods manufactured from the same quality of inputs to domestic market and also exporting the same finished goods or clearing them to SEZ following the EXIM norms (as per which wastage of any type must not be more than 2%). Further, it was alleged that as the appellant had maintained the EXIM norms of production ratio, no facts or submission had been made by the appellant as to why for domestic production, the input-output ratio was 87.72% only during 2013-14.

iii) from the tax audit report filed under section 44AB of Income Tax Act, 1961 in Form 3CD by the appellant company for the financial year 2012-13, it was observed from point 40 of Form 3CD report that input-output ratio of the assessee was 88.05%. As the Form 3CD is filed not before the month of October of the succeeding financial year , the demand for the financial year 2012-13 is well within the time limit of extended period of limitation

The input-output ratio declared by the appellant for the financial year 2013-14 & 2014-15 in ER-5 return was 87.72% and 89.28% respectively. Similarly, the input-output ratio of finished goods produced against the raw material consumed for the

financial year 2015-16 and 2016-17 was found to be 86.01% and 84.25% respectively as per Form 3CD report.

iv) the appellant was required to strictly follow the Standard Input-Output Norms (SION) as per proviso to condition 3 (d) of Notification No. 52/2003 Cus as amended by Notification No. 84/2007-Cus dated 06.07.2007 and 60/2008-Cus dated. 05.05.2008 which stipulates that where no input-output norms have been notified, the generation of waste and scrap and remnants up to 2% of inputs quantity shall be allowed.

v) the appellant company had produced and deliberately, willfully and clandestinely removed finished goods (by showing reduced input output ratio to department) without payment of duty of Rs. 15,43,94,279/- during the period 2012-13 to 2016-17. The amount of Rs. 15,43,94,279/-was proposed to be recoverable under provisions of section 11 A(4) along with interest under section 11AA of Central Excise Act, 1944. The penal provision under section 11AC of the Act invoked.

5. The appellant submitted reply to show cause notices vide their letter dated. 29.09.2018 and inter-alia denied the allegation made in the Show Cause Notice. The demand of duty was contested besides assailing extended period of limitation and penal provisions.

6. The learned Commissioner, CGST Commissionerate, Bolpur decided the case vide the impugned order date 28.05.2019 wherein he demanded duty of Rs. 15,43,94,279/- under section 11A(10) of the Central Excise Act , 1944 along with interest under section 11AA of the Central Excise Act, 1944. Penalty of Rs. 15,43,94,279/- was also imposed in terms of Rule 25 (1) of Central Excise Rules, 2002 read with section 11AC (1) (c) of the Act.

Being aggrieved, the appellant company has filed the present appeal on the grounds narrated in the Appeal Memorandum.

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7. The appellants are engaged in the manufacture of MS Angle, MS Channel, MS Flat etc. classifiable under chapter 72 of Central Excise Tariff Act, 1985 and were holding Central Excise Registration No. AACCB5169JXM001 (Now holding GSTIN w.e.f. 01.07.2017). The manufactured products were cleared on payment of duty as per section 3 read with section 4 (1)(a) of Central Excise Act. The basic raw materials used in the manufacture of impugned goods are MS Billets, Blooms and Ingots etc.

8. The show cause cum demand notice No. 16/Commr/ MIPL/DGP Audit/2018 dt. 27.08.2018 was issued to the appellant under CNo. V(15)249-SCN/MIPL/ Tech/ DGP Audit/2018/8699 dated. 30.08.2018 alleging that:

i) during the course of audit for the financial year 2013-14 (conducted in March 2015), it was observed that appellant company was an ISO certified unit and they have to maintain input-output ratio at 95% as per the terms and conditions for supplying manufactured goods to SAIL (Steel Authority of India Ltd.). The appellant had exported finished goods wherein the mandatory Standard Input Output Norms (SION) has to be maintained and it is clear that they maintained SION while exporting. The Input-Output ratio in their ER-4 return for the financial year 2013-14 was reflected as 88.48%. Accordingly, it was alleged that the appellant had short paid duty of Rs. 1,13,18,463/- during the year 2013-14 on 2730.842 MT of short production of finished goods as compared to SION.

ii) similarly, in the year 2012-13 & 2014-15, the Input-output ratio as per their ER-4 returns was found to be 87.18% & 88.13% respectively and thus appellant short recorded production of finished goods 3250.974 MT & 3848.235 MT respectively as compared to SION

iii) during the year 2015-16 and 2016-17, the ER-4 return was dispensed with, the input-output ratio has been taken from 3CD, declared by the appellant company which was 90.0% & 90.10% respectively The appellant assessee short recorded production of finished goods 3246.669 MT and 3411.820 MT respectively as compared to SION.

iv) the submissions made by the appellant assessee (in response to audit objection) that norms fixed by SAIL for ISO certified unit did not include short length/end cutting/miss-rolls generation and mill scale/other losses occurred during manufacturing of finished goods is not tenable.

v) the Report No. PA 24 of 2009-10 of the Union Government (Indirect Taxes) at point 1.7.1.2: clearly mentions that as per norms fixed by M/s Steel Authority of India Ltd., the production of MS Bars/MS TMT Bar from billets and ingots should be 95% PMT of ingots/billets. All ISO licence holder companies have to observe these norms of production.

vi) the appellant company had supplied finished goods i.e. MS Angles, MS Channels and MS Joists to M/s Steel Authority of India Ltd. observing the input-output ratio of 95% as revealed in their agreement with the SAIL; also the appellant had exported finished goods during relevant period, where they had to strictly follow the SION norms { as per proviso to condition 3 (d) of Notification No. 52/2003-Cus as amended by Notification No. 84/2007-Cus dated 06.07.2007 and 60/2008-Cus dated 05.05.2008}, where no standard input-output norms (SION) have been notified, the generation of waste, scrap and remnants up to 2% of the input quantity shall be allowed.

vii) during the period 2012-13 to 2016-17, the appellant company had produced and deliberately, willfully and clandestinely removed 16588.74 MT finished goods of differential assessable value of Rs. 55,78,62,629/- without

payment of central excise duty of Rs. 6,92,53,201/- (calculated on taking ER-4 returns in consideration for the financial year 2012-13 to 2014-15 and Form 3CD for the Financial year 2015-16 to 2016-17 in absence of ER-4 returns). The appellant assessee had suppressed the facts from department by not showing such removal in the returns filed with the department.

viii) The duty of Rs. 6,92,53,201/- was alleged as short paid during the period 2012-13 to 2016-17 and proposed to be recoverable under section 11A (4) of Central Excise Act, 1944 by invoking extended period of limitation along with interest under section 11AA. The penal action under section 11AC of Central Excise Act, 1944 proposed.

9. The appellant submitted reply to show cause notices vide their letter dated 05.04.2019 and inter-alia denied the allegation made in show cause notice. The demand of duty was contested besides assailing invocation of extended period of limitation and penal provisions.

10. The learned Commissioner, CGST Commissionerate, Bolpur decided the case vide the impugned order wherein he dropped the demand of Rs. 99,40,577/- out of total demand of Rs. 6,92,53,201/- and demanded duty of Rs. 5,93,18,624/- under section 11A(10) of the Central Excise Act , 1944 along with interest under section 11AA of the Central Excise Act, 1944. Penalty of Rs. 5,93,18,624/- was imposed under proviso to Rule 25 (1) of Central Excise Rules, 2002 read with section 11AC (1)(c) of the Act.

Being aggrieved the appellant has filed the present appeal on the grounds as narrated in the Appeal Memorandum.

11. Shri Sudhir Malhotra, learned Advocate for the appellants submitted that duty has been demanded on presumed production

derived by applying standard input output ratio @ 95% laid down in SION in Foreign Trade Policy and by referring to proviso to condition 3(d) of Notification No. 52/2003-CUS as amended. He states that Notification No. 52/2003- CUS relates to Export Oriented Units; that the appellant companies were neither EOU nor they had imported any raw material under advance authorization nor procured any goods under any duty exemption scheme. There were no SION number given in the show cause notice and ld. Adjudicating Authority had considered SION number C460 & C514 in the impugned orders which is beyond the scope of show cause notice. The ld. Counsel further submitted that SION under Foreign Trade Policy exhibits average consumption of raw material for manufacture of finished goods. The SION varies from unit to unit; that it depends on number of factors viz nature of infrastructure installed; nature or quality of raw material used; expertise and technical efficiency of staff employed etc. The ld. Counsel stated that norms fixed under SION are not compatible for every industry of same product and same can be modified by the Norms Committee, DGFT New Delhi and referred to para 2.5 of Foreign Trade Policy 2014 and Aayaat Niryaat Form (ANF-4B) which is prescribed for fixation/ modification/ revision of SION. The ld. Counsel emphasized that there is no provision in the Central Excise Act, 1944 and Rules made hereunder to determine production based on SION and demand duty thereto. Regarding non applicability of SION for demand of duty under Central Excise Act, the ld. counsel stated that section 3 of Central Excise Act, the Charging Section, stipulates demand of duty on goods produced or manufactured; that no physical verification of manufacturing process was carried out to ascertain the actual input output ratio. Further, there is nothing brought on record to show that appellant had manufactured and clandestinely cleared finished goods without payment of duty. There is neither any statement of any consignee nor of any transporter, neither any flow back nor any inculpatory statement of any person has been brought on record to substantiate clandestine removal of goods without payment

of duty. He also objected to extended period of limitation and imposition of penalty. The Ld. Counsel relied upon various case laws in support of his contention and also emphasized that the duty has been demanded on deemed presumption, which is incorrect.

12. The learned Authorized representative of the department reiterated the findings of learned Adjudicating Authority. On query by the Bench, regarding any corroborative or otherwise any evidence of clandestine removal, the learned Authorized Representative stated that case has been made on audit objection and there is no material other than audit objection on record to prove clandestine removal without payment of duty. The Bench further asked learned Authorized Representative to intimate any statutory provision under Central Excise Law providing for determination of production based on SION laid down under Foreign Trade Policy; the learned Authorized Representative informed there is no statutory provision under Central Excise Act requiring determination of production based on SION.

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

14. The common issue involved in both these appeals is: whether the Standard Input Output Norms (SION) of DGFT Policy is applicable on the appellants and whether they had followed the SION norms as per proviso to condition 3(d) of Notification No. 52/2003-CUS as amended during the period 2012-13 to 2016-17. The second issue is whether in the circumstances and the facts on record, extended period of limited can be invoked.

15. In both the appeals, the duty has been demanded on the basis of an audit objection on difference in production arrived by taking input output ratio @ 95% based on SION and that shown in their Form 3CD, ER-5 /ER-4 returns. The Notification No. 52/2003-CUS has been issued in terms of sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and is an exemption notification. It does not prescribe any method/ procedure to determine quantum of production

under Central Excise Act for demand of duty . Section 3 of the Central Excise Act –being the charging section, stipulates that duty is to be charged on the goods produced or manufactured. We find that no physical verification of input consumption qua finished goods manufactured thereto was carried out by the department. The duty has been demanded on the basis of audit objection without causing any investigation. It is our considered view that the objection of audit cannot be the basis or reason to believe to further investigate the matter and cannot be the sole ground for holding clandestine manufacture and removal, in absence of any corroborative evidence. It is observed from records that neither investigation has been carried out from any buyer of finished goods nor from any transporter nor any flowback of funds was checked and neither any statement brought on record to substantiate clandestine removal without payment of duty. We find that no SION number was given in the show cause notice while learned Adjudicating Authority has relied upon SION number C-460 & C-514. Thus, he has travelled beyond the Show Cause Notice.

The Tribunal in the case of Saradha Terry Products Ltd. Vs. Commissioner of Central Excise, Salem-2015 (327) ELT 675 (Tri-Chennai) held that in absence of evidence of removal of excess yarn or finished goods without payment of duty, duty demand not justified purely on basis of input-output norms (SION) without adequate and corroborative evidence of excess utilization of cotton yarn or diversion of yarn. The decision of the Tribunal in the case of Jakap Metind Pvt. Ltd. Vs. Commissioner of Customs & CE – 2017 (356) ELT 279 (Tri-Mumbai) has also been on the same lines.

16. We find that there is neither any corroborative nor any other evidence brought on record to substantiate clandestine removal without payment of duty. The deemed production arrived on presumption for demand of duty is not permissible under Section 3 of Central Excise Act, 1944. The learned Adjudicating Authority merely

relied upon standard input-output norms (that too without disclosing any relevant SION SNo.) to confirm the demand of duty and to hold the charge of clandestine removal of goods without payment of duty. As discussed above the same cannot be made basis for determining the duty liability, in absence of any evidence to justify the clandestine manufacture / clearances.

17. Reliance is placed on the case of Union Enterprises Vs. Union of India 2014 (306) ELT 216 (Cal.) and the case of CCE Vs. RA Castings Pvt. Ltd. 2011 (269) ELT 337 (All.), upheld by Hon'ble Supreme Court in Commissioner Vs. RA Castings Pvt. Ltd. 2011 (269) ELT A108 (SC).

The ratio of case laws cited supra are squarely applicable to the facts of the present cases in hand and accordingly the demands confirmed are not sustainable under the law.

18. We find that the total demand has been computed by applying extended period of limitation in terms of Section 11A of Central Excise Act, 1944. The said section prescribes conditions in under which extended period of limitation as below;-

> *:(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of—*
>
> *(a) fraud; or*
>
> *(b) collusion; or*
>
> *(c) any wilful mis-statement; or*
>
> *(d) suppression of facts; or*
>
> *(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,*

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

In the present case, entire demand is based on the audit objection and is alleged to have been detected only after the audit was conducted and thus the appellant willfully suppressed the facts from the department.

19. We find that in Appeal No. E/77116/2019-DB the appellant is duly registered with the department and there is no allegation in the impugned order of non submission of any periodical returns. The appellant unit took central excise registration on 12.04.2007 and audit of department and by AG, West Bengal is being conducted as per details below :-

SlNo.	Audit conducted by	Period of Audit	Date of Audit conducted	Remarks
1.	Central Excise Audit party	F.Y. 2008 - 2009	08/02/2010 TO 11/02/2010	
2.	Central Excise Audit party	F.Y. 2009 - 2010	22/11/2010 TO 23/11/2010	
3.	Central Excise Audit party	F.Y. 2010 - 2011	14/09/2011 TO 15/09/2011	
4.	Central Excise Audit party	F.Y. 2011 - 2012	06/11/2012 TO 08/11/2012	
5.	Central Excise Audit party	F.Y. 2012 - 2013	18/12/2013 TO 21/12/2013	

While in Appeal No. E/77215/2019-DB the appellant took central excise registration in 2006 and audit of department and by AG, West Bengal was regularly being conducted as per details below and no discrepancy ever pointed out :-

Sl. No.	Audit conducted by	Period of Audit	Date of Audit conducted	Remarks
1.	Central Excise Audit party	F.Y. 2009-2010	26.09.2011 to 29.09.2011	
2.	Central Excise Audit party	F.Y. 2010-2011	16.12.2011	
3.	Central Excise Audit party	F.Y. 2011-2012	05.09.2012	
4.	Central Excise Audit party	F.Y. 2012-2013	12.02.2014 to 14.02.2014	
5.	Central Excise Revenue Audit (AG)	2008-2009, 2009-2010 2010-2011	25.11.2011	
6.	Central Excise Revenue Audit (AG)	2011-2012	04.02.2013 to 08.02.2013	
7.	Central Excise Revenue Audit (AG)	2012-2013 & 2013-2014	18.09.2014 to 22.09.2014	

The allegation of suppressing the facts from the department does not hold good in the event of periodic audit of both the appellant assessees. There is no other evidence in the impugned order to show that the appellants have willfully suppressed the facts from the

department in order to evade payment of duty. As such extended period of limitation cannot be invoked in the present case. Reliance is placed on the following case laws;-

(i) Collector of Central Excise Vs. Malleable Iron & Steel Casting Co. Pvt. Ltd. 1998 (100) ELT 8(SC).

(ii) Collector of Central Excise Vs. H.M.M. Ltd. 1995 (76) ELT 497 (SC).

In view of above discussions, both the impugned orders are set-aside and both the appeals are allowed with consequential relief, if any.

(Order pronounced in the open Court on 01 December 2020.)

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

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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