Customs, Excise and Gold Tribunal - Mumbai
Kohinoor Trading Co. vs Commissioner Of Central Excise on 22 July, 2005
Bench: S T S.S., T Anjaneyulu
ORDER S.S. Sekhon, Member (T)

1. These appeals arising from the same order are being disposed by the common order.

1.2 M/s. Virat Ispat Ltd, one of the appellants herein is an assessee engaged in the manufacture of Iron & Steel Products in an induction furnace, and avails inter alia Modvat credit on inputs M.S. Scrap. Such scrap is obtained from manufacturers as well as from first stage and second stage dealers in scrap.

1.3 Consequent to certain enquiries made, a notice dtd 3.5.2001 was issued to the assessee as Notice No. 1 as to why-

(a) Credit availed on inputs during the period 1996-97 should not be disallowed under Rule 57-I(ii). The notice had enclosed.

(i) Annexure A which listed 17 invoices wherein the vehicle numbers mentioned in the excise invoice on which credit was availed were found to be relating to such vehicles which could not have transported the said quantities of scrap from the dealers to the assessees factory. They being non-existent or smaller vehicles i.e. other than trucks.

(ii) Annexure B listed the demands on credits availed which were required to be claimed, as the enquiries made revealed (as per show cause notice Para 32 reproduced below):

In view of the foregoing paras, it appears that notice No. 1 had indulged in misuse of Modvat credit by adopting the modus operandi that the registered dealers were supplying the goods to the Notice No. 1 which were not the goods as specified in the corresponding invoices which also is corroborated from the statements referred supra. The said registered dealers were showing in their statutory books and invoices that the said inputs are sold from the stock of the said inputs received by them in a particular purchase invoice. Whereas, investigations revealed that the goods documented on the Modvatable invoice were neither sent to nor received by Notice No. 1. Although on the invoices issued to Notice No. 1, it is shown that the total goods are sold to Notice No. 1, as per the description given by original manufacturer yet the goods which had been received were not the same as described and cleared by the original manufacturers. The Notice No. 1 had full knowledge of the above mentioned fact and was availing Modvat credit on the invoices issued by the said dealers. Further Notice No. 2 in his statement dtd. 30-3-2001 categorically admitted that it is their legal responsibility to ensure that the goods in the Modvatable invoices are same as stated in the original invoice. Although the Notice No. 1 had full knowledge of the legal provisions for availing the Modvat credit, yet, the Notice No. 1 availed Modvat credit in an illegal manner which was otherwise not admissible to them. Further the Notice No. 1 to 27 could not produce any evidence of transportation of the said inputs. The Notice No. 3 also could not produce any documents of the movements of trucks owned by them and shown in the invoices issued to Notice No. 1. Further it appears from

verification reports from the R.T.Os. that the said inputs are shown to be transported in a number of cases by Tankers, Vans and Delivery vans. The capacity of the vehicle in some of the cases 1 MT and the quantity shown to be transported by the said vehicle is more than 5 MT. The details of invoices are shown in Annexure A to this show cause notice. The above facts prove that Notice No. 1 had availed Modvat credit on the invoices without actually receiving the said goods.

Notice No. 2, is Director of assessee while Notices No. 3 to 27 were the dealer who were proposed penalties under Rule 209A of the Central Excise Rules.

1.4 Commissioner, vide the impugned order, confirmed the charges of denial and recovery of credit as proposed in Annexure A and Annexure B of the notices and ordered its recovery with interest and imposed penalty on the assessee; the Directors and other dealers were imposed penalty under Rule 209A read with Rule 26. Hence these appeals by the assessee, the director and certain dealers.

2.1 After hearing both sides and considering the submissions, it is found-

(a) there is no serious challenge to the orders of reversal of credits as per list in Annexure A by the ld. Advocate for the assessee. The reversal is not pressed, except for denial of the finding arrived by the ld. Commissioner in Para 72 of the order as regards non-receipt of the inputs. Considering the charges and the findings arrived at by the adjudicator, we find no merits in the plea of the registration numbers being incorrectly recorded in few cases, of the vehicles of the dealers, as made before us. We would therefore confirm the findings as arrived by the ld. Adjudicator as regards the reversal of credit being found not eligible.

(b) As regards the finding on the credit reversals ordered as regards Annexure B, it is found-

(i) Revenues case in this regard based on statements of dealers, which can be generalized as-

(a) The dealers purchase duty paid scrap from original manufacturers under the cover of invoice issued under Rule 52A of erstwhile Central Excise Rules, 1944.

(b) The scrap is received in mixed form. The dealers, in their premises, sort the mixed scrap.

(c) After sorting, good quality scrap is sold at prices higher than purchase price, with or without passing, on the Modvat benefit to the customers.

(d) Out of low quality melting grade scrap, some part is sold to the appellants.

(e) The deficit stock in a particular consignment is made up from the duty paid scrap lying in the godown of the registered dealers.

(f) Appellants are responsible for arranging transportation from the godown of dealers to factory at Tarapur.

and since the dealers sort the scrap, therefore entire quantity relating to a particular purchase transaction by them as having been transferred to the assessee is being questioned.

(ii) There is no allegation/finding of non-duty paid scrap being received or short quantities having been received. The dealers having sorted the scrap is not fatal to deny the credit; since dealers registered under Modvat scheme are permitted to transfer credit and required to keep accounts of only such goods, on pro rata basis which are sold/transferred by them in Modvat chain. For part goods, sold out side Modvat chain, the dealers need not even keep Central Excise Accounts. In any case, the sorting and mixing of two consignments of scrap and thereafter transferring the total quantity on any one document will not render the denial of credit as per the document duty paid, if the scrap mixed to make good the quantity short fall due to sorting is not proved to be at a lower rate/amount of duty than that shown in the document on which credit was availed. For goods which get mixed by accident or design, if the values, nature of duty component, consequent to price remains the same, then the principles of material management of first in first out can be applied to delivery ex-godown of first stage dealers.

(iii) The second stage dealers and even first stage dealers have in many cases delivered goods ex-originating godown i.e. of manufacture or first stage dealer and not ex-godown of the dealer. The second stage dealers have not conducted the sorting operations.

(iv) The relationship of price paid/charged by the dealer first stage or and second stage has no relationship with the credit to be eligible to be transferred on their documents. Since dealers are not manufacturers and there is not even a deeming fiction of manufacture, to revalue the goods and assess the duty cast by law on sales/supplies affected by dealers.

(v) This Tribunal in case of Singh Scrap Processors Ltd. as held that process of sorting and pressure billeting engaged by first stage scrap dealers to be amounting to manufacturer. If that be so, then it was for the Revenue to have charged such dealers with duty liability caused reassessment of the 'scrap' so sorted and then proceeded to vary the credit availed by the assessee. It is well settled that the route of 57E where applicable has to be resorted and not route of Rule 57-I to deny the credit.

(vi) Perusal of the statements, as read before us, viz. Sh. Kelhen Choudhury of M/s. Royal Trading Co. dtd. 2.2.01 reveals the following-

(a) they purchase M.S. scrap from Press Metal Corporation, Automobile Corporation of Goa Ltd., Tube Investment of India Ltd., Telco, Bajaj Auto Ltd, Premier Automobile Ltd., and Balmer Lawrie & Co. Ltd.

(b) The appellants were either placing orders on phone or through broker named Sri Rajpal Chaudhary, Chembur.

(c) The scrap was transported through their trucks and when necessary other transporters trucks were also arranged. He also gave vehicle number for 22 vehicles.

(d) The sales of scrap to the appellants is ex-godown basis. Freight amount is paid to drivers in cash for which no separate bill of transport is raised on the notices. Octroi formalities were looked after by the assessee.

(e) The scrap received by them from original manufacturers consisted of mixed scrap which is sorted by them in their godown. After sorting, good quality scrap was sold at higher prices without passing Modvat benefit, Low quality melting scrap was sold the notices at lower prices. In this manner, the purchase cost is higher than the selling price in the case of scrap sold to the notices. The deficit melting scrap is taken from the stock of duty paid MS scrap lying in the godown which is also purchased from the manufacturers under the cover of Rule 52A invoice.

Fear from the invoices of Royal Trading Co. issued by them clearly states that the term of sale is free delivery at Tarapur. As there was no octroi during the relevant period in Tarapur therefore the question of completing octroi formalities by the appellants did not arise. Only when the truck did not belong to Royal Trading Co. and the freight was on "to pay" basis that the transportation charges were paid by the appellants in cash to the driver of the truck and the amount paid to the transporter was in turn recovered from the dealer by debiting the account of dealer.

Shri Kalhan Chaudhary has specifically stated that the deficit melting of scrap is taken from the duty paid scrap lying in their godown. He has not stated that the deficit scrap which is made up is non-duty paid scrap. Therefore, it is clear from the statement that only duty paid scrap has been supplied to the appellants.

The statement of Shri Kalhan Chaudhary also does not state that they have supplied merely excise invoice without the supply of corresponding scrap to the appellants. The statement of Shri Kalhan Chaudhary is very categorical and he states that they have supplied only duty paid scrap to the appellants.

(vii) Similarly Sh. Abdul M. Khan of M/s. Kohinoor Trading Co. in his statement dtd. 23.3.01 has stated to have purchased the scrap on Tender basis from different manufacturers which after segregation is supplied to the assessee Sh. Abdul M. Khan has stated as follows:

Never stated that they were supplying non-duty paid scrap to the appellants. In fact his statement is clearly proves that only duty paid scrap has been supplied to the appellants. When confronted with the illustration of vehicles by which the scrap was supplied to the appellants, which was not capable of supplying the scrap mentioned in the invoice, he stated that the scrap cannot be supplied in tankers and/or delivery vans. The statement does not state that the transportation was arranged by the appellants. The department should then have enquired from Shri Abdul Mannan Khan as to how the wrong vehicle number has been mentioned in the excise invoice. Failure to enquire the relevant questions vitiates the entire proceedings.

Shri Abdul Mannan Khan gave the address and phone No. of the broker namely Shri Sunil. The department failed to take any statement of Shri Sunil to verify the statements made by Shri Abdul Mannan Khan. This was important since Shri Abdul Mannan Khan has specifically stated that the

transportation of goods was arranged by brokers. Failure of the department to take the statement of the broker vitiates the proceedings initiated by the show cause notice and confirmed by the Order-in-Original.

In the statement, no question was asked to Shri Abdul Mannan Khan as to how the deficit scrap is made up after sorting of scrap. In other words, the department cannot rely on this statement to allege that the scrap mentioned in the invoice was not supplied to the appellants. This statement is entirely in favour of the appellants and no allegation can be made by the department from this statement.

Statement of Shri Maqbool Hassan, Proprietor of M/s. M.H. Steel Corporation.

Shri Maqbool Hassan in his statement dtd. 30.4.01 has stated that they have supplied duty paid scrap purchased from M/s. Mahindra Ugine, to the appellants. Shri Maqbool Hassan has clearly stated that the scrap is sorted out in their godown and thereafter good quality is sold at higher price and low quality melting scrap is supplied at low price to the appellants.

There is nothing in the statement which is against the appellants. In fact the statement is entirely in favour of the appellants. It is very clear statement which proves that only duty paid scrap has been supplied to the appellants.

(viii) Shri Siraj-Ul-Haq in his statement dtd. 9.4.01 has stated that they purchase M.S. Scrap from TELCO, Kosan Industries, Kinetic Engineering and Bajaj Tempo. He stated that they sort out this scrap in their godown and supplied low quality melting grade scrap to the appellants and the good quality scrap is sold to non-modvat excise invoices. He also stated that the quality of melting scrap and found short in a particular consignment is replenished from the quantity of melting scrap lying in the godown. From this statement it cannot be inferred that non-duty paid scrap is being supplied to the appellants. The statement only means that the duty paid scrap is replenished with some quantity of duty paid scrap lying in the godown and supplied to the appellants. Therefore, this statement is also in favour of the appellants.

Shri Siraj-Ul-Haq stated that the appellants arranged transportation from the dealers godown to the appellants factory and the transportation charges is also paid by the appellants. The appellants submit that this part of the statement is incorrect. The invoices issued by M/s. United Scrap Traders are enclosed which clearly state that the scrap price is ex-Tarapur factory of the appellants. Therefore, there is no question of appellants arranging for transportation.

The department did not specifically asked Shri Siraj-Ul-Haq as to how wrong vehicle numbers were entered in the excise invoices by them, as alleged by the show cause notice in Annexure A to the show cause notice. In other words, the department has failed to enquire from Shri Siraj-Ul-Haq as to how the scrap was supplied by them or at least how the vehicle Nos. were entered by them in the excise invoices as alleged in the Annexure to show cause notice. Therefore, this statement is also of no help to the department in forwarding their case.

(ix) The statement of Sh. Aziz U.R. Rehman, proprietor of M/s. Mehboob & Co., dtd. 10.4.02 clearly indicate that after segregation the deficit on a particular invoice quantity is replenished from same quality scrap lying in the godown. There is thus no material of deficit being retained or substituted by non-duty paid scrap.

(x) There is no statement about non-supply of scrap material or and supply of an accommodation invoice to transfer duty only. 'The mention of one parent invoice on dealer's invoice will thus not invalidate the credit eligibility.

(xi) FIFO principle has been accepted by Board (refer to Sr. No. 19 of Trade Notice No. 63/Mumbai-III/General/(33)/190 of Bombay III Collectorate & Circular No. 261/6/5/84-CX.-8, dtd. 17.7.84 also accept the position for grant of such facility in deserving cases. We find that 'scrap' could be an eminently suitable commodity to be eligible to this benefit of Trade Notice No. 63. Commissioner should have considered these instructions of the Board and granted the benefit of credit.

2.2 In view of our finding on merits, we could find the liability of amount mentioned in Annexure A to the notice to be required to be upheld while no case is to be found to uphold the denial of and raise consequently the disabilities under the C.Ex. Acts and Rules as and on regards the quantities mentioned in Annexure B.

2.3 Since consolidated penalty, as arrived at, for both the liabilities i.e. Annexure A & Annexure B, the penalties as implied required reconsideration and redetermination. Penalties under Rule 209A on dealers, not connected with the 17 invoices in Annexure 'A', are to be set aside and their appeals are to be allowed. The other appeals are remanded back for redetermination of the penalties, if any, called for on the assessee, the Directors the dealers in respect of Annexure A invoices.

2.4 While redetermining the penalties afresh, the question of demands under Rule 57-I(ii), interest may be also determined keeping in mind the substitution of the Modvat rules & the decision of the Tribunal in the case of Pyrite Phosphate & Chemical and Sunshine Structurals & Engg. Ltd. A/711 to 722/WZB/04/C-II, dated 27.8.2004.

2.5 Appeals to be partially allowed as remanded in above terms.

3.1 Ordered accordingly and appeals disposed in above terms.

(Pronounced in Court on 22-7-2005)