NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 5784-5788 OF 2007

M/S GUJARAT INDUSTRIES & ORS. .....APPELLANT(S)

VERSUS

COMMISSIONER OF CENTRAL EXCISE-I, AHMEDABAD .....RESPONDENT(S)

W I T H

CIVIL APPEAL NOS. 9196-9202 OF 2012

J U D G M E N T

A.K. SIKRI, J.

The assessee/manufacturer in the instant appeals, has commended this Court to decide the following questions of law which arise for consideration in these appeals:

(a) Whether the process of cold-rolling undertaken by the assessee on the hot-rolled stainless steel patta/pattis amount to 'manufacture' within the meaning of Section 2(f)(i) of the Central

Excise Act, 1944?

(b) Whether the Custom Excise & Service Tax Appellate Tribunal (CESTAT) was correct in holding that the process of cold-rolling of stainless steel patta/pattis amounts to manufacture in view of Chapter No.4 of Chapter No.72 of the Central Excise Tariff Act, 1985, when the said Chapter Note was not even referred to or relied upon in the show cause notice?

(c) Whether in the facts and circumstances of the case, extended period of limitation under proviso to Section 11A of the Act was invokable for demanding duty from the assessee and for imposing penalty on the assessee?

2. The factual background under which the appeals have been preferred by the appellants can be captured by taking note of the following salient features:

The assessee is engaged in the process of cold-rolling of hot-rolled stainless steel patta/patti on job work basis. As per the assessee, for this purpose, it receives hot-rolled SS patta/patti from other manufacturers and thereafter undertakes the process of cold-rolling in the cold-rolling mill. The purpose of cold-rolling is only to reduce the gauge of the SS patta/patti. After so

reducing the gauge by the process of cold-rolling, the SS patta/patti are sent back to the suppliers. For this purpose, the assessee receives job charges from the suppliers of the materials. The assessee claims that apart from cold-rolling, no other process was undertaken by the assessee on the SS patta/patti. The assessee had undertaken this activity during the period between November 1995 and March 1997. It is also the case of the assessee that by the process of cold-rolling, only the gauge of the SS patta/patti gets reduced and no new commercially identifiable commodity comes into existence, and the appellants were under the bona fide belief that the process of cold-rolling does not amount to manufacture under the Central Excise Act and accordingly did not take out central excise registration and did not discharge any central excise duty liability.

3. After conducting some investigation, Commissioner of Central Excise, Ahmedabad issued a show cause notice dated 15.05.2000 to the assessee contending that the process of cold-rolling undertaken by the assessee amounts to manufacture within the meaning of Section 2(f) of the Act and accordingly, the show cause notice sought to demand duty of Rs.24,06,310/- from

the assessee for the period from 1995-96 to 1996-97 by invoking the extended period of limitation under proviso to Section 11A of the Act.

4. After considering the reply of the assessee, the Commissioner of Central Excise, Ahmedabad passed Order-in-Original confirming the duty demand of Rs.12,20,563/- after extending the benefit of small scale exemption and imposing penalty of Rs.12,32,563/- on the assessee. The Commissioner held the process of cold-rolling to be amounting to manufacture, in terms of Chapter Note 4 to Chapter 72. The Commissioner also imposed penalties on the suppliers of the materials.

On the appeals filed by the assessee and the suppliers of the cold rolled SS patta/patti, the Tribunal by a 2-1 majority held that the process of cold-rolling amounts to manufacture in view of Chapter Note 4 to Chapter 72. The majority of the Tribunal further held that the extended period of limitation under proviso to Section 11A of the Act is invokable and accordingly confirmed the duty demands and the penalties imposed by the Commissioner.

5. It is in the aforesaid backdrop the questions of law formulated/raised by the appellants need to be decided.

6. We first advert to the central and crucial issue, namely, whether the gauge reduction of the hot rolled SS patta/pattis by cold-rolling process will amount to manufacture of a new product attracting further central excise duty. As we have already pointed out above, the Department seeks to include the said item of the assessee under Chapter Heading 7220.20. Chapter 72.20 including the entry in which Department claims the product falls, is as under:

72.20			**Flat-rolled products of stainless steel, of a width of less than 60mm**	
	7220.10	-	Not further worked than hot-rolled, whether or not in coils	15%
	7220.20	-	Not further worked than cold-rolled (cold-reduced)	15%
	7220.90	-	Other	15%

7. We find that in the Order-in-Original passed by the Adjudicating Authority on the question as to whether cold-rolled pattas are distinct marketable commodities, he relied upon the Harmonised Commodity Description and Coding System (HSN) published by World Custom Organisation to facilitate uniform classification of goods traded in the world classifies cold rolled strips and the hot rolled strips under two separate headings. As per him, this itself shows that all over the world these products are considered as

separate identifiable products. As per general explanatory notes given in part (IV)(B) to Chapter 72 of HSN on which Central Excise Tariff Act, 1985 is based, cold rolled products can be distinguished from hot rolled products by the following criteria:-

(a) The surface of cold rolled products has a better appearance than of products of hot rolled and never has a layer of scale.

(b) The dimensional tolerances are smaller for cold rolled products.

(c) Thin-Flat products are usually produced by cooled rolling.

(d) Microscopic examination of cold-worked products reveals a marked deformation of the grains and grain orientation parallel to the direction of working. By contrast, products obtained by hot process show almost regular grains owing to recrystallisation;

(e) He also opined that cold rolling in the true sense, changes the crystalline structure of the work piece by considerably reducing its cross section.

Thus what emerges after cold rolling of hot rolled strips is altogether a different product which has different physical properties. And, in the explanatory Note to Chapter Heading 72.09 of HSN, it is further elaborated that because of their special properties (better surface finished, better aptitude to cold – forming, stricter tolerances, generally reduced thickness, higher

mechanical strength, etc.), the products of this heading are in general use for purposes different from those of their hot rolled counterparts, which they increasingly tend to replace. They are used, in particular, in the manufacture of automobile bodies, metal furniture, domestic appliance, and central heating radiators and for producing angles, shapes and sections by cold process (either forming or profiling). They are easy to coat (by tinplating, electroplating, varnishing, enamelling, lacquering, painting, coating with plastics, etc.). They are often delivered after annealing, normalizing or other heat treatment.

8. From the above, he concluded that the explanatory notes to HSN also lends support to the fact that hot rolled products and cold-rolled products are two distinct products having their own identity, name, character and use. Cold-rolled strips are used for making cycle/auto-parts etc., whereas hot rolled strips cannot be used for this purpose. The order, thus, proceeded to hold that cold-rolled strips are entirely different than hot-rolled strips which forms the principle raw material for the manufacture of CR strips. A categorical finding was given by the Adjudicating Authority that goods are of different use and have a distinct identity of their own

in the market which was sufficient to hold that the new commodity has come into existence as for a product to be marketable it is not necessary that the products should be actually marketed but they should be capable of marketing since cold reducing is being independently by multiple number of units either on job work basis or for use in their other factories it is certainly capable of being marketed.

9. When the matter was taken in appeal before the Tribunal by the assessee, Judicial Member took the view favourable to the assessee whereas Technical Member affirmed the view of the Commissioner. The Technical Member in his brief order pointed out that the Commissioner had given detailed findings that the process of cold-rolling imparts quality of hardening to the products in question and this process entails changes in the characteristics. The Judicial Member also passed a brief order holding that the case was covered by the judgment of this Court in ***Steel Strips Ltd.*** wherein it was held that cold-rolling of steel strips reduced out of the duty paid hot-rolled steel strips do not undergo a process of manufacture. The Judicial Member also observed that there was nothing on record to show that the mere

passing of hot-rolled SS patta/pattis between the two rollers, so as to reduce the thickness of the same, amounts to process of hardening or tempering being undertaken.

10. With this difference of opinion, when the matter came up before the Third Member, he undertook a very detailed discussion and ultimately concurred with the opinion of the Technical Member. Not only he relied upon the HSN explanatory notes which corresponds to the Chapter sub-heading of the Schedule to the Tariff Act but also took note of the entire process and discuss the same with reference to the technical literature.

11. After going through the said order, we are inclined to concur with the reasons and rationale given by the Third Member holding the entire process to be 'manufacture' within the meaning of Section 2(f) of the Act. Since, we are agreeing with the said reasoning, it would be apt to reproduce the relevant portion thereof:

> "5. In this context, the Harmonized System of Nomenclature known as HSN Explanatory Notes was referred to by both the sides. These notes correspond to the Chapter sub-headings of the Schedule to the Tariff Act. The HSN throw considerable light on the process of production in iron and steel industries. To begin with, in the present context, semi-finished products and in certain cases ingots are converted into finished products which are generally sub-divided into

flat products ("wide flats" including universal plates, wide coil, sheets, plates and strip) and long products (bars and rods, hot-rolled, in irregularly would coils, other bars and rods, angles, shapes, sections and wire). These products are obtained by plastic deformation, either hot, directly from ingots or semi-finished products (by hot-rolling, forging or hot-drawing); or cold, indirectly from hot finished products (by cold rolling, extrusion, wire, drawing, bright-drawing), followed in some cases by finishing operations (e.g., cold-finished bars obtained by centreless grinding or by precision turning). In the category of hot plastic deformation, "hot-rolling" means rolling at a temperature between the point of rapid recrystallization and that of the beginning of fusion. The temperature range depends on various factors such as the composition of the steel. As a rule, the final temperature of the work-piece in hot-rolling is about 900ºC. In the category of cold plastic deformation, "cold-rolling" is carried out at ambient temperature, i.e., below the recrystallization temperature. Thus, the most significant operational distinction between the hot-rolling and cold-rolling is that, hot-rolling is a rolling done at a temperature between the point of rapid recrystallization and that of the beginning of fusion, while cold rolling is carried out at ambient or room temperatures which is below the recrystallization temperature.

5.1 The cold-rolled strips have the following properties which may be shared by certain hot-rolled products:-

(a) because of the strain or work hardening they have undergone, cold-worked products are very hard and possess great tensile strength, though these properties may diminish appreciably with heat treatment;

(b) elongation of fracture is very low in cold worked products; it is higher in products that

have undergone suitable heat treatment.

Cold-rolling in the true sense also includes cold reduction changing the crystalline structure of the work-piece by considerably reducing its cross-section. The HSN Notes, therefore, clearly indicate that in the cold-rolling processes because of the strain or work hardening, the cold-worked product becomes very hard. Therefore, when hot-rolled strips, which are flat-rolled products, are subjected to cold rolling, such cold-worked product would be very hard and would possess great tensile strength. The process of cold-rolling on such flat products would harden them and, therefore, it is a process of hardening. The fact that hardening can be achieved by heat treatment of steel cannot lead to a conclusion that no hardening can take place by cold-rolling. Hardening or tempering of a matter by heat treatment does not negate the existence of process of hardening or tempering by cold-rolling. The reference to the literature on hardening or tempering from a 'Dictionary of Metal Heat Treatment', 'Hand book of Heat Treatment Steels', 'Heat Treatment Principles and Techniques', would give a lop sided picture of the concept of hardening or tempering. If by heat treatment hardening or tempering of metal can be achieved, equally so by a cold-reducing or cold-rolling or cold-working, hardening of the flat rolled product/strips can be achieved. Heat treatment for hardening or tempering may be suited for particular products while cold-rolling or cold-working may be suited for hardening or tempering other kinds of products. Therefore, by merely referring to hardening or tempering by process of heat treatment, one cannot shut out the entire cold-rolling or cold-working processes which bring about hardening or tempering. In the midst of technical literature produced on behalf of the appellant, there are certain excerpts from 'Material Science and Metallurgy', Chapter 57 of which deals with mechanical

working processes. Mechanical working of metals may either by (i) Hot working, or (ii) Cold working. Plastic deformation of a metal above the recrystallization temperature, but below the melting or burning point is called hot working whereas plastic deformation of a metal below its recrystallization temperature is known as cold working. In that chapter, there is an analysis done on principles of hot and cold working of metals and their effects on mechanical properties. The purposes of hot working and its advantages as well as purposes and advantages of cold working are narrated. While stating the principles of hot and cold working, the very first distinction drawn is that in hot working, metal working is performed on a metal held at such a temperature that the metal does not work-harden, while in cold working it is stated that it is a plastic deformation of a metal which results in strain hardening. It usually involves working at ordinary (room) temperature, but for high melting point metals cold-working may be carried out at a red heat. Hot working processes are: forging, rolling, pipe welding, extrusion, spinning and hot piercing and rolling (tubes) etc., while cold rolling processes commonly employed are : rolling, extrusion, pressing and deep drawing, stamping, squeezing, bending, shearing etc.

5.2 Cold rolling is a process by which the sheet metal or strip is introduced between rollers and then compressed and squeezed. The amount of strain introduced determines the hardness and other material properties of the finished product. Cold rolled sheet can be produced in various conditions such as skin-rolled, quarter hard, full hard depending on how much cold work has been performed. <u>This cold working (hardness) is often called temper, although this has nothing to do with heat treatment temper.</u> Cold-rolled metal is given a “temper” rating based on the degree it was compressed. Temper is the state or a condition

of a metal as to its hardness or toughness produced by either thermal treatment or heat treatment and quench or cold working or a combination of same in order to bring the metal to its specified consistency. As per Steel dictionary, cold rolling means rolling metal at a temperature below the softening point of the metal to create strain hardening (work-hardening). It is the same as cold reduction, except that the working method is limited to rolling. Cold rolling changes the mechanical properties of strip and produces certain useful combinations of hardness, strength, stiffness, ductility and other characteristics known as tempers.

5.3 It is not disputed that cold-rolled sheet products are used in a wide variety of end applications such as appliances-refrigerators, washers, dryers, and other small appliances, automobiles-exposed as well as unexposed parts, electric motors, and bathtubs. Cold-rolled sheet products are used in these and many other areas of manufacturing. To meet the various end use requirements, cold-rolled sheet products are metallurgically designed to provide specific attributes such as high formability, deep drawabiliity, high strength, high dent resistance, good magnetic properties, enamelability and paintability. The primary feature of cold reduction is to reduce the thickness of hot-rolled coils into thinner thicknesses that are not generally attainable in the hot rolled state. Cold reduction operation induces very high strains (work hardening) into the sheet. Thus, the sheet not only becomes thinner, but also becomes much harder, less ductile, and very difficult to form. However, after the cold-reduced product is annealed (heated to high temperature), it becomes very soft and formable. Tempering is a form of cold rolling that gives the steel a precise amount of hardness on the outer surface of the steel. Cold rolling is undertaken to reduce the thickness, improve the surface finish,

improve the thickness tolerances, to offer a range of tempers and as a preparation for surface coating. Thus, cold-rolling process is also a process of hardening or tempering which is applied to flat rolled products, namely hot rolled strips so as to attract Chapter Note 4 of Chapter 72 of the Schedule to the Tariff Act. In the present case, there is no dispute over the fact that the appellant-assessee was undertaking cold-rolling process on its cold-rolling mills on the hot-rolled strips which were sent to it for the job work of reducing the gauge. The process of reducing the gauge by cold-rolling was also a process of hardening or tempering because cold-rolled products become hard and possess a very high tensile strength by the process of cold-rolling. The fact that a degree of hardness can be achieved will not dilute the applicability of the Chapter Note 4 because every degree of hardening or type of tempering resulting from cold-rolling of flat-rolled products would amount to manufacturing within the meaning of Chapter Note 4 of Chapter 72. The fact that annealing and pickling was done earlier by the party sending the goods for job work, will not make any difference because hardening or tempering of such flat-rolled products comes about only after cold-rolling. Having regard to the variety of flat-rolled products, which are cold-rolled, it cannot be said that the goods are not marketable. Admittedly, none of the parties sending the goods for job work to the appellant-assessee adopted the procedure of sending the goods for job work, as contemplated by Rule 57F of the Central Excise Rules, 1944 and, therefore, there can arise no question of the goods having been sent for job work under Rule 57F. It was not the case of any of these appellants that the goods were sent in accordance with the provisions of Rule 57F of the said Rules.

12. The other question raised in the appeals pertains to the extended

period of limitation. The case set up by the assessee is that, in any case, there was no willful mis-declaration, mis-statement or suppression on the part of the assessee and, on the other hand, the facts gave rise to a bona fide belief that the process did not amount to manufacture and, therefore, show case notice dated 15.05.2000 was beyond the normal period of limitation and, thus, time barred. As pointed out above, the assessee had not been paying any excise duty on the aforesaid process as according to it, this process did not amount to manufacture and no excise duty was paid. It is only on the basis of intelligence report that assessee was evading central excise duty that the matter came to the notice of the Revenue which led to the exercise of issuing of notice. It so happened that on the basis of intelligence, the Officers of Central Excise Department visited and searched the said factory premises on 25.03.1999 in the presence of two independent panchas and Shri Rajnibhai Veljibhai Katharia, partner of assessee and seized certain records for which panchnama dated 25.03.1999 was prepared. Officers in the panchnama observed that the two housing of cold-rolling mills fitted with debapti and gearbox were found installed and other parts were not found in the said rolling mills. During the course of

panchnama itself, it was stated by Shri Rajnibhai in presence of panchas:

(a) That the said factory was engaged in the reduction of gauge (15 gauge to 20 gauge) of hot-rolled SS patta, received from various parties on two cold-rolling installed in the factory from November, 1995 to March, 1997;

(b) That hot-rolled SS pattas after annealing and picking process were received from various units in his factory and after reducing the gauge from (15 to 20 gauge) in his factory, the same was sent back to senders on job charges of Rs.1.50 per KG for the said process;

(c) That they closed the said two rolling mills in April, 1977 and sold out the parts other than housing, debapti and gearbox.

Statements of the responsible persons for the said unit were recorded and after conducting some investigation, the Commissioner of Central Excise, issued the show cause notice dated 15.05.2000 to the assessee contending that the process of cold-rolling undertaken by the assessee amounts to the manufacture within the meaning of Section 2(f) of the Act.

13. Once, we keep the aforesaid facts in mind, it is difficult to accept

that the assessee was under bona fide belief that excise duty was not payable and that it was not permissible for the Department to avail the larger period of limitation by invoking proviso to Section 11A of the Act. All the Authorities below have rejected this argument of the assessee. The Tribunal while upholding the view of the Commissioner agreed with the reasons given by the Commissioner in the following manner:

> "The Commissioner has also for valid reasons held that the extended period of limitation was applicable and that the Department's record did not show the receipt of any letter allegedly written on 28.09.1996. The assessee, dealing with several similar manufacturing units who paid excise duty on identical processes, and doing job work on their behalf would have obviously known that excise registration was required for the cold rolling mills in its factory for the purpose of manufacturing cold-rolled pattas/pattis. The partner of the assessee was fully aware that such activity was dutiable, in view of the fact that four out of six units from which the goods were received by M/s. Gujarat Industries were paying duty on similar manufacturing activity. Thus, the Commissioner is right in issuing the show cause notice by invoking the extended period of limitation and also holding that the assessee had connived and deliberately acted in a manner to defraud the Revenue. The Division Bench of this Tribunal in ***Indian Strips*** v. ***CCE, Ahmedabad*** 2004 (173) ELT 265 took note of the Chapter Note 4 of Chapter 72 for holding that cold rolling process on flat rolled product would amount to manufacture. This decision was rendered after considering the decision of Hon. Supreme Court in ***Steel Strips Ltd.*** 1995 (77) ELT 248 (SC), which was rendered prior to the enactment of the

> said Chapter Note 4 which had the effect of including the process of hardening or tempering in relation to flat-rolled products in the definition of 'manufacture'. The subsequent decision in ***Lalit Engineering Works*** v. ***CCE, Ahmedabad*** could not have taken a view contrary to the earlier binding decision in ***Indian Strips*** v. ***CCE, Aurangabad*** (supra) is required to be followed in a subsequent decision of the Division Bench. The assessee M/s. Gujarat Industries removed the goods without any cover of excise invoices and the other assessees received the cold-worked goods without cover of such excise invoices."

14. We, thus, reject the plea of the assessee that the impugned notice was time barred.

15. We do not find any merit in these appeals, which are accordingly dismissed.

.....J.
(A.K. SIKRI)

.....J.
(ROHINTON FALI NARIMAN)

NEW DELHI;
DECEMBER 14, 2015.