'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2830 OF 2005

M/S. MAAN ALUMINIUM LTD. .... Appellant

VERSUS

COMMISSIONER OF CENTRAL EXCISE, INDORE .... Respondent

J U D G M E N T

A. K. SIKRI, J.

The appellant herein is engaged in the business of manufacturing of Aluminium Profils, bars and roads, tubes and papers. These items which are finished goods are subjected to excise duty and classified under chapter 76 of the Schedule to the Central Excise Act. Substantial quantity of the aforesaid goods manufactured by the appellant is exported. Some officials of the Central Excise Department visited the factory of the appellant on 16.08.1996 and checked the physical stock of the finished goods viz-a-viz, the stock recorded in its books. On verification, these officials found that several quantities of goods are unaccounted. These goods were, accordingly, seized. The raiding party also visited the office premises of the appellant. It went to the dealers of the appellant and recorded their statements as well. Statements of some of the employees of the appellant company who were dealing with the affairs of the appellant were also recorded.

On the basis of the aforesaid material and the statements recorded, the Department took the view that the appellant had been clandestinely removing some of the quantities of the finished goods. On this basis, a show cause notice dated 03.03.1999 was issued to the appellant company as well as its managing director. Making out the case of evasion of excise duty and suppression of facts on the part of the appellant, extended period of limitation was invoked, as per proviso to Section 11A(1) of the Central Excise Act.

The appellant submitted its reply to the said show cause notice contesting the position which was taken by the Department in the said notice. The appellant submitted that there was no clandestine removal of any quantity of finished goods and the raw material was in fact used in manufacturing the finished goods.

After hearing the appellant, the adjudicating authority passed the Order-in-Original dated 28.08.2002, raising the demand of Rs.64,82,565/- as differential duty payable by the appellant. The appellant went in appeal, which appeal was dismissed by the Customs, Excise and Services Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') as well vide its orders dated 22.12.2003. Relevant portion of this order which contains the discussion on the essential aspects is reproduced below:-

> "3.1 The company had cleared goods for export also. The export documents showed the "catalogue weight" of the goods, which was more than the actual

(physical) weight recorded in RG-1 register. Consequently, the weight of goods actually exported was less than what was shown I the export documents viz. AR4s. Invoices etc. The SCN alleged that the differential quantity of goods had not been accounted and the same had been clandestinely cleared without payment of duty during the period February 1994 to January 1999. this allegation was also based on the finding that the "gate register" and other records seized from the factory premises had shown that goods had been cleared without invoice and without payment of duty. The demand of Rs.1,05,67,090/- was raised on a total quantity of 641.145 Mts of goods which was allegedly cleared in the above manner during the above period, corresponding to which the total quantity of exports as noted by the Commissioner was 6507.073 Mts. The adjudicating authority has found that out of this quantity of total exports, the exports made to M/s Man Intertrade Co. (UAE) are not to be taken into account for demanding duty and accordingly it has requantified the demand as Rs. 64,82,565/-. That authority has worked out this demand on the basis of the appellants own records and statements. For instance a letter issued by Sh. U. D. Selvan, Senior Engineer of the company, to their Indore office showed the catalogue weight of certain Aluminium Sections as 21986 Kgs. and its physical weight as 21404.2 Kgs. Shri Selvan, in his statement, confirmed this fact. Some official correspondence between functionaries of the company also indicated that the catalogue weight of export goods was 5-10% more than the actual weight. Shri Deepak Das, Senior Manager (Tool Room) who was confronted with the letters, admitted that the catalogue weight (despatch weight) was always more than the physical weight. Shri Prahalad Das Sarda, Excise (Officer & Authorised Signatory, stated that it was his function to make entries in RG-1 Register on the basis of the Packing departments reports which were prepared on the basis of actual weight. But he could not explain as to how the differential quantity of goods was disposed of. He further stated that he had only acted as per the directions of the Managing Director and the latter alone could offer any explanation. Shri J.C. Mansukhani, in his statement, admitted that in some cases of exports, the catalogue weight was higher than the physical weight and the differential quantity of goods remained in the factory. However, he could not say as to how this quantity was disposed of. In the aforesaid example, the quantity of Sections exported under GP2 No. 58 dated 29.12.93 was shown as 21986

Kgs. (catalogue weight) whereas the actual weight was only 21404.2 Kgs. The differential quantity (581.8 Kgs.) was not actually cleared and exported, though, in RG-1, it was shown as debited for clearance for export. Shri Mansukhani in his statement conceded this factual position but could not say as to how the 581.8 Kgs. of Sections remaining in the factory were disposed of. The Consultant for the appellants submitted before us that J.C. Mansukhani and Deepak Das had been wrongly quoted in the SCN and the Commissioner's order. He added that the allegation of clandestine removal of goods had not been proved by the department. Yet another submission made by the Consultant was that the difference in weight of the goods was less than 5 which according to him, was too negligible to be taken into account. The DR submitted that he demand of duty was based only on the differential quantity admitted by the appellants and hence was irresistible. We are unable to accept the Consultant's arguments as we have noted that the demand of duty of Rs. 64,82,565/- is based on the unrebutted documentary evidence gathered from the appellants premises as well as the unretracted statements of the Managing Director and other responsible functionaries of the company. We have perused these statements and find that the adjudicating authority has correctly quoted and appreciated the same. The statements were never retracted, nor, was any of the documents disowned. The result was that the differential quantity of goods i.e. the difference between the actual (physical) weight and the weight shown to have been cleared for export was proved to have been removed from the factory without invoices and without payment of duty. The differential quantity was admitted but its accountal and clearance in terms of the legal provisions were not shown. (In view of the admission of the differential quantity by the company authorities, it was not necessary for the adjudicating authority to allow them to cross-examine any officer of the department). The department's allegation of clandestine removal of the said quantity stood proved. The appellants have stated that the total exports quantity noted by the Commissioner (6507.073 Mts) is not correct and that the correct figure must be less by 95.614 Mts and, on this basis, the demand of duty should be reduced. We are unable to accept this claim as we find that the Commissioner has noted the above quantity from a report of the Deputy Commissioner of Central Excise Division II, Indore, which has not been called in question in these appeals. Yet another ground of

challenge to the demand of duty is that many of the exports taken into account by the Commissioner had taken place prior to the period of demand. This, again, cannot be accepted as J.C. Mansukhani admitted that the differential quantities remained in the factory. Such quantities which accumulated from past exports could well be removed during the period of demand. We uphold the above demand of duty for the reasons recorded."

The appellant preferred further appeal to the High Court under Section 35G of the Central Excise Act. This appeal has also been dismissed by the High Court primarily on the ground that the two authorities below have looked into the facts and law in confirming the demand and a finding of fact has been arrived that it was a case of evasion of duty by resorting to clandestine manner in removing the finished goods and therefore, these findings do not call for any interference. Since the High Court has dismissed the appeal with the aforesaid observation, that was a reason for reproducing in detail, the discussion carried out by the CESTAT in its order.

This is how the present appeal comes up for hearing which challenges the orders of the authorities below.

In the first blush, the impression that would be gathered is that a finding of fact is arrived at by the authorities below holding that there was clandestine removal of the goods from the factory premises of the appellant without the payment of excise duty and therefore, no

question of law is involved in the present case. However, the submission of Mr. S. Ganesh, learned senior counsel appearing for the appellant, is that from the reading of the order of the CESTAT, it becomes apparent that the CESTAT has primarily been influenced by the statements of two employees of the appellant company viz., Mr. Deepak Das and Mr. J.C. Mansukhani and the entire order is rested on the so called admissions contained in the statement of these two employees. He submitted that from the reading of the statement of the two employees it would be crystal clear that there was no such admission made by them at all and what is sought to be read into those statements is not there at all and is conspicuously missing in these statements. It was thus, argued that the present case is a case of perverse findings. It is additionally argued that when the Commissioner or for that matter, the CESTAT relied upon the so-called admissions of the aforesaid two employees, it failed to look into any explanation furnished by the appellant in reply to the show cause notice and also in the form of other materials produced before the adjudicating authority. It was also argued that even in the statements of the said two employees, these employees had amply demonstrated and clarified the doubts pertaining to the differential in quantity but the authorities have blissfully ignored those parts of the statements of these employees, which has resulted in miscarriage of justice.

In order to substantiate the aforesaid statement, Mr. Ganesh took us through the reply to the show cause notice, other documents filed as well as the statements of Mr.J. C. Mansukhani and Mr. Deepak Das. On going through this record, we are inclined to accept the argument of Mr.Ganesh that the findings arrived at by the CESTAT which are accepted by the High Court are totally perverse and there is no such admission made by these two persons which has become the basis of the orders passed by the authorities below.

Before we advert to these statements, it would be pertinent to mention here that the appellant had explained that there is a variation in the die hole between 5% to 7.5%, i.e., in the manufacture of dye. It was a specific case put by the appellant that the hole of the die, after its continuous use at Press machine for extruding the required section/ finish goods, the internal diameter always expanded to some extent and therefore the dies are being manufactured accordingly so that the produced output should match the specifications. It had also taken support of the technical literature that is available in the market, to prove the aforesaid assertion. On this basis, it was stated that in the export catalogue which was prepared and issued by the appellant in order to take care of the final production with varying specifications because of the aforesaid reason, 10 per cent actual weight would be 5% more or less than the weight as mentioned in the catalogue. It

was further explained that even as per the show cause notice, the difference in quantity was hardly 2 per cent.

We find from the reading of the statements of Mr.Deepak Das and Mr. J. C. Mansukhani that this aspect is explained in abundance by them in their statements. After reading the statement of these two persons, we find that no such admission was made by them, as recorded in the order of the CESTAT which is extracted above. Mr.Deepak Das had only stated that "In export dies, catalogue weight should be always equal or 10% than the physical weight". This is in reply to Question No. 4 which was put to Mr. Deepak Das. For the sake of clarity and better understanding, we reproduce the exact question and answer given thereto:

> "Question-4 Please see page No. 359 of file 2B, seized from factory premises on 16.8.96 please explain the meaning of "we may follow the wt. Range in export dies from – 10% to 0%" as mentioned in the above said letter written by you to Mr. D. K. Chandwani Indore office on 8.8.94.
>
> Ans In export dies, catalogue weight should be always equal or 10% than the physical weight."

We fail to understand how it amounts to admission on the part of Mr. Das that the quantity disclosed was less. To the similar effect is the statement of Mr. Mansukhani which is treated as his admission. In this behalf, we reproduce question No. 5 and answer thereof which is taken as admission of Mr. Mansukhani: -

> "Question 5: Please see page No. 137 of File 49B where catalogue weight for different Section shown

as 21986 kg., and same goods were cleared under BP-258, dated 29.12.1993 this BP 2 shows that in case of Export of goods the same are cleared on catalogue weight.
Ans. 5. As per my knowledge in certain exports goods we will have to charge them as per catalogue weight and there is possibility of (+-) litter difference in the weight this is because of international rules."

Apart from the aforequoted positions of the two statements, learned counsel for the Revenue could not point out any other part of the statements on which he could rely to demonstrate any admissions by any of these witnesses.

Once we arrive at an conclusion that there was no such admission on the part of these two persons which is erroneously read out to be so, entire basis of the impugned orders passed by the Commissioner as well as the CESTAT gets knocked off.

We would also like to mention at this stage that in reply to show cause notice, a specific plea was taken by the appellant that the allegations made in the show cause notice were purely hypothetical and the difference occurred because of +/- 5 per cent tolerance which was admissible in invoicing of export dispatches. It was also specifically pleaded that the exporter always dispatches 10% less quantity and yet the importer pays foreign exchange for full invoice amount, even for 10% less quantity received by him. The statements made in the catalogue were also justified in

the following manner: -

> **"For export of the finished products to various countries, the noticee No. 1 has made out an Export catalogue which contains technical details of our different section; weight per meter etc. and as per the international practice, the invoicing of export dispatches is made on the basis of Catalogue weight whereas the actual weight of the section may be as per catalogue weight in most of the cases and in some case it may be 5% more or less than the weight as mentioned in the catalogue. Each export consignment consist of minimum 15-20 different varieties of section/ profiles and out of these different types, only in three four sections there can be variation and in rest of the sections, the weight is almost same. However, the aggregate value of the invoice is always as per the actual weight of the total consignment. To elaborate further, if the quantity of any particular section is 5% less than the catalogue weight, the quantity of other section will be 5% more than that of catalogue weight. The average weight of a container is thus always equal to the actual weight."**

It was specifically pointed out that the Department had taken only those samples of products with larger quantity and missed out those with lesser quantity and in case all the items are taken together, there would not be any difference in quantities. This was sought to be demonstrated by a chart prepared as Annexure 'AE' to the show cause notice in the following manner: -

> **"The chart as Annexure 'AE' prepared for differential quantity 4.044 MT pertaining to the exports made during the period from 19.07.93 to 28.06.94 which is totally irrelevant as the relevant period of the proposed demand duty is from Feb, 94 to Jan, 99. The difference worked out in this chart comes to about 4.91% of total 82.391 MT quantity invoiced which is also appeared to be well within the tolerable limit of 5%. Another aspect for this chart is that the investigating officers while preparing the chart "AE" deliberately have taken only those cases in which catalogue weight is**

more than the actual weight and ignored the cases in which actual weight were more than the catalogue weight. On going through whole para 6, it appears that these were the only stray evidences which the investigating officer of the department could collect after searching the files and records of Noticee No. 1 by spending almost three years valuable time of the Central Excise department. But these cases are also not relevant in the case of Noticee No. 1 as the relevant period of proposed demand of duty made in the impugned show cause notice is from Feb, 94 to Jan, 99."

It is unfortunate that in spite of the fact that the aforesaid plea was specifically raised by the appellant in explaining that there was no difference in the quantities and thus, no question of any clandestine removal of the goods from the premises, the said plea has not been adverted to and there is no reference made to the aforesaid material produced by the appellant. It is stated at the cost of repetition, that only on the basis of so called admissions made by Mr.Mansukhani and Mr. Deepak Das, the authorities jumped to the conclusion without undertaking any further exercise. Such an order of the CESTAT which is confirmed by the High Court does not stand legal scrutiny and therefore, these orders are liable to be set aside. We, accordingly, allow this appeal and quash the demands raised by the authorities.

No costs.

.....J.
[A.K. SIKRI]

.....J.
[ROHINTON FALI NARIMAN]

New Delhi;
May 08, 2015.