IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.106 OF 2015

Agarwal Metals And Alloys ... **Appellant**
V/s.
The Commissioner of Central
Excise And Service Tax. ... **Respondent**

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Mr.Chirag Shetty i/by Economic Laws Practice, Advocate for the Appellant.

Mr.Pradeep S. Jetly, Advocate for the Respondent.

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CORAM : S.V.GANGAPURWALA & A.M.BADAR JJ.

DATED : 27th June 2017.

P.C. :

1 Leave to amend. Leave also to add and amend the prayer clause at the request of learned counsel for Appellant.

2 The appellant assails the order of the Tribunal confirming the order of the Appellate authority. The appellant has framed following questions purporting to be substantial questions of law :

"a. Whether the Tribunal was right in passing the impugned order without considering various submissions made by the Appellants and without giving any reasons for the same ?

b. Whether the Tribunal was right in rejecting the appeal without recording any reasons against the appellant in the impugned order ?

c. Whether the Tribunal was correct in upholding the Order dated 22.04.2008 passed by the Respondent by rejecting the prayer of cross-examination of witnesses whose statements have been the sole basis of confirmation of demand against the Appellant ?"

3 The learned counsel for the appellant strenuously contends that the order impugned is contrary to the show cause notice issued to the appellant. In show cause notice, it was averred that though the goods were manufactured at Unit I of the appellant, the invoices were shown to be of M/s.Agarwal Alloys, whereas by giving a finding, the Appellate Authority and the Tribunal have held that though the goods were manufactured by Unit No.II, they were cleared and invoices were made in the name of Unit I. The said finding is perverse against the record and the show cause notice issued by the Department. The learned Counsel further submits that the order impugned is a non-speaking order.

It does not give any reason. The learned counsel further submits that the finding is based on statement made by one Mr. Swami. The appellant has not been given an opportunity to cross-examine the said witness. The same is against the principles of natural justice.

4 Mr. Jetly, the learned counsel for the respondent supports the order and submits that the other evidence is also considered so there was no need to give opportunity of cross-examination.

5 With the assistance of the learned counsel for the respective parties, we have gone through the Judgment. The show cause notice has been issued to the appellant. The appellant is Unit-I i.e. Agarwal Metals and Alloys Unit-1. The relevant part in the show cause notice referable to the appellant Unit-I is thus :

> "18. In view of the facts discussed in the foregoing paras, it appears that Agarwal Metal & Alloys (Unit-I) has indulged in illicit removal of excisable goods valued Rs.6,02,641/- without accounting for in their Central Excise records, i.e. Daily Stock register, without issuing any Central Excise invoices and without payment of duty by showing the same as manufactured and cleared in the name of M/s.Agarwal Alloys.

Therefore, it appears that they have contravened the provisions of Section 3 of the Central Excise Act, 1944 read-with Rules 4,6,8,10,11 and 12 of the Central Excise Rules 2002 (herein after referred to as "CER,2002"), in as much as they failed to discharge appropriate Central Excise Duty payable on the finished excisable goods, Viz., Aluminum Alloy Ingots, Zinc Ingots, Copper Bar etc. In terms of Rule 4; failed to remove the excisable goods on payment of appropriate Central Excise Duty in terms of Rule 6; failed to account for the production and clearance of excisable goods manufactured and clandestinely removed by them under Rule 10; failed to prepare and issue Central Excise Invoices in terms of Rule 11; failed to furnish a monthly return in respect of the said goods removed illicitly in terms of Rule 12. All the above acts of contravention on their part appear to have been committed by them by recourse of suppression of facts, willful misstatement and contravention of the provisions of the Central Excise Act and Rules made thereunder with intent to evade the payment of Cenvat and such acts of contravention on their part appears to have constituted the offence of the nature as described in clause (a), (b) and (d) of Rule 25(1) of the Central Excise Rules, 2002 rendering themselves liable to penal action under said rule and

Section 11AC of Central Excise Act, 1944. The Cenvat (Central Excise duty) amounting to Rs.96,423/-, as detailed in Annexure-D to this show cause notice, is required to be demanded and recovered from M/s.Agarwal Metals & Alloys (Unit-I) under the proviso to section 11A(1) of the Central Excise Act, 1944. Further, the interest on the Central Excise duty evaded as discussed above is also required to be demanded and recovered from them under Section 11AB of Central Excise Act, 1944."

6 However, the findings given by the Tribunal reads thus:

"4. The Commissioner has found that clearances under Invoice No.1 to 6 on 29/03/2004 and 30/03/2004 were made in the name of AMA-I even though goods were manufactured by AMA-II. This finding is supported by the statements of Shri.Narsingh Swamy who had admitted that the goods were in fact manufactured by AMA-II. Shri.Narsingh Swamy not only stated that the invoices were raised in the name of AMA-I though goods were manufactured by AMA-II, he also gave reasons for the same which is to avail the benefit of Sales Tax and Income Tax. Shri.Samir Agarwal Partner of AMA-II in his statement never disputed the panchanama or the statement of Shri.Narsingh Swamy. There are no submissions in this regard by both sides but we find that the Commissioner's findings in this regard are required to be upheld and, therefore, duty demand, interest and penalties are imposable."

7 In the show cause notice, it was nowhere the case of the Department nor Mr. Swami had given a statement that the goods were manufactured by Unit No.II and were cleared by Unit-I. The said finding is alien to the statement given by Mr.Swamy and also the show cause notice issued to the appellant. The said finding appears to be perverse and contrary to the show cause notice and the statement of Mr.Swamy relied by the Department. Such a finding which is perverse against the statement recorded and also the show cause notice issued cannot be sustained.

8 In light of the above, the substantive questions are answered accordingly in favour of the appellant.

9 The impugned order passed by the Tribunal and the Commissioner, Central Excise & Customs, Vapi are quashed and set aside to the extent of appellant. Appeal, accordingly, allowed.

10 No costs.

(A.M.BADAR J.) **(S.V.GANGAPURWALA J.)**