(2018) 08 P&H CK 0361

In the Punjab And Haryana At Chandigarh

Case No : Central Exceise Appeal No. 56 Of 2015 (O&M)

Commissioner Of Central Excise Faridabad II, Block C, New CGO Complex NH-IV, Faridabad — APPELLANT

Vs

Equipment Conductors And Cables Limited, 14th Mile Stone, Mathura Road, Faridabad, office at 605, Eros Apartment, 56, Nehru Place, New Delhi. — RESPONDENT

Date of Decision : 07-08-2018

Acts Referred:

Central Excise Act, 1944 — Section 11A, 11AC, 14, 35G
Customs Act, 1962 — Section 110
Central Excise Rules, 1944 — 9(2), 209A

Citation : (2018) 08 P&H CK 0361

Hon'ble Judges : Ajay Kumar Mittal, J;Aveneesh Jhingan, J

Bench : Division Bench

Advocate : Aushuman Chopra, Siddarth Sharma, Munish Kumar Garg

Final Decision : Dismissed

Judgement

1. This order shall dispose of CEA Nos.56 and 71 of 2015, as according to the learned counsel for the parties, the issue involved in both these appeals is identical. However, the facts are being extracted from CEA No.56 of 2015.

2. CEA No.56 of 2015 has been filed by the appellant-revenue under Section 35G of the Central Excise Act, 1944 (in short, "the Act") against the order dated 23.12.2014, Annexure A.3 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (in short, "the Tribunal") in Excise Appeal No.E/4381/2004, claiming following substantial questions of law:-

I) Whether the Hon'ble CESTAT is correct in setting aside the demand of Rs. 91,57,546/- alongwith interest and penalty by relying on judgment of the Hon'ble Supreme Court in the case of M/s Oudh Sugar Mills vs. Union of India reported in 1978(2) ELT CT 172) (SC) wherein the Apex Court has held that the allegation of duty evasion by clandestine removal based only on the calculation of the raw material fed into process or on the working of the machinery as noticed during the inspection, is not sustainable, when there is no tangible evidence in support of such allegation. The fact and circumstances vary from case to case, in the instant case the clandestine removal is proved on the basis of purchase order and admissible statements of Shri Alok Sharma, Managing Director, Shri K.J.Joseph, Works Manager and Shri S.R.Karup, authorized signatory of the party and BIA formula (15:398) and the Central Excise duty is recoverable from them under Section 11A of Central Excise Act, 1944?

II) Whether the Hon'ble CESTAT is correct in setting aside the penalty on party and Alok Sharma Managing Director on the basis of precedence established by the Apex Court in the case of M/s Oudh Sugar Mills. The Hon'ble CESTAT has decided the case on the question of law whereas Managing Director, Works Manager and authorized signatory of the party had admitted clandestine removal of raw material in their statements and are liable for penalty under Rule 209A of the Rules and Section 11AC of the Central Excise Act, 1944?"

3. A few facts relevant for the decision of the controversy involved as narrated in CEA No.56 of 2015 may be noticed. The respondent assessee - M/s Equipment Conductors & Cables Limited is engaged in the manufacturing of aluminum conductors and is registered with the Central Excise Department. It was availing Modvat Credit on Aluminum Wire Rod in terms of the Central Excise Rules, 1944 (in short, "the Rules"). Acting on the intelligence that they were showing excess consumption of principal raw material i.e. aluminum wire and were diverting the inputs clandestinely from the factory, on 25.11.1999, the officers of the Central Excise (Anti Evasion), Delhi IV, Faridabad visited the factory premises, scrutinized the excise records maintained by the assessee. In physical verification of finished goods, the quantity of finished goods was found to be tallied with the recorded balance in the RG-1 register but quantity of raw material was found short. Thereafter, statements of Alok Sharma, Managing Director, K.J.Josepth, Works Manager and S.R.Karup, authorised signatory were recorded on 25.11.1999 itself under Section 14 of the Act who admitted the above evasion. It was also observed that in one invoice No.146 dated 24.11.1999 issued in the name of M/s Dicco Conductors, Delhi, duty had not been debited. On scrutiny of records, it was noticed that the said invoice had not been issued from regular invoice book but had infact been issued from another invoice book which was not pre-numbered except Sr.No.146 and in which earlier 5-6 invoices had been torn off. Follow up action was conducted on 25.11.1999 in the premises of M/s Dicco Conductors, Shahardra, Delhi. In stock taking, 2640 kgs. of aluminum wire of 5.9 mm and 1852 kgs of aluminum wire rods of 9.5 mm were found over and above the recorded balances in the statutory excise records and reported to have been received from the assessee on 24.11.1999. This stock was seized under Section 110 of the Customs Act, 1962. Further on 26.11.1999, K.J.Joseph, Works Manager of the unit in his statement confirmed a debit in the PLA of an amount of Rs. 6,12,567/- on account of Central Excise duty payable on raw material and scrap removed without payment of duty and on the raw material found short in

the factory on 25.11.1999. Alok Sharma, Managing Director of the assessee company in his statement dated 30.11.1999 admitted that 4472 Kgs. of aluminum wire rod was cleared without payment of CE duty vide invoice dated 24.11.1999 issued from another invoice book. Scrap detailed in executive pad of K.J.Joseph and aluminum wire rod as shown had been removed without payment of Central Excise duty. He accepted the shortage of 6170 Kgs. of raw material i.e. aluminum wire rod and accepted the duty liability arising therefrom. Alok Sharma in his statements dated 12.1.2000 and 14.3.2000 admitted the clandestine removal of inputs on which the assessee had availed Modvat credit. From the investigation, it was noticed that the assessee had cleared 839.271 MT of Aluminum Wire Rod valued at Rs. 6,49,75,466/- involving excise duty of Rs. 98,28,564/- during the period from 1.4.1995 to 25.11.1999 without payment of Central Excise duty equivalent to the Modvat credit availed and without any account in the statutory records. As the assessee had inflated consumption of Aluminum Wire Rod in the statutory records and clandestinely removed 839.271 MT of Aluminum Wire Rod, Central Excise duty of Rs. 98,28,564/- on 839.271 MT of Aluminum Wire Rod valued at Rs. 6,49,75,466/- was found recoverable from the assessee upon invoking extended period under the proviso to Section 11A of the Act read with Rule 9(2) of the Rules. Accordingly, on 27.3.2000, a show cause notice was issued to the assessee by the Commissioner of Central Excise as to why Central Excise duty and penalty be not recovered from it. Aggrieved by the order, the assessee filed appeals before the Tribunal. Vide order dated 23.12.2014, the Tribunal allowed the appeals filed by the respondent except the demand of Rs. 2,11,344/- in respect of 22.015 MT of aluminum scrap removed clandestinely and duty demand of Rs. 4,01,233/- on 29.265 MT Aluminum Wire Rod removed clandestinely. Not satisfied with the order, the revenue has filed the instant appeals before this Court.

4. We have heard learned counsel for the parties.

5. After examining the entire material, evidence on record, relevant statutory provisions and the case law on the point, it has been categorically recorded by the Tribunal that the modvat credit demand is based on the difference between the consumption of aluminum wire rods calculated by the departmental officers based on the approximate mass per kilometer (Km.) of various types of aluminum alloys standard conductors given in the ISI standard and the consumption of aluminum wire rod as recorded by the assessee company in its Central Excise records. For estimating the actual consumption of the aluminum wire rods, the departmental officers have calculated the weight of the aluminum conductors manufactured by the assessee during each financial year based on the approximate mass in per Kms. given in the table 2 of ISI standard IS 398/1994 for the conductors of various diameters. It has been further recorded that mass in terms of Kg. per Km. given in table 2 of ISI standard IS 394/1994 is only approximate mass and is not a figure which is 100% correct. It was held that the approximate mass in terms of Kg. per Km. given in table 2 of the ISI specification cannot be treated as absolutely correct figure and applied in every

case. Thus, merely on the basis of the approximate weight of wire in terms of Kg. per Km. for different types of aluminum conductors given in the ISI standard, the allegation of clandestine removal of modvat credit availed aluminum wire rods could not be made. Reliance was placed on judgment of the Apex Court in Oudh Sugar Mills vs Union of India, 1978(2) ELT (J172) (SC) holding that allegation of duty evasion by clandestine removal based only on the calculation of the raw material fed into the process or on the working of the machinery as noticed during test inspection was not sustainable, when there was no tangible evidence in support of such an allegation. Thus, the impugned order confirming the modvat credit demand of Rs. 91,57,546/- against the assessee company alongwith interest thereon and imposing penalty of equal amount under Section 11AC of the Act was rightly set aside by the Tribunal. Consequently, the penalty of Rs. 20 lacs on Alok Sharma, Managing Director of the assessee company was also set aside. However, the duty demand of Rs. 2,11,344/- in respect of clandestine removal of 22.015 MT of aluminum scrap and duty demand of Rs. 4,01,223/- on clandestine removal of 29.265 MT aluminum wire rods being not contested by the assessee, was upheld. The relevant findings recorded by the Tribunal in this regard read thus:-

"The order which is disputed on the part of impugned order confirming modvat credit demand of Rs. 91,57,546/- alongwith interest thereon under Section 11AB on alleged removal of 782.436 MT of modvat credit availed aluminum wire rods during the period 1.4.1995 to 24.11.1999 and imposition of penalty of equal amount on the appellant. This modvat credit demand is based on the difference between the consumption of aluminum wire rods calculated by the departmental officers based on the approximate mass per Km. of various types of aluminum alloys standard conductors given in the ISI standard and the consumption of aluminum wire rod as recorded by the appellant company in their Central excise records. For estimating the actual consumption of the aluminum wire rods the departmental officers have calculated the weight of the aluminum conductors manufactured by the appellant during each financial year based on the approximate mass in per Kms. given in the table 2 of the ISI standard IS 398/1994 for the conductors of the various diameters. To this weight, the weight of the scrap generated and the aluminum wire rod cleared as such had been added. However, it is seen that the mass in terms of Kg. per Km. given in table 2 of the ISI standard IS 394/1994 is only approximate mass and is not a figure which is 100% correct. Table 1 of the ISI standard gives the nominal diameter, the minimum diameter and the maximum diameter and mass in terms of kg per KM of the aluminum alloy wires used in the manufacture of standard aluminum alloy conductors. The diameter of aluminum alloy wire as per para 7.1.2 of the ISI standard can be 1% more or 1% less than the nominal diameter. Therefore, the weight per Km. of the aluminum alloy standard conductors given in table 2 for the standard wires of different cross sectional area and specifications is only approximate weight and the weight of stranded conductors can be 1% more or 1% less than the weight mentioned in this table. In our view, therefore, the approximate mass in terms of Kg. per Km. given in the table 2 of the ISI specification cannot be treated as absolutely correct figure and applied in every case. It is also seen that even as per the department's calculations, only during 1995-96 the actual consumption of the wire rod - 1395.825 MTs was more than maximum consumption of 1370.583 MTs. but in the subsequent years 1996-97, 1997-98, 1998- 99 and 1999-2000, the consumption of the aluminum wire rod as per the appellant's record was much less than the maximum possible consumption during the period of dispute is seen, the consumption as per the appellant's records would be less than the maximum possible consumption as per the ISI standard. Therefore, merely on the basis of the approximate weight of wire in terms of Kg. per Km. for different types of aluminum conductors given in the ISI standard, the allegation of clandestine removal of modvat credit availed aluminum wire rods cannot be made. We are supported in this view by Apex Court judgment in the case of Oudh Sugar Mills (supra) wherein Apex court has held that allegation of duty evasion by clandestine removal based only on the calculation of the raw material fed into the process or on the working of the machinery as noticed during test inspection is not sustainable when there is no tangible evidence in support of such an allegation. In view of this impugned order confirming the modvat credit demand of Rs. 91,57,546/- against the appellant company alongwith interest thereon and imposing penalty of equal amount under Section 11AC is not sustainable and the same is set aside."

Learned counsel for the appellant revenue has not been able to point out any error or illegality in the findings recorded by the Tribunal, warranting interference by this Court. The judgment relied upon by the learned counsel for the revenue in Commissioner of Central Excise, Ludhiana vs. Ghansham Bassi, 2016(332) ELT 714 (P&H) is based on individual fact situation involved therein and thus, the appellant cannot derive any advantage from the said decision.

6. In view of the above, no substantial question of law arises and both the appeals stand dismissed.

