(2012) 11 BOM CK 0024

In the Bombay High Court

Case No : Central Excise Appeal (L) No. 77 of 2012 With C.E.A. (L) No. 78 of 2012

Finolex Cables Ltd. APPELLANT

Vs

Commissioner of Central Excise, Pune-I RESPONDENT

Date of Decision : 29-11-2012

Acts Referred:

Citation : (2012) 286 ELT 658

Hon'ble Judges : M.S. Sanklecha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Sridharan, with Prakash Shah, Jas Sanghavi and Uchit Jain, instructed by PDS Legal, for the Appellant; Pradeep S. Jetly, for the Respondent

Judgement

M.S. Sanklecha, J.—The issue raised in the present two appeals arising out of a common order dated 15-3-2012 of the Custom Excise and Service Tax Tribunal (Tribunal) is :

Whether the Tribunal is justified in directing the appellant to make a pre deposit of Rs. 1.38 crores out of the total demand of Rs. 9.04 crores (Rs. 4.52 crores duty plus Rs. 4.52 crores equivalent penalty) as confirmed by the a common order dated 8-8-2011 of Commissioner of Central Excise for the purposes of entertaining the appellant''s two appeals before it?

The appellant has two divisions viz. Cable division and Sheet division at Urse. From its two divisions it clears intermediate products to its sister units at Pimpri, Goa and Rorkee for use in manufacture of final products. These intermediate goods cleared by the two divisions to its sister units for captive consumption, discharge duty in accordance with Rule 8 of the Central Excise (Valuation) Rules, 2000 (Valuation Rules) i.e. on the value arrived at the cost of production plus 10% thereon. The cost of production for captively consumed goods is arrived at in accordance with CAS-4 developed by the Institute of Cost and Works Accounts of India (ICWA). It is the case of the revenue that for the period August 2005 to March 2010 the cable division and for the period July 2005 to March 2010 the sheet division had not properly arrived at the cost of production of the captively consumed intermediate goods as set out in show cause notices dated 19-8-2010 and 29-7-2010 respectively. In particular, it is alleged that the cost of the materials consumed to manufacture the intermediate goods has not been correctly taken leading to undervaluation.

2. The appellant responded to both the notices and resisted the same. However, by a common order dated 8-8-2011, the Commissioner of Central Excise confirmed both the notices invoking the extended period of limitation. The order dated 8-8-2011 negatived the submission that the entire exercise being revenue neutral the notices must be withdrawn as well as the fact that having filed monthly CAS-4 along with ER-1 returns, the revenue did not at any time prior to the notice object to the cost of materials taken.

3. Being aggrieved by order dated 8-8-2011 of the Commissioner of Central Excise, two appeals were filed to the Tribunal by the appellant. Along with the appeals the appellant also filed two applications for dispensing with the pre-deposit of duty and penalty aggregating in both the appeals to Rs. 9.01 crores. During the hearing of the stay application, the appellant pointed out that if the cost of manufacture is done strictly in accordance with final CAS-4 the demand of duty in the aggregate would be only Rs. 1.38 crores. However, the submission of the appellant before the Tribunal appears to have been only with regard to the demand being time-barred as recorded in Para-6 of the impugned order. The submissions in support of the plea for the time bar was that there is no revenue loss on account of revenue neutrality, therefore, no intent to evade duty. Further, it was contended that an audit has carried out in 2004 at which time an objection was taken with regard to incorrect payment of duty on captively consumed goods and therefore time-barred. The Tribunal did not deal with the issue of revenue neutrality but held that when the deficiencies were pointed out in 2004, it appears that the appellant had not yet removed the same and therefore prima facie concluded that extended period was invocable. The Tribunal also found that the monthly CAS-4 filed by the appellant were not correct and therefore, the plea of bona fides also would not be sustainable. Therefore, for the purposes of stay, a prima facie view was taken by the Tribunal directing the appellant to pre-deposit a sum of Rs. 1.38 crores for hearing the appeals on merits.

4. Mr. Sreedharan in support of the appeals submits :

(a) the entire exercise is revenue neutral and consequently there should have been complete waiver of deposit of any duty and penalty for the purpose of consideration of the appeals on merits. This is so in view of the fact that the units at Pimpri & Goa which received intermediate goods from the two divisions had paid more duty through their PLA then the amount of differential duty payable by the two divisions as demanded by the revenue. Consequently, in case the two divisions had paid duty as demanded by the revenue, the units at Pimpri and Goa would have paid the duty through the credit taken immediately on receipt of inputs;

(b) the appellant had been submitting monthly CAS-4 Certificates along with its ER-1 returns to the revenue. In the Certificates the appellant had declared that the costs of material was taken as prevailing in the month prior to the month for which Certificate has been issued. However, the revenue never objected to the same and let the appellant believe that the same was acceptable;

(c) the audit objection of 2004 was in the knowledge of the department and in view thereof the extended period of limitation cannot be invoked by the revenue, and

(d) the method followed by the appellant of furnishing monthly CAS-4 Certificates resulted in some months leading to short levy and to some months excess payment. If the entire period in both the appeals are considered together and by off setting the excess payments of duty paid there would be no duty payable at all.

In view of the above, the appellant had a strong prima facie case and the Tribunal ought to have granted a complete waiver of deposit of duty and penalty for the purpose of hearing the appeals on merits.

5 As against the above, Mr. Jetly appearing for the revenue submits that:

(a) the order directing the appellant to deposit amount of Rs. 1.38 crores for the purpose of hearing the appeals on merits is reasonable as this amount was admittedly payable by the appellant as per the final CAS-4 Certificate submitted by the appellant, and

(b) the contentions raised by the appellant would be heard in depth at the final hearing of the appeals as the same would require examination of facts to establish revenue neutrality as well as the set off of excess amounts paid.

Therefore, the prima facie view to pre-deposit of Rs. 1.38 crores for hearing the appeals on merits is reasonable and calls for no interference.

6 We have considered the submissions. We note the fact that the Tribunal has recorded in the impugned order that the appellant has not pleaded any financial hardship. We are conscious of the fact that absence of financial hardship by itself would not lead to an order directing the appellant to deposit some amounts for the hearing of the appeals. However, financial hardship is a factor to be taken into consideration along with the prima facie case while considering the pre-deposit to be ordered. We find that the deposit of Rs. 1.38 crores out of the aggregate demand of Rs. 9.04 crores in both the appeals as confirmed by the Commissioner of Central Excise is reasonable. This is particularly so as the issue of revenue neutrality would have to be examined on merits after ascertaining what is the exact amount which is paid by units at Pimpri, Goa and Rorkee receiving the intermediate goods on which credit of duty paid is taken. The appellant at Page 18 of its appeal memo and at Exhibit-Q to the memo of the appeal in Appeal No. 77 of 2012 has given details only with regard to Pimpri and Goa units and not with regard to the Rorkee unit. Consequently, the same would

be a matter of examination at the time of final hearing of the appeals. Further the issue whether there was any intent to evade duty on the part of the appellant or not warranting invocation of extended period is itself a debatable issue. Therefore, the deposit of the admitted amount of Rs. 1.38 crores as per the final CAS-4 Certificate submitted by the appellant cannot be said to be arbitrary and perverse. Therefore, as the issues raised in the applications are contentious and require examination in greater depth at the time of final hearing of the appeals, we see no reason to interfere with the order of the Tribunal directing the appellant to deposit an amount of Rs. 1.38 crores on a prima facie view.

7. However, the time to deposit the amount of Rs. 1.38 crores is extended by a period of another six weeks from today i.e. upto 11-1-2013. On the appellant depositing the amount of Rs. 1,38,14,819/- with the revenue and reporting compliance thereof to the Tribunal, the appeals of the appellant would he heard and disposed of on merits. The appeals are disposed of in the above terms. No order as to costs.

