
(2024) 10 CESTAT CK 1197

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Excise Appeal No.2952, 2953, 2954 of 2010

M/s Amarnath Industries and Ors. @APPELLANT @Hash Commissioner of Customs & Central Excise @RESPONDENT

Date of Decision : 16-10-2024

Acts Referred:

Central Excise Act, 1944 — Section 9D, 9D(1), 11A, 11A(1), 11AC, 35E
Central Excise Rules 2002 — Rule 26

Citation : (2024) 10 CESTAT CK 1197

Hon'ble Judges : Dilip Gupta, President (J); P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : Prakash Shah, Mohit Raval, Mihir Ranjan Kumar

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. Excise Appeal No. 2952 of 2010 has been filed by M/s. Amarnath Industries, the appellant to assail that part of the order dated 17.05.2010 passed by the Commissioner of Central Excise, Delhi-I, the Commissioner that denies refund of Rs. 10,14,57,998/- with a further direction for recovery of the same under section 11A of the Central Excise Act 1944, the Central Excise Act by invoking the extended period of limitation contemplated under the first proviso to section 11A(1) of the Central Excise Act. The order also confirms the demand and recovery of interest with penalty.

2. Excise Appeal No. 2953 of 2010 has been filed by Vinay Agarwal to assail that part of the order dated 17.05.2010 passed by the Commissioner that imposes a penalty of Rs. 20,00,000/- on him as partner of Amarnath Industries under rule 26 of the Central Excise Rules 2002, the Central Excise Rules.

3. Excise Appeal No. 2954 of 2010 has been filed by Manish Jain to assail that part of the order dated 17.05.2010 passed by the Commissioner that imposes a penalty of Rs. 20,00,000/- upon him as partner of Amarnath Industries under rule 26 of the Central Excise Rules.

4. The appellant is a manufacturer of Mentha Products namely Menthol Crystal, Menthal Powder, Menthal Solution, Pepper Mint Oil, Menthone, Terpene Distilled Fractionated Piperita Oil, Distilled Fractionated Mentha Oil, Distilled Fractioned Spearmint Oil. The main raw materials used in the manufacture of these products are curde Mentha Oil, Crude Mentha Oil Shivalik, Crude Tymol Oil, Crude Spearmint Oil, Crude Piperita Oil, Crude Lemon Grass Oil and Crude Peppermint Oil. They shall collectively be referred to as Crude Mentha Oils. The appellant procured the raw materials from the manufacturers/ producers in the State of Uttar Pradesh. The manufacturing unit of the appellant is situated in industrial area Kathua and the appellant availed the benefit of the Exemption Notification No. 56/2002 dated 14.11.2002, the Exemption Notification.

5. Under this Exemption Notification, Central Excise duty paid by the appellant on the said products in a particular month is subjected to refund in the subsequent month by the Jurisdictional Assistant Commissioner after verification. The appellant claims that during the period from April 2005 to June 2006, it made payment of central excise duty amounting to Rs. 10,14,57,998/- from its current account and subsequently claimed refund of the said amount of duty in terms of the Exemption Notification.

6. A show cause notice was issued to the appellant alleging that the appellant did not have the capacity of deterpenation/fractionation of either the Crude Pipertia Oil or Crude Mentha Oil (Shivalik) or any Mint Oil and so no manufacturing process took place in the manufacturing unit of the appellant in respect of the goods cleared as Fractionated/Deterpenated/Distilled Pipertia Oil and Fractionated/Deterpenated/Distilled Menthe Oil (Shivalik)/Spearmint Oil or Terpene. The show cause notice further alleges that the appellant manipulated entries in the registers/documents to show manufacturing operations with the sole intention of accommodating the supplies. The duty paid on the products cleared as Fractionated/ Deterpenated/Distilled Pipertia Oil, Fractionated/ Deterpenated/ Distilled Menthe Oil (Shivalik) and Fractionated/Deterpenated/ Distilled Spearmint Oil and Terpene, therefore, appeared to be irregular and the products cleared were actually Crude Pipertia Oil, Crude Menthe Oil (Shivalik) and Crude Spearmint Oil only. The exemption under the Exemption Notification is available only to a manufacture of goods on the clearance of manufactured goods and so the appellant was not entitled to exemption as the goods were not manufactured. The show cause notice also alleges that the evidence gathered indicated that appellant dispatched the raw materials (crude mint oils) without putting them to any manufacturing process. Thus, the refund availed by the appellant by self-credit was liable to be denied and recovered by invoking the extended period of limitation.

7. The appellant filed a detailed reply and denied the allegations made in the show cause notice. The Commissioner, however, confirmed the demand proposed in the show cause notice.

8. To support the contention that the appellant undertook manufacturing process

of freezing, the appellant has stated the following facts in the appeal.

9. The factory premises of the appellant were searched by the department on 23.06.2006. During the search, the officers found the following plant and machinery installed in the factory premises:

(a) 6 Flakes machine

(b) Compressors Chllers/Freezer

(c) 1 Melting Tank

(d) 8 Centrifugal Machines

(e) 3 fractional distillation columns with 3 tanks and 1 boiler.

10. The following machines were also found to be installed in the appellant's factory premises:

Serial No.

Details of Plant and Machinery

Quantity

1.

Flack Machine with 2 open type compressor glycol tanks.

1

2.

Flack Machine with 3 open type compressor glycol tanks.

1

3.

Flack Machine Compressor

2

4.

Centrifugal

8

5.

Cutter Machine Manual

1

6.

Fractional and Distillation Column

1

7.

Vacuum Pump with Motor

1

8.

Sealing Tower

1

9.

Melting tank with pump heater and diesel burner

1

10.

Centrifugal base and pipe line for D.O. storage tank and pump

1

11.

Pipe line for sealing system for freezing and column

1

12.

Aluminum Containers

466

13.

Tin Containers

300

11. The officers also found electric power of 50HP installed at the factory premises. 11 workers employed by the appellant were also present for the factory premises. During the course of the search of the officers resumed RG-1 Registers. Form-4 Register, attendance Register, Cash Books, VAT-65 Consumed File, Fuel and Electricity File, PLA Register, RG-23C, Part-II, Sale Bills/Purchase Bills Files, Central Excise Files, Files Containing Misc. papers, Sales tax Files, machinery bill File, Form-F register, Production Slips, Issue Slips, Analysis Reports, Capacity Assessment File and DIC Verification Certificate.

12. Shir Anurag Mishra, learned counsel for the appellant made the following submissions:

- (i) The appellant had correctly availed CENVAT credit of the duty paid on inputs/raw-materials;
- (ii) The findings recorded by the Commissioner that the appellant had no infrastructure/ capacity to manufacture goods is contrary to the record;
- (iii) The entire proceedings initiated against the appellant are based on assumptions and presumptions;
- (iv) Refunds granted to the appellant remain unchallenged and have attained finality;
- (v) Once the duty paid by the appellant was accepted by the department, the credit of the same cannot be denied to the appellant as the recipient. To support this contention learned counsel placed reliance upon the following decisions:
 - (a) Commissioner of Central Excise, Goa vs. Nestle India Ltd., 2012 (275) E.L.T. 49 (Bom.);
 - (b) Commissioner of Central Excise & Customs vs. MDS Switchgear Ltd., 2008 (229) E.L.T. 485 (S.C.)
- (vi) The statements of various persons to conclude that no manufacturing activity was undertaken by the appellant are not relevant and inadmissible as they failed to comply with provisions of section 9D of the Central Excise Act and denial of cross examination of the said persons has vitiated the order. To support this contention learned counsel placed reliance upon the following decisions:
 - (a) Sukhwant Singh vs. State of Punjab, 1995 (3) TMI 468 – Supreme Court;
 - (b) Commissioner of Central Excise, Meerut-I vs. Parmarth Iron Pvt. Ltd., 2010 (260) E.L.T. 514 (All.);
 - (c) Jindal Drugs Pvt. Ltd. vs. Union of India, 2016 (340) E.L.T. 67 (P & H);
 - (d) Additional Director General (Adjudication) vs. Its My Name Pvt. Ltd., 2021 (375) E.L.T. 545 (Del.);
 - (e) Swiber Offshore Construction Pvt. Ltd. vs. Commr. of Cus., Kandla, 2014 (301) E.L.T. 119 (Tri. - Ahmd.); and
 - (f) Gaurav Mungad vs. Commissioner of CGST, Ex. & CUS., Bhopal, 2021 (376) E.L.T. 69 (Tri. - Del.).
- (vii) The extended period of limitation could not have been invoked in the facts and circumstances of the case;
- (viii) Interest and penalty under section 11AC of the Central Excise Act could not have been levied; and
- (ix) The imposition of penalty under rule 26 of the Central Excise Rules 2002, the 2002 Rules on the Directors of the appellant bad in law.

13. Shri Mihir Ranjan Kumar, learned special counsel appearing for the department, however, supported the impugned order and made the following submissions:

(i) The request for cross examination was denied for good and valid reason. The departmental officers merely verified the facts that had been declared by the appellant in the statutory records submitted from time to time. As there was no reason to doubt the genuineness of test reports/analysis reports, the request of cross-examination is devoid of merits.

(ii) The appellant is not justified in asserting that the show cause notice has been adjudicated only on the basis of assumptions and presumptions. The Commissioner had examined all the evidence on record to arrive at the findings;

(iii) The records indicate that no manufacturing activity in relation to the goods supplied to the appellant was carried out in the factory premises of the appellant;

(iv) The benefit of the Notification dated 14.11.2002 has been wrongly availed;

(v) The availment of CENVAT credit has been correctly denied to the appellant; and

(vi) The extended period of limitation was correctly invoked and the penalty was also correctly imposed.

14. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the department have been considered.

15. The appellant is situated in Jammu and operated under the Notification dated 14.11.2002. Under this Notification, the duty paid by the appellant in cash on the raw materials cleared was refunded/granted as self credit to the appellant.

16. Learned counsel for the appellant submitted that the appellant has been granted refunds on the basis of orders passed by the Jurisdictional Assistant Commissioner and these orders were not challenged. The CENVAT credit could not have, therefore, been denied to the appellant.

17. This submission advanced by the learned counsel for the appellant deserves to be accepted in view of the decision of the Gauhati High Court in Commissioner of C. Ex., Shillong vs. Jellalpure Tea Estate, 2011 (268) E.L.T. 14 (Gau.), wherein it was held:

"14. Insofar as the present case is concerned, the prescription of law required that the order of the Assistant Commissioner passed on 29-4-2002 could be challenged only by resorting to Section 35-E of the Act. The Revenue could not initiate collateral proceedings to set aside the order dated 30-4-2002 by resorting to the enabling power under Section 11A of the Act.

15. Consequently, we are of the opinion that : (i) Section 11A of the Act is not applicable to the facts of the case since the issue raised did not concern any approval, acceptance or assessment relating to the rate of duty on or valuation

of any excisable goods. The issue raised by the assessee related to its entitlement to the benefit of Notification No. 33/99-C.E., dated 8-7-99, (ii) Even otherwise, the Revenue could not take recourse to Section 11A of the Act when it had a statutory remedy available to it to challenge the order dated 29-4-2002 passed by the Assistant Commissioner of Central Excise, Silchar by resorting to the revisional power available under Section 35-E of the Act."

18. Learned counsel for the appellant also submitted that once duty paid by the appellant was accepted by the department, the CENVAT credit of the same could not have been denied to the appellant who is the recipient.

19. The payment of duty at the time of clearance of goods to the appellant is not in dispute. The credit of the duty paid, therefore, could not have been denied to the appellant. This issue was examined by the Bombay High Court in *Nestle India*. The issue that arose was that if excise duty is levied on an assessee at place "A" and Modvat credit is sought to be availed at place "B", is it open to the Authorities at place "B" to deny credit on the ground that no duty was payable at place "A". This issue was answered by the Bombay High Court in the following manner:

"5. Mr. Ferreira, learned Assistant Solicitor General for the appellant, submitted that the scheme of law is that if, excise duty is collected, a person at subsequent place is entitled to claim Modvat credit. According to Mr. Ferreira, learned Assistant Solicitor General, this can be so if, duty is validly collected at an earlier stage. In this case duty was not payable at all at the place outside Goa, since no duty can be levied on job work but only on manufacture and, therefore, the respondents are not entitled to claim any Modvat credit. Though this submission appears to be reasonable and in accordance with law, we find it not possible to entertain this submission in the facts of the present case since at no point of time the Revenue questioned the applicability of the excise duty at the place outside Goa. Those assessments have been allowed to become final and the goods have been removed from the jurisdiction of the Excise Officer at that place and brought to Goa. Now, in Goa it will not be permissible to allow the Revenue to raise the contention that the assessee in Goa cannot claim Modvat credit in Goa because duty need not be paid outside Goa.

6. As we have observed that the assessment is allowed to be final, it would not be legal and proper to allow the Revenue to raise the question on the basis of Modvat credit. Indeed, now the payment of excise duty must be treated as valid, therefore, the claim of Modvat credit must be treated as excise duty validly paid."

(emphasis supplied)

20. The same view was taken by the Bombay High Court in *Commissioner of Central Excise, Pune-III vs. Ajinkya Enterprises*, 2013 (294) E.L.T. 203 (Bom.). It was held:

"10. Apart from the above, in the present case, the assessment on decoiled HR/

CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 (T), Super Forgings - 2007 (217) E.L.T. 559 (T), S.A.I.L. - 2007 (220) E.L.T. 520 (T) = 2009 (15) S.T.R. 640 (Tribunal), M.P. Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has held that once the duty on final products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity does not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue."

(emphasis supplied)

21. In view of the aforesaid decisions, it has to be held that CENVAT credit of the duty paid could not have been denied to the appellant.

22. Learned counsel for the appellant also submitted that the statement of various persons like Employees/Directors of the appellant were relied upon though they were inadmissible since they failed to comply with the provisions of section 9D of the Central Excise Act and denial of cross examination of the said persons has also vitiated the order.

23. This submission advanced by learned counsel for the appellant also deserves to be accepted.

24. The Allahabad High Court in Parmarth Iron examined this issue in detail and on a perusal of section 9D of the Central Excise Act observed:

"16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered."

25. The Punjab and Haryana High Court in Jindal Drugs also observed as follows:

"9. A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.

10. Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T.189 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well. There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.

11. As already noticed hereinabove, sub- section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).

12. The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.

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19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/ inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause

(a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion

that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

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22. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.”

(emphasis supplied)

26. The Commissioner found that since the departmental officers had verified the facts which had been declared by the appellant in the statutory records and the test reports also indicated that the goods would be Crude Mint Oils, the genuineness of test report conducted after receipt of the goods from the appellant, cannot be doubted and so the request for cross examination of departmental officers and other persons should not be granted. The Commissioner also observed that the case against the appellant is not only on the basis of statements of employees of the appellant, but also on circumstantial test reports and, therefore, denying the right of cross examination would not be violative of principle of natural justice.

27. These observations made by the Commissioner in the impugned order are clearly contrary to the principles enunciated by the Allahabad High Court in Parmarth Iron and the Punjab and Haryana High Court in Jindal Drugs. In the first instance, under section 9D of the Central Excise Act it is clear that a statement made during investigation/enquiry before a central excise officer cannot be relied upon unless it is first admitted and for this the person who made the statement has to be summoned and examined as a witness in adjudication proceedings. Failure to do so would mean that the adjudicating authority has relied upon an irrelevant material and, therefore, the order would be vitiated. The question of cross examination would arise only after examination of the person who makes statement before the central excise officer.

28. The Commissioner has placed reliance upon the statements without following the procedure prescribed under section 9D of the Central Excise Act. The order passed by the Commissioner deserves to be set aside for this reason also.

29. The penalties imposed upon the Partner and Managing Director of the appellant cannot also, for the same reasons, be sustained.

30. The impugned order dated 17.05.2010 passed by the Commissioner so far as it concerns the three appellants deserves to be set aside and is set aside. The appeals are, accordingly, allowed with consequential relief(s), if any, to the appellants.

(Order Pronounced on 16.10.2024)