(2021) 02 CESTAT CK 0003

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 75465 Of 2016

M/s Black Diamond Explosives Private Limited @Hash Commr. Of Central Excise And Service, Bolpur

Date of Decision : 02-02-2021

Acts Referred:

Central Excise Act, 2004 — Section 11AC, 11AA
Central Excise Rules, 2002 — Rule 25
Central Excise (Determination of Price of Excisable Goods) Rules, 2000 — Rule 4, 8

Citation : (2021) 02 CESTAT CK 0003

Hon'ble Judges : P. K. Choudhary, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : Kartick Kurmy, Rajesh Sharma, S.S.Chattopadhyay

Final Decision : Allowed

Judgement

1. The instant appeal has been filed by the assessee, M/s. Black Diamond Explosives Pvt. Ltd, assailing the Order dated 20.01.2016 passed by the Ld.

Commissioner of Central Excise, Bolpur, whereby demand of central excise duty of Rs.4,68,84,408/- has been confirmed alongwith equivalent penalty

under Section 11AC of the Central Excise Act (the Act) read with Rule 25 of the Central Excise Rules, 2002 and applicable interest under Section

11AA of the said Act, for the period from January 2009 to November 2013 by invoking extended period of limitation as proposed in the Show Cause

Notice dated 05.02.2014 (SCN).

2. The appellant is engaged in the manufacture of explosives and allied products on which central excise duty is being paid. During the period in

dispute, the appellant has cleared â??Matrix Emulsionâ? from its manufacturing unit located at Napara, Barabani, Burdwan to its sister unit at

Dhanbad, by valuing the said goods under Rule 8 of the Central Excise (Determination of Price of Excisable Goods) Rules, 2000 [Valuation Rules], i.e., cost plus 10% as per the CAS-4 Valuation Standard. SCN dated 05.02.2014 was issued to raise demand of differential duty on the ground that

value for the purpose of payment of duty on said goods should have been made under Rule 4 of the Valuation Rules instead of Rule 8. It was

contended that for the purpose of said valuation, the price charged to independent buyers, i.e. Integrated Coal Mining Ltd, various subsidiaries of Coal

India Ltd, etc, should have been adopted for payment of duty on aforesaid goods cleared from their factory at Burdwan to Dhanbad unit.

3. Sri Kartik Kurmy and Sri Rajesh Sharma, Ld. Advocates appeared for the appellant whereas, Sri S. S. Chattopadhyay, Ld. Authorised

Representative appeared for the Revenue.

4(i). Sri Kurmy appearing for the appellant, at the outset, submitted that the Ld. Commissioner has not taken into consideration the Reply filed on

16.10.2015 against the SCN, whereas, the impugned Order has been passed on 20.01.2016, i.e. three months after the date of filing of Reply. He

relied on the decision of the Honâ??ble Calcutta High Court in the case of Ramesh Candra Kushwaha vs. Pr. Commissioner, Customs (Airport)

2018 (362) ELT 575 (Cal) to submit that the impugned order is illegal and has been passed in clear violation of the principles of natural justice and

hence, the same should be set aside.

(ii) On merits, he submitted that the goods (Matrix Emulsion) which have been classified by them under Ch. 3602.00.90 which have been cleared from

their Burdwan factory is not a final product, but have been further used in the manufacture of final product i.e. Site Mixed Explosives at their

Dhanabd unit, which is classifiable under Ch. 3602.00.10. Since the goods cleared from their Burdwan factory and final products cleared from their

Dhanbad factory and not comparable, the price of later goods cannot be adopted for raising the impugned duty demand.

(iii) He further submitted that the goods, Matrix Emulsion, is not an explosive and is not marketable. As per the Explosives Act, they are not entitled to

sell such goods. Since both the goods i.e. Matrix Emulsion and Site Mixed Explosives are different products, and that Matrix Emulsion is an input for

manufacture of Site Mixed Explosives, they have correctly valued the said goods under Rule 8 of the Valuation Rules, i.e. cost plus 10%.

(iv) He also submitted that in any case, whatever duty is paid from their

Burdwan unit will be available as Credit at their Dhanbad unit and the said payment would be completely revenue neutral. He submitted that it is a settled legal position that there cannot be any question of fraud or suppression in such case as has been held in the case of Nirlon Ltd vs.CCE 2015 (320) ELT 22 (SC), Amco Batteries Ltd vs. CCE 2003 (153) ELT 7 (SC) and Jay Yushin Ltd vs. CCE 2000 (119) ELT 718 (LB). He accordingly prayed that extended period of limitation is not available to the Department. On same counts, penalty is also not imposable.

5. The Ld. D.R. appearing for the Revenue reiterated the findings made by the Ld. Commissioner and submitted that despite the appellants were given adequate opportunity to file their written Reply, they did not file within the time prescribed as also recorded in the impugned Order. The appellant has been very reluctant at the time of adjudication. The documents which are now being submitted, were never presented before the Ld. Commissioner and therefore, the demand has been rightly raised. He accordingly prayed that the appeal be rejected being devoid of any merit.

6. Heard both sides through video conferencing and perused the appeal records.

7. The issue involved herein is whether the value of goods removed by the appellant to their unit located at Dhanbad would be in terms of Rule 4 of the Valuation Rules or Rule 8 of the said Rules as adopted by the appellant. We find that the appellant has duly filed reply to SCN on 16.10.2015 which is appearing at Page no. 249 of the Appeal Book. The Ld. Commissioner without taking into cognizance of the said Reply, has passed the impugned order wherein he has recorded that no Reply has been submitted till 29.09.2015. We find that since the impugned order has been passed after more than 3 months, the Ld. Commissioner was not justified in not considering the written reply submitted by the appellant.

8. The appellant has submitted that both the goods in question are different and that demand raised in respect of goods i.e. Matrix Emulsion is an input which is further used in the manufacture of final product Site Mixed Explosive. The duty demand has been raised on Matrix Emulsion (input) by considering the price at which output, Site Mixed Explosive, has been cleared from their Dhanbad unit, which is not permissible under Rule 4 of the Valuation Rules. However, the Ld. Commissioner, in his impugned order in para 3.8, while justifying the valuation adopted by him has clearly noted

that both the goods which were cleared by the appellant to their sister unit as well as those cleared to independent buyers are the same. We find that

in the Reply filed the appellant, which has not been considered by the Ld. Commissioner while adjudicating the matter, has submitted the production

process involved in the manufacture and delivery thereof to the independent buyers. The appellant has also submitted the license issued by concerned

department under Explosives Act to justify their claim that goods in question, i.e., Matrix Emulsion is not an explosive and they are not entitled to sell

such goods to any third party and hence do not have any market.

9. We are of the view that since factual issues are involved as noted above, it would be just and proper that matter is remanded back to the Ld.

Commissioner who would examine the said facts and pass a reasoned order by considering all the contentions raised by the appellant as above as well

as that may be further submitted duly supported with documents in the remand proceedings.

10. In so far as the invocation of extended period of limitation is concerned, we have carefully examined the SCN as well as the impugned order.

After having gone through the same, we do not find any specific instance or allegation to show that the demanded duty amount has not been

deliberately paid for reasons on account of fraud or suppression to justify the invocation of extended period of limitation. We have also gone through

the specimen excise invoices have duly issued to their Dhanbad unit, enclosed in page nos. 141 to 147 of the Appeal Paper Book, which shows that

the goods have been cleared to their Dhanbad unit. The Department was at its liberty to examine the aspect of correct valuation in normal course and

having not done, the demand of differential duty cannot be raised by invoking extended period of limitation. Thus, the demand pertaining to extended

period of limitation is set aside. Penalty as imposed in the impugned order is also set aside in entirety in absence of any element of fraud or

suppression. In the remand proceedings, the Ld. Commissioner will decide the issue afresh, limited to the duty demand raised for the period covered

within the normal limitation. Needless to mention, the appellant will be given reasonable opportunity to present their case adhering to the principles of

natural justice.

11. Appeal is thus allowed by way of remand in the manner stated above.

(Pronounced in the open court on 02 February 2021)