
(2023) 11 CESTAT CK 0018

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 2385, 2386 Of 2012

M/s Great India Steel Fabricators And Others

APPELLANT

Vs

CCE & ST Panchkula

RESPONDENT

Date of Decision : 20-11-2023

Acts Referred:

Central Excise Act, 1944 — Section 11AC

Citation : (2023) 11 CESTAT CK 0018

Hon'ble Judges : S. S. Garg, Member (J); P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Naveen Bindal, Aman Garg, Aneesh Dewan

Final Decision : Allowed

Judgement

S. S. Garg, Member (J)

1. The present appeals are directed against the impugned order dated 09.05.2012 whereby the Commissioner has confirmed the demand of duty of Rs. 2,13,47,150/- alongwith equal penalty under Section 11AC of the Central Excise Act, 1944 and the Commissioner has also imposed penalty of Rs. 20.00 Lakhs upon Varinder Mehndiratta partner of the firm.

2. Briefly the facts of the case are that the appellant was registered with central excise department and is engaged in manufacturing of 'structural material and boiler parts' classifiable under Chapter 73 & 84 of the Tariff Act.

- During the course of audit for the period 2008-09 and 2009-10 conducted on 02.08.2010, it was noticed that the Appellant had shown miscellaneous income of Rs. 1.00 Crore in the ledger account for the period 2009-10 which has not been taken into the account for the purpose of central excise duty.
- In furtherance of inquiry, statement of Sh. Varinder Mehndiratta, partner of the Appellant was recorded on 23.11.2010 in which he inter-alia stated that income of Rs. 1.00 Crore is related to partner's income generated from sale/

purchase of properties on earnest money and this income has no relation with regular activities of manufacturing. They have shown this income to cover up the discrepancies pointed out by the income tax department during the course of survey. It was also observed that the said additional income declared before the income tax authority was under various heads i.e. excess cash in hand 15 Lakh, difference in valuation of sales 10 Lakh and sundry advance receivable of Rs. 75 Lakh.

- On the basis of the investigation conducted by the department, the department entertained the view that the appellant had no other business activity and any other regular income and therefore, it is obvious that miscellaneous income had been generated from the sales/clearances of manufactured structural material and boiler parts on which central excise duty is recoverable.
- On completion of the investigation, the appellant was called upon to show cause as to why central excise duty amounting to Rs. 2,13,47,150/- should not be demanded along with interest and penalty. The Appellant No. 2 was also called upon to show cause as to why penalty under Rule 26 should not be imposed.
- After following due process, the Ld. Commissioner confirmed the demand vide Order-in-Original dated 09.05.2012 along with interest and penalty and also imposed penalty of 20 Lakh upon the Appellant No. 2.
- Hence, the present appeals.

3. Heard both the parties and perused the case records.

4. Shri Naveen Bindal, Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and the law. He further submitted that the excise duty is payable on manufacture and clearance of goods. The Respondent had not adduced even single evidence to indicate purchase of raw material, manufacture of finished goods and clearance thereof. The Appellant is engaged in the manufacture of 'structural materials and boiler parts' which had been supplied to unit like L&T and BHEL. There is no evidence of movement of goods and statement of buyers to indicate that goods have actually manufactured and cleared. He further submits that on the basis of mere surrendered income before Income Tax Authorities, excise duty cannot be demanded. Sale tax is payable on sale of goods like excise duty on manufacture of goods. He further submits that the issue of levy of sale tax/excise duty on the basis of income surrendered before Income Tax Authorities has come up for consideration before various courts including Hon'ble Supreme Court. He further submits that this issue is no more res-integra and has been settled by the various decisions of the Tribunal and the High Court wherein the courts have clearly held that excise duty/sale tax cannot be demanded on the basis of income surrendered before Income Tax Authorities. In support of his submission, he relied upon the following decisions:-

- Commissioner of C. Ex. Vs. Mayfair Resorts, 2011 (22) STR 263 (P&H).
- Girdhari Lal Nannelal Vs. The Sales Tax Commissioner, M.P. MANU/SC/0401/1976.
- P.C. Ittymathew and Sons Vs. Deputy Commissioner of Sales Tax, MANU/SC/2618/2000.
- Arisudana Industries Ltd. Vs. Commissioner of Central Excise, 2016 (339) ELT 258 (Tri. Chandigarh).
- Vardhman Chemtech Limited Vs. CCE, Chandigarh, Final Order No. A/60931-60932/2016-EX(DB) dated 11.07.2016.
- Oscar Remedies Pvt. Ltd. Vs. CCE, Panchkula, Final Order No. A/61229-61230/2017-EX(DB) dated 06.07.2017.
- Commissioner of Central Excise, Ludhiana Vs. Zoloto Industries, 2013 (294) E.L.T. 455
- Ravi Foods Pvt. Ltd. Vs. Commissioner of Ex., Hyderabad 2011(266) E.L.T. 399

5. On the other hand, the Ld. DR defended the impugned order and submitted that the Ld. Commissioner has rightly confirmed the duty demand because admittedly the appellant firm has generated undisclosed profit of Rs.1.00 Crore which obviously would have been the result of the clandestine production and removal of excisable goods. Ld. DR has further submitted that an opportunity was given to the partner of the appellant firm to explain the source of aforesaid income but he failed to give satisfactory explanation. The appellant has even failed to give satisfactory explanation about the source of aforesaid income to the income tax department. He further submitted that Shri Varinder Mehndiratta in his statement to the Department explained that concealed income was the result of sale purchase of property but the appellant failed to give any evidence to substantiate this submission, instead the appellant submitted a letter indicating that they do not have any documentary evidence to substantiate their plea of having generated income from the sale purchase of property. He further submitted that Ld. Commissioner has rightly relied upon the statement of partner of the appellant firm because he did not retract his statement made to the income tax authorities. In support of his submission, he relied upon the following decisions:-

- Collector of Customs, Madras vs. D. Bhoormull reported as 1983 (13) ELT 1586 (SC)
- Commissioner of Central Excise vs. International Cylinders Pvt. Ltd. 2010 (255) ELT 68 (H.P.)
- Lawn Textile Mills Pvt. Ltd. vs. CESTAT Chennai-2018 (362) 559 (Mad.)
- T. Manivannan vs. Commissioner of Customs, Tuticorn – 2017 (348) ELT 513 (Tri.-chennai)

- CCE, Chandigarh vs. Vinay Traders – 2016 (340) ELT 521 (Tri. Del.)

6. After considering the submission of both the parties and perusal of material on record, we find that on perusal of the show cause notice as well as Order-in-original that the impugned order is based only on the ground that there was unexplained income of Rs.1.00 crore which was detected by the income tax authorities and the Department has presumed that aforesaid income must have been the result of undeclared production and clandestine removal of excisable goods. Further, we may note that if the Department has raised duty demand, then the onus of proving excess production and clandestine removal of excisable goods is on the Department.

7. We also take note of the fact that the impugned order is prima facie based on assumption and presumption and there is no evidence which may suggest excess production or clandestine removal of excisable goods by the appellant.

8. Further, we find that this Tribunal in the case of Vardhman Chemtech Limited & Ors. Vs. CCE, Chandigarh cited (supra) wherein on identical issue, the Tribunal has held as under:-

"6. Heard the parties and considered the submissions.

7. After hearing both the sides, we find that the short issue involved in the matter is that whether excise duty can be demanded on the basis of Income surrendered before the Income Tax Authorities without adducing any independent evidence with regard to purchase of raw material, manufacture of finished goods and sale thereof or not?

8. The said issue came up before this Tribunal in the case of M/s Arisudana Industries Ltd. (Supra) wherein this tribunal has observed as under:-

"8. As duty is payable on manufacture of the goods. Revenue have not come up with any positive evidence to shows that the appellant has manufactured excisable goods and cleared without payment of duty. In the absence of such evidence, duty cannot be demanded from the appellant. The same view was taken by this Tribunal in the case of Zalota Industries therefore, the duty cannot be demanded from the appellant according the demand of duty alongwith interest is set aside. As demand of duty is not sustainable, the question of imposing penalty does not arise."

9. On considering the facts that this issue has already been decided by this Tribunal holding that duty is payable of manufacture of goods and no evidence has been produced by the Revenue to that extent, therefore, without manufacturing the excisable goods and clearance the duty cannot be demanded from the appellants.

10. In these circumstances, we do not find any merit in the impugned order.

Accordingly, the same is set-aside and the appeals are allowed with consequential relief, if any."

9. Further, we find that in the case of Oscar Remedies Pvt. Ltd. & Ors. Cited (supra), this Tribunal on identical facts relying upon the decision of Vardhman Chemtech Limited & Ors cited (supra) has allowed the appeal of the appellant and set-aside the demand.

10. Further, we find that in the case of CCE, Ludhiana vs. Zoloto Industries cited (supra), this Tribunal has observed as under:-

"8. We also find that apart from the decision relied upon by the Commissioner (Appeals), the Tribunal in the case of Ravi Foods Pvt. Ltd. v. C.C.E., Hyderabad - 2011 (266) E.L.T. 399 (Tri.-Bang.) has held that admission by assessee to Income Tax department as regards undisclosed/suppressed sales turnover cannot be held to be on account of clandestine removal of their final products, in the absence of any other corroborative evidence. Similarly, in the case of C.C.E., Ludhiana v. Mayfair Resorts - 2011 (22) S.T.R. 263 (P&H), it was held so."

10. Further, we find that in the case of Continental Cement Company cited (supra), the Hon'ble High Court of Allahabad has held in Para 12 to 14 as under:-

"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

- (i) To find out the excess production details.
- (ii) To find out whether the excess raw materials have been purchased.
- (iii) To find out the dispatch particulars from the regular transporters.
- (iv) To find out the realization of sale proceeds.
- (v) To find out finished product receipt details from regular dealers/buyers.
- (vi) To find out the excess power consumptions.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.

14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so called buyers, namely M/s. Singhal Cement Agency, M/s. Praveen Cement Agency; and M/s. Taj Traders are based on memory alone and their statements were not supported by any documentary evidence/proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts

cannot be ruled out.”

11. Further, we find that the decisions relied upon by the department are not squarely applicable in the facts and circumstances of the present case whereas the decision relied upon by the appellant are squarely applicable, therefore, by following the ratio of the aforesaid decisions, we hold that the impugned order is not sustainable in law and the same are set-aside by allowing both the appeals of the appellant.