(2016) 02 CESTAT CK 0005

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 2038 Of 2007

M/s. Raymond Ltd. APPELLANT

Vs

C.C.E.- Bhopal RESPONDENT

Date of Decision : 24-02-2016

Acts Referred:

Central Excise Tariff Act, 1985 — Section 51, 55, 58
Central Excise Valuation Rules, 2000 — Rule 8, 9, 10, 11
Central Excise Act, 1944 — Section 4, 4(1)(b), 11A

Citation : (2016) 02 CESTAT CK 0005

Hon'ble Judges : S.K. Mohanty, J;B. Ravichandran, Technical Member

Bench : Division Bench

Advocate : Prakash Shah, R.K. Grover

Final Decision : Allowed

Judgement

1. This appeal is directed against the impugned order dated 11.05.2007 passed by the ld. Commissioner, Customs & Central Excise, Bhopal, wherein

duty demand of Rs.67,42,575/- along with interest has been confirmed and equal amount of penalty imposed on the appellant.

2. Brief facts of the case are that the appellant is engaged in the manufacture and sale of woolen fabrics, MM fabrics and Plush fabrics, falling under

Chapter Nos. 51, 55 and 58 of the Central Excise Tariff Act, 1985. During scrutiny of ER 1 returns for the disputed period, the Central Excise officers

noticed that the appellant had paid lesser amount of duty on clearance of MM fabrics to its associate company, M/s Raymond Apparel Ltd. (for short,

M/s RAL""). Thus, the Department issued the show cause notice dated 04.04.2006, seeking recovery of short paid duty for the period from

September, 2001 to June, 2004. In response, the appellant, inter alia, contended that it had paid the duty correctly on sales made to its subsidiary unit

M/s RAL, as per Rule 8 of the Central Excise Valuation Rules, 2000. The matter was adjudicated vide the impugned order dated 11.05.2007, holding

that since there is no stock transfer of goods to the sister unit, but sold on purely commercial considerations, the value of the goods for the purpose of

charging of duty of excise has to be determined as per Section 4 of the Central Excise Act, 1944 and the provisions of Rule 8 ibid cannot be resorted

to for determination of value for payment of duty. On the basis of such findings, the adjudicating authority has confirmed the demands against the

appellant.

3. Shri Prakash Shah, the ld. Advocate appearing for the appellant submitted that since the goods were sold to M/s RAL, who is related to the

appellant, the assessable value was determined under the provisions of section 4(1)(b) ibid read with Rule 8 ibid. He further submitted that show cause

proceedings initiated by the Department is barred by limitation of time in as much as the period of dispute is from September 2001 to June 2004;

whereas, the notice was issued on 04.04.2006, invoking the extended period of limitation. He submitted that the appellant had disclosed the sale

transaction made with RAL and the method of determination of assessable value under cost construction basis during the period December 2001. In

this context, the Ld. Advocate has referred to various correspondences exchanged between the appellant and the Department regarding supply of

goods to RAL on the valuation derived under the cost construction method. He further summits that the appellant had adopted the valuation rules for

determination of the assessable value based on the CBEC Circular dated 01.07.2002. Thus, the ld. Advocate submitted that since there is no

suppression or misstatement on the part of the appellant to defraud the government revenue, the show cause notice should have been issued within

one year from the date of filing the monthly return/knowledge regarding sale to such related person. To support the stand that the proceedings cannot

be initiated beyond the normal period, the ld. Advocate has relied on various judgments delivered by the judicial forums.

4. On the other hand, Shri R.K. Grover, ld. D.R. appearing for the Revenue reiterated the findings recorded in the impugned order.

5. Heard both sides and perused the case records.

6. The Department had confirmed the demand against the appellant on the

ground that there was no stock transfer of goods to the sister unit M/s

RAL and the goods were sold on purely commercial considerations; thus, the valuation provisions contained in Section 4(1)(a) ibid will be applicable

for determination of the transaction value, as against the claim of appellant for the valuation as provided under Rule 8 ibid.

7. The valuation provisions contained in Rule 8 ibid provides that in case, where the goods are not sold by the assessee, but are used for consumption

by him or on his behalf in the manufacture of other articles, the value shall be one hundred and ten per cent of the cost of manufacture of such goods.

In this case, it is an admitted fact on record that goods were sold by the appellant to M/s. RAL at the price at which it had sold similar goods to other

buyers. Since there was no stock transfer of goods for consumption by the appellant or on its behalf by others in the manufacture of other articles, the

situation is not governed under the provisions of Rule 8 ibid and the valuation provisions contained in Section 4 ibid will be applicable for determination

of the transaction value for the purpose of charging duty of excise. We also find that Shri. Ratan Chakravorty vide his statement dated 19.07.2002 had

also accepted that upto 08.09.2001, the appellant was discharging duty on the transaction value (sale value), but from 14.09.2001 onwards, it had

decided to pay duty as per Rule 8 ibid. When the position of law remains the same, appellant cannot change the practice according to his choice. Thus,

the stand taken by the Department regarding adoption of Rule 8 of Valuation Rules, for determination of value cannot be faulted with.

8. On perusal of the case records, we find that extended period of limitation has been invoked for confirmation of the adjudged demand inasmuch as,

the period of dispute is from September, 2001 to June, 2004; whereas, the show cause notice was issued on 04.04.2006. From the available records,

we find that the appellant had disclosed the sale transaction to the related person and method of determination of assessable value under cost

construction method. Further, Shri Ratan Chakravorty in his statement dated 17.09.2002 had also informed the Department regarding the modus

operandi adopted by the appellant in supplying the goods to the sister unit M/s. RAL. Furthermore, clarification furnished by the CBEC vide Circular

dated 01.07.2002 has also clarified with regard to determination of valuation of goods under different circumstances. Vide the said circular, it has been clarified that in case of sale of goods to related buyers, recourse will have to be taken to the residual Rule 11 read with Rule 9 (or 10). Thus, adoption

of Rule 8 for determination of value by the appellant can be said to be on entertaining a reasonable doubt, for which extended period of limitation, in

our opinion, cannot be invoked. There is no element of mensrea involved in the case.

9. The demand for extended period can be issued and confirmed only in case where the non-payment of duty is by reason of fraud/collusion/wilful

mis-statement/suppression of fact/contravention of any statutory provision with intent to evade payment of duty. In the present case, we note that the

enquiry into the activities of the appellant were carried out in summon proceedings way back in 2002. The materials/documents submitted by the

appellants were with the Department. However, with the same set of facts/ background and based on records maintained by the appellant, demand

invoking suppression of fact was issued in 2006. While we are aware that the relevant date for issue of demand is with reference to periodical returns

to be filed, the Department has to allege and establish with supporting evidence, the existence of factors indicating wilful misstatement/suppression of

facts etc. It should be a positive act of the appellant. The particulars, which formed basis of demand were all maintained and recorded in books of the

appellant and were furnished to the Department.

10. The show cause notice in this case has been issued by the Department alleging suppression of facts by the appellant. It is trite in law that the

suppression (intentional and deliberate) can never be said to exist when material and relevant fact forming the basis of the demand were already

within the knowledge of the Department. Accordingly, the pre-conditions for applicability of the proviso to Section 11A ibid cannot be said to be

existing and in such eventuality, the extended period of limitation cannot be invoked and the demand to be confined to the normal period of one year.

11. In context with issuance of show cause notice, where there is no involvement of suppression on the part of the assessee, the Honâ??ble Supreme

Court in the case of C.C.E., Bangalore vs. Pragathi Concrete Products Ltd. â?" 2015 (322) E.L.T. 819 (S.C .h)ave held that extended period of

limitation not to be invoked where the show cause notice was issued in 2000 for the period from 1995-1999 as no case of suppression could be made out when the Department had conducted several audits of the Appellant during the period prior to issue of show cause notice. Further, in the case of

Blue Star Ltd. vs. Union of India â?" 2015 (322) E.L.T. 820 (S.C.,) it has been held by the Honâ??ble Supreme Court that no case of suppression

could be made out where all the relevant facts were within the knowledge of the Department and consequently, the extended period of limitation could

not be invoked. In the case of Commissioner vs. Shah Alloys Ltd. â?" 2011 (270) E.L.T. A 38 (S.C.), the SLP filed by Revenue was dismissed,

holding that the extended period of limitation cannot be invoked, when it is established that the Department had knowledge of the facts. In the case of

C.C.E., Meerut vs. Monsanto Manufactures Pvt. Ltd. â?" 2010 (260) E.L.T. 335 (S.C.), the Honâ??ble Supreme Court held that the Appellantâ??s

transaction was on the basis of an agreement which was within the knowledge of the Department from 1995 and accordingly, the extended period of

limitation under Section 11A of the Central Excise Act, 1944 could not be invoked vide show cause notice issued in 2000. In case of Kushal Fertilisers

vs. C.C.E., Meerut â?" 2009 (238) E.L.T. 21 (S.C.,) the Department carried out periodic inspections of the factories and was also intimated in 1991

by the Assessee of the details of its business. In this background, the Department issued a show cause notice to the assessee in 1994 invoking

extended period of limitation. The Honâ??ble Apex Court held that since the requisite information had always been provided to the Department when

requested, no case of suppression could be made out against the assessee. Where the Department had inspected and collected necessary information

and details from the assessee, the Honâ??ble Supreme Court in the case of C.C.E., Mumbai vs. Damnet Chemicals Pvt. Ltd. â?" 2007 (216) E.L.T.

3 (S.C.) held that the relevant facts were within the knowledge of Departmental Authorities and accordingly the extended period of limitation could

not be invoked. Further, in the case of Aban Loyd Chiles Offshore Ltd. vs. C.C.E, Maharashtra â?" 2006 (200) E.LT. 370 (S.C,.)the Honâ??ble

Supreme Court held that since the Department was all throughout aware of the Appellantâ??s operations, the extended period of limitation under

proviso to Section 28 of the Customs Act cannot be invoked. In the case of C.C.E. vs. Chemphar Drugs & Liniments â?" 1989 (40) E.L.T. 276

(S.C.), it has been held by the Honâ??ble Supreme Court that when the Department had full knowledge and the assesseeâ??s non-disclosure was based on its interpretation of the law, the extended period of limitation could not have been invoked.

12. In the case in hand, the modus operandi adopted by the appellant for selling its products were known to the Department and based on the

information/documents furnished by the appellant in 2002, the show cause proceedings were initiated by the Department on 04.04.2006, seeking

confirmation of demand for the period September 2001 to June 2004. We are of the considered view that the proceedings are barred by limitation of

time, having not been initiated within the normal period. Thus, the appeal should succeed on the ground of limitation.

13. In view of the foregoing discussion and analysis, we set aside the impugned order and allow the appeal in favour of the appellant on the ground of

limitation alone.

(Operative part of the order Pronounced in the open court)