Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 880 of 2012 - DB

(Arising out of OIA-SRP/84/DMN/SDMN/2012-13 dated 13/08/2012 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Transasia Bio Medicals Ltd **........Appellant**
B-11 Oidc,
Ringanwada,
Daman, U T Of Dadra & Nagar Haveli

VERSUS

C.C.E. & S.T.-Daman **.......Respondent**
3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat - 396191

APPEARANCE:
Shri Vipul Khandhar, Chartered Accountant for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR

Final Order No. A/ 11806 /2023

DATE OF HEARING: 01.05.2023
DATE OF DECISION: 29.08.2023

RAMESH NAIR

The issue involved in the present case is that whether the appellant is liable to pay duty on forwarding and freight charges collected by the appellant from their customers while clearing/selling excisable goods on payment of duty. In other words, whether the forwarding and freight charges is includible in the assessable value of excisable goods for the purpose of charging excise duty.

2. Shri Vipul khandhar, Learned Chartered Accountant appearing on behalf of the Appellant at the outset submits that the entire demand is under extended period, therefore, the same is liable to be set aside on the ground of limitation itself. He submits that the issue involved is of interpretation of

provision of Section 4 of Central Excise Act, therefore, there is no suppression of fact. Moreover, the appellant were filing regular ST-3 returns wherein the details of clearances along with the value has been declared.

2. He further submits that the same issue of inclusion of freight in the assessable value in the appellant's own case this Tribunal has set aside the demand on the ground of limitation. Therefore, in this case for the subsequent period the extended period cannot be invoked in the light of Hon'ble Supreme Court Judgment in the case of Nizam Sugar Factory, therefore, the demand is not sustainable on time bar alone.

3. Shri Ajay Kumar Samota, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. On careful consideration of the submission made by both sides, we are of the view that the matter can be decided on the limitation itself without going into the merit of the case. We find that the issue on merit is whether the forwarding and freight charges collected by the appellant from their customer should be included in transaction value for the purpose of charging excise duty. We find that the identical issue in the appellant own case earlier has come up before this Tribunal reported at 2013 (297) ELT 429 (Tri – Ahmd) wherein this Tribunal dealing with the issue of freight to be includible or otherwise has taken the following view:-

> ***"18.*** *The Revenue has raised the point of demanding duty on packing and forwarding charges. It was the contention of the appellant that as per provisions of Section 4 read with Rules 5 and 7 of Valuation Rules when the goods are sold at the factory gate but the goods are transferred to a depot or such other place from where the delivery is made to the customers' premises the assessable value would be the transaction value without the addition of case of transportation. Rule 5 of the Central Excise Valuation Rules reads as follows :*
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> *"Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at o place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.*

Explanation 1. - "Cost of transportation" includes,-

(i) the actual cost of transportation; and

(ii) in case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing."

22. *With regard to the allegation that the extended period is available because of suppression/misstatement of facts with an intend to evade payment of duty the appellant argued that the allegations are baseless and untenable in law. They submitted that the production and clearance of diagnostic reagents demokits were duly recorded by them in their records and had been subjected to audit/verification. Regarding freight charges also it was submitted that they were under the bona fide belief that the excess of actual amount paid towards the freight was not liable to be included for purpose of determination of assessable value in view of the principles of law laid down in the Acts and Rules. It was the opinion of the appellant that the department was in full knowledge of the activities while they were initiating proceedings by way of issue of show cause notice on different grounds in the past during the relevant time. In support of their submissions the appellants relied upon the following judgments ;*

1.Pushpam Pharmaceuticals Co. v. CCE, Bombay - 1995 (78) E.L.T. 401 (S.C.).

2.Cosmic Dye Chemical v. CCE, Bombay - 1995 (75) E.L.T. 721 (S.C.)

3.Collector v. Chemphar Drugs & Liniments - 1989 (40) E.L.T. 276 (S.C.).

4.Padmini Products v. Collector - 1989 (43) E.L.T. 195 (S.C.)

5.ATE Enterprises Ltd. v. CCE - 2004 (163) E.L.T. 314 (Tri.-Del.)

6.MEK Slotted Angles (India) Ltd. v. CCE - 2004 (178) E.L.T. 948 (Tri.-Mum.)"

4.2 From the above decision in the appellants own case, it is seen that the Tribunal has set aside the demand on the ground of time bar. In the present case also somewhat the identical issue involve i.e. duty liability on forwarding and freight charges collected from the customer. In the present case the Show cause notice was issued subsequent to the period involved in the aforesaid tribunal decision. In these facts, as per the law settled by the Hon'ble Supreme Court in the case of Nizam Sugar Factory – 2008 (9) STR 314 (SC) the demand for the subsequent period will not sustain on the ground of time bar. The relevant para of the Apex court judgment are reproduced below:-

***"8.** Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in (2003) 3 SCC 599 = 2003 (153) E.L.T. 14 (S.C.) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows :*

"14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period."

This judgment was followed by this Court in the case of ECE Industries Limited v. Commissioner of Central Excise, New Delhi reported in (2004) 13 SCC 719 = 2004 (164) E.L.T. 236 (S.C.). In para 4, it was observed :

"4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. v. Commissioner of Central Excise, Hyderabad reported in 2004 (166) E.L.T. 151 (S.C.). It was observed in para 6 :

".......... On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct."

> ***9.*** *Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.*
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> ***10.*** *For the reasons stated above, Civil Appeal Nos. 2747 of 2001 and Civil Appeal No. 6261 of 2003 filed by the assessees are accepted and the impugned orders are set aside on the question of limitation only. The demands raised against them as well as the penalty, if any, are dropped. Civil Appeals @ Special Leave Petition (C) Nos. 9271-9278 of 2003 filed by the department are dismissed. Questions of classification and marketability are left open. Parties shall bear their own costs."*

4.3 In the present case, it is admitted fact that the show cause notice was issued for the subsequent period and even for the earlier period also. This Tribunal in the appellant's own decision cited (Supra) demand related to freight charges was held time bar. Therefore, in view of the said Tribunal decision and also in view of the Hon'ble Apex court judgment in the case of Nizam Sugar Factory, the demand in the present case also is hopelessly time barred. Accordingly, we set aside the demand on the ground of limitation itself.

5. Consequently the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 29.08.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L. MAHAR
MEMBER (TECHNICAL)

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