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

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 11892 of 2016
(Arising out of OIA-KCH-EXCUS-000-APP-009-16-17 Dated- 27/06/2016 passed by Commissioner of Central Excise-KUTCH (GANDHIDHAM))

Nilkanth Concast Pvt Ltd **........Appellant**
Survey No 221 Vadala Taluka Mundra
Kutch, Gujarat

VERSUS

C.C.E.-Kutch (gandhidham) **......Respondent**
Central Excise & Service Tax Commissionerate, Centeral Excise Bhavan Plot No. 82, Sector 8, Gandhidham(Kutch)
Gandhidham(Kutch)
Gujarat

APPEARANCE:
Shri Sarju Mehta, Chartered Accountant for the Appellant
Shri R.K Bhashkar, Superintendent (Authorised Representative) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Final Order No. A/ 12559 /2021

DATE OF HEARING: 04.08.2021
DATE OF DECISION: 01.12.2021

RAMESH NAIR

Brief facts of the case are that the appellant are engaged in the manufacture of excisable goods falling under chapter no. 72 of Central Excise Tariff. They were working under area based exemption notification no. 39/2001- CE date 31.07.2001 and was availing the benefit of re-credit facility available as per as per para 2A of said notification. The appellant had cleared their finished goods i.e. 550.9MT of TMT Bars without payment of Central Excise duty under the guise of waste coal during the month of July 2008 by showing the said clearance as waste coal in their invoice attracting nil rate of duty and thereby evade the payment of central Excise duty. They admitted this fact during investigation and made payment of Rs 29, 00,504/- on 06.08.2008 against the amount of duty payable on the said clandestine clearance made by them. Since the appellant was availing benefit of Notification No 39/2001- CE they availed the re- credit of the duty of Rs

29,00,504/- paid on the said clandestine clearances. Show Cause Notice dated 08.07.2013 was issued against the appellant for the recovery of wrongly taken credit of Rs. 29,00,504/- in respect of duty paid for clandestine removal of their finished goods i.e. 50.9 MT IMT bars in contravention to the Notification No. 39/2001 –CE dated 30.07.2011 read with section 11A (1) of Central Excise Act, 1944 along with interest under section 11 AB of Central Excise Act, 1944 .It was also proposed to impose penalty under Rule 27 of the Central Excise Rules, 2004 and Central Excise Act,1944. The Appellant denied the charge regarding their intention to evade the payment of duty with suppression of fact. They also submitted before the Adjudicating Authority that the Show Cause notice is time barred. Though the personal hearing was fixed on 9 dates but no one appeared during personal hearing. The charges of the Show Cause Notice has been confirmed vide order in original dated 20.01.2015 whereby the re- credit was disallowed and imposed penalty of equal amount and demanded the interest, penalty of Rs 5,000/- was also imposed under Rule 27 of Central Excise Rules, 2004. Being aggrieved by the OIO the appellant filed an appeal before the Commissioner (Appeals) who upheld the OIO except setting aside the penalty imposed under Rule 27 of Central Excise Rules, 2004. Therefore, the present appeal was filed by the appellant.

2. Shri Sarju Mehta, Learned Chartered Accountant appearing on behalf of the appellant submits that the impugned order is non-Speaking and non –reasoned. He submits that this is not a case of Clandestine Removal but it is only a case of oversight mistake in preparation of invoice. He further submits that the finding recorded by the Adjudicating Authority in as much as it was alleged that there is suppression of fact being a clandestine removal case is under dispute and yet to finalize in an appeal pending with this CESTAT under appeal no E/ 1858/2010. Therefore, the Adjudicating Authority should not have concluded that there is suppression of fact in

making clandestine removal and consequently, the re- credit of the duty paid is not available to the appellant. He further submits that the Show cause notice is time barred as the appellant has been filing ER-1 return.

2.1 He submits that the Additional Commissioner has recorded contradictory findings at para 8 in the OIO on the plea of time limit. The Additional Commissioner has recorded the finding that the time limitation as mentioned under section 11A of Central Excise Act, 1944 is not applicable to the units exclusively operating under separate scheme i.e. Area Based Exemption Benefit Scheme under Notification No 39/2001-CE dated 31.07.2001. This finding is contradictory to the finding recorded by him at para 6.3 in OIO under which he has recorded that I hold that the Noticee has wrongly availed re-credit of Rs 29,00,504/- under the said notification and the same is required to be recovered under section 11A(1) of the Central Excise Act, 1944 read with Notification No. 39/2001- CE dated 31.07.2001. Therefore, The Adjudicating Authority has not recorded the finding properly in the plea of time limit.

3. Shri R.K Bhashkar, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order. He submits that as admitted by the learned counsel as regard the clandestine removal the SCN dated 23.02.20009 was issued. The said SCN was adjudicated whereby it was decided that the appellant has clandestinely removed the goods without payment of duty by suppressing the fact. The said Order in Original was upheld by the Commissioner (Appeals) against which appellant had filed an appeal before this tribunal bearing No. E/1858/2010. This appeal stands withdrawn by this CESTAT Order dated 30.03.2021 as the appellant had availed SVLDR Scheme. He submits that with this proceeding of demand matter though the appellant have got their case settled under SVLDR but the OIA attained finality and the charges of suppression of fact also attained finality. In this fact the appellant is not entitled for re- credit

of amount paid on clandestine removal of goods. Therefore, the impugned order is sustainable. He placed reliance on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Customs (Preventive) vs. AAFLOAT TEXTILES (I) P.LTD. – 2009 (235) ELT 587 (SC).

4. We have carefully considered the submission made by both sides and perused the records. We find that it is an undisputed fact that the appellant at the time of clearance of the goods under area based exemption Notification No- 39/2001- CE dated 31.07.2001 has not paid the duty. Moreover, the clearance of goods was made under the guise of that waste coal and accordingly goods were clandestinely cleared and evaded the payment of excise duty. Though the appellant subsequently paid duty but at time of clearance they have mis-declared and cleared the goods clandestinely. Therefore, the appellant has clearly contravened the condition stipulated under the Notification No. 39/2001- CE. Therefore the re credit of the duty paid subsequently is not admissible to the appellant. In respect of nonpayment of duty at the time of clearance, the separate proceeding was initiated by the department by issuing the SCN wherein the suppression of fact, fraud etc was alleged. The said SCN has been decided against which the appellant had filed an appeal before the Commissioner (Appeals), the Commissioner (Appeals) also upheld the remand order of the Adjudicating Authority. Against the OIA the appellant filed an appeal before this Tribunal. As per the submission made by the Learned AR the said appeal bearing No E/18585/2010 has been withdrawn as the case of the appellant was settled under SVLDR Scheme. In this position the suppression of fact, fraud alleged and confirmed by the revenue attained finality in term of OIA No 430/2010/COMMR(AR)/CMC/RAJ dated 28.09.2010.Therefore, the appellants plea that there is no suppression of fact in the present case is of no help to them. As per our above undisputed fact there is clear contravention with malafide intention of Notification No 39/2001-CE. Therefore the appellant is

not entitled for re- credit of the amount of duty paid in respect of goods clandestinely removed.

5. Accordingly the impugned order is upheld and appeal is dismissed.

(Pronounced in the open court 01.12.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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