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

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10119 of 2015- DB

(Arising out of OIO-AHM-EXCUS-002-COMMAR-014-14-15 dated 21/10/2014 passed by Commissioner of Central Excise-AHMEDABAD-II)

Phenix Construction Technology ....**Appellant**
Plot No. 30-p, Sanand Viramgam Highway,
Village-naranpura, Taluka-sanand,
Ahmedabad, Gujarat

VERSUS

COMMISSIONER OF C.E.-Ahmedabad-ii ......**Respondent**
Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat- 380009

WITH

(i) EXCISE Appeal No. 10120 of 2015- DB (Malav G Patel)
(ii) EXCISE Appeal No. 10167 of 2015- DB [EXCISE (Cross) Application NO. 10382 OF 2015] (Commissioner of C.E.-Ahmedabad-ii)
(iii) EXCISE Appeal No. 10168 of 2015- DB (Commissioner of C.E.-Ahmedabad-ii)

APPEARANCE:
Shri J C Patel & Shri Rahul Gajera, Advocates for the Appellant- Assessee
Shri Anoop Kumar Mudvel, Superintendent (AR) for the Respondent -Revenue

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

Final Order No. 10723-10726/2024

DATE OF HEARING: 30.11.2023
DATE OF DECISION: 01.04.2024

RAMESH NAIR

These appeals are directed against impugned Order-In-Original No. AHM-EXCUS-002-COMMR-014-14-15 dtd. 21.10.2014. Appellants-assessee have filed appeals against confirmation of duty demand, fine and penalties, whereas the Department is in appeal on the ground that Ld. Commissioner should have ordered appropriation of the amount of Rs. 1 crore deposited by the assessee at the time of investigation and enforcement of bond and encashment of the Bank Guarantee towards redemption fine and penalty and further that the penalty imposed under Rule 25 should have been imposed under Rule 25 read with Section 11AC. Since all the appeals are filed against the same impugned order, they are taken up for disposal by this common order.

1.1 The facts of the case in brief are that M/s Phenix Construction Technology (here-in-after referred to as 'assessee') were engaged in the manufacture of Pre-fabricated engineering building material and steel structures and components of structure, falling under Chapter No. 94 & 73 of the Central Excise Tariff Act, 1985. During the search/investigation it appeared that said assessee had not only failed to account for the production of the finished excisable goods i.e 785.860 MT. of "Pre-fabricated building materials" but also failed to account for the scrap generated i.e. 152.120 MT of "Heavy Metals and MS Waste & Scrap' during the process of manufacture. The officers under a reasonable belief that the said qty. of finished goods and waste/scarp were not accounted for in the Daily Stock account had seized the goods and handed over to Shri Malav Girishbhai Patel, Director of assessee under Suparatnama dtd. 27.09.2013. A statement of Shri Malav Girishbhai Patel was recorded. During the investigation assessee paid the Central Excise Duty of Rs. 1 crore. The seized goods were provisionally released on execution of B-11 Bond for the full value of the goods alongwith cash security equivalent to 25% of value of Bond amount. Resultantly, assessee was issued show cause notice dtd. 24.03.2023 proposing duty demand on the said goods and proposing confiscation of the goods under Rule 25 of the Central Excise Rules 2002 and penalties under Section 11AC, Rule 25 and Rule 26 of the said Rules. In adjudication, Ld. Commissioner vide impugned order confirmed the demand of central excise duty of Rs. 62,41,582/ and held the goods to be liable for confiscation under Rule 25 of the Central Excise Rules 2002. As the goods had been provisionally released he imposed redemption fine of Rs. 1,26,24,560/- . He imposed the penalty of Rs. 62,41,582/- on assessee and penalty of Rs. 5,00,000 on Shri Malav G. Patel under Rule 26 of the Central Excise Rules, 2002. Being aggrieved, the assessee and revenue are before this Tribunal.

2. Shri J.C. Patel learned counsel with Shri Rahul Gajera Ld. Advocate appearing for the assessee submits that mere non –entry of the final products and waste and scrap in Daily Stock register cannot make the

goods liable to confiscation under Rule 25, when admittedly the goods are lying within the factory and there is neither any attempt of removal without payment of duty nor any evidence or statement that the non-entry in register was with a view to remove the same clandestinely without payment of duty.

2.1 He also submits that Rule 25 is subject to Section 11AC and therefore Rule 25 to apply, the ingredients of Section 11AC need to be established. In the present case the goods were within the factory, there was no attempt of removal without payment duty nor any evidence to establish that the non-entry of the goods in the Register was with a view to remove them clandestinely and accordingly the ingredients of Section 11AC are absent and therefore confiscation under Rule 25 and imposition of penalties are bad in law. He placed reliance on the following judgments:-

- CCE Vs. Sadashiv Ispat Ltd. – 2010(255)ELT 349 (P&H)
- CCE Vs. Indo German Fabs-2007(209)ELT 184 (P&H)
- CCE Vs. Saurashtra Cement Ltd.- 2010(260)ELT 71 (Guj.)
- CCE Vs. Resham Petrotech Ltd. 2010(258)ELT 60 (Guj)
- Rishiraj Filaments Ltd. Vs. CCE -2014(312)ELT 670
- Swastik Ceracon Ltd. Vs. CCE -2018(364) ELT 652
- CCE Vs. ABS Metals P. Ltd. -2016(341)ELT 425
- Supreme Industries Vs. CESTAT -2007(214)ELT 187(MP)
- CCE Vs. Ganpati Rolling Mills Ltd. -2016(338)ELT 587
- CCE Vs. BMW Steel Ltd. – 2011 (272) ELT 315.

2.2 Without prejudice, he further submits that ,in any event, mere non-entry of the goods in Daily Stock Register does not mean that the appellants have not accounted for the goods within the meaning of Rule 25(1)(b) of the Central Excise Rules, 2002. When goods are physically available in the factory, it cannot be said that the manufacturer has not accounted for the goods, since the phrase "accounting for" is not synonymous with "entering into the account" and it only means that the manufacturer is able to show the presence of the goods or to provide explanation in absence of the goods. He placed reliance on the following judgments:-

- CCE Vs. Continetal Chemicals – 2002(140)ELT 116

- Nilesh Textiles Pvt. Ltd. Vs. CCE -2003(162)ELT 553
- CCE Vs. Amrut Ceramics -2007(209)ELT 390.

2.3 As regard the appeals filed by the department he submits that the duty having been paid before adjudication, it was not open for the adjudicating authority to have appropriated any amount from the amount of security furnished by the appellant. As such, the impugned order of the adjudicating authority is legal and proper and the appeal filed by the department is required to be dismissed.

2.4 He also submits that department also contended that the adjudicating authority should have ordered enforcement of bond and encashment of bank guarantee. However, the adjudicating authority being a quasi judicial authority has to adjudicate the case independently without being guided by any other authority. In the present case, the adjudicating authority has imposed a disproportionate redemption fine on the appellant without considering the basic tenets of determining the quantum of redemption fine. The margin of profit has to be considered for determining the quantum of redemption fine

3. On other hand, Shri A.K. Mudvel Learned Authorised Representative for the Revenue reiterates the findings of impugned orders in respect of parties' appeals and grounds of appeal in the Revenue appeal.

4. Heard both sides and perused the records.

4.1 As regard the assessee's appeal, we find that the main allegation is that the appellant have not accounted for the excisable goods in the records. As per grounds of appeal the appellant's submissions have not been considered by the Adjudicating authority, in this regard we reproduced the relevant grounds raised in the appeal:-

> *"13. The impugned order passed by the appellate authority is in utter violation to the principles of natural justice, as the adjudicating authority has failed to consider the submissions made by the appellant. It was obligatory on the part of the adjudicating authority to have dealt with all the submissions made by the appellant and in case he did not agree to the same, the same should have been negated by reasoning. The*

impugned order is thus violative of principles of natural justice and therefore is liable to be quashed and set aside.

14. The adjudicating authority in para 22 of the impugned order has clearly recorded that the finished goods that were bearing Job Number painted as per lot of goods or having punch mark were recorded in the statutory records. Immediately thereafter, his recorded that 785.860 MT of alleged finished goods were not bearing any job number, punch mark or weight. The above observation goes to show that the said alleged 785.860 MT of goods were not fully finished and some process were still to be carried out on the said goods. The said goods having not attained the character of goods which were ready for dispatch and as such, the same were not required to be entered in the daily stock account register. The finding that the said goods were meant for clandestine removal is without any basis.

15. The adjudicating authority has all though recorded the submission of the appellant that there was no attempt its part to clear the said goods; that the nature of the goods was such that it was incapable of being shifted without the aid of machine and that specially designed vehicles were needed for its transportation. No such machine or means of transportation was found in the factory premises at the time of visit of the officers. The adjudicating authority has simply negated the above submissions by observing that he was not convinced by the above submissions of the appellant. It is submitted that the above findings do not stand the test of law. It was obligatory on the part of the adjudicating authority to have negated the above submissions of the appellant based on some evidence on record. Thus, the findings of the adjudicating authority are not based on any material fact and accordingly is not sustainable."

We have examined the impugned order in view of the above submissions made by the appellant and found that the adjudicating authority has not considered the vital submissions made above by the appellant. Therefore, in our view the principle of natural justice has not been complied with by the adjudicating authority.

4.2 As regard Revenue's appeal we find that M/s Phenix Construction Technology and Shri Malav Girishbhai Patel, Director of M/s Phenix Construction Technology, were called upon to show cause notice vide Show Cause Notice dtd. 24.03.2024 as to why : -

(i) 785.860 MT. of finished goods, pre-fabricated building material and heavy metal and 152.120 MT. of MS Waste & Scrap totally valued at Rs. 5,04,98,240/- involving Central Excise Duty of Rs. 62,42,582/- should not be confiscated under the provisions of Rule 25 of Central Excise Rule, 2002;

(ii) the seized goods which had been provisionally ordered for release on execution of B-11 bond alongwith the security as per order dtd. 23.01.2014 of the Commissioner, Central Excise, Ahmedabad –II, as intimated vide F.No. V.94/15-01/OA/Prov-Release-Phenix/2014, and the said goods which was required to be produced, failing which, why the provisions of B-11 Bond should not be enforced and the security deposit to be furnished by them should not be appropriated;

(iii) Central Excise Duty of Rs. 62,42,582/- involved in the said seized goods should not be demanded under sub-section (1A) of the Section 11A of the Central Excise Act, 1944;

(iv) Penalty under Section 11AC of the Central Excise Act, 1944 should not be imposed upon them;

(v) Penalty under Rule 25 of Central Excise Rules 2002 should not be imposed upon them

(vi) the said seized goods should not be disposed off as per the provisions of Rule 29 of the Central Excise Rules, 2002, or a fine is lieu of confiscation should not be imposed;

(vii) the amount of Rs. 1,00,00,000/- paid by the unit through challans dtd. 24.09.2013 should not be adjusted and appropriated towards the aforementioned duty and penalty.

4.3 We have also gone through the finding of the Ld. Commissioner and find that despite giving his finding in respect of the other proposal of the show cause notice he has not given any finding in respect of the proposal (ii) and (vii) of the show cause notice as above. It is incumbent on the Commissioner to pass an order on each and every proposal made in the show cause notice and he cannot be silent in the operating portion of the order on any of the proposal made in the show cause notice.

4.4 Therefore, on this count we find that there is a clear error in the order. In the absence of reasons in support of the order it is difficult to assume that the authority had properly applied provision of laws before passing of the order. We are therefore of the view that since no order was passed on the above two proposal, the whole matter needs to be remanded for passing a fresh order. The learned Adjudicating Authority granting fair opportunity of hearing shall pass a reasoned and speaking order in respect of the concerned charges to hold whether sustainable or not. Such exercise shall meet the scrutiny of law.

5. We make it clear that we have not expressed any opinion as regards the merit or otherwise and make it clear that we keep all the issues open. Further, we also direct the Ld. Adjudicating Authority to give appellants opportunity to present their case before taking a final decision. In the result, we set aside the impugned order and remand the entire matter to the Ld. Adjudicating Authority for passing a *de novo* order within a period of six months from the date of receipt of this order. Thus all the appeals are disposed of by way of remand. CO also disposed of.

(Pronounced in the open court on 01.04.2024)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

Raksha