

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.10569 of 2015

(Arising out of OIO-BH-EXCUS-BHARUCH-COM-011-14-15 dated 09/01/2015 passed by Commissioner of Central Excise, Customs and Service Tax-Bharuch)

Kumaka Industries Ltd

.....Appellant

Formerly M/S Ashok Organic Industries Ltd
5 Th Floor, Ramkrishan Chamber,
Bpc Road, Alkapuri, VADODARA, GUJARAT

VERSUS

C.C.E-Bharuch

.....Respondent

R K Casta Second Floor, Corporate House, Station Road
Bharuch, Gujarat-392001

APPEARANCE:

Shri P P Jadeja, Consultant for the Appellant

Shri G. Kirupanandan, Superintendent (AR) for the Respondent

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

Final Order No. A/ 10341 /2022

DATE OF HEARING: 24.02.2022

DATE OF DECISION: 12.04.2022

RAMESH NAIR

This appeal is filed by M/s Kumaka Industries Ltd against impugned order No. BH-EXCUS-BHARUCH-COM-O11-2014-15 dated 09-01-2015 issued by Commissioner of Central Excise, Bharuch. The issue involved is to ascertain whether entire stock transfer of "Ethyl Alcohol" to Appellant's Sister Unit, cleared during the period from November 1997 to March 2000 was including margin of profit in the cost of production or not and whether there was any under valuation resulting in a short payment of duty or otherwise.

2. Brief facts of case are that Appellant M/s Kumaka Industries Ltd is a Manufacturer Company engaged in manufacture of chemicals falling under Chapter 22 of the Central Excise Tariff Act, 1985. Appellant had two manufacturing units one known as Boridra Unit and another known as Distillery Unit at Ankleshwar and both units were registered with Central Excise Department and paying appropriate duty from inception of the units.

Appellant as a manufacturer, maintained all statutory records including Modvat Register, RG-1, Central Excise Invoices etc. at respective factory, and filed periodical returns as per Central Excise Act 1944 and Rules made. Excisable goods i.e. Ethyl Alcohol, manufactured by Appellant in Boridra Unit were transferred to their sister unit at Ankleshwar for Captive Consumption, on payment of duty, and final product manufactured out of it were removed from Ankleshwar Unit on payment of applicable rate of Central Excise Duty. Central Excise Duty paid at Boridra Unit was admissible as Credit to their sister unit at Ankleshwar and it was availed as per Rules. Revenue's case is that Ethyl Alcohol was transferred by Appellant to its sister unit, assessable value of goods was without including margin of profit, resulting in short payment of duty. Show Cause Notice No. V(Ch.22)3-109/Dem/2000 dated 25.11.2002 covering period from November 1997 to March 2000 was issued, proposing to recover excise duty Rs. 90,02,010/- with interest and penalty. The said SCN was issued by invoking the extended period of limitation. Despite objection by the Appellant, entire duty demand of Rs. 90,02,010/- was confirmed. In the first round of litigation, this Tribunal at Ahmedabad vide its final Order No. A/10225/2014 dated 12-02-2014 remanded matter back to Adjudicating Authority, for reconsideration of the issue, keeping all issues open including following the principles of natural justice. However, by Order-in-Original No. BH-EXCUS-BHARUCH-COM-O11-2014-15 dt. 09-01-2015 issued by Commissioner of Central Excise, Bharuch has confirmed the entire amount of duty with interest and penalty. Hence, the Appellant is before this Tribunal again in second round of litigation.

3. Shri P.P. Jadeja, learned Consultant appearing on behalf of the Appellant, while reiterating all the grounds of Appeal and submissions made during hearing has stated that Appellant have defended case against them mainly on the following submissions :-

- a)** Allegation of short payment of Central Excise Duty is bad in law, fallacious, illegal and requires to be quashed and set aside in toto.
- b)** The entire stock transfer of Ethyl Alcohol to Sister Unit, cleared during November 1997 to March 2000 was including margin of profit in the cost of production.
- c)** There was no under valuation on stock transfer of Ethyl Alcohol.
- d)** Assessable value in such case, Rule 6(b)(i) of CEVR, 1975 is not considered first before going to the said Rule 6(b)(ii) *ibid*.
- e)** Method of valuation adopted by the Revenue is also incorrect.

- f) Certificate dt. 10-10-2014 by Chartered Accountant shows that the element of profit has been included in cost of production.
- g) This is a case of complete revenue neutrality as duty paid on clearance to sister unit was available as Modvat/Cenvat Credit and the sister unit was also in position to utilise such credit for payment of duty on final products cleared by the said sister unit of Appellant.
- h)** Duty demand with Interest invoking extended period of time limit is also completely time barred, as the SCN demanding duty for period from November 1997 to March 2000 was issued on 25-11-2002.
- i) This is a pure case of interpretation of provisions of the law only. Accordingly, Penalty u/s 11AC is not justified/warranted.

4. Shri G. Kirupanandan, Learned Superintendent (Authorized Representative), appearing on behalf of the Revenue reiterates findings of adjudicating authority and has submitted that the case of Revenue is proved as Appellant has not included profit in their cost of production while clearing the product Ethyl Alcohol to their sister unit. Hence, submissions made by Appellants are untenable and accordingly he submits that Appeal filed by Appellant may be rejected. He has relied upon the various decisions.

5. Heard both the sides and perused the relevant records including submissions filed by both the sides. We find that there is no dispute on the facts that entire stock of product "Ethyl Alcohol" manufactured in one unit was transferred to its sister unit under Invoices on payment of excise duty. The sister unit had taken credit of duty paid and Captively used the said "Ethyl Alcohol" for manufacture of their other final products which were cleared on payment of duty by the said sister unit. It is the Revenue's case that assessable value was without including the element of profit for the clearances of "Ethyl Alcohol" entirely to its sister unit, whereas Appellant has contended that assessable value was including profit element. Revenue has taken into consideration profit margin about 10 % on the basis of the Balance sheets for FY 1995-96 and 1996-97 and added the same to the cost of production and accordingly determined the price as Rs. 17 per Ltr for the clearances of "Ethyl Alcohol" during the period from November 1997 to March 2000. Appellant has objected this method of valuation and submitted a Certificate dated 10-10-2014 by Chartered Accountant, which shows that the costs of production are inclusive of the element of profit. The said Certificate by CA is said to have been issued after verification of Appellant's accounting records, RT-12 Returns, Sales Invoices and audited Financial Statements for respective periods etc. However, adjudicating authority has not accepted the Appellant's

contention and the certificate issued by Chartered Accountant as the same is not supported by any other acceptable evidence. We find that whether assessable value for clearance of "Ethyl Alcohol" was inclusive of profit or not can decide the entire issue on merits of the case. When revenue is making such an allegation, the burden is on revenue only to establish this factor with sufficient evidences. Revenue has only assumed that the element of profit was not included in the assessable value, without producing any evidence in support of their allegation. The cost of production and element of profit depends on various factors prevailing in the market from time to time. Revenue has assumed and adopted cost of production Rs. 17 per Ltr for the entire period in question without showing how and which data they have relied upon to formulate such value and the charges of under valuation framed against Appellant. Certificate submitted from Chartered Accountant shows that element of profit was included in assessable value in clearance of "Ethyl Alcohol" to Appellant's sister unit. Certificate of Chartered Accountant could not be brushed aside, without any other reliable contra evidence. Thus, we are of the view that Revenue has not adduced any positive, clinching, sufficient evidence to prove case on merits in facts of this case.

5.1 We also find that Appellant has objected the duty demand on various grounds including Time Limitation and Revenue Neutrality etc. It is a settled legal position that Revenue cannot invoke larger period of limitation in cases involving Revenue Neutral Situation, because an assessee would not have any intent to evade payment of duty in a Revenue Neutral situation. Appellant has discharged substantial excise duty liabilities on its final product from PLA during relevant period. Cenvat of amount of duty under dispute could have been utilized by the Appellant. We find that Show Cause Notice and demand against an assessee would not be justified, if assessee himself was entitled to avail Cenvat credit of disputed duty demanded when assessee is in a position to utilize Cenvat credit for payment of duty on clearance of their final products.

5.2 We find that the Show Cause Notice in this case has been issued, invoking extended period of limitation, which is objected by the Appellant. Decisions relied upon on Time Limitation by Appellant are like HMM Limited – 1995 (76) ELT 497 (SC), Padmini Products and Chemphar Drugs & Liniments- 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) and others referred to in their submissions in this case. We find that the adjudicating authority has not given sound reasons for rejecting submissions on the time limitation. We have carefully considered facts on this point and we find that issue involved is also of pure interpretation of provisions of levy of duty including profit in

assessable value in clearance of goods to sister unit for captive use. In such facts of case, it cannot be said that the Appellant had any mala fide intentions to evade payment of duty, which otherwise was available to Appellant as Cenvat Credit in sister unit and that Appellant have not suppressed assessable value with intention to evade payment of duty. There is nothing on record to show that suppression of facts or wilful misstatement were made by Appellant to evade payment of excise duty. Appellant has also filed periodical ER-1 return regularly and disclosed all the details as required. Their Invoices for clearances of "Ethyl Alcohol" at the relevant time were defaced by jurisdictional officers at the relevant time. In such circumstances, charge of suppression or willful misstatement with intention to evade payment of duty cannot be sustained against the Appellant. Hence extended period for demand cannot be invoked. No mala fides can be attributed to Appellant for such issue of interpretation and hence extended period of time limitation is not invocable in the facts of this case.

6. As per our above discussion and findings, we hold that the Order-in-Original No. BH-EXCUS.BHARUCH-COM-O11-2014-15 dated 09-01-2015 is not sustainable. Consequential interest and penalty imposed on Appellant does not survive. Accordingly, the impugned Order-in-Original No. BH-EXCUS.BHARUCH-COM-O11-2014-15 dated 09-01-2015 deserves to be set aside and we do so. The Appeal is allowed with consequential reliefs, if any, in accordance with the law.

(Pronounced in the open court on 12.04.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)