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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.917 of 2012

(Arising out of OIA-70/2012/CE/SKS/COMMR-A-/AHD dated 18/09/2012 passed by Commissioner of Central Excise-AHMEDABAD-I)

Messrs Disha Engineers **.........Appellant**
677, Bhalabhai Ka Kuvo, Ctm Ramol Gaon Road,
Nr. Ramol Police Station, Ramol,
Ahmedabad, Gujarat

VERSUS

C.C.E.-Ahmedabad-I **.........Respondent**
C. Ex Bhavan,
Nr Panjrapole & Polytechnic, Ambavadi,
Ahmedabad, Gujarat-380015

APPEARANCE:
Shri Sudhanshu Bissa, Advocate for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. P.ANJANI KUMAR

Final Order No. A/ 10422 /2022

DATE OF HEARING: 18.11.2021
DATE OF DECISION: 10.05.2022

RAMESH NAIR

The appeal is directed against order-in-appeal No.70/2012(Ahd-I) CE/SKS/Commr (A)/Ahd dated 18.09.2012 passed by the Commissioner (Appeals).

1.1 The brief fact of the case is that the appellant are engaged in manufacture of Cement and Alumina Bulkers and Fly Ash Bulkers falling under chapter heading 87 of the Central Excise Tariff Act, 1944. Intelligence gathered was that the Appellant had manufactured and cleared Bulkers without payment of Central Excise Duty by misclassification of the Bulkers, so as to avail the exemption from payment of duty as provided under the Notification No. 6/2006 -CE dated 01.03.2006, vide Sr. No. 39 read with condition no.9. The officers conducted the search at the factory premises of Appellant and withdrew some incriminating documents/records and recorded the statement of persons. After the detail investigation Appellant was issued show cause notice dated 31.12.20210 by the Joint Commissioner (Prev.), Ahmedabad-I as to why:

i) The semi-trailer type of Bulker (attached to 'horse') manufactured should not be classified under Chapter sub-heading 8716 of the Central Excise Tariff Act, 1985 and the Bulker manufactured which are mounted on the chassis, should not be classified under Chapter Sub heading 8707 of the Central Excise Tariff Act, 1985.

ii) Central Excise Duty of Rs. 47,63,915/- leviable on the above both types of bulkers being manufactured and cleared, should not be demanded and recovered under the provisions of Section 11A(1) of the Central Excise Act, 1944. Already paid amount of Rs. 8,00,000/- under protest should not be appropriated and adjusted against the duty liability.

iii) Interest should not be charged and recovered under the provisions of Section 11AC of the Central Excise Act, 1944.

iv) Penalty should not be imposed under the provisions of Section 11AC of the Central Excise Act, 1944.

v) Penalty should not be imposed under Rule 25 of the Central Excise Rules, 2002.

The adjudicating authority after considering the submissions made by the appellant re-quantified the demand and confirmed duty demand of Rs. 30,60,884/- along with interest and penalty vide OIO dated 22.12.2011. Aggrieved by the said order, Appellant filed appeal before the Commissioner (Appeals), and Commissioner (A) vide impugned order under challenge upheld demand of duty and classified all goods under Chapter 8716. Hence, the present appeal.

02. Learned Counsel Shri Sudhanshu Bissa, learned counsel appearing for the appellant submits that the demand of Rs. 15,62,589/- has been confirmed by the Commissioner(Appeals) on the ground that the "Bulker mounted on Chassis" are classifiable under the category of "trailers and semi trailers" under Chapter Heading 8716 of the Tariff and demand of Rs. 14,98,295/- has also been confirmed by the Commissioner (Appeals) on the ground that "Bulkers on horse" are also classifiable under the category of " trailers and semi trailers" under Chapter Heading 8716 of the Tariff.

2.1 He submits that impugned order passed by the Commissioner (Appeals) is incorrect and unsustainable because all the findings recorded therein have been now held to be unsustainable and incorrect by virtue of decision rendered by Principal Bench at the Hon'ble Tribunal in case of M/s Commercial Engineers & Body Builders Co. Ltd. Vs. CCE & ST, Bhopal vide Final Order No. 54085-54086/2017 dated 20.06.2017. The said decision of that Hon'ble Tribunal covered the entire controversy involved in the present case and therefore, impugned order passed by the Commissioner (Appeals) deserves to be set aside in the interest of justice.

2.2 He also submits that the show cause notice proposed to classify the goods manufactured by the Appellant under two different categories under chapter 8716 of the Tariff and under Chapter 8707 of the Tariff. But the Commissioner (Appeals) has committed a grave error in classifying all the goods manufactured by the appellant under one chapter heading 8716 of the Tariff. The classification cannot be changed at appellate stage by the appellate authority and a settled legal position that demand of duty cannot be sustained under an another classification if it was found that the revenue initially has not claimed the correct heading or classification. In this regard, he placed reliance on the following decision:

- Warner Hindustan Ltd. Vs. Coll. Of Central Excise, Hydrabad-1999(113)ELT 24(SC)
- Hindustan Polymers Co. Ltd. Vs. Coll. Of Central Excise, Guntur – 1999(106)ELT 12 (SC)
- Bharat Commerce and Industries Vs. UOI – 1979 (4) ELT (J527) (Del)
- Commissioner of Customs Vs. Krishna Petrochemicals – 2014(304)ELT 744 (Tri -Ahmd)

2.3 He further submits that another allegation in the show cause notice was that the motor vehicle with chassis was separate entity and the Bulker manufactured by the Appellant was separate entity. Thus, it was proposed that for manufacture of the Bulker, the continued presence of the Chassis was not necessary. The Show Cause Notice proposed to demand duty on the ground that the appellant was engaged in manufacture of bulkers only and not motor vehicles. On such basis, the show cause notice proposed to classify the goods manufactured by the appellant under two different heading namely 8707 and 8716. The adjudicating authority has also classified such goods under heading 8707 of the Tariff. The Commissioner

(Appeals) in order has accepted the submission of the appellant that fabricated structure mounted on the chassis or attached to prime mover amount to 'manufacture' but the Commissioner (Appeals) gone on different footing that the dispute is only limited to classification of bulker. He submits that the case against the appellant in the show cause notice was that the goods manufactured by the appellant were bulkers which are separate from motor vehicle and therefore, the goods were classified under Chapter Heading 8707 and 8716. But the Commissioner (Appeals) travelled beyond the show cause notice and held that even though the fabricated structure whether mounted on chassis or attached to horse/ prime mover amounts to manufacture of motor vehicle, but the goods in question would fall under Chapter 8716 being trailer and semi- trailers. Once the fact that the fabricated structure whether mounted on chassis or attached to horse/ prime mover amounts to manufacture of motor vehicle is admitted by the Commissioner(Appeals), the goods cleared by the appellant cannot be classified under chapter 8716 on the basis of completely different reasoning which is not envisaged in the show cause notice. The show cause notice is the foundation of the case and the Commissioner (Appeals) has no authority in law to travel beyond the scope of show cause notice.

2.4 He argued that the Commissioner (Appeals) has failed to properly consider the note 5 of chapter 87 of the tariff which provides that building a body or fabrication or mounting or fitting of structures or equipment on the chassis falling under heading 8706 shall amount to "manufacture" of a motor vehicle. But the Commissioner (Appeals) has failed in appreciating that what was done by the appellant was not only producing an MS Structure but also mounting thereof on chassis fitted with engine received from customers. The Commissioner (Appeals) has not considered the fact that bulker was a motor vehicle made for transportation of materials like fly ash or cement, and thus bulker was a motor vehicle comprising a chassis fitted with engine, the driver's cabin and also MS Structure mounted/fitted thereon for carrying the material. Thus, the goods manufactured by the Appellant were rightly classified under chapter 8704 of the Tariff as motor vehicles for transport of goods and the exemption from duty provided under Notification No. 06/2006-CE was available to the Appellant.

2.5 The Commissioner (Appeals) has relied upon the HSN to hold that the 'trailer' and 'semitrailer' provided under chapter 8716 includes tanker trailers. There is no provision in HSN like note No. 5 of Chapter 87 of the

Tariff thereby creating a fiction of specified activities and processes. The impugned order classifying bulkers under heading 8716 of the Tariff on the basis of HSN is therefore ex-facie illegal.

2.6 He also argued that the Commissioner (Appeals) has failed to consider the fact that the department has accepted classification of the goods manufactured by the Appellant under chapter heading 8704 for the previous period. He also submits the issue of classification of goods manufactured by the appellant is decided in favour of the Appellant by the Commissioner (Appeals) vide Order-In-Appeal No. 117 to 118/2012(Ahd-I)CE/AK/Commr(A)/Ahd dated 07.10.2012 for the subsequent period of February 2011 to January 2012.

03. Shri Vinod Lukose, learned Superintendent (AR) appearing for the Revenue, while reiterating the findings of the adjudicating authority, submits that Appellant were manufacturing Bulkers separately and thereafter attaching it to the chassis with the king pin or mounting it on the chassis; that the chassis was not required for the actual manufacture of chassis and therefore it was not manufacture out of chassis. Owing to the above that benefit of Notification ibid, was not available to the appellant. The appellant's contention that chapter note 5 of chapter 87 would come to play and therefore the process of manufacture of bulker would amount to manufacture of motor vehicle thereby falling under 8704 and hence they would be eligible for benefit of Notification No. 6/2006-CE dated 01.03.2006 is not tenable argument because of the following:

(i) Chapter Note 5 states that building a body or fabrication or mounting or fitting of structures or equipment on the chassis falling heading 8706 would amount to manufacture.

(ii) in this case it is clearly stated that two/three axles are attached at the rear end of bulkers; that axles with hubs are fitted with two or more set of wheels and that these bulkers are attached/locked to the horse by king pins.

(iii) The requirement under HSN 8716 are also met in so far as these by themselves are not mechanically propelled vehicle; that they have specialised coupling system.

(iv) the appellant has not claimed that these are mounted or fabricated or constructed on the chassis.

(v) Lastly the appellant is on record that these are easily attachable or detachable to the prime mover and that the bulker would trail behind the horse.

In view of the forgoing, merit classification under 8716 as has been held by the Appellate authority. He placed reliance on following decisions:-

- AMCL Machinery Ltd. – 2019-TIOL-2194-CESTAT-MUM
- Super Industries -2014(310)ELT 779 (Tri. Ahmd)
- Automotive Coaches and Components – 2011(264)ELT 518 (Tri.)
- Heat Weld-1992(57)ELT 432 (Tri.)
- Mitusha Vessels & Engineers Pvt. Ltd.- 1994 (114) ELT239(Tri.)
- Orient Paper Milles – 1998 (97) ELT 80 (Tri.)

04. We have carefully considered the submissions made by both the sides and perused records. In the present case issue needs to be decided that the goods "Bulker" mounted on chassis fitted with engine is classifiable under Chapter Heading 8704 or 8707 or 8716 or otherwise and thereafter it is to be examined whether the appellant has been correctly availed the benefit of exemption as per the Notification No. 6/2006-CE dated 01.03.2006 by classifying their products under Chapter Heading No. 8704 or other otherwise.

4.1 It is admitted fact that the appellant's customers supply duty paid chassis which are used for production of Bulker which is in the nature of fabricated tanker. The said Bulker specially designed for transport of fly ash which is mounted on duty paid chassis fitted with the engine received from the customers. We find that the Appellant had classified the said goods under Chapter heading No. 8704 and also claimed the exemption benefits available as per the Notification No. 6/2006-CE dated 01.03.2006. Learned Adjudicating Authority per contra, disputed the claim of appellant and held that Bulker either mounted on chassis or attached to horse is appropriately classifiable under heading 8716 of the First Schedule to the Central Excise Tariff Act, 1985 and appellant are not eligible to claim the benefit of exemption under the above referred notification on merits correct classification of their products under Chapter Heading 8716 instead of 8704 as claimed by appellant.

4.2 In order to appreciate the issue and proper classification of the goods viz. Bulker mounted on duty paid chassis we reproduce the relevant chapter heading No. 8704, 8716 and Chapter Note 5 to Chapter heading 87 as under :

Heading No.	Description of Goods
1	**2**
8704	Motor vehicles for the transport of goods
8716	Tailers and Semi- trailers; other vehicles, not mechanically propelled, parts thereof

Chapter Note 5 to Chapter heading 87

5. For the purpose of the this Chapter, building a body or fabrication or mounting or fitting of structures or equipment on the chassis falling under heading 8706 shall amount to "manufacture" of a motor vehicle.

4.3 From the above Central Excise Tariff heading and chapter Note we find that Chapter heading 8704 covers the product Motor Vehicle for the transport of goods and Chapter heading 8716 covers a group of non-mechanically propelled vehicles. Chapter Note 5 to the Chapter 87 creates a fiction whereby building a body or fabrication or mounting or fitting of a structure or equipment on a chassis, falling under Heading 8706, shall amount to "manufacture" of a motor vehicle. In terms of the legal fiction, since the appellant is mounting or fitting bulkers on the chassis falling under Chapter 8706, Appellant is deemed a manufacturer of motor vehicle and since the said vehicle is used for transportation of goods viz. fly Ash /cement etc, Appellant is a manufacturer motor vehicle falling under 8704. From the description of the articles and the use to which they put, we find that heading 8704 is the most appropriate. However, so far as heading 8716 is concerned, the said chapter heading deal with the Trailers and semi-trailers; other vehicles, not mechanically propelled vehicles.

4.4 The view taken by the Adjudicating authority that Bulkers mounted on chassis is classifiable under Chapter heading no. 8716 is incorrect. There is no dispute that after fabrication of bulkers appellant undertaking the process of mounting it on chassis and in the same form they were clearing it as complete and integrated motor vehicle for transport goods. Further Chapter heading 8716 would be applicable for fabrication of bodies for trailers /semi-tailers covered under Heading 8716 and these fabrication of bodies would be regarded as bodies for trailer /semi-trailer of Heading 8716 and such bodies would also be classified under Heading 8716.Thus it is quite clear that the disputed goods cannot be classifiable under Chapter Heading 8716.

4.5 We find that vide serial No. 39 of the table annexed to Notification No. 6/2006 motor vehicles for the transport of goods falling under 8704 is exempt from excise duty subject to condition No. 9 which stipulates that the manufacturer does not avail of the Cenvat Credit of duty paid on chassis falling under 8706 or other inputs used in the manufacture of such vehicle. In the present case, it is not in dispute that the appellant has not availed any Cenvat Credit on any of the inputs which have been used in the manufacture of either the bulkers or the duty paid on the chassis and therefore, the appellant would be entitled for the benefit of exemption under the said Notification vide Serial No. 39. Therefore, there would not be any duty liability on the appellant on the bulkers manufactured and captively consumed in the manufacture of motor vehicle falling under Chapter 8704.

05. In view of the discussion and analysis as above, we find merit in the appeals filed by the appellant and hold the impugned order as unsustainable. Accordingly, the same is set aside. The appeal is allowed.

(Pronounced in the open court on 10.05.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

Mehul