IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/2148-2150/2008-EX[DB]

(Arising out of Order-in-Original No. 10/Commr./Meerut-I/2008 dated 25/07/2008/ passed by Commissioner of Central Excise & Customs, Meerut)

M/s Polymer Papers Ltd. (In Appeal No. E/2148/2008),
Shri Anil Suneja (In Appeal No. E/2149/2008) &
Shri T. K. Tiwari (In Appeal No. E/2150/2008) **Appellant**
Vs.

Commissioner of Central Excise, Meerut-I **Respondent**

Appearance:

Shri A. K. Prasad, Advocate, for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision : 03/05/2018

FINAL ORDER NO.**72233-72235/2018**

Per: Anil Choudhary

The issue in this appeal is, whether the Show Cause Notice which was issued on 05/08/2005 and subsequently modified by way of amendment vide Corrigendum dated 23/01/2007, thereby increasing the proposed demand from Rs.41-50 Lakhs, what shall be the period of limitation and consequently under the facts and circumstances the situation being wholly revenue neutral, whether the Show Cause Notice is tenable for change of opinion.

2. The brief facts of the case are that the appellant company, located in Muzaffarnagar (U. P.), is engaged in the manufacture of Base Filter Paper. 95% of this filter paper is transferred to their sister unit in Faridabad for captive consumption in the manufacture of different sizes of filter. The remaining 5% is sold to independent buyers at the factory gate.

3. The other two appellants in this case are Shri T. K. Tiwari, Works Manager in the appellant company and Shri Anil Suneja, Finance Controller-cum-Assistant Secretary in the appellant company.

4. The case of the Department is that the appellant company was paying duty on the filter paper transferred to their sister unit, on cost construction basis under Rule 8 of the Central Excise Valuation Rules, 2000, but while doing so they adopted lower values to determine the cost of production which resulted in payment of less duty. A Show Cause Notice dated 05/08/2005 was, accordingly, issued demanding duty of Rs.41,12,455/-. Subsequently, a corrigendum to the show cause notice was issued on 23/01/2007 enhancing the duty demand to Rs.50,39,219/-.

5. During the course of adjudication, in the first round of litigation, the appellant sought some relied upon

documents which were supplied very late. Despite seeking adjournment, the show cause notice was decided ex-parte. On appeal, this Tribunal remanded the matter to the Commissioner for de-novo decision.

6. In the second round of litigation, the ld. Counsel for the appellant raised a number of points or grounds. However, none of the points were considered and, vide Order-in-Original dated 25/07/2008, the full demand of duty was once again confirmed, along with equivalent penalty on the appellant company. Penalties of Rs.5 Lakhs each were imposed on the other two appellants under Rules 26/209A of the Central Rules. Hence, these three appeals.

7. Heard the ld. Counsel for the appellant, who has reiterated the grounds of appeal against impugned order on the following lines:-

7.1 The Department has accepted that the appellant company has at least 5% sales of their products, namely, Base Filter Paper, to independent buyers. On this issue the Courts have consistently held that if a party partly consumes a manufactured goods captively in their factory or in another factory of theirs, and partly sells them to independent buyers, Rule 8 of the Central Excise Valuation Rules, 2000, will not apply. This Rule will apply only if all (i.e. 100%) of their manufactured product is captively consumed. This principle was discussed and upheld by the Larger Bench of CESTAT in the case of Ispat Industries Ltd. *Versus* CCE, Raigarh – 2007 (209) E.L.T. 185 (Tri.- LB). This decision has been followed in a number of subsequent decisions of the CESTAT as well as of courts.

7.2 Rule 8 of the Valuation Rules, 2000 was amended/revised vide Notification No.14/2013-CE(NT) dated 01/12/2013 to specifically provide that in case an assessee partly sells goods to independent buyers at the factory gate and partly consumes the same in their own factory or another factory of their own, the valuation of goods captively consumed would be done on the basis of cost construction method i.e. at 110% of the cost of production (as per CAS-4). This clearly shows that prior to this amendment, Rule 8 could not be invoked in such a situation as that of the appellant company.

7.3 The whole exercise is revenue neutral. Whatever differential duty is payable by the appellant company at their Muzaffarnagar Unit, would be available as Modvat/Cenvat credit to their Faridabad Unit. Hence, the demand itself is not sustainable.

7.4 The Courts have consistently held that in a revenue neutral situation, neither can any penalty be imposed on an assessee nor can the extended period be invoked.

7.5 Since the alleged corrigendum dated 23/01/2007 made significant changes to the original show cause noticed dated 05/08/2005, including enhancement of demand by nearly Rs.10 Lakhs, it will be considered that the date of the show cause notice is 23/01/2007 and not 05/08/2005.

7.6 The demand is time barred since the final show cause notice has been issued on 23/01/2007 whereas the period involved in the show cause notice is July, 2000 to March, 2005, which is beyond the normal period of one year from the relevant period.

7.7 The Department has held that the costing data adopted by the appellant company was incorrect. It is submitted that the departmental officers are not technically qualified to pass such judgments/comments. In fact, precisely for this purpose, an Assistant/Deputy Director (Costs) is posted in every Central Excise Zone for advising the Departmental officers on such technical matters. There is no evidence to show that the department either sought the assistance of the said

AD/DD (Costs) or that of any other Cost/Chartered Accountant.

7.8 When the case against the appellant company does not survive there can be no case of imposition of penalty either on the appellant company or on the other two appellants (employees).

7.9 Penalty under Rule 26 cannot be imposed on Shri T. K. Tiwari or Shri Anil Suneja since there is no proposal in the show cause notice for holding any goods liable for confiscation.

7.10 Penalty cannot also be imposed under Rule 26 on the above two appellants since they had never physically dealt with the goods.

8. Heard the ld. A. R. for Revenue, who has supported the impugned order and have further stated that for the purpose of determination of limitation, wholly revenue neutral situation is irrelevant nor the date of corrigendum.

9. Having considered the rival contentions and on appreciating the facts, we find that the appellant – Muzaffarnagar unit is clearing the 95% of its production to their Faridabad unit which manufactures, further taxable goods which are cleared on the payment of appropriate duty. Thus, under the facts and

circumstances, whatever Excise duty is paid by the Muzaffarnagar unit, the same shall be available as Cenvat Credit at the Faridabad unit. Thus, making the situation wholly revenue neutral. Further, we hold that the effective Show Cause Notice will be the date of corrigendum dated 23/01/2007 as the proposed demand in SCN is increased substantially above 25%. Thus, we find that the show cause and the corrigendum is for the sake of change of opinion only, based on the cost of production taken by Revenue. Accordingly, we hold that the Show Cause Notice is not sustainable for invoking the extended period of limitation, only for the sake of change of opinion and the situation being wholly revenue neutral. Thus, in this view of the matter, we allow all the appeals by setting aside the impugned order. The appellants shall be entitled for consequential relief, if any, in accordance with law.

(Dictated in Court)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Sd/-
(Anil Choudhary)
Member (Judicial)

Ansari/Nihal