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

APPEAL Nos. E/902-903/2011-EX[SM]

(Arising out of Order-in-Original No. MP (Dem-45/2010) 58 of 2010 dated 27/12/2010 passed by Commissioner of Central Excise & Service Tax, Allahabad)

M/s Arpit Plastics Pvt. Ltd.

Ritesh Agarwal **Appellant(s)**

Vs.

Commissioner of Central Excise, Allahabad **Respondent(s)**

Appearance:

Ms Stuti Saggi (Advocate) for Appellant(s)
Shri Sandeep Kumar Singh (Dy. Commr.) AR for Respondent(s)

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)

Date of Hearing : 05/10/2018
Date of Decision : 05/10/2018

FINAL ORDER NOs. **72485-72486 / 2018**

Per: Archana Wadhwa

As per facts on record the appellant is engaged in the manufacture of Poly Propylene Glasses falling under Chapter 39 of the Central Excise Tariff Act, 1985. The appellant was availing the benefit of exemption notification in terms of Notification No. 08/2003-CE dated 01.03.2003. They were also engaged in trading of Rope, Disposable Caps and P.P. Glasses manufactured by others.

2. Their factory was visited by the Central Excise Officers on 29.04.2009, who conducted various checks and verifications. Nothing incriminating was recovered as the stock of the raw material as also the final product was found to be tallying with the recorded balance. Statement of Shri Ritesh Agarwal, Director was recorded wherein he stated that rolled sheets are used for manufacture of P.P Glasses and during production 50% of the same is utilized and remaining is rejected and after grinding the same is converted into rolled sheets. During the course of further investigations statements of various other persons like Foreman, Machine Operator, etc. were recorded on various dates.

3. Based upon the above, allegations of clandestine removal were made against the appellant resulting in passing of the present impugned order vide which duty of Rs.22,60,835/- stands confirmed against the appellant along with confirmation of interest and imposition of identical amount of penalty. In addition penalty of Rs.1 lakh stands imposed upon Shri Ritesh Agarwal, Director of the manufacturing unit.

4. After hearing both the sides duly represented by Ms Stuti Saggi (Advocate) for the appellants and Shri Sandeep Kumar Singh (Deputy Commissioner) AR for the Revenue it is seen that the allegations are mainly based upon the electricity consumption, the project report furnished to bank for

procurement of loan, capacity of machine installed in the factory, statements of Director as also the other workers of the factory. The Adjudicating Authority has compared the production of previous years with the production of 2009-10 and has held that the production during the earlier years was much lower than the production of 2009-10 and as such it has to be held that the same was suppressed. He has also relied upon the calculations based upon the working of the two machines installed in the appellant's factory and the electricity consumption. For better appreciation I reproduce findings of the Commissioner:-

"4.6. It is admitted fact that there were two thermoforming machines operating 14 hours a day regularly upto 2008-09 and each machine manufactured 4-5 carton boxes (containing 4 Kg. each) per hour in normal course. Considering both machines run simultaneously for average 14 hours per day for a year (315 manufacturing days taking into account one weekly off as admitted by the party in the statement dated 29.04.2009), the production comes to 141120 Kg in a year when only 4 carton boxes are manufactured per hour and the production amounts to 176400 Kg every year when 5 carton boxes are manufactured per hour. Since no exact data for production per hour by a machine was submitted, I am forced to take the average of these two production figures as the production of two machines for a year working simultaneously, which comes out as 158760 Kgs. ((141120+176400)/2). The two machines were under constant operation during the period 2005-06 to 2008-09 as admitted by the Director and the employees of the party no. 1 in their statements, thus it seems logical to consider the production

figure as worked out above to be the standard production for a year. However one other important fact for consideration is that the electricity consumption during the years 2005-06 to 2008-09 has not remained constant. And it is not logical to conclude that the same quantities of glasses were manufactured by using lesser quantity of electricity in some years. As such I propose to consider the production of 158760 kgs of glass for the year when maximum electricity was consumed for running two thermoforming i.e. 2008-09 and calculate the production accordingly for previous years.

It is also worth noting that, as reported in the defence reply of the party no. 1 and reproduced above, the reported production during the year 2009-10 was 270690 kgs of glasses, which is more than double from the production reported in any of the earlier years. In my opinion the reasons for this are firstly the part used more than two machines for manufacturing glasses in the year 2009-10 and secondly a more correct and true accounting of production was done by the party no. 1. Thus I am of the opinion that the production reported by the party during 2009-10 should be considered correct and acceptable.

However, when comparing the production reported by the party no. 1 during the year 2009-10 with the production reported in earlier years and the quantity of electricity consumed, it is very clear that the production as reported by the party no. 1 during 2005-06 to 2008-09 was very much suppressed and therefore escaped the duty liability."

5. As is seen from above, findings of clandestine removal are based upon the calculations, which in turn are based upon the working of machines and consumption of electricity. Such findings which are based upon the consumption of

electricity have been held to be as no sustainable for arriving at the findings of clandestine removal. Reference can be made to Tribunal's decision in the case of R.A. Castings Pvt. Ltd. vs. Commissioner reported at 2009 (237) E.L.T. 674 (Tribunal) which stands upheld by the Hon'ble Allahabad High Court reported as 2011 (269) E.L.T. 337 (All.) and further upheld by Hon'ble Supreme Court reported as 2011 (269) A108 (S.C.). The said decision stands followed in number of subsequent decisions of the Tribunal. One such reference can be made to the Tribunal decision in the case of Commissioner of Customs and Central Excise, Indore vs. Venus Alloy Pvt. Ltd. reported at 2016 (337) E.L.T. 561 (Tri. – Del.). I note that apart from such calculations, there is no evidence produced by the Revenue to reflect upon the clandestine activities of the appellant.

6. The observations of the Adjudicating Authority is that the buyers reflected in some of the invoices were found to be non-existing. We find that same cannot be adopted as a reason for arriving at findings of clandestine removal inasmuch as such sales were effected on the basis of Central Excise invoices. If the buyers subsequently could not be traced by the Revenue, the same will not be indicative of clandestine activity of the appellant, inasmuch as such sales were made under cover of Central Excise invoices and on payment of duty. We also note that no discrepancy in the

stock of raw materials or final product was detected by the officers at the time of search of the appellant's factory on 29.04.2009.

7. It is well settled law that the onus to prove the clandestine removal is upon the Revenue and is required to be discharged by production of sufficient and positive evidence. In the present case I find that there is no evidence at all produced by the Revenue to show that the appellant had clandestinely manufactured and cleared their final product. As such I hold that the impugned order is unsustainable. The same is accordingly set aside and both the appeals are allowed with consequential relief to the appellants.

(Pronounced in Court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Ankit