CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, ALLAHABAD

REGIONAL BENCH : COURT NO.I

Excise Appeal No.70523 of 2016

(Arising out of Order-in-Appeal No.GZB-EXCUS-000-APP-0332 to 0334-15-16 dated 04.03.2016 passed by Commissioner(Appeals), Meerut-II, Central Excise & Customs, Noida.)

M/s. Akona Engineering Pvt.Limited
(A-460, Behind Hindon Motels, Hindon Vihar,
Delhi-Meerut Road,
Ghaziabad-201001(U.P.))

...Appellant

VERSUS

Commr. of Customs, Central Excise & Service Tax, Ghaziabad
.....Respondent
(CGO Complex-II, Kamla Nehru Nagar,
Ghaziabad (U.P.))

WITH

Excise Appeal No.70524 of 2016

(Arising out of Order-in-Appeal No.GZB-EXCUS-000-APP-0332 to 0334-15-16 dated 04.03.2016 passed by Commissioner(Appeals), Meerut-II, Central Excise & Customs, Noida.)

Shri Rambharose Rothod, Managing Director
(M/s.Akona Engineering Pvt.Ltd.
A-460, Behind Hindon Motels, Hindon Vihar,
Delhi-Meerut Road,
Ghaziabad-201001(U.P.))

...Appellant

VERSUS

Commr. of Customs, Central Excise & Service Tax, Ghaziabad

.....Respondent
(CGO Complex-II, Kamla Nehru Nagar,
Ghaziabad (U.P.))

AND

Excise Appeal No.51679 of 2016

(Arising out of Order-in-Appeal No.GZB-EXCUS-000-APP-0332 to 0334-15-16 dated 04.03.2016 passed by Commissioner(Appeals), Meerut-II, Central Excise & Customs, Noida.)

M/s. Akona Engineering Pvt.Limited
(Unit Roorkee, Khasra No.200,
Village Raipur-Bhagwanpur, Roorke,
District Haridwar, Uttarakhand.)

...Appellant

VERSUS

Commr. of Customs, Central Excise & Service Tax, Ghaziabad

.....Respondent

(CGO Complex-II, Kamla Nehru Nagar,
Ghaziabad (U.P.))

APPEARANCE

Shri R. Krishnan (Advocate) for the Appellant (s)
Shri Gyanendra Kumar Tripathi (Dy.Commr.) (A.R.) for the Revenue

CORAM:

HON'BLE MRS. ARCHANA WADHWA, MEMBER(JUDICIAL)
HON'BLE SHRI ANIL G. SHAKKARWAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 71361-71363/2019

DATE OF HEARING : 21 June 2019
DATE OF DECISION : 12 July 2019

MRS. ARCHANA WADHWA :

All the appeals are being disposed of by a common order as they arise out of the same impugned order of lower authorities vide which demand of duty of Rs.42,56,777/- stands confirmed against M/s.AKona Engg. Pvt.Ltd., Ghaziabad along with confirmation of interest and imposition of penalty of identical amount in terms of section 11AA of the Central Excise Act. Further he has confiscated the excisable goods totally valued at Rs.4.35 crores with an option to the appellant to redeem the same on payment of redemption fine of Rs.43,58,626/-. Further penalty of Rs.10.00 Lakhs stands imposed upon M/s.Akona Engg. Pvt.Ltd., Roorke in terms of the provisions of Rule 26 Central

Excise Rules along with penalty of Rs.5.00 Lakh upon Shri Rambharose Rathod, Managing Director of Ghaziabad unit.

2. As per facts on record M/s.Akona Engg. Pvt.Ltd. located at Ghaziabad, against whom the demand stands confirmed are engaged in the manufacture of concrete batching/mixing plant, concrete mixer machine, builders hoists etc falling under Chapter Heading 847431110 of the First Schedule to the Central Excise Tariff Act, 1985 in their factory located at Hindon Vihar, Ghaziabad. They were not paying excise duty on their clearances availing SSI exemption on their clearances. Appellants have also another unit located at Roorkee, District Haridwar (Uttarkhand) for manufacturing primarily bigger machines only and the Roorkhee unit enjoys excise duty exemption (area based exemption) in terms of Notification No.50/2003-CE, dated 10.06.2003. Accordingly, appellants did not pay any excise duty on their clearances from Roorkee Unit.

3. Based upon some information, the DGCEI, Mumbai visited the factory premises of the appellants at Roorkee as well as at Ghaziabad on 15.12.2011 and seized certain records from both the locations. The officers also recorded statements of the Managing Director of the company Shri Rambharose Rathod as well as four employees of Roorkee unit only. No statement from any employee from Ghaziabad unit was recorded. Four more statements of the Managing Director were recorded on 16 December 2011, 9 January 2012, 1 January 2012 and 12 April 2013 at Mumbai. No stock taking of the raw materials/inputs or of the finished products were taken by the visiting officers.

4. Based on those statements recorded as well as the records seized from Roorkee/Ghaziabad units appellants Ghaziabad unit were served with a show cause notice dated 30.01.2014 in which it was alleged that:-

- Though the receipt of inputs/raw materials were found duly entered in the stock register at Roorkhee unit, they have not shown the corresponding bill (excise invoice) for finished goods in which these were used as has been done in one case of MRB engineering.

- internal gate passes were not prepared in respect of some excise invoices and in respect thereof corresponding entry of essential parts used in the clearance of finished goods like air compressor, gear box, motor, control panel etc. were not reflected in the stock register of such inputs;

- In respect of four invoices drawn on Director General Border Road Organisation, Managing Director has admitted that the clearances were effected from Ghaziabad unit whereas bills were raised from Roorkhee unit and that he would be paying the duty thereon;

- That therefore on a scrutiny of the stock register maintained at Roorkhee unit with the sale invoices of the goods issued from that unit, it wsa revealed that in respect of sale invoices as detailed in the Annexure A to the SCN the issuance of parts for the manufacture of the finished goods has not been reflected in the stock register; therefore in respect of the said Annexure A goods have been cleared actually from Ghaziabad unit clandestinely without payment of duty but corresponding excise invoices have been issued from Roorkhee unit and accordingly excise duty of Rs.42,56,777 was demandable with equal penalty u/s 11AC of the Central Excise Act, along with interest, excisable goods of the value of Rs.4,35,86,267 cleared clandestinely from Ghaziabad unit were liable to confiscation under Rule 25 of the Central Excise Rules, and penalties were imposable on them.

- After filing of reply and additional submissions the learned adjudicating authority confirmed:-

a) Duty demand of Rs.42,56,777 with interest on the Ghaziabad unit 15 June 2015 imposing equal penalty under Section 11AC.

b) Redemptoin fine of Rs.43,58,626 on the goods which were held to be clandestinely cleared without payment of duty;

c) Penalty of rs.10 lakhs on the Roorkhee Unit under Rule 26(2)(i).

d) Penalty of Rs.5 Lakhs on Shri Ram Bharose Rathod under Rule 26.

5. The Learned Appellate Commissioner upheld the Oder-in-original. But set aside the redemption fine imposed on the ground that when the goods were not available for confiscation, redemption fine was not imposable.

6. The present appeal is against the impugned order in appeal for setting aside the duty demand and the penalties.

7. After hearing both sides duly represented by Shri R. Krishnan, learned Advocate for the Appellant and Shri Gyanendra Kumar Tripathi, learned Dy.Commissioner (A.R.) for the Revenue, we find that the duty stands confirmed against the Ghaziabad unit of the appellant on the allegations and findings of clandestine removal. Such findings are primarily based upon the investigations made at the Roorkee Units and the statements of the Managing Director and four employees of Roorkee Unit. As per the Revenue, the goods shown to have been manufactured and cleared from Rookee unit, so as to avail the benefit of area based exemption Notification, were in fact manufactured and cleared from their Ghaziabad unit.

8. It is seen that though the Ghaziabad unit was engaged in the manufacture of altogether different items than the Roorkee unit of the appellant and though the factory premises of Ghaziabad unit were also put to search along with Roorkee unit, but no discrepancy in the stock of either the inputs or the final product was found at Ghaziabad unit. No stock of the major inputs meant for bigger machines like compressors, motors etc. were found in the premises of the Ghaziabad unit, which were the requisite inputs for manufacture of the bigger machines at Roorkee unit. No statement of any employee of the Ghaziabad unit was recorded. The Managing Director in his statement has clearly stated that the Ghaziabad unit was engaged only in the manufacture of smaller machines and the bigger machines were being manufactured at Roorkee unit.

9. The entire case of the Revenue is based upon the scrutiny of the documents at Roorkee . Apart from the statement of the four employees of the Roorkee unit and the Managing Director, there is no further evidence produced by the Revenue in the shape of statements of transporters of the goods or the identification of the buyers. There was also no shortage of raw materials at Roorkee unit, thus indicating that the documents maintained at Roorkee unit were perfect. The appellants have also taken a stand that the clearances from Roorkee unit were being effected both for local customers and for customers outside the state. They had produced a statement before the adjudicating authority indicating invoicewise details showing clearances against 'C' forms, Form No.38 and GR numbers. For supplies to the customers in Uttar Pradesh, road permits were required and permit numbers were indicated in all the excise invoices. These facts are sufficient enough to establish that the goods were being manufactured at Rookee unit and were being cleared from Roorkee unit only. Wherever the GR numbers are not reflected in the invoices, Managing Director has indicated in his statement that in those case the customers themselves have takne the delivery at the factory gate of Roorkee unit and arranged transport. The Revenue has not bothered to make enquiries from the customers to verify the truth of the said statement of the Managing Director.

10. Further the Managing Director in his statement has admitted clearance of the goods to Director General, Border Roads Organisation having been cleared from Ghaziabad unit. The appellants' contention is that the said statements were given under coercion and in the absence of examination of the deponent of the said statement, the same cannot be admitted as an evidence. On the other hand the appellants have shown documentary proof in the form of GRs showing dispatch to Rishi Kesh, Chandigarh and Pathankot. Revenue has not made any efforts to counter-check this factual aspects either from the transporters or from D.G. Border Roads Organisation. They have placed two affidavits to that effect before the adjudicating authority which do not stand considered by the adjudicating authority.

11. Apart from that the appellants have also produced confirmatory letters from various customers to the effect that they received the goods only from Roorkee unit. The adjudicating authority has not bothered to examine the said customers and has simplicitor discarded the said evidence.

12. It is well settled law that the findings of clandestine removal are required to be established on the basis of positive and sufficient evidences. As already observed, in the present case the demand is being confirmed agasint Ghaziabad unit, without producing any evidence against the said manufacturing unit. There is not even an iota of evidence indicating that the clearances stand effected from the said unit. We find no justifiable reasons to uphold the impugned order confirming the demands and imposing penalties. As such the impugned order is set aside. Consequently all the appeals are allowed.

(Order pronounced in the open court on 12.07.2019)

SD/

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

SD/

(ANIL G. SHAKKARWAR)
MEMBER(TECHNICAL)

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