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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 28/12/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71987/2017-EX[DB] dated 21/12/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/2625/2009	**Tin Manufacturing Comapny** S-347, Greater Kailash Ii NEW DELHI 110048
		Name and Address of Respondent
2		C.C.E. & S.T.-Ghaziabad 202...WING A C.G.O. COMPLEX-II,KAMLA NEHRU NAGAR, GHAZIABAD, UTTAR PRADESH-201002

Copy To

3Advocate(s) / Consultant(s):

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FA-9, KAVI NAGAR,
GHAZIABAD,
UP

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File

Asstt. Registrar

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

APPEAL No. E/2625/2009-EX[DB]

(Arising out of Order-in-Original No. 14/Commissioner/Ghaziabad/2009 dated 20/05/2009 passed by Commissioner of Central Excise, Ghaziabad)

M/s Tin Manufacturing Company **Appellant**

Vs.

Commissioner of Central Excise, Ghaziabad **Respondent**

Appearance:

Shri Rajesh Chhibber (Advocate) for Appellant
Shri Rajeev Ranjan (Joint Commr.) AR for Respondent

CORAM:

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

Date of Hearing : 06/10/2016
Date of Decision : 06/10/2016

FINAL ORDER NO. 71987/2017

Per: Anil Choudhary

The present appeal has been filed against Order-in-Original No. 14/Commr./GZB/2009 dated 20/05/2009 whereby demand of duty of Rs.5,46,47,223/- has been confirmed and penalty of Rs.1,00,00,000/- has been imposed.

2. The facts of the case are that appellant are engaged in the manufacture of metal containers and agriculture equipments. A team of DGCEI visited the factory of

appellant and various other places on 23/06/1988 and conducted investigation. Number of record was resumed and statements of various persons were recorded. During the course of investigation by DGCEI, a copy of FORM A alleged to be furnished to the Joint Chief Controller of Imports and Exports for obtaining import license during the period 1983 to 1987 was said to be recovered. However, no statement of any person was recorded on the same. Form A contained the details of imports made by the appellant for the manufacture of their final products.

2.1 The details mentioned in FORM A were compared with the details of monthly returns filed with Excise Department and sales returns filed with the Sales Tax Department for relevant period and the differential quantity of imported material reflected in Form A over and above the quantity of raw material shown in excise records was alleged to be used for clandestine manufacture of goods removed without payment of duty.

2.2 SCN dated 22/12/1988 was issued demanding duty on various counts and on account of impugned demand. The assessee contested the SCN mainly on the basis that the details mentioned in FORM A were not the actual figures of import and consumption, which were prepared for getting higher import quota.

2.3 The Commissioner vide Order-in-Original dated 24/04/1991 confirmed all demands except the impugned demand and the reserved his order on said demand, which is the subject matter of dispute in the present appeal. For ready reference, relevant Para of order of Original Authority is reproduced below: -

"A. (vi)(a) No order confirming the demand of duty of Rs.5,46,47,223/- worked out on the basis of figures mentioned by the party in their Form A application to the Joint Chief Controller of Import and Export, is passed;

However, I, reserve my orders on this aspect of the matter till the verification of figures of Import of raw material supplied at the time of personal hearing and their utilization is ascertained by the Central Excise Authorities.

(vi)(b) Demand of duty amounting to Rs.43,700/- in respect of supplies of tin containers valued at Rs.2,13,500/- made by M/s Tin Manufacturing Co. of India to M/s Goyal Tin Works Ltd. vide their invoices T-I dated 14.03.1985, T-I dated 17.04.1985 and T-2 dated 27/29.04.1985, the evasion of which has been upheld in earlier paragraph,

under Rule 9(2) read with Section 11-A of Central Excises & Salt Act, 1944, is confirmed;

(vii) I impose a penalty of Rs.5,00,000/- (Rupees Five Lakhs only) on M/s Tin Manufacturing Co. of India Ltd. under Rule 173-Q of Central Excise Rules, 1944 for the aforesaid contraventions committed by them;

B. Lastly, I come to the point as to whether the Central Excise duty of Rs.5,46,47,223/- alleged by the Department to have been evaded by the party during December, 1983 to March, 1987 is recoverable under Rule 9(2) read with Section 11-A of Central Excises & Salt Act, 1944. In support of this allegation the department has relied upon the contents of application filed by the party to the Joint Chief Controller of Imports & Exports, New Delhi. The party had declared the consumption of raw material (tin-sheets) and also the value of resultant production. The party has challenged the figures of consumption, contending that these are inflated figures furnished to Export & Import Control Authorities for obtaining higher quota of imported goods and such inflated figures cannot be made basis for fastening duty liability. They also argued that no effort was made to verify the correctness of figures from Customs Authorities. I find that there is *substantial force in submission of the party and no effort appears to have been made in this case to verify the correctness of figures. Further, the party also submitted that they imported CR Sheets/GP Sheets/TMBP for manufacturing Agricultural implements, while the short levy has been worked out on the basis of total import of tin-sheets on the assumption that the total sheets had been consumed in manufacture of metal containers. This leads to doubt as to whether the quantity of inputs shown to have been consumed, Tin-sheets had been utilized in the manufacture of metal was actually imported and whether the total imported containers alone. This called for investigations which I find, had not been undertaken as no evidence has been brought on record, that the above said quantity of tin-sheets had actually been utilized in manufacture of tin containers. Till this is done, it will not be proper to create any demand against party on the above said quantity indicated in Form-A application."*

2.4 However, without adhering to the aforesaid directions, the Commissioner vide addendum dated 24/04/1992 i.e. exactly after one year from the date of earlier Order-in-Original, confirmed impugned demand and imposed penalty as well.

3. The appellant filed appeals against both the orders passed by the Original Authority. The Tribunal, vide order dated 23/02/1997 disposed all the appeals filed against both the orders. The Appeal No.2586-88/1991 were disposed by the Tribunal but in the Appeal No.4472/1991, the Tribunal remanded the matter to the Original Authority for *de novo* adjudication. For ready reference, Para-12 of the Tribunal order dated 23/02/1997 is reproduced below:-

"C. In respect of Appeal No.4472/92 the Collector, Central Excise in Order-in-Original No.56 dated 24/04/1991 reserved the order. In respect of demand of duty of Rs.5,46,47,223/- till the verification of figures of material. The Collector, Central Excise issued addendum to Order-in-Original No.56 dated 24/04/1991 and confirmed the demand of Rs.5,46,47,223/- on M/s Tin Manufacturing Co. of India and also imposed the personal penalty of Rs.1 crore. The contention of the appellant is that before issuing the order the Collector has not granted an opportunity of personal hearing though he in the earlier order dated 24/04/1991 he reserved the order on this aspect till the verification of figures of import by the appellants. The contention of the appellant is that the entire demand was based on the contents of Form-A

application filed with Joint Chief Controller of Import and Export for grant of import licence. The contention of the appellant is that they were not put to the notice before issuing the impugned order regarding the verification or investigation conducted by the Collector of Central Excise in this respect. We also took notice of the order dated 28/10/1994 passed by the Additional Director General of Foreign Trade New Delhi where the of Import & Export (Control) Act, 1949 read with Section 20(2) of Foreign Trade (development & regular) proceedings under Section 4MA for mis-utilization of the Tin Act, 1992 plates imported by the appellant were set aside. The Additional Director General of Foreign Trade in the order held that the notices firm have properly accounted for all the material and hence the mis utilisation of the material is not sustainable.

The Collector of Central Excise has not granted the opportunity of personal hearing before passing the order and the appellant's were never put to notice as to what they had to say on the figures arrived at by the Collector after verification and investigation of the figures of the import made by the appellant. In these circumstances we hold that the impugned order was passed without complying the principles of natural justice and without going into the merits of the appeal we set aside the *impugned order for non compliance of the principles of natural justice and remanded the matter back to the Collector of Central Excise for de novo adjudicating and the Collector to pass order after affording an opportunity of personal hearing in accordance with law to the appellant. Consequentially the Appeal No. E/4472/92-NB is allowed by way of remand."*

4. The Commissioner vide order dated 04/11/1997 again confirmed the demand without complying with the order of Tribunal.

5. The appellant challenged said order before the Tribunal which vide Final Order dated 01/07/1999 disposed the appeal itself on the date of hearing of Stay Application by observing that the Commissioner did not follow the directions in earlier order of Tribunal.

6. In remand proceedings, the Commissioner said to have made efforts to get information from DGFT, but since no information could be received, the Commission again confirmed the demand under his order dated 31/07/2002.

7. The appellant again challenged said order before the Tribunal which vide order dated 16/08/2007 observed

that the Commissioner simply reproduced the order of his predecessor and that the directions of Tribunal given were not complied with. Hence the matter was again remanded to the Commissioner.

8. This time the Commissioner again confirmed the demand vide Order-in-Original dated 20/05/2009, by concluding as under:-

"D. In the light of above mentioned facts, I observe that the party has nothing in their defence and they are deliberately adopting delaying tactics by asking investigation report which has neither been relied upon by the department in fastening the duty liability nor it is available with the department. Therefore, I decide the case on merits having fully complied with the directions of the Hon'ble Tribunal. I also observe that the ends of natural justice have fully been met with.

As far as the principles of natural justice are concerned, it would be seen that ample opportunities had already been given to the party and that matter cannot be continuously adjourned to suit their convenience. Anyone taking the plea of natural justice should come with clean hands. Unfortunately, that does not seem to be the case here.

Relying on the judgement of the Hon'ble Supreme Court in the case of Natwar Textile Processors (P) Ltd. Vs. Union of India [1995 (57) ECR (10) (Supreme Court) Para-12 thereof] and further the Hon'ble High Court of Madras in D.C.W. Vs. Collector of Central Excise [1990 (46) ELT (233)] quoting favourably the view of the Hon'ble Supreme Court on the principles of natural justice as under: "Natural justice is no unruly horse, no lucking land mine, nor a judicial cure all. If fairness is shown by the decision maker to the man proceeded against, the form, features, and the fundamentals of such essential processual propriety being conditional by the facts and circumstances of Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be financial but should be flexible yet firm in this jurisdiction......"

As far as the order of the Additional Director General of Foreign Trade is concerned, the same has also been examined and found to be of no relevancy with the current proceedings. The said order is based mainly on the issue of mis-utilization of imported tin sheets whereas the current case is based on many other issues. Further more the figures submitted by the party in Annexure-A to the DGFT which have been relied upon in the current case *have no where been discussed and refuted in the order issued by the Additional Director General of Foreign Trade. This fact also strengthens the case for the department."*

9. Aforesaid Order No. 14/Commr./GZB/2009 dated 20/05/2009 passed by the Commissioner is under challenge before us.

10. Shri Rajesh Chhibber, counsel for the appellant at the outset submitted that in first round of adjudication when Commissioner adjudicated the show cause notice dated 22/12/2008 vide Order-in-Original No.56/Collector/1990-91 dated 24/04/1991, the show cause notice stood disposed and no further order could be passed even by way of addendum by reversing his own findings given while passing order dated 24/04/1991. The second order by way of addendum dated 16/07/1992 was not maintainable at all and consequently all subsequent proceedings became illegal and void *ab initio*.

10.1 The counsel also submitted that the entire demand was based on FORM A said to be recovered during investigation by the DGCEI, whereas in subsequent proceedings, the Additional Commissioner (Adj.), Central

Excise, Ghaziabad vide letter dated 20/10/2010 informed the Income Tax Authorities that there was no mention of Form A in the Panchnama dated 23/06/2008 which showed the casual approach of department. It was contended that when the department did not properly resume FORM A from the factory of appellant, entire case made on the said document was illegal and consequently all subsequent proceedings were illegal and the impugned order deserves to be quashed on this ground alone.

10.2 It has further been contended by the appellant that even otherwise, when vide order dated 24/04/1991 the Commissioner in the very first round of adjudication had concluded that there was no evidence to support the case of department which was made out solely on the basis of FORM A, the Commissioner was bound to drop the demand then and there itself and, therefore, also the entire proceedings initiated thereafter were not maintainable. He further submitted that in any case, the facts remained the same as were there at the time of issue of SCN on 22/12/1988 till the passing of impugned order that there was no investigation to support the case of department demanding duty solely based on Form A. Therefore, based on the findings of Commissioner as

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given in internal Page 29 of OIO dated 24/04/199, no demand could otherwise sustain.

10.3 The counsel further contended that in any case, the department had done miscarriage to the justice as the Commissioner while adjudicating the case in remand proceedings, that too on four occasions, never carried out the directions of Tribunal which remanded the matter for *de novo* adjudication on more than one occasions, which was sufficient to show that because the department had no material to substantiate its demand, it did not comply with the directions of Tribunal. It is further submitted by the learned counsel that in remand proceedings, the scope of adjudication was limited as the same was to be done in terms of remand directions of Tribunal. Therefore also, he submitted, that the impugned order is liable to be set aside on this ground alone.

10.4 It is also contended by the Learned Counsel that long back the Director General of Foreign Trade issued SCN dated 26/02/1993 for mis-utilization of goods imported against 13 licenses issued from 16/07/1984 to 17/12/1987. The Add. Director General vide order dated 20/10/1994 (Page 45 of appeal) categorically held that the assessee (Appellant herein) did not mis-utilize the imported material. Said order clearly mentioned the total quantity of imports made by the appellant during the period was 9025MT only which alone was also sufficient to set aside the demand in the instant case. When DGFT specifically ordered that the appellant imported 9025 quantity, the case made out by the department for import of 20699MT (Page No.160) is clearly contrary to otherwise established fact. Hence when concerned Authority i.e. DGFT governing the import did not find any fault on the part of appellant in imports made by it, the entire case of department merely based on a Form A showing some inflated details of imports is not sustainable submitted to the DGFT is not maintainable at all.

10.5 The Learned Counsel also submitted that on the basis of investigation so made by the Central Excise, Income Tax Department also initiated similar proceedings. Ultimately vide order dated 14/11/2011, the Commissioner of Income Tax (Appeals) dropped the addition made by the Income Tax Department on the basis of information available in Form A only, details of which were provided to the Income Tax Department by the Central Excise Department. He emphasized over the fact that a perusal of Page 7 (Para-2) of said order dated 14/11/2011 had made reference to communication dated 20/12/2010 received from the Central Excise Department having jurisdiction over the factory of appellant that there was no mention of FORM A in the Panchnama dated 23/06/1988 prepared at the factory at the time of resuming records. The appellant drew attention towards Para-3 (Page 9) of said order in which it is mentioned that the Income Tax Department made enquiry from DGFT and on the basis of information received from DGFT, the Income Tax Authority proceeded with the case and did not make any addition whereas in the present proceedings the Central Excise Department said to have not received any information from DGFT, in spite of there being categorical directions by the CESTAT every time the case was remanded to the Commissioner for re-adjudication.

10.6 It is also contended by the Learned Counsel that in any case if the department did not receive any information from DGFT, investigation could be conducted from the jurisdictional Customs Department (as was ordered by the Tribunal and even requested by the appellant to the lower authority) as to when and how said imports were made, details of which were said to be available in Form A. If according to the department, the appellant had imported some quantity in excess than recorded in statutory records, the information of same must have been with Custom Department as it was not the case of Excise Department that said material was imported in a clandestine manner.

10.7 The Learned Counsel also drew attention towards the findings of Lower Authority in Para-3.8 in which he refused to go by the findings of given by DGFT on the ground that said order did not refer to the quantities mentioned in Form A. It has been contended by the counsel that when there was no actual import of quantity in dispute, details of same could not be found mentioned in DGFT, records. Here it was pertinent to mention that on all earlier occasions, Tribunal remanded the matter for getting investigation report from DGFT. In other words, the Lower Authority has gone against the findings of Tribunal given on earlier occasions.

10.8 The Learned Counsel also submitted that the department even did not make any efforts to substantiate its case from any other corroborative evidence i.e. as to how the so called quantity of over 12000MT was cleared from custom port, how and when the same was transported from custom port to factory by crossing the border of Delhi, how and when the final product was manufactured, whether the appellant had the capacity to manufacture the same, when and to whom the final products were sold and how the so called unaccounted cash was received for clandestine manufacture. It was otherwise illogical that the goods imported through proper channel were used for manufacture of clandestine manufacture of final product. The counsel submitted that it is a settled legal position that the charge of clandestine removal cannot be made without having corroborative evidences. Therefore also the impugned order is not sustainable.

11. Heard the Learned A.R. for the Department who has supported the case of department as given in the impugned order.

12. We have perused the records and have considered the submissions made from both the sides.

In the instant case, when the Adjudicating Authority while deciding the case vide OIO dated 24/04/1991 had held that the demand in dispute called for investigation, the Lower Authority was bound to drop the demand on the said basis itself. Under no provision of law, the Lower Authority could decide the show cause notice in parts.

Therefore, entire adjudication proceedings after passing of the OIO dated 24/04/1991 are vitiated and deserve to be set aside on this ground alone.

It is found that the entire case of department is made out on the basis of information found available in Form A, whereas the DGFT and even the Income Tax Appellate Authority has already concluded that there was no such improper import by the appellant. Further, on four occasions this Tribunal gave opportunity to the department to substantiate its case by bringing on record the investigation carried out by DGFT. The lower authority in the impugned order has shown total disrespect to the remand directions. At the same time, when said information was brought on record by the appellant, the lower authority has refused to go by the same, whereas once the DGFT had given clean chit to appellant, the lower authority was bound to drop the demand.

It is observed that it is otherwise also illegal that the appellant imported the material on the basis of information submitted to DGFT whereas said production was cleared in unaccounted manner. There is even no mention as to how the appellant discharged its custom duty liabilities, if the goods in dispute were imported through proper channel.

It is also observed that when on the basis of investigation made out by the Central Excise Department, the Income Tax Department dropped the charges on the basis that there was no evidence of improper import by the appellant, the Excise Department was also supposed to drop its case also.

It is also further observed that even otherwise the entire case of department is made out on mere surmises and presumptions. It is a settled legal position that for demanding duty on the charge of clandestine removal, it was must for the department to show as to how the so called quantity of over 12000MT was cleared from customs port, how and when the same was transported from custom port to factory by crossing the border of Delhi, how and when the final product was manufactured, whether the appellant had the capacity to manufacture the same, when and to whom the final products were sold and how the so called unaccounted cash was received for clandestine manufacture. It was otherwise illogical that the goods imported through proper channel were used for manufacture of clandestine manufacture of final product. The counsel submitted that it is a settled legal position that the charge of clandestine removal cannot be made without there being corroborative evidences. Therefore the impugned order is not sustainable. In view of the above, impugned order is set aside with consequential relief to the appellant. The appeal is allowed.

(Dictated & Pronounced in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Lks

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