CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, BANGALORE

REGIONAL BENCH – COURT NO. 2

Central Excise Appeal No. 1028 of 2009

[Arising out of Order-in-Appeal No. 332/2009 dated 06.08.2009 passed by the Commissioner of Central Excise (Appeals) Mangalore]

M/s. Rachana Rubbers Pvt. Ltd. **....Appellant**
KIADB Industrial Area,
Nanjangud

VERSUS

C.C.E. & S.T, Mangalore **....Respondent**
7th Floor, Trade Centre
Bunts Hostel Road,
Mangalore-575 003
Karnataka

WITH

(i) Central Excise Appeal No. 992 of 2009 (Mr. T.S. Muralidhara, Accounts Manager); (ii) Central Excise Appeal No. 1027 of 2009 (Mr. B.S. Siddalinga Swamy, Managing Director)

[Arising out of Order-in-Appeal No. 332/2009 dated 06/08/2009 passed by the Commissioner of Central Excise (Appeals) Mangalore]

APPEARANCE:

Mr. M.S. Nagaraja, Advocate for the Appellant
Mr. Dyamappa Airani, Authorized Representative for the Respondent

CORAM:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon’ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order Nos. 20781-20783/ 2023

Date of Hearing: 29/03/2023
Date of Decision: 28/07/2023

Per: P.A. Augustian

The appellant M/s. Rachana Rubbers Pvt. Ltd. (RRPL) is the manufacturer of Pre-cured Tread Rubber (PCTR), Bonding/Cushion Gum(B), Black Vulcanizing Cement and Flaps. Alleging under valuation, show-cause notice was issued for the period from 2001-02. Evasion of duty of Rs. 39,01,412/- (Rupees thirty nine lakhs one thousand four hundred and twelve only) was alleged for the period from 2001-02 to 2003-04. In addition, a demand of Rs. 7,93,311/- (Rupees seven lakhs ninety three thousand three hundred and eleven only) was made alleging that the goods sold through Surya Rubbers & Chemicals Pvt. Ltd. (SRCL) and Pyramid Rubber Company Pvt. Ltd. (PRCL) are not accounted in the books of RRPL. The adjudicating authority vide order dated 30.03.2007 confirmed the demand of duty with interest and imposed penalty on the appellants. The adjudicating authority also ordered confiscation of 102 rolls of PCTR and 182 boxes of BG and allowed to redeem the same on redemption fine of Rs. 1,00,000/- (Rupees One Lakh only). Aggrieved by the said order, appeals were filed before the Commissioner (Appeals) and vide the impugned order, the appeals were dismissed. Aggrieved by the said order of the First Appellate Authority, present appeals were filed.

2. The learned counsel appearing on behalf of the appellant submitted that the allegations in the show-cause notice are *prima facie* not sustainable since the show-cause notice proposes the demand of excise duty being the duty on the goods cleared by adopting lesser value for effecting clearance through related persons during the period from 2001-04, whereas on the other hand the authorities alleged that the firm SRCL & PRCL are non-existing unit and only dummy units of the appellant. The

learned counsel for the appellant further submits that M/s. Surya Rubber and Chemical Ltd., (SRCL) is a partnership firm issued with registration certificate on 07.11.2002. M/s. PRCL is a Private Limited Company incorporated vide certificate of incorporation and having a factory in Hindupur. The learned counsel further submits that the show-cause notice was issued demanding duty from RRPL on the ground that the goods were cleared by adopting lesser value for effecting clearances through related persons. The learned counsel also draws our attention to the Final Order in the case of ***Hind Hydraulic Engg. Versus CCE, Delhi-IV reported in 2019 (370) E.L.T. 1685 (Tri.-Chan.).*** Learned counsel also submitted that the show-cause notice has not alleged that RRPL, SRCL & PRCL are "related persons" as defined in sub-clause (i), (ii), (iii) or (iv)of Section 4(3) (b) of the Central Excise Act, 1944. However, invoked the provisions of Section 4(1) (b) of the Central Excise Act, 1944 read with Rule 11 and Rule 9 of the Central Excise Valuation Rules, 2000 for determination of the value of the goods cleared. The learned counsel submitted that the adjudicating authority in Order-in-Original dated 16.05.2007 has proceeded on the ground that the value of the goods sold through SRCL and PRCL is to be determined as per Rule 11 of the Central Excise Valuation Rules, 2000. The learned counsel further submitted that the impugned orders thus proceeded on the grounds beyond the basis and scope of the show-cause notice and hence are unsustainable. Learned counsel also submitted that Hon'ble Supreme Court in the matter of ***Commissioner of Central Excise, Aurangabad Versus Goodyear South Asia Tyres***

Pvt. Ltd. reported in 2015 (322) E.L.T. 389 (SC) has held as under:

> ***"16.*** *This contention of the assessee is accepted by the CEGAT and the CEGAT is justified in adopting this course of action. It is clear that the two are companies and therefore, they are not relatives and therefore, clauses (ii) and (iii) are not applicable on the basis of it. Insofar as clause (iv) is concerned, what is to be shown is that they have interest, directly or indirectly, in the business of each other. The expression "each other" would signify the element of mutuality and we have already held above that this mutuality principle has not been satisfied in the instant case."*

3. In addition to the above, the Learned counsel draws our attention to the finding in the Order-in-Original, where adjudication authority framed the issues to decide as;

> (a) Whether the value of goods manufactured by M/s. RRPL and cleared to M/s. SRC & PRC is correct transaction value in the back drop of investigation conducted and offences registered against the assessee?
>
> (b) Whether there was clandestine removal of goods without payment of duty?
>
> (c) Whether 102 Rolls of PCTR & 182 Boxes of BG totally valued at Rs. 3,25,762/- which were unaccounted and lying seized from the factory premises of the assessee are liable for confiscation?

4. The Learned counsel draws our attention to documents relied in the show-cause notice and submitted that to allege undervaluation, the document purportedly dated 10.08.2003

was relied in the show-cause notice to adopt the market value of rubber @ 49 per kg. The above said documents cannot be considered as admissible evidence since it is neither signed nor source of the said document is disclosed in the show-cause notice. The Learned counsel also draws our attention to correspondence made by assessee with Rubber Board, where clarification issued by Rubber Board vide its communication dated 28.03.2022 shows that the average price of rubber at the relevant time was only Rs. 31 to Rs.36.67 and not Rs.49 as considered by the adjudicating authority. The learned counsel also draws our attention to large number of documents showing that the PRCL and SRCL were existing with the due permission from concerned statutory authorities. In support of the above, the Learned counsel also draws our attention to the report of the Inspection Committee, dated 19/10/2002 on the visit to the State based SSI units manufacturing pre-cured tread rubber and allied materials. To support the above submissions, the Learned Counsel draws our attention to the judgment of Hon'ble Supreme Court in the case of ***Commissioner of C.Ex., Cus. & S.T., Calicut Versus Cera Boards and Doors reported in 2020 (373) E.L.T. 794 (S.C)*** wherein it is held as under:

> *"88. For the valuation under Section 4(1) to follow the "transaction value", (after amendment) the three conditions stipulated in clause (a), namely (i) that the goods are sold for delivery at the time and place of removal, (ii) that the assessee and buyer are not related and (iii) that the price is the sole consideration for the sale, should be satisfied.*

89. If the three conditions, enumerated in clause (a), (indicated above) are not satisfied, then the case would fall under clause (b) of sub-section (1) of Section 4, which starts with the words "in any other case". In other words, in cases not covered by clause (a), the value can be determined in such manner as may be prescribed.

90. After the amendment under Act 10 of 2000, the Central Government issued a new set of rules called the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. These rules were issued in exercise of the power conferred by Section 37, in supersession of the 1975 Valuation Rules.

----

93. Therefore, in essence, an adjudicating authority is obliged to do the following, in respect of transactions that took place after 1-7-2000:

(i) first, he must see whether there is a sale and

(ii) next, he must see if such sale satisfies the three conditions stipulated in clause (a) of sub-section (1) of Section 4.

94. In cases where there is a sale and the three conditions stipulated in clause (a) of sub-section (1) of Section 4 are satisfied, the adjudicating authority should determine the value based upon the transaction value. But (i) in cases where there is no sale and (ii) in cases where there is a sale but the three conditions stipulated in clause (a) are not satisfied, then the adjudicating authority should fall back upon the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000."

4.1 He further submitted that Hon'ble Supreme Court in the said decision held as under:

97. But the Adjudicating Authorities as well as CESTAT are also guilty of failure to do something in these batches of cases. They are:

(i) Failure to find out, in cases covered by Section 4(1) as it stood prior to 1-7-2000, whether there were sales in the course of wholesale trade, satisfying the 3 conditions prescribed therein, falling under clause (a) of sub-section (1) or whether the sales in question fell under clause (b) of sub-section (1) of Section 4;

(ii) Failure to find out, in cases covered by Section 4(1) as it stands amended by Act 10 of 2000 with effect from 1-7-2000, whether the sales in question fell under clause (a) or clause (b) of sub-section (1) of Section 4;

(iii) Failure to find out, in the event of the sales in question falling under clause (b) of sub-section (1) of Section 4 (before or after the amendment), whether the valuation had to be done only in accordance with the Rules (1975 Rules or the 2000 Rules, as the case may be), and

(iv) Failure to find out, in cases covered by Section 4(l)(b), the specific rule that is applicable among the 1975 or 2000 Rules, as there are different rules covering different contingencies, both in the 1975 Rules and in the 2000 Rules.

98. Since the Adjudicating Authorities as well as the CESTAT failed to make a determination as indicated above, we are of the view that the orders of remand passed by the Tribunal, though for completely different reasons, were justified. Hence the appeals are liable to be disposed of, confirming the orders of remand passed by CESTAT, with a clarification on the legal issues so that the Adjudicating Authorities know how to proceed.

Conclusion

99. In fine, these appeals are disposed of, confirming the impugned orders of CESTAT setting aside the Orders-in-Original passed by the Adjudicating Authorities and remanding the matters back for re-adjudication. However, while carrying out the exercise of re-adjudication, the Adjudicating Authorities should keep in mind the principles enumerated hereunder:

(A) Cases where the period of assessment is prior to 1-7-2000

(I) First ascertain the price at which such goods are ordinarily sold by the assessee to a buyer who is not related to him, in the course of wholesale trade, at the time and place of removal and also find out whether the price is the sole consideration for the sale. If the Adjudicating Authority is able to find this out, he may take such price as the normal price and treat the case as covered by Section 4(1)(a), applying, wherever permissible, the prescriptions contained in the proviso to clause (a) of sub-section (1) of Section 4.

(II) If the normal price is not ascertainable, either for the reason that the goods are not sold or for any other reason, then he may take it that the case would fall under Section 4(l)(b) and take recourse in such cases, to the Central Excise (Valuation) Rules, 1975.

(III) The phrase "for any other reason" appearing in Section 4(1)(b) would include cases where the price charged in the course of wholesale trade is not discernible or where the same, though discernible, cannot be linked to delivery at the time and place of removal or where the price is not the sole consideration for the sale, even though the price charged in the course of wholesale trade for delivery at the time and place of removal are available.

(IV) If the case falls under Section 4(1)(b) and the Adjudicating Authority takes recourse to the method of valuation prescribed in the 1975 Rules, he shall find out which among the relevant rules would apply to the cases on hand before proceeding with the valuation.

(B) Cases where the period of assessment is after 1-7-2000

(I) First ascertain the "transaction value", with particular reference to the definition of the said expression contained in Section 4(3)(d).

(II) Apply the transaction value so ascertained, to cases where three conditions, namely (i) the goods are sold for delivery at the time and place of removal, (ii) the assessee and buyer are not related and (iii) the price is the sole consideration, are satisfied. This is because such cases will fall under Section 4(1)(a).

(III) In cases where one or more of the aforesaid three conditions are not satisfied, and also in cases where there is no sale, the Adjudicating Authority should treat the cases as falling under Section 4(1)(b) and hence take recourse to the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

(IV) If a case falls under Section 4(l)(b) and the Adjudicating Authority takes recourse to the method of valuation prescribed in the 2000 Rules, he shall find out which among the relevant rules would apply to the case on hand before proceeding with the valuation.

4.2 Learned counsel also cited the judgment in the case of ***Commissioner of Central Excise, New Delhi Versus Superior Products reported in 2008 (230) E.L.T. 3 (S.C)*** to support their case.

5. Heard the Learned counsel for the appellant and the Learned Authorized Representative for the Revenue and perused the records.

6. The learned AR for the Revenue, reiterated the findings of the adjudicating authority as well as lower authority and submitted that the statements recorded from the appellant clearly substantiate the findings of the adjudicating authority regarding clandestine removal and the non-existing firms SRCL and PRCL. Learned AR draws our attention to findings in the impugned order and submitted that during search in the factory and the office premises of RRPL and PRCL, various documents and records were seized and during follow up investigation various documents were obtained from Banks, KSRTC, Chartered Accountant and other related persons. During verification of sale invoices submitted by RRPL regarding clearances made by them to SRC and PRC, for the period 2003-04, it is seen that RRPL cleared PCTR at the rate of RS. 40 per kg. From the records seized at factory premises of RRPL, the landed cost of Rubber is shown as Rs. 49 per kg and cost of PCTR in the market is claimed to have been shown as Rs. 50 per kg. Learned AR submitted that the adjudicating authority had recorded that all the goods cleared by RRPL, SRC and PRC were actually manufactured by RRPL; no proper accounts were maintained by the assessee as well as by the above two units; the total quantity of goods cleared by the 3(three) units put together clearly exceeds the quantity of goods on which RRPL (assessee) has paid the excise duty; thereby a clear picture emerges that

goods have been clandestinely removed. However, to a specific question regarding the source of said finding and admissibility of the document relied upon by the investigating agency while issuing show-cause notice and adjudicating authority to adopt value of rubber as Rs.49 to allege undervaluation, the Learned AR could not substantiate the evidentiary value of said document. The learned AR draws our attention to the statement recorded from Sri B.S Siddalinga Swamy and MD of RRPL. In his statement dated 05.04.2005 Sri. B.S Siddalinga Swamy stated that main intention of creating SRC and PRC was to procure orders from KSRTC, when in reality only RRPL had the manufacturing facility.

6.1. Learned AR also submitted that the PRC had made payment of more than Rupees one crore to various raw-material suppliers from the account of PRC and more than Rs.1.74 crore from the account of SRC to various raw-material suppliers, an amount of Rs. 25,81,000/- is paid to PRC when there is no billing between the two companies. The learned AR also draws our attention to the documents produced by the appellants regarding reference to the Inspection Committee, wherein it is stated that during the course of inspection of the firms located in different places of Karnataka, it was observed that most of the tenderers have been quoting under 2 or 3 firms though they do not possess the required machineries for manufacturing all the three items namely, Pre-cured Tread Rubber, Bonding/Cushion Gum and BVC/USC in all these firms.

7. We have gone through the records and also the submissions made by both sides. Prima facie, we have found strong force in the statements made by the appellants that when adjudicating authority has held that RRPL, SRC and PRC are related persons, it contradicts the finding in the impugned order that SRC and PRC are only dummy units created for procuring the tenders offered by KSRTC. In addition to that during hearing, the Learned counsel for the appellant draws our attention to large number of documents including registration, deed of partnership, VAT registration and proforma of registration issued by Central Excise authorities to SRC & RRPL firms, books of accounts etc., to substantiate that the units are functioning independently and not dummy units as alleged. We have also found strong force in the contentions made by the Leaned counsel for the appellant in reference to the report of Inspection Committee during their visit to the RRPL, PRC and SRC showing that they have sufficient infrastructure to manufacture different goods. Though the Learned AR submitted that each firm is not holding sufficient infrastructure to produce entire goods as demanded by KSRTC, in the said report it is stated that each firm was holding sufficient material to produce different goods, which can be either used as it is or can be used as raw material

for other firms. Hence, the findings in the impugned order regarding non-existence of the firm PRC & SRC is unsustainable. Further considering the law laid down by the Apex Court in the matter of ***Commissioner of Central Excise, New Delhi Versus Superior Products and Goodyear South Asia Tyres Pvt. Ltd.,*** wherein it is categorically held that all the three units even few of the directors or responsible persons are one and same, they cannot be considered as related persons since all the three were having separate legal entities. Regarding the allegation of undervaluation, the document relied on by the adjudicating authority to adopt the value of the rubber cannot be considered as admissible evidence. Moreover, appellant had produced documents issued by Rubber Board regarding the average value of rubber at the relevant time. If the Investigating authority had reason to believe that the cost of rubber at the relevant time was higher than the value shown in the books of accounts, they could have obtained authentic data from the Rubber Board or other agency than relying on unsigned/unauthenticated document allegedly recovered during investigation. Moreover, there is no evidence regarding place of recovery of said document, it is unsigned and it was not brought to the notice of concerned person during investigation.

Considering the above fact, there is no reason to allege undervaluation regarding transactions carried out between the RRPL, SRC and PRC.

8. Regarding the submission made by the learned AR relating to the payments made by PRC and SRC allegedly to the raw-material suppliers, to a specific question regarding the books of account related to manufacturing activities for the goods supplied by the SRC and PRC, the learned AR fairly admits that there are no such records available on record.

9. In view of the above, appeals are allowed with consequential relief. Penalties are set aside.

(Order pronounced in the Open Court on 28/07/2023)

(P.A. AUGUSTIAN)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

iss...