CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,

BANGLORE-560009

Regional Bench COURT-2

Excise Appeal No. 1027 of 2010

[Arising out of the Order-in-Appeal No.105/2010 dated 08.03.2010 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.]

M/S GLOBAL PUNCH **....Appellant**
No.26/B, 2nd Main,
2nd Cross, Kanakapura Main Road,
J.C. Industrial Estate,
Bangalore - 560 062

Vs.

COMMISSIONER OF CENTRAL EXCISE **....Respondent**
PB.No.5400 Queens Road,
Central Revenues Building,
Bangalore,
Karnataka – 560 001

Appearance:

Mr. M.S. Nagaraja, Advocate **.... For Appellant**

Mr. Neeraj Kumar, AR **....For Respondent**

CORAM:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

<u>FINAL ORDER No. 20083 of 2024</u>

Date of Hearing: 01.08.2023

Date of Decision: 30.01.2024

Per : P. A. AUGUSTIAN:

1. Appellant is manufacturing parts of media converter/control panel …etc falling under Chapter 84 and 85 of the Central Excise Tariff Act, 1985. During audit of the records

pertains to April 2005 to June 2007, an objection was raised that appellant is not paid Central Excise duty/CENVAT credit totaling Rs. 5,79,987/-. As per said objection, Appellant paid amount on 27.07.2007 and 29.07.2007. Thereafter there is no SCN issued on Appellant for above said demand and when Appellant realized that the Appellant is not liable to pay said amount, Appellant submitted a refund application on 06.08.2007. On receipt of said refund application, a SCN was issued and after recording the objections made by the Appellant, Adjudicating authority issued an order dated 05.01.2009 and denied the refund. In appeal, Commissioner (Appeals) also rejected the appeal vide impugned order dated 08.03.2010. Aggrieved by said order, present appeal is filed.

2. When the matter came up for hearing, Ld Counsel for the Appellant submits that the Department made demand without any supporting evidence and payment of Rs. 5,79,987/- made by the Appellant is only as per demand of Central Excise audit party and it is not appropriate by proper authority. There is no SCN issued demanding said amount and in the absence of any order appropriating above said amount, Appellant is eligible for refund of the same. Ld Counsel for the Appellant further submits that the issue is squarely covered by the judgment of Hon'ble Supreme Court in the matter of M/s Metal Forgings Vs Union of India (2002 (146) E.L.T 241 (SC) Paragraph 7, 10). wherein revenue argued that the show cause notice being only a notice informing the assessee of his liability to pay the duty, the said information having been made known to the assessee by way of various letters and orders, it should be held that there was substantial compliance of the requirement of the said notice.

However Hon'ble Supreme court held that "We do think that we cannot accede to this argument of the learned Counsel for the Revenue. Herein we may also notice that the learned Technical Member of the Tribunal has rightly come to the conclusion that the various documents and orders which were sought to be treated as show cause notices by the Appellate authority are inadequate to be treated as show cause notices contemplated under Rule 10 of the Rules or Section 11A of the Act. Even the Judicial Member in his order has taken almost a similar view by holding that letters either in the form of suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note of as show cause notices for the recovery of demand, and we are in agreement with the said findings of the two Members of the Tribunal. This is because of the fact that issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice. For this reason the above argument of the Revenue must fail".

3. Following above judgment, in the matter of M/s Indian Oil Corporation Ltd Vs CCE, Vadodara (2003 (157) E.L.T 344 (Tri. Del) ,while allowing refund of amount paid during investigation,

it is held that "We find substantial force in this submission of the learned Sr. Counsel that it is the requirement of Section 11A of the Central Excise Act that where any duty of Excise has not been levied or not paid or has been short-levied or short-paid, a show cause notice has to be served within 6 months from the relevant date on the person chargeable with the duty requiring him to show cause notice as to why he should not pay the amount specified in the notice. The Revenue has not brought on record any show cause notice issued to the Appellants for including RPO charges, etc. in the assessable value of the Petroleum products or any Adjudication Order confirming the demand of duty under Section 11A(2) of the Central Excise Act".

4. Similarly Hon'ble Supreme court in the matter of M/s Esland Combines Vs CCE, Coimbatore (2003 (152) E.L.T 39 (SC) held that :-

> **"11.** In our view, there is no substance in this submission. As stated earlier, the relevant amended portion of Section 11A *inter alia* makes it abundantly clear that when any duty of excise has been short levied or short paid, whether or not such short levy or short payment was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of the Act or the rules, the Central Excise Officer, can within one year from the relevant date, serve notice on the person chargeable with the duty, which has been short levied or short paid, requiring him to show cause why he should not pay the amount specified in the notice".

5. The issue was considered by this Tribunal in the matter of M/s Merchant Impex Vs CC, Bangalore (2009 (15) STR 504 (Tri. Bang) and held that;-

> " **5.** We have carefully considered the submissions and perused the records. The Apex Court in the case of *Metal Forgings* (supra) have clearly held that issue of show cause notice is a mandatory requirement for raising demands. It is further observed that communications, orders, suggestions or advices from the department cannot be deemed to be a show cause notice. It is held that a specific show cause notice indicating the amounts demanded and calling upon the appellant to show cause is necessary. The above noted letter cannot be treated as a show cause notice in terms of this judgment. Furthermore, the appellants were not served with show cause notice but the above letter was served on the CHA. In terms of the above noted judgments, the proceedings are bad in law, as the CHA has not been authorized to receive the show cause notice on the appellant's behalf. On both points, the appellants succeed. Appeal is allowed with consequential relief, if any".

6. Ld Counsel further submits that the issue in unsustainable on merit also. Regarding claim of Rs. 1,31,372/-, it is rejected on the ground that there is no evidence to prove that the goods supplied would be finally used in manufacturing Agricultural equipment. In this regard, Ld counsel brought our attention to the Tax invoices issued by the Appellant dated 26.05.2006 where the Chapter/Tariff sub Heading is clearly mentioned as 8437 parts of Agricultural Equipment at the time of sale of the goods. Similarly Ld Counsel draw our attention to the letter dated 27.07.2007

issued by the manufacturer of the product wherein they have certified that they are manufacturer of Agri processing machinery covered under Tariff Heading 8437 and sub assembly purchased from Appellant as per the drawing and it is meant exclusively for Agri processing machinery covered under 8437. Ld Counsel also submits that the above said document produced by Appellant is sufficient to prove that the goods supplied by the Appellant is used in manufacturing of Agricultural equipment. Thus, Excise duty of Rs.1,31,373/- demanded from the Appellant is illegal and unsustainable.

7. Further on denial of CENVAT credit of Rs. 11,991/-, Ld Counsel draw our attention to the Bill raised by the Chartered Accountant having Sl. No. 175 dated 15.12.2006 where they have mentioned the service tax registration. Further submits that even if said service registration is not mentioned, it is not a reason to deny the CENVAT credit on audit service. Ld Counsel also submitted that as per the law settled by various authorities including in the matter of M/s Philips Electronics (I) Pvt Ltd Vs CCE, Vadodara I (2009 (14) STR 209 (Tri-Ahm), M/s Agarwal Industries Vs CCE Kanpur (2006 (205) E.L.T 412 (Tri.Del), M/s Lokesh Machines Ltd Vs CCE, Hyderabad I (2017 (48) STR 486 (Tri.Hyd), CCE, Vapi Vs Jindal Photo Ltd (2009 (14) STR 812 (Tri.Ahmd) CENVAT credit is admissible even where invoices did not mentioned the registration number of the service provider. Thus the objection made by the Adjudication authority that the invoices is not containing service tax registration is not sufficient reason to deny the CENVAT credit.

8. Regarding denial of Rs. 19,556/- and Rs. 10,907/- as credit taken on security services, Ld Counsel draw our attention to the

invoice dated 01.01.2007 and the letter dated 31.08.2007 issued by M/s Pramod Security service admitting that there is an omission on their part in mentioning the address in the invoice. Ld Counsel submits that the issue is considered in the matter of Rajendra Kumar & Associates (2021 (45) GSTL 184 (Tri.Del). Regarding Rs.1,01,173/-, it is denied on the ground that the description of the goods on AR3(i) is different from CT3. In this regard, Ld Counsel draw our attention to form AR3 submitted by the appellant wherein it is evident that the AR3 is duly endorsed by the Customs officer in charge of EOU in the Customs Division. The Ld Counsel also draw our attention to various documents produced as part of the appeal memorandum and submitted that the above said finding of the adjudicating authority is also factually unsustainable. Regarding the refund of Rs.3,04,986/- under business auxiliary service, the adjudicating authority denied the same on the ground that the job work declaration or supporting documents to prove use of the goods in manufacturing of final products by M/s Nash Industries and 100% EOU is not filed. Ld. Counsel for the Appellant also submitted that claim on the ground that they have no jurisdiction for refund of service tax. It is also unsustainable. If the Adjudicating authority and Commissioner (Appeals) of Central Excise & Service tax have examined the matter on merit, they cannot plead lack of jurisdiction and confirm the order of lower authority. Activity of converting steel sheet into steel cabinet of required specification amount to manufacture and it is excluded from the definition of business auxiliary service. Ld Counsel further submits that they were forced to make payment as demanded by the respondent and for the delay, Respondent is liable to pay interest after 3 months from the date of submission of the refund application. The Ld Counsel relied on the judgment of M/s Ranbaxy

Laboratory Ltd Vs UOI (2011 (273) E.L.T 3 (SC) wherein it is held that if refund is sanctioned, the interest is payable from the date of expiry of 3 months from the date of submission of the application for refund.

9. The Ld. DR reiterated the finding in the impugned order and submits that the Appellant is not eligible for refund of the amount, since it is paid by them voluntarily and no SCN is required to appropriate the above said payment. Regarding the claim of the appellant on merit, Ld. DR reiterated the finding of the Adjudication authority and submits that Appellant is not eligible for any refund of the duty since it was paid by them as per the Audit objection and refund application was rightly rejected by the Adjudication/Appellate authority.

10. I have gone through the submission made by both side. It is an admitted fact that Appellant was submitting returns from time to time and when an objection was made by Central Excise audit party, Appellant paid the amount. Thereafter when there was no further proceedings initiated by the respondent to appropriate the amount paid by the appellant, refund application was submitted for refund of said amount. Only based on the refund application, SCN was issued by Deputy Commissioner of Central Excise without specifying the provision under which is issued. However from the wording of the above said SCN, it is evident that on scrutiny of the documents along with refund claim, they have issued the said SCN. Thereafter Adjudicating authority issued impugned Order-in-Original on 31.12.2008 rejecting the refund application submitted by the Appellant on the ground that the goods manufactured and cleared are not eligible for Nil rate of duty, description of the goods mentioned in CT3 is different from that is mentioned in the invoice, Appellant is not eligible to avail service tax credit under Rule 4A of

Service Tax Rules, 1994 r/w 9(2) of the CENAT Credit Rule, 2004 and reject the claim of Rs.17,120/- on the ground that there is no jurisdiction to sanction the refund of service tax paid under Section 11(b) of Central excise Act, 1944. As per the judgment of Hon'ble Apex court in the matter of M/s Metal Foreign (Supra), issue of SCN is mandatory requirement for raising demand. In the absence of any SCN or order appropriating the amount paid by the Appellant during investigation, Adjudicating authority have no reason to reject the claim for refund made by the Appellant.

11. In view of the above and also considering the submissions made by the appellant on merit, Appeal is allowed as prayed with consequential relief if any in accordance with law.

(Order pronounced in open court on ……30.01.2024)

(P.A. Augustian)
Member (Judicial)