

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 2599 of 2010

(Arising out of Order-in-Appeal No. 234/2010-C.E. dated 13.09.2010
passed by the Commissioner of Central Excise (Appeals-I),
Bangalore.)

**M/s. Kishone Engineering
Works,**

No.33, 22nd Cross,
Coddanna Industrial Estate,
Hegganahalli,
Viswaneedam Post,
Bangalore – 560 091.

Appellant(s)

VERSUS

**Commissioner of Central
Excise, Bangalore II
Commissionerate,**

C. R. Buildings,
Queens Road,
Bangalore.

Respondent(s)

With

Central Excise Appeal No. 2600 of 2010

(Arising out of Order-in-Appeal No. 234/2010-C.E. dated 13.09.2010
passed by the Commissioner of Central Excise (Appeals-I),
Bangalore.)

**G Arul Das,
Proprietor,
M/s. Kishone Engineering
Works,**

No.33, 22nd Cross,
Coddanna Industrial Estate,
Hegganahalli,
Viswaneedam Post,
Bangalore – 560 091.

Appellant(s)

VERSUS

**Commissioner of Central
Excise, Bangalore II
Commissionerate,**

C. R. Buildings,
Queens Road,
Bangalore.

Respondent(s)

APPEARANCE:

Mr. Raghavendra B, Advocate, for the Appellant

Mr. H. Jayathirtha, Superintendent (AR), for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER
(TECHNICAL)**

Final Order No. 21070 – 21071 /2024

DATE OF HEARING: 26.06.2024

DATE OF DECISION: 25.10.2024

PER : DR. D.M. MISRA

These appeals are filed against Order-in-Appeal No.234/2010-C.E dated 13.09.2010 passed by the Commissioner of Central Excise (Appeals-I), Bangalore.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of drilling hammers and parts of drilling hammers falling under Chapter Heading 8207 1900 of Central Excise Tariff Act (CETA), 1985. They are engaged in the manufacture of said drilling hammers since 2003. On the basis of intelligence that the appellant had exceeded the SSI exemption limit of Rs.100/- lakhs, investigation was initiated and certain records, documents were seized under Mahazar dated 14.11.2006. Consequently, statements of the proprietor and other persons have been recorded and on completion of investigation, show-cause notice was issued to the appellant on 06.02.2008 alleging that even though they had exceeded the aggregate value of clearances of excisable goods of more than Rs.100/- lakhs during the Financial Year 2005-06 and 2006-07, they failed to discharge excise duty totalling to Rs.14,29,024/- which proposed to be recovered with interest and penalty. On adjudication, the demand was confirmed with interest and penalty; also, penalty of Rs.1,50,000/- was imposed on the proprietor under Rule 26 of Central Excise Rules (CER), 2002. Aggrieved by the said order, they filed an appeal before the learned Commissioner (Appeals), who in turn rejected their appeal. Hence, the present appeals.

3. At the outset, the learned advocate for the appellant has submitted that the appellant is a proprietorship concern and *inter alia* engaged in the manufacture of drilling hammers and parts of drilling hammers. During the relevant period, they have availed SSI exemption under Notification No.08/2003-CE dated 01.03.2003. the product hammer consists of following major parts viz., Barrel, Buckhead, Piston Air Distributor, Control Tube, Bit Lock, Front Chuck and Stem Bush and these parts are assembled to make a hammer. He submits that each of these parts are required to manufacture one hammer. The appellant did not have inhouse facility for heat treatment and thus, had been sending these parts of hammers for heat treatment on job work basis to M/s. Kasturi Heat Treaters and M/s. Perlite Heat Treaters from March 2006 onwards. Heat treatment is one of the essential process for manufacture of Drilling Hammer and parts thereof. Parts were sent for heat treatment to the job workers were used in the assembly of hammers and also some parts were sold as such. Hammers manufactured were sold under invoice whereas parts were replaced free of cost to the customers during the free warranty period, for which no invoices were raised. The price of hammers was declared as Rs.20,000/- in the invoice raised at the time of its clearance/sale to the customers.

3.1 He has further submitted that the authorities below have confirmed the demand solely on the basis of assumptions and presumptions without single piece of evidence with regard to clandestine removal of goods. Since there is no documents to prove the said allegation except the statements obtained from the proprietor and two job workers under pressure and coercion, Department has not collected any details from the buyers of the final products nor the suppliers of raw materials for manufacture and clearance of hammers clandestinely. The statements obtained under coercion and threat cannot be acceptable as

evidence as has been settled in a series of cases. Further, he has submitted that in the statement of the Proprietor dated 24.04.2007, it is informed that the figures furnished by the job workers are not acceptable as many a time due to failure of hardness testing after heat treatment, the goods were sent back to the job workers for reworking. He has though accepted the maintenance of a small notebook by his employee, however, categorically stated that all the manufactured goods were cleared under invoices only. The entries made in the notebook has neither been corroborated nor any statement of employee who had written the contents of it has been examined. Under these circumstances, reliance cannot be placed on the notebook also. Further, he has submitted that reliance placed by the Department on four letters in adopting higher rate of quantification of duty demand, which were obtained under threat and coercion with retrospective date, hence, not reliable piece of evidence. He has further submitted that the ultimate manufacturer is the job worker who finished the product and not the raw material supplier.

3.2 It is his contention that parts of hammer comes into existence only after the heat treatment process. Hence, the job workers is the real manufacturer of the goods and the hammers assembly cleared by the appellant cannot fall under CTH 8207 1900 of CETA, 1985. In absence of cutting and drilling bits in view of Chapter Note 8 to Chapter 82; the hammer assembly cleared by the appellant cannot be considered as an excisable goods. In support, he has referred to the judgment of this Tribunal in the case of Sparr Engineering vs. CCE, Bangalore-II: 2007 (207) ELT 545 (Tri.-Bang.). Further, he has submitted that quantification of duty is not correct as parts returned after heat treatment many a times as the job of heat treatment was not proper; it was sent back to the job worker under challan once again to complete the heat treatment in a perfect manner.

Further, he has submitted that they have submitted a revised worksheet after considering SSI benefit and cum-duty benefit and the duty liability comes to Rs.8,15,331/-. Hence the appellant is entitled to refund of balance amount of duty paid in excess. In the absence of corroborative evidences in the form of raw materials, manufacturing facility, financial transactions, manpower required for the manufacture and clearances cannot be sustained. In support he has relied on the following decisions:

- Suntlet Aluminium P. Ltd. vs. CCE: 2013 (288) ELT 500 (Guj.)
- Continental Cement Co. vs. UOI: 2014 (309) ELT 411 (All.)
- CCE, CE & ST, Ghaziabad vs. Auto Gollon Industries P. Ltd.: 2018 (360) ELT 29 (All.)
- CCE, Chandigarh vs. Nachiketa Paper Ltd.: 2008 (225) ELT 194 (P&H)
- Flevel International vs. CCE: 2016 (332) ELT 416 (Del.)

3.3 He submitted that the onus to prove the allegation of clandestine manufacture and removal lies on the department in view of the following decisions:

- Oudh Sugar Mills Ltd. vs. UOI: 1978 (2) ELT J 172 SC
- Pacific Pharmaceuticals Pvt. Ltd. vs. CCE, Bangalore-II: 2007 (216) ELT 263 (Tri.-Bang.)
- Vidya Laminates Pvt. Ltd. vs. CCE: 2006 (197) ELT 260 (Tri.-Mum.)

3.4 Further, he has submitted that since there is no suppression of facts and hence, penalty cannot be imposed on the appellant; also imposition of penalty on the proprietor under Rule 26 of Central Excise Rules, 2002 is bad in law.

4. Per contra, the learned Authorised Representative for the Revenue reiterated the findings of the learned Commissioner (A). He has submitted that department on the basis of

intelligence that appellants were sending parts of hammer for heat treatment on job work basis to job workers and each part is assembled into hammer, is an essential process for completion of the drilling hammer and parts thereof; part of the quantity were used for assembling the hammers and remaining were sold as such without payment of duty as replacement of parts during warranty period. However, it was noticed that they have raised invoices indicating the value of drilling hammer as Rs.20,000/- per hammer but the records recovered during investigation revealed the price in the range of Rs.26,000/- and Rs.37,000/- which was admitted by the Proprietor of the appellant in his statement dated 24.04.2007 and 11.12.2007. The statement furnished by the Proprietor on 24.04.2007 and 11.12.2007 was given voluntarily without any coercion and it was never retracted; only at the time of reply to the show-cause notice after a gap of more than one and half years, the above statements were disputed, thus, the adjudicating authority has not rightly accepted such retraction. The allegation of clandestine manufacture and clearance was proved by the department not only on the basis of entries found in kutch paper-book but also other evidences in the form of notebooks, letters, registers, etc., which were corroborated by the job worker and employees during the course of recording their statements. The proprietor of the appellant in his written submission and also statements admitted that hammer assembly is a part of drilling rig and correctly classifiable under Chapter Subheading 8431.00. Thus, the process of assembly of parts amounts to manufacture and the ratio laid down in **Sparr Engineering** (supra) case is not applicable to the facts of the present case.

4.1 Rebutting the arguments of the appellant that job worker is the manufacturer, the learned AR submitted that appellants were sending their goods to the job worker for heat treatment

and after receiving the goods back in their factory, they carried the processes like machining, honing, grinding, ruffing, milling, threading, etc., thereafter assembling the same and manufacture drilling hammers; also the parts were marketable since all the parts were assembled in the factory of the appellant for manufacture of drilling hammers. Therefore, the appellant is the manufacturer and not the job worker is the manufacturer. In support, he has referred to the following judgments:

- Satnam Overseas Ltd.: 2015 (318) ELT 538 (SC)
- G.G. Automotive Gears Ltd. : 2014 (308) ELT 546 (Tri.-Del.)
- Anod Plasma Spray Ltd.: 2007 (208) ELT 588 (Commr.Appl.)

4.2 The quantification has been correctly been done as the relevant data were supplied by the job workers who received the goods for heat treatment from the appellant. The appellants have not maintained any records for sending the goods to job workers for heat treatment and the same were obtained from the job workers by the department. Further, he has submitted that the gross undervaluation of the finished goods which were shown as Rs.20,000/- whereas the same were in fact sold during the period at a price range of Rs.26,000/- to Rs.37,000/- as stated by the Proprietor of the appellant.

4.3 He further submitted that the statements furnished by the proprietor on 24.4.2007 and 11.12.2007 have never been retracted, hence, they are reliable piece of evidence. In support, he relied on the following decisions:

- National Boards vs. CCE, Calicut: 2014 (313) ELT 113 (Tri.-Bang.)
- S.M. Steel Ropes vs. CCE, Mumbai: 2014 (304) ELT 591 (Tri.-Mum.)

- Kripa Fabs Pvt. Ltd. vs. CESTAT, Chennai: 2015 (322) ELT 114 (MAD.)

4.4 The department by adducing evidences on clandestine removal and undervaluation, discharged its burden and shifted the same to the appellant who failed to discharge the same; hence, confirmation of demand is rightly upheld by the adjudicating authority. Since the appellant had cleared the goods without payment of duty and without obtaining excise registration, therefore, imposition of penalty is sustainable.

5. Heard both sides and perused the records. The short question involved in the present appeal is, whether during the period 2005-06 and 2006-07, the appellant exceeded the SSI exemption limit of Rs.100/- lakhs under Notification No.8/2003-CE dated 01.03.2003 by resorting to clandestine removal and clearance of goods.

6. Undisputedly, the appellants are engaged in the manufacture of drilling hammers falling under Chapter 8207 1900 of CETA, 1985 and parts thereof. For the manufacture of the said drilling hammers which comprises of various parts, they cleared the parts for an essential process of heat treatment on job work basis to job workers M/s. Kasturi Heat Treaters and M/s. Perlite Heat Treaters. After receiving the heat treated parts, they assemble the same in their factory and manufacture drilling hammers. On the basis of intelligence and subsequent investigation including retrieving of private notebooks and consequent statements of the Job workers and proprietor Shri G. Arul Das, who admitted to clearance of the drilling hammers and also its parts by undervaluing and without accounting in their books of accounts, the demand was confirmed with interest and penalty. In confirming the demand, the authorities below mainly relied upon on a private notebook retrieved from the

premises of the appellant, the authenticity of which is not disputed by the Proprietor Shri G. Arul Das. The said notebook was maintained by the employee of the appellant Shri Prakash who records despatch and receipt of raw materials to their job workers viz., M/s. Perlite Heat Treaters which was shown as PHT and M/s. Kasturi Heat Treaters which was shown as KHT. It is a vital piece of evidence which keeps the track of raw material sent to them for heat treatment, and its return to the Appellant's factory for further manufacture. When the said evidence was shown to the proprietor Shri Arul Das, he had admitted to the manufacture and clearance of the goods through his statement dated 24.04.2007 and 11.12.2007 which has not been retracted any time before the submissions to reply to the show-cause notice. The process of heat treatment undertaken as a job work has been endorsed by the said job workers through their statements. Thus, it is clear that the chain of evidence has been established on the clandestine manufacture and clearance of the goods.

7. Further, on the issue of undervaluation, we find that in the absence of any clearance documents/ invoices retrieved from the premises, the statements of the proprietor was considered in this regard, wherein he had categorically admitted to have undervalued the goods by selling at a price ranging from Rs.26,000/- to Rs.37,000/- during the relevant period. The quantity and value of the drilling hammers was considered by taking note of the entries made in the notebook and also as confirmed by the proprietor in his statement dated 11.12.2007, and the Job workers whereunder it revealed that due to cut throat competition in the market to sell the hammers, they had resorted to undervaluation and also cleared the parts of hammers without payment of duty. In his statement dated 24.04.2007, admitting that there is variation in the price shown in the invoice wherever it is prepared, when compared to the

actual price charged to the customers, it is stated that the actual price of hammer was Rs.23,000/- and Rs.26,000/- per piece in the year 2004-05 and Rs.26,000/- and Rs.31,000/- during 2006-07 and between Rs.31,000/- to Rs.36,000/- up to December 2006 and from January 2007 onwards, the price have been increased to Rs.37,000/-. Further, he has submitted that they have not collected any tax above the said price and the same are all inclusive. Applying the said value as informed by the Proprietor, the clearance value of the respective financial year to compute the admissibility of SSI exemption Notification No.8/2003-CE dated 01.03.2003 was carried out and accordingly, the value in excess of the aggregate value of Rs.100/- lakhs was held to be liable to duty and duty demanded in the show-cause notice was confirmed. The argument of the learned advocate for the appellant that the entire demand is based on assumptions and presumptions and not on records is devoid of merit in as much as the department had taken into consideration the private notebook which records meticulously the movement of the raw material for heat treatment and also in the statements, the proprietor of the appellant had admitted to clandestine removal and clearance including undervaluation so as to meet the market cutthroat competition and corroborative statements were also recorded from the job workers. Also, it is argued by the learned advocate that since the witnesses have not been examined by the adjudicating authority, their statements cannot be admitted as evidence in view of Section 9D of Central Excise Act, 1944 cannot be accepted. The statements have been recorded under Section 14 of CEA,1944 after issuing summons to the respective persons and in such circumstances the statement *per se* be admissible in evidence as held **Bihar Foundry and Castings vs. CCE, Ranchi: 2023 (3) Centax 107 (Jhar.)** that. Thus, in these circumstances, the department fairly established the case of clandestine

manufacture and clearance of drilling hammers including undervaluation of the same.

8. It is argued on behalf of the appellant that drilling hammers manufactured by them is not excisable as held by the Tribunal in **Sparr Engineer's case**. We find that the adjudicating authority had distinguished the applicability of the said judgment observing that in the said case the part known as 'CHUNK' which involves three operations like buttress threading, direct hardness and finish machining, were completed at the job work's premises itself, thereby the job worker is to be treated as manufacturer of such 'CHUNK' and not the appellant. Thus, in the said case, it is in respect of parts of hammer which were manufactured at the premises of the job worker and sent to the appellant who did not carry out any operation on such part. Further, he has held that contrary to the said case, in the present case, through statement dated 24.04.2007, the Proprietor had admitted that hammer assembly is the part of drilling rig and accordingly, the same rightly classifiable under Chapter Subheading 8431.00, thus the process of assembly of parts in the premises of the Appellants amounts to manufacture and accordingly dutiable and the principle laid down in the said case is not applicable. We do not find any discrepancy in the reasoning of the authority below. Consequently, argument of the Appellant on this count also deserves to be rejected.

9. Further, the appellant had argued that the computation of the demand is without taking note of cum-duty value, hence the revised worksheet appended to the appeal-memo reveals that the liability of the appellant would at best Rs.8,15,331/-. However, on going through the worksheet appended to the show-cause notice, we find that during the period 2005-06 had the aggregate value of clearance was Rs.1,00,63,675/- and after deducting the SSI exemption of Rs.100/- lakhs, the excess

value was Rs.63,675/-, treated as cum-duty value and differential duty was calculated accordingly. Similarly, for the year 2006-07, the excess value of Rs,1,01,15,100/- was considered as cum-duty value and differential duty calculated. Therefore, we do not find any merit in the contention of the learned advocate and the demands have been computed without extending cum-duty benefit. Consequently, we do not find merit in the said argument of the learned advocate. Accordingly, the demand with interest and penalty confirmed on the Appellant M/s. Kishone Engineering Works in the impugned order is upheld. However, since penalty has been imposed on the proprietorship firm, penalty under Rule 26 of CER, 2002 on the proprietor Shri G. Arul Das, cannot be sustained.

10. In the result, Appeal No.E/2599/2010 filed by M/s. Kishone Engineering Works is rejected and Appeal No.E/2600/2010 filed by M/s. G Arul Das, Proprietor is allowed.

(Order pronounced in Open Court on 25.10.2024.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

RV