CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/962/2009-DB

[Arising out of Order-in-Appeal No. 119/2009 dated 10/09/2009 passed by Commissioner of Central Excise, (Appeals I)]

Finedec.
Finedec, C/o Sri. Tajuudeen Basha (proprietor) " Darus Surroor" # 126, Thomas Street, Kammanahalli
BANGALORE - 560084
KARNATAKA

Appellant(s)

Versus

The Commissioner of Central Excise and Customs
PB 5400 CR BUIDING, QUEENS ROAD,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

Appearance:

MR. M A NARAYANA, ADVOCATE
FLAT A GR FLOOR, SEVEN HILLS EXCELLENCY, #33,2ND CROSS,
SBM COLONY,
BRINDAVAN NAGAR,MATHIKERE
BANGALORE – 560 054.
KARNATAKA

For the Appellant

MRS. C.V. SAVITA, AR For the Respondent

Date of Hearing: 24/09/2019
Date of Decision: 30/09/2019

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20855 / 2019

Per : P. ANJANI KUMAR

The appellants, M/s. Finedec, are manufacturers of excisable goods like aluminium doors/windows, frames of doors and windows, structural glazing, etc. The appellants were availing benefit of SSI Notification

No.8/2003-CE dt. 28.2.2003. During the course of verification of ER-3 returns, the Department noticed that the assessee were engaged in the fabrication of aluminium composite panels (ACP) falling under subheading 7610.90 of CETA, 1985. A show-cause notice dated 19.5.2006 was issued to the appellants seeking to demand central excise duty of Rs.5,52,044/- and Rs.10.708/- Cess. Joint Commissioner vide Order-in-Original dated 23.7.2007 has confirmed the demand along with interest and imposing equal penalty under Section 11AC of the Act. On an appeal filed by the appellants, Commissioner (A) vide Order dated 10.9.2009 upheld the Order of the lower authority, hence, this appeal.

2. Learned counsel for the appellant submits that they are not manufacturing any new product. They are only cutting the already manufactured aluminium composite panels into the required sizes as per the requirement at the work sites. ACP is a composite product of aluminium and polythene sheets; aluminium sheet of 0.5mm is placed on both sides of the polythene sheet; such sheets are used in buildings as a covering or cladding; these panels normally come in the size of four feet by six feet; they are cut into smaller sizes of various shapes and cleared to site, as such; no new product is emerging and therefore, the process undertaken by them does not amount to manufacture in view of Hon'ble Supreme Court decision in the case of Delhi Cloth and Oil Mills: 1977 (1) ELT 199 (SC). Hon'ble Supreme Court has reaffirmed this decision in the case of Hindustan Zinc Ltd. vs. CCE, Jaipur: 2005 (181) ELT 170 (SC). The criteria laid down by the Hon'ble Supreme Court and other Courts that there must be a process carried out on the raw material; the process or processes must result in the emergence of new product distinct from the raw material and that the new product must have a different and distinctive name, character and use and should be known as such in the market and must be ordinarily bought and sold in the market. He also submits that this Bench of the Tribunal has decided the issue in favour of the appellants vide 2006 (206) ELT 1025 (Tri.-Bang.). He submits that Hon'ble Tribunal has observed as follows:

> ***4.*** *On a careful consideration, it is seen that the Revenue has not produced any evidence of trade parlance and understanding in the market that this activity of cutting and routing i.e., cutting the aluminium of ACP would bring into existence the new product as known in the market. The Apex Court in the case of UOI v. Delhi*

> *Cloth and General Mills Co. Ltd. as reported in 1977 (1) E.L.T. (J199) (SC) has clearly laid down that manufacture means bringing into existence a new substance known to the market and not merely producing some change in a substance. The same ratio was reiterated by the Apex Court in Hindustan Zinc Ltd. (supra). In the light of both these rulings and the ruling relied on by the Counsel rendered in the case of M/s. Hubli Electricity Supply Company Ltd. and KEB (supra), it is clear that mere process of cutting and routing (i.e. cutting the grooves) does not bring into existence new products. The Tribunal in the case of AGV Alfab Limited (supra) have also held that mere cutting of aluminium angles, plates to size, drilling holes, etc., would not bring into existence new product. The above cited ratios clearly apply to the facts of the present case. As the Revenue has not discharged their burden of marketability of the item as a separate goods, therefore, in the light of the cited judgment, it has to be held that the impugned order is not legal and proper. The same is set aside by allowing the appeal with consequential relief, if any.*

2.1 He submitted that there was no suppression and therefore, the demand is time barred; vide their letter dt.6.1.2003/04, they have informed the department about the manufacture of ACP cladding for doing various jobs undertaken by them; they have submitted ER-3 returns for the quarter ending 31.3.2005 on 20.4.2005; only because they have not included the value of clearances of ACPs in the ER-3 returns, suppression cannot be alleged; they themselves have furnished the figures relating to the value of impugned goods vide letters dated 6.1.2005 and 11.4.2005; they were under the bona fide belief that the goods are not excisable and no duty is payable to them; having a bona fide belief does not amount to suppression.

3. Learned AR for the department reiterates the findings of Order-in-Original and Order-in-Appeal and submits that the case relied upon by the appellant is no longer final. The High Court of Karnataka has decided the issue in favour of the Revenue vide 2011 (273) ELT 377 (Kar.), Hon'ble High Court in para 8 has observed as under:

> ***8.*** *In the instant case, since the process of cutting, grooving and routing of aluminium sheets to make composite panels amounts to manufacture as a new product emerges the product is dutiable. The Tribunal has not taken into consideration the actual process involved and the nature of the operation that have been carried out by the respondent-assessee in changing the nature of the product which it has been using to suit the particular requirement. That mere cutting sheets to size, drilling, grooving, welding, fastening etc. is not manufacture when the original identity of the product is not lost. In several other cases it was held that cutting to size, welding steel plate to make "Steel Band" which is a product with distinct name and character is 'manufacture'. The goods in the instant case cannot be equated with*

the aluminium sheets in running length used for manufacturing the aluminium composite panels. In view of the foregoing, we are of the view that cutting, grooving of the Aluminium sheet to make Aluminium composite panels amounts to manufacture of a distinct product commercially known as different. Therefore, we find that the view expressed by the Tribunal that no manufacturing activity is carried out by the respondent-assessee is contrary to the material on record and also the judgments of the Apex Court. Hence the order of the Tribunal is set aside and the orders of the Addl. Commissioner of Central Excise (Appeals) is restored by answering the substantial question of law in favour of the revenue and against the assessee.

4. Interfering at this juncture, learned counsel for the appellant submits that the matter relates to classification and valuation and as such, the Hon'ble High Court of Karnataka should not have entertained the appeal as the High Court themselves, in the case of Mangalore Refineries and Petrochemicals Ltd.: 2011 (270) ELT 49 (Kar.), held that an order passed by the appellate Tribunal relating to the determination of any question having relation to the rate of duty of excise or to the value of goods for the purposes of assessment lies to the Supreme Court under Section 35L(b) of the Act and not to High Court under Section 35(G).

5. Heard both sides and perused the records of the case. We find that despite the various submissions given by the appellant, the issue stands decided by the jurisdictional High Court. As such, judicial discipline requires that this Bench follow the Hon'ble High Court's order, as the same has not been stayed or set aside by a higher Court. Therefore, we are not in a position to appreciate the submissions of the appellants as far as the merits of the case are concerned. We hold that the activity of the appellant in cutting, etc., of aluminium composite panels for the purpose of cladding amounts to manufacture. However, we find that the appellants have a fair case in terms of limitation. As submitted by the appellants, the appellants have given a letter to the department as back as 1.4.2003/04 informing the department about their activity undertaken in respect of ACPs; they have been regularly filing ER-3 returns and they have furnished the figures relating to the value of clearances of ACPS vide letters dated 6.1.2005 and 11.4.2005. We find reasons to believe that it is because of a bona fide belief the appellants held, they did not submit the figures relating to the clearances of ACP in their ER-3

returns. For this reason, alone, suppression, etc., with an intent to evade payment of duty cannot be invoked. It can be seen that as on 2006, the decision of this Tribunal in the case of Pushpdeep Enterprises (supra) was in their favour and only in 2011, the Hon'ble High Court has set aside the order of the Tribunal. Under these circumstances, we find that the demand is hit by limitation.

6. In the result, the impugned order is set aside to the extent of limitation. The appeal is partly allowed by way of remand for the purpose of computation of duty for the normal period. The appellants shall pay the duty so computed. Penalty imposed is however set aside.

(Order was pronounced in Open Court on **30/09/2019**.)

S.S GARG
JUDICIAL MEMBER

P.ANJANI KUMAR
TECHNICAL MEMBER

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