CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 55386 of 2013

[Arising out of Order-in-Appeal No. 209/CE/APPL/CHD-I/12 dated 26.10.2012 passed by the Commissioner (Appeals), CE & ST, Chandigarh]

M/s Omid Engineering Pvt Ltd **......Appellant**
Village Deoll, Tehsil Amb, una, Himachal Pradesh

VERSUS

Commissioner of C.E. Shimla **......Respondent**
Central Revenue Building, Sector 17-C, Chandigarh 160017

APPEARANCE:

Present for the Appellant: Shri Sudeep Singh Bhangoo, Advocate

Present for the Respondent: Shri Ravinder Jangu, Authorized Representative

CORAM: **HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)**
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60394/2024

DATE OF HEARING: 18.03.2024
DATE OF DECISION: 28.06.2024

PER S. S. GARG

The present appeal is directed against the impugned order dated 26.10.2012 whereby the Commissioner (Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the appellant had been engaged in the manufacture of LPG Cylinders for all the public sector oil companies namely Indian Oil Corporation, Hindustan

Petroleum Corporation and Bharat Petroleum Corporation etc. since the year 2002 the appellant undertook substantial expansion of their installed capacity and qualified themselves for exemption from payment of duty under area based exemption Notification No.50/03-CE dated 10.06.2003. They started availing the exemption w.e.f. 24.01.04; that DGCEI, Ludhiana conducted a raid on 12.12.07. The raiding party could not find any irregularity in the matter of availment of exemption under Notification No.50/03-CE dt. 10.06.2003. However, the officers entertained a view that the appellants had been collecting amounts representing excise duty from their Customers i.e. Public Sector Oil Companies after availing exemption. According to the department that since same price, described as NDP "Net Delivered Price", was being charged in respect of supplies made prior to 24.01.04 as well as w.e.f. 24.01.04 (when they started availing exemption under Notification No.50/03-CE) so the duty of excise which was being deposited with the Government upto 23.01.04 had been collected and retained by the appellants.

3. A Show cause Notice dt.30.11.09 was issued whereby an amount of Rs. 19,41,594/- was sought to be recovered under Section 11D(2) along with interest under Section 11DD ibid, on the L.P.G Cylinders cleared during the period from 24.1.04 to 31.03.04. The Show Cause Notice was issued after five years from the date of the clearance of the cylinders. The appellant filed detailed reply to the show cause notice and stated that Section 11D is not applicable as no

amount representing as duty of excise has been recovered from the buyer. He further submits that the goods were exempted under Notification No. 50/2003 which was clearly mentioned on the invoices and against the column of "B.E.D @ 16%" the word exempted has been mentioned; after following the due process, the original authority confirmed the demand. Aggrieved by the said order, the appellant filed before the Commissioner (Appeals) who upheld the Order-In-Original. Hence, the present appeal.

4. Heard both the parties and perused the material on record.

5. Ld. Counsel submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and binding judicial precedents. He further submits that Section 11D is applicable only where any amount over and above the assessed amount has been charged from the customers representing as duty of excise. Whereas, in the present case, no amount has been charged from the customers by representing it as duty of excise. He further submits that on the invoices issued after 24.01.2004 it is mentioned "Exempted under Notification No.50/03-CE dt. 10.06.03". And also against the column of "B.E.D @16%" the word "exempted" has been mentioned which shows that no amount has been charged from the customer representing as duty of excise. Hence, no demand is sustainable. In support of their submissions, the relied upon the following decisions:

- Pitamber Coated Paper Ltd. Vs. CCE, Jaipur 2003 (152) ELT 392 (Tri)

- Shree Shyam Pulp and Board Mills Ltd Vs. CCE-2018 (364) ELT 205 (Tri.ALL).

6. Ld. Counsel further submits that prior to 2008 Section 11D did not cover goods which were wholly exempt or chargeable to Nil rate of duty. This position was only covered after the introduction of Section 11D (1A) in 2008. The period in the present case is prior to 2008; hence, no demand is sustainable. For this submissions, he relied upon the case of Everest Industries Ltd. Vs. CCE 2019(369) ELT 1569 (Tri. Chennai). Ld. Counsel further submits that entire the proceedings in this case for recovery are barred by limitation. That maximum period for recovery of any amount under Central Excise Act has been prescribed is five years as per Section 11A. Although, no time period has been prescribed under Section 11D for making the recovery but it is settled proposition of law that where no period is specified in that case reasonable period has to be applied.

6.1. Whereas, in the present case the recovery pertains to the period 24.01.04 to 31.03.04 whereas show cause notice has been issued on 30.11.09 after more than five years. In this regard, he placed reliance on the decision of the case of CCE, Chandigarh Vs. Hari Concast Pvt. Ltd., 2009(232) ELT 12 (P&H) and CCE Vs. Bharat Sanchar Nigam Ltd. 2017(3) GSTL 271 (Tri. Kol.).

7. He further submits that the Ld. Commissioner has ignored the fact that maintenance of same price before and after availment of exemption is also due to fact that benefit of Cenvat Credits availed under Cenvat Credits Rules had been forgone and substantial amount

had been spend on carrying out expansion. It is due to this fact that the price of the cylinder charged by appellant before and after availment of exemption remained the same and it could not be presumed that maintenance of same price was due to amount of duty involved on final products.

8. On the other hand, Ld. AR reiterated the findings of the impugned order.

9. After considering the submissions of both the parties and perusal of the material on record, we find that Section 11D is not applicable in the present case as no amount representing as duty of excise has been recovered from the buyer. Further, we find that on the invoices issued after 24.01.2004 after date of availing of area based exemption, the appellant has subsequently mentioned on the invoices "Exemption Notification No. 50/03-CE dated 10.06.2003 and against the column of "B.E.D @ 16% the word "exempted" specifically mentioned which clearly shows no amount has been charged from the customers representing as duty of excise. This issue has been considered by the Division Bench of this Tribunal in the case of Pitambar Coated Paper Ltd. Vs. Commissioner of Central Excise, Jaipur-I reported in 2003 (152) E.L.T. 392(Tri.-Del.). It is pertinent to refer to the relevant findings of the Tribunal which is reproduced here in Below:

6. No doubt, the appellants availed the benefit of exemption Notification No. 6/2000-CE dated 01.03.2000 during the period 01.03.2000 to 31-8-2000 and cleared the goods on the same price on *which they were clearing earlier to that period. They did not reduce the sale price of the goods. But, in our view, no presumption that they still collected duty from the buyers or that the duty was inbuilt in the price charged by them from the buyers at the time of sale of the goods to them, could be drawn. The appellants have placed on record the copies of the invoices issued by them during the disputed period when they were avalling the exemption benefit under the notification No. 6/2000-C.E. and we find that the column of BED had been left blank. In another words, no BED was charged by them from the buyers while selling the goods to them. No presumption that duty was inbuilt in the cum-duty price recovered by them from the buyers, could be drawn, as whenever they had charged the duty, they had shown it in the Invoices against the column BED as we find from the copies of some of the invoices placed on record.*

"7. Similarly, the fact that the appellants continued to sell their goods to the buyers at the same price at which they were selling earlier, even during the disputed period when they availed the duty exemption under the above referred notification, could not also warrant a presumption that the price recovered by tham from the buyers included the duty element also. In their Invoices against the duty column, they had shown nil recovery of duty by putting the X. The ratio of law laid down by the Apex Court in ACCE v. Bata India Ltd.1996 (84) ELT. 164 and by Karnataka High Court in Mangalore Chemicals & Fertilizers Ltd. v. ACCE-1986 (23) E.LT. 48, referred by the learned Commissioner in the order, do not advance the case of the department for want of evidence to prove that the price charged by the appellants from the buyers represented the duty also. The judgments in both these cases had been rendered prior to the insertion of Section 11D. Sub-section (1) of said section enacts that

every person who had collected from the buyers of the goods, the amount in any manner as representing excise duty, shall forthwith pay the amount to the credit of the Government. For Invoking the provisions of this section it is quite evident that it must be proved that the amount had been collected by the assessee from the buyer of the goods as representing excise duty. But there is not an iota of evidence on record that in the instant case, the appellants had Collected the amount from the buyers as representing excise duty. As observed above, in their invoices against column BED, they had put a X which indicated that they had not accepted any amount representing as excise duty from the buyers. Whenever, they had collected earlier to the availment of the exemption from payment of duty under the notification in question, they had separately shown the rate of duty recovered from the buyers of the goods, against the column BED. This fact is quite evident, as discussed above, from the copies of the invoices placed on the record by the appellants. Therefore, the provisions of Section 11D of the Act could not be Invoked against the appellants.

8. In the light of the discussions made above, the impugned order of the Commissioner cannot be sustained and the same is set aside. The appeal of the appellants stands accepted with consequential relief."

10. Further, in the case of Shree Shyam Pulp and Board Mills Ltd cited (Supra), the Division Bench of the Tribunal by relying upon the Pitambar Coated Paper Ltd. cited (Supra) has allowed the appeal of the appellant and held that recovery under Section 11D is not sustainable. Further, in the case of Everest Industries Ltd. cited (Supra), examined the provision of Section 11D of the Central Excise was examined prior to 2008 because the period involved in the present case is from 24.01.2004 to 31.04.2004 and the Tribunal

after examining the provisions of Section 11D prior to 2008 has held in para 9 as under :

9. We have considered the arguments from both sides and perused the records. Section 11D of the Central Excise Act required during the day as period of every person who is liable to pay duty under this Act or Rules and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods in any manner and he can excise to forthwith pay on which amount to the Central Government. Evidently, it did not cover the goods which exempt from duty but on which manufacturer collects some amount as representing Central Excise duty. This lacuna was collected introduction of Section 11D(1A) in 2008. The Budget Speech of the Hon'ble Finance Minister for the year referred to above clarifies that prior to 2008 this Section 11D did not cover those goods where the goods were who exempted or were chargeable to Nil rate of duty as in the present case. The amendment in 2008 has not been given retrospective effect. For this reason, the liability to Section 11D does not apply to the appellant's goods because undisputedly. The products were fully exempted from payment of duty. A plain reading of Section 11D also shows that what is required to be deposited in the Government exchequer is any amount collected as representing excise duty. In this case there is nothing on record that they have collected any amount as representing excise duty. They have collected a consolidated amount stating it as inclusive of Excise dutles. No specific amount was shown as representing excise duty. On this ground also, the demand does not sustain. We have carefully *considered the arguments of Ld. D.R. that they should have reduced the price and passed on the benefit of exemption notification to customers which they have not. It is true, from a plain perusal of the records that the appellant has resorted to profiteering by not passing on the benefit of the exemption notification to the customers. theary enjoyed the exemption notification, they have not reduced the prices to customers thereby enhancing their own profits However, non-profiteering is not what is contemplated in Section 11D of the Central Excise Act. Therefore no demand can be raised or sustained on this ground. Unless any amount is specifically collected representing as excise duty, Section 11D cannot be invoked. Whenever duties are reduced or exempted, a shrewd businessman can pocket the windfall by not reducing his prices and such profiteering is not covered by Section 11D.*

10. As regards the limitation, we find that no statutory period is prescribed for recovery in Section 11D but Punjab and Haryana High Court in the case of CCE, Chandigarh Vs. Hari Concost Pvt. Ltd after relying upon the judgment of the Hon'ble Apex Court in the case of CCE Vs. Bharat Sanchar Nigam Ltd. has held that maximum period of five years can be considered as reasonable period for effecting the recovery but in the present case the recovery is sought to be affected after the expiry of more than five years.

11. In view of the our discussion above, we are of the considered view that impugned order is not sustainable in law and therefore we set aside the same by allowing the appeal of the appellant, with consequential relief, if any, as per law.

(Order pronounced in the open court on 28.06.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Kailash