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

Appeal No.E/EH/154/2012, E/170/2012

[Arising out of Order-in-Original No.14/2011 (Commissioner) dt.28.11.2011 passed by the Commissioner of Customs & Central Excise, Salem]

Bannari Amman Sugars Ltd. Appellant

Versus

Commissioner, Central Excise, Salem. Respondent

Appearance:

Shri P.C.Anand, C.A.
For the Appellant

Shri A.Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 13.4.2018

Per Bench

FINAL ORDER No. 41752/2018

1. Brief facts are that the appellants who are manufacturers of sugar had commenced production during 1986 and were registered under the Central Excise Department for manufacture of sugar. The Central Government had given certain incentive schemes during 1987, whereby certain newly set up sugar industries were allowed to pay the excise duty as applicable to levy sugar but however could collect duty

at the normal rate and retain the difference between levy sugar and normal sale sugar.

1.1 Thus in 1989, notification No.14/89-CE was in vogue and subsequently amended vide Notification No.103/89 wherein a concessional rate of BED of Rs.34/- and AED of Rs.37/- per quintal was prescribed for free sale sugar / normal sale sugar. At the same time for, the levy sugar the rates of duty were BED Rs.17/- and AED Rs.21/- per quintal. This resulted in a differential saving of total sum of Rs.33/- for those units which had the benefit of the incentive scheme. The differential amount was to be used by the new sugar industry in payment of the loans taken for establishing such industry; consequently, for each sugar season the details of such differential collections were to be got certified by an independent chartered accountant and used for repayment towards the loan outstanding from the financial institution with reference to the new projects.

1.2 Section 11D was introduced with effect from 20.9.1991, and the section specified that when any amounts were collected as excise duty and not subsequently remitted to the Government, a Central Excise Officer may direct through a show cause as to why the said amount should not be recovered from the central excise assessee. With the new section 11D coming into force, the excise department issued various notices to the sugar industries proposing to recover the incentive alleging that it is excise duty.

1.3 The appellant was also issued Show cause notices for various period from 20/9/1991 to 31/1/1994 proposing to demand the extra money collected by them under the guise of excise duty invoking Section 11D of the Central Excise Act. After due process of law, the original authority confirmed the demand of Rs.1,49,99,292/- being the duty collected as incentive by the appellants for the period 1/10/1991 to 31/1/1994. Hence this appeal.

2. On behalf of the appellant, the Ld.Consultant, Sh.P.C.Anand submitted that the excise duty applicable for levy sugar is always low, when compared to the excise duty for free sale sugar. By availing incentive scheme of 1987, the appellant factory can have the entire production as free sale sugar for the first eight years and as per, the notification appellant had the benefit of clearing the sugar under lower excise duty. There was thus additional realisation by way of cost of sugar, which were sold to the customers. This additional realisation was to be accumulated by the sugar factory under the scheme to enable the factory to generate funds for repayment of loans from Financial Institutions related to the sugar projects. Thus excise duty paid was Rs.38/-, while the sugar factory was eligible to retain Rs.33/- per quintal as incentive. The scheme further envisaged that the sugar factory would have to submit "Utilisation Certificate" annually from Chartered / Cost Accountant in respect of each sugar season giving details of the incentives collected under the scheme and further repayment towards the loan outstanding from the financial institution with reference to the new projects.

2.1 Accordingly, the appellant company provided the various certificates for the said period giving details of the incentives collected and the subsequent repayment of the new project loan. Further, it is a fact that the appellant unit during the relevant period issued gate passes only specifying the actual excise duty paid to the Excise

Department. In the commercial invoice which was also raised, details were given of the value of the goods, the incentive element collectable by the sugar factory, the excise duty in terms of the gate pass and other commercial details such as freight etc. The invoices raised from 2.5.1992 had the element of incentive added to the value of sugar sold.

2.2 In terms of Section 11D, the only representation made by the appellant towards the duty payment would only be, in the gate passes in which the exact amount of duty paid to the department was mentioned. No additional amount was realised and mentioned as excise duty. The additional amount realised under the scheme was clearly shown as incentive. In fact this is admitted in the show cause notice, wherein it is stated that Rs.33/- is collected in the form of incentive.

2.3 He submitted that the Tribunal vide Misc.O.No.40167/2013 dt.8/1/2013 directed the appellant to produce the relevant documents to the concerned Divisional Officer and also directed the Divisional officer to examine these documents and submit a report as to whether the amount is collected as excise duty or otherwise. He adverted to the report filed by the Assistant Commissioner of the respective Division dated 15.4.2013. The appellant had produced all the documents for the disputed period before the Officer, as directed by the Tribunal and after verification, it has been categorically stated that in all the invoices raised for the sale of sugar, the assessee has shown the collection of the amount of Rs.33/- as 'incentive' upto the period 30/4/1992. That after 30/4/1992, it is reported that though there is clearance of sugar from incentive free sales quota, in the invoices there is no mention about collection of incentive from the customers. Instead the appellant had thereafter added the said amount in the cost of sugar. Thus the appellant had added incentive in the cost of incentive free sugar. The appellant had thus not collected anything in the guise of excise duty. Whatever extra amount realised was only as incentive and later as cost of sugar. Section 11D can be invoked only when the amount is collected representing excise duty. The department is of the view that the appellant is liable to pay the incentive collected as well as the extra cost of sugar collected from the customers. That such payment is not sustainable by invoking Section 11D of Central Excise Act, 1944. He relied upon the decisions in the case of ***Kisan Sahkari Chini Mills Ltd. vs. Commissioner of C.Ex., Meerut-II, 2011 (273) E.L.T.289 (Tri. – Del.)*** and ***Shakthi Sugars Ltd. vs. Commissioner of C.Ex., Bhubaneswar-I, 2007 (217) E.L.T.222 (Tri. – Kolkata).***

3. The Ld.AR, Sh.A.Cletus supported the findings in the impugned order. He submitted that the appellant have collected incentive of Rs.33/- per quintal upto 30/4/1992 by raising invoices. This is in addition to the excise duty collected. After 30/4/1992 till 31/1/1994, they have added the said incentive of Rs.33/- to the cost of sugar. He explained that when normal free sugar was sold at a cost of Rs.810/-, the appellant cleared incentive free sugar at Rs.843/-, which gives clear indication that Rs.33/- has been added to the cost of sugar. Thus the appellants have collected the extra cost as incentive / excise duty and are liable to deposit the same to the Central Government. It was also argued by him that the appellants had approached the Hon.High Court of Madras by filing Writ Petition Nos.6288 and 6295 of

1994. The Hon.High Court vide judgment dated 22.7.2010 had opined that if the appellants had collected anything in the nature of excise duty, then they are liable to deposit the same. Hence the confirmation of duty payment is legal and proper.

4. Heard both sides.

5. On perusal of records, we find that at the time of hearing the application for waiver of pre-deposit, the appellant had argued that all the invoices including gate passes are available at their Corporate Office and the same can be examined by the Officers concerned which would establish their case. The appellant had contended that nothing has been collected by them representing excise duty. The Tribunal thus directed the appellant to furnish all documents to the Divisional Office within one month and directed that the same be examined and a report filed before the Tribunal. We have perused the report of the Assistant Commissioner dt.15/4/2013. It is brought out from the report that upto 30/4/1992, the appellants have collected the amount of Rs.33/- as incentive. Nowhere in these documents, it is collected as excise duty. After such date, they have added the amount in the cost of sugar. Thus after 30/4/1992 till 31/4/1994, the same is collected as part of the cost of sugar and not as incentive or excise duty. From the report, it is brought out that the appellants have not collected any amount representing excise duty, other than the excise duty which they have already paid to the Government. The demand has been raised alleging that the appellants have collected the amount representing excise duty. As already stated, the invoices/gatepasses show otherwise. The Tribunal in the case of ***Shakthi Sugars Ltd.*** as well as ***Kisan Sahkari Chini Mills Ltd.*** (supra) has held that the

amount collected as incentive cannot be recovered u/s.11D of Central Excise Act. When the appellants have not collected any amount representing excise duty, we are of the considered opinion that the demand invoking Section 11D cannot sustain. The impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

10. The Early Hearing petition filed by the appellant is disposed accordingly, as the appeal itself is taken up for hearing and disposed.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

vsr