CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALSOUTH ZONAL BENCH CHENNAI

S.No.	Appeal No.	Appellant	Respondent
1.	E/456/2010 E/CO/64/2010	CCE Coimbatore	Surya Prakaas Foundry
2.	E/493/2010 E/CO/40893/2017	CCE Coimbatore	Surya Prakass Alloys
3.	E/494/2010 E/CO/66/2010	CCE Coimbatore	SreeSuryajothi Alloys
4.	E/495/2010 E/CO/67/2010	CCE Coimbatore	M. Kanagarajan
Arising out of Order-in-Appeal No.68/2010-C.Ex dt. 07.05.2010 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore			

Appearance :

Shri M. Arjun Raghavendra, DC (AR)
For the Appellant

Shri S.Durairaj, Advocate
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision :06.06.2018

FINAL ORDER No. 41832-41835 / 2018

Per Madhu Mohan Damodhar

The facts of the case are that M/s.Surya Prakaas Foundry (hereinafter referred to as SPF -1st respondent), are manufacturers of unmachined castings and were availing SSI Notification No.8/2003-CE. From the investigations carried out by departmental officers, it appeared that there were two other adjoining units by the name and style of Surya Prakass Alloys (hereinafter referred to as SPA – 2nd respondent) and Sree Suryajothi Alloys (hereinafter referred to as SSA – 3rd respondent), and that there was no manufacturing activity taking place or no machinery / furnace in the other two units. Few labour delivery challans were found during the course of visit and were taken over by the officers. A statement was recorded from one Sri M. Kanagarajan, Managing Partner of SPF (4th respondent) on 08.02.2008. Investigations were also extended to seven buyers of the castings. From the investigations, it appeared to the department that these three units were not independent and that SPA and SSA were only dummy units of SPF floated for the purpose of availing unintended SSI exemption for all three units.

It appeared that there was no production facility and no machinery available at SPA and SSA. Department took the view that the Profit & Loss Account for the year 2007-08 contained labour charges received for the year 2006-07, which is not permissible as per the IT Act, hence it appeared that labour charge bills were fabricated to evade Central Excise duty.

In the statement of Shri M. Kanagarajan recorded on 08.02.2008, it had been admitted that goods manufactured at SPF were cleared under cover of sales invoices of SPF, SPA and SSA; that two other units neither had any manufacturing activity nor any machinery in the two units; that SPA was used as a godown and SSA as office premises; that to escape from payment of Central Excise duty, the clearances had been split in the name of these three units.

From the statements recorded from the seven buyers, it emerged that these buyers had placed orders only with Shri M. Kanagarajan; that however supply order of castings would be sent to them in the name of any of these three units.

It also appeared that delivery challans issued by the suppliers were not in conformity with Central Excise Rules.

2. Based on these findings, show cause notice dt. 24.02.2008 was issued to all these four respondents, inter alia proposing recovery of an amount of Rs.49,33,786/- being the Central Excise duty alleged to have been evaded with interest thereon. Imposition of penalty was also proposed on these respondents, under Rule 25 of the Central Excise Rules, 2002 and under Section 11AC of the Central Excise Act on SPF and under Rule 26 ibid on the other respondents. In

adjudication, the original authority vide an order dt. 20.05.2009 dropped the proceedings initiated in the said notice, and only imposed a penalty of Rs.2000/- on SPF under Rule 25 for contravening the provisions of Rule 9 of Central Excise Rules, 2002. Department preferred an appeal before the Commissioner (Appeals), who vide impugned order No.68/2010-CEdt. 07.05.2010 upheld the order of the lower authority and rejected the department appeal. Aggrieved, Revenue is before this forum.

3. Today, when the matter came up for hearing, on behalf of the appellant, Ld. A.R. Shri Arjun Raghavendra reiterated the grounds of appeal. He also made oral submissions which can be summarized as under :

i) It can be noted from the statements recorded from the landlords of the premises occupied by SPA and SSA that in respect of SPA, the room occupying the space is only 121 sq. ft which could not have been able to store the raw material, machinery and also perform the manufacturing activity; in respect of SSA, the landlord has stated that as per the agreement, space was let out for business activities.

ii) With respect to observation of the Commissioner (Appeals) that no flow back was established, it is submitted that in a situation where all finished goods are cleared from one single manufacturer flow back of funds need not be established. Further, there are sufficient other corroborative evidence has been made out by the department to prove that SPA and SSA did not have any facility to manufacture castings and that they were only dummy units of SPF.

iii) Mr.Kanagarajan (4th respondent) is the main entity who is tied to all the three units.In the mahazardt. 28.8.2008 and in the statement dt. 8.2.2008 he has admitted that there was no manufacturing activity at SPA or SSP, hence the statement dt. 18.08.2008 where earlier admissions have been contradicted, has been made after a lapse of 4 months on legal advice and should be construed only an after thought.

iv) The Certificate of Registration issued by Commercial Tax Department bears TIN number effective from 1.1.2007. However, SPA purportedly informed the department about this TIN vide their letter dt.28.05.2005 which is an impossible thing.

v) From the Delivery Challans and invoices it is seen that 8 to 18 tons were transported through a single delivery challan which is not possible to be done on one bullock cart. This glaring anomaly was not considered by the adjudicating authority and also by Commissioner (Appeals).

vi) With regard to the contention raised by the respondents in their synopsis that appeal by the department against Commissioner (Appeals) was only in respect of SPF. It is submitted by it had added names of other three respondents on 18.11.2009. This aspect has been analyzed by the Commissioner (Appeals) in para 4.2 and 4.18 of the impugned and the appellate authority has considered the appeal made by the department as having been done against all the four respondents.

vii) With regard to the contention raised by the respondents in the synopsis that the grounds of appeal have traversed beyond the SCN, these are only technical objections raised by them, however no substantial objection has been raised in respect of the merits of the matter.

4. On the other hand, on behalf of the respondents, Ld. Counsel Shri S.Durairaj made oral and written submissions which can be summarized as under :

i) The department had filed only one appeal in respect of SPF to the Commissioner (Appeals) against order of original authority. However, only by way of a letter dt. 18.11.2009, the department sought to add names of other three respondents. The acceptance of this request by the Commissioner (Appeals) is bad in law and the respondents have raised this aspect in the Memorandum of Cross Objections filed on 28.09.2010 before the Tribunal in para 3.0 therein. Ld.Advocate draws our attention to the ratio of the Tribunal decisions in *CCE Vs Chokhani Silk Mills (P) Ltd*. - 2013 (290) ELT 710 (Tri.-Mumbai) and *CCE Vs Mahavir Group of Companies* - 2014 (313) ELT 427 (Tri.-Mumbai. Placing reliance on these decisions, ld. counsel contends that Commissioner (Appeals) could not have added or implicated the respondents to the main appeal when there was no appeal filed against the other three respondents in the E.A-2 filed by the department. So also, when an allegation has been made about the unit being ‘dummy unit’ of another unit, the appeal should have been filed against all the units whose clearances were sought to be clubbed and not just one unit. Ld. Advocate submits that various admissions made by Shri M. Kanagarajan in his initial statement dt. 08.02.2008 were contradicted and denied in his second statement dt.

18.06.2008. He pointed out that the second statement was recorded by the very same officer of the department who recorded the first one, hence this would have the effect of totally retracting any admission that may have been made in the first statement. The grounds of appeal in paras H, K, L & M have brought up contentions which should have been raised at the stage of SCN by alleging common funding, labour charge transactions and so on. Ld. Advocate placed reliance on the ratio of the judgement of the High Court of Gujarat in *Commissioner Vs Reliance Ports and Terminals Ltd*. - 2016 (334) ELT 630 (Guj.) wherein inter alia, it was held that SCN being foundation of the demand, the OIO and subsequent orders by the appellate authority would be confined to the SCN, hence the question of examining the validity of the impugned orders thereto on grounds which were not the subject matter of SCN would not arise.

5. Heard both sides and have gone through the facts.

6.1 We first intend to address the technical objections raised by the respondents against the appeals filed by the department. Ld. Advocate for respondent has pointed out that against order dt. 20.05.2009 dropping further proceedings initiated in the SCN against the four respondents, only one appeal had been filed by the department to the Commissioner (Appeals) in respect of M/s.Surya Prakash Foundary (SPF). Only by way of a letter dt. 18.11.2009, the department made a request to add the names of other three respondents. Ld. Advocate has argued that acceptance of this request by Commissioner (Appeals) is bad in law and has placed reliance on more than one Tribunal decisions. From the facts on record, we find that the department had indeed initially filed appeal only in respect of SPF. In para 4.2 of the impugned order, the Commissioner (Appeals) has justified the addition of the remaining three respondents by way of the subsequent letter from the department, on the reasoning that "mere omission of the names of the respondents in column 2 of the application at the time of filing, does not vitiate the proceedings in deciding the main issue". He also held that it is a mere procedural omission which was made good subsequently. We find that the Tribunal in the case of *CC (Export), Mumbai Vs Chokhani Silk Mills Pvt. Ltd. -* 2013 (290) ELT 710 (Tri.-Mumbai) in respect of a departmental appeal had held that department could not have added or impleaded the respondents to main appellant, against whom no appeal was filed. The relevant portion of that Tribunal decision is reproduced below :

> "**4.** After hearing both sides and considering the decision cited before us, we observe that by filing this application the appellants have chosen a route to implead the respondents by this application as respondents to their main appeal which is not permissible in law as they have not filed any appeal against the intended respondents. Moreover, they have filed the main appeal against the main appellant, i.e., M/s. Chokhani Silk Mills Pvt. Ltd., in April, 2008 and they have made this application in November, 2010. The case laws relied upon by the ld. DR are not relevant to the facts of the case as in those cases, a composite appeal was filed against all the respondents, but in this case no appeal has been filed against the intended respondents, which are intended to be impleaded as respondents. Moreover, the case laws cited by the ld. Advocate is applicable to facts of this applicable as is in the case of *L.P. Shenoy* (supra), wherein this Tribunal has considered the issue and observed that on later stage, the change of cause title is not permissible."

6.2 We further find that the Chennai Bench of the Tribunal in the case of *CCE Chennai Vs Arihant Micro Computers Pvt. Ltd.*– 2006 (204) ELT 350 (Tri.-Chennai) which decision has been affirmed by the High Court of Madras as reported in 2009 (237) ELT 663 (Mad.). The primary objection of the respondent on this score will therefore succeed.

6.3 The other technical objections raised by the respondent is that Revenue in paragraphs H, K, L, M of their grounds of appeal have tried to put forth grounds which were not at all raised in the SCN and hence the appeal on these grounds cannot be entertained. On going through the grounds of appeal in pages 62 to 67 of the appeal book, we find that the department has indeed brought forth the grounds which were not part of the SCN. In Ground “H”, it has been argued by the department that flow back of funds need not be established. So also in “L”, the department has sought to argue that the declaration dt. 25.08.2008 is fabricated, that there is no entry for its receipt in the inward corresponding register etc. In “M”, an inference has been made from the non-deduction of TDS on account of labour charges by SPF in 2005-06 and 2006-07 but was included only in 2007-08, to argue that the labour charge bills had been fabricated. In “N”, it is argued that 8 to 18 tons of goods which were said to have been transported on a single delivery challan would not have been possible through bullock carts. In our view, these grounds may, possibly, have been made on the basis of new findings or inferences by the department. Nonetheless, the undeniable fact is that these charges or arguments were not at all raised in the SCN including that in the grounds of appeal at the stage of appeal before the Tribunal is nothing but belated back door attempt to add to the charges / allegations made out in the SCN. This is surely such an action cannot be supported by law. The Ld. Advocate has correctly cited the case law of *Reliance Ports and Terminals Ltd.* - 2016 (334) ELT 630 (Guj.). The Hon'ble High Court of Gujarat in that judgement has held that SCN is the foundation of demand under the Central Excise Act and Order-in-Original and subsequent orders passed by appellate authorities under the statute would be confined to the SCN, hence question of examining the impugned on grounds which were not subject matter of the notice would not arise. The relevant portion of the judgment is reproduced below :

> **"9.** On a conjoint reading of the show cause notice issued to the assessee and the questions proposed in this appeal, it is evident that the issues raised in the questions proposed do not find place in the show cause notice. From the averments made in the memorandum of appeal and the grounds raised therein as well as on a perusal of the impugned order passed by the Tribunal, it appears that the appellant does not dispute the validity of the order of the Tribunal on the grounds decided by the Commissioner, but on grounds, which were not subject matter of the show cause notice. In the show cause notice, the assessee was not called upon to state as to whether the services of "Consulting Engineers" and "Banking and other Financial Services" are "input services" of the respondent or as to whether the capital goods were used for providing "output services" provided by the respondent viz. "Port Services", etc. Evidently therefore, in the present appeal, the appellant seeks to challenge the impugned order passed by the Tribunal on grounds which were never subject matter of the show cause notice. Under the circumstances, in the light of the settled legal position as emerging from the above referred decisions of the Supreme Court, that the show cause notice is the foundation of the demand under the Central Excise Act and that the order-in-original and the subsequent orders passed by the appellate authorities under the statute would be confined to the show cause notice, the question of examining

> the validity of the impugned order on grounds which were not subject matter of the show cause notice would not arise."

The above judgment was relied upon by the Tribunal in *Dhananjay Industrial Engineer (P) Ltd*. *Vs CCE Mumbai* - 2017 (52) STR 320 (Tri.-Mumbai) and in *S.D. Fine Chem Ltd*. *Vs CCE, Cu & ST Vadodara* – 2017 (354) ELT 412 (Tri.-Ahmd.).

7. In the event, we find merit in the technical objection by Ld. Advocate. Revenue appeals are devoid of merits by putting forth grounds which are beyond the scope of the SCN. Thus even at the threshold stage, we find that the Revenue appeals will fail the test of *ratio decidendi* as laid down by higher appellate forums. The appeals are therefore devoid of merits and requires to be rejected, which we hereby do. We note that the main edifice of the allegation brought out in the SCN is the statement of one Mr. M. Kanagarajan, Managing Partner of the SPF recorded on 08.02.2008. However subsequent to this, another statement dt. 18.06.2008 was recorded from Shri M.Kanagarajan, by the same officer who had recorded the first statement. In the second statement, Shri M.Kanagarajan has virtually retracted all the admissions made in the first statement. Viewed in this context, and especially when the admissions and SCN against the main appellant has been dropped by the original adjudicating

authority, we are unable to fathom how a penalty can be imposed on the very same appellant. For these reasons, the prayer made by the respondents through their cross objections is allowed.

8. To sum up, -

(i) Revenue appeals are dismissed.

(ii) Memorandum of cross objections filed by respondents are allowed.

Appeals disposed of on above terms.

(dictated and pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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