IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Appeal Nos. E/00460/2009, E/00540-00542/2009

Sl. No.	Appeal No.	Appellant	Respondent
1.	E/00460/2009	M/s. Emkay Engineering Works	The Commissioner of Central Excise, Chennai-II Commissionerate
2.	E/00540/2009	The Commissioner of Central Excise, Chennai-II	M/s. Emkay Engineering Works
3.	E/00541/2009	The Commissioner of Central Excise, Chennai-II	M/s. Selvanayaki Scaffolding Systems Pvt. Ltd.
4.	E/00542/2009	The Commissioner of Central Excise, Chennai-II	Shri. R. Chinniah, (Director, Selvanayaki Scaffolding Systems Pvt. Ltd.)
Arising out of Order-in-Original No. 05/2009 dated 12.05.2009 (passed by the Commissioner of Central Excise, Chennai-II Commissionerate)			

Appearance:-
Ms. P. Srija, Advocate
for the Appellant

Shri. B. Balamurugan, AC (AR)
for the Respondent

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

Date of Hearing/Decision:**11.07.2018**

Final Order No. 42422-42425 / 2018

Per Shri. Madhu Mohan Damodhar,

Out of these four appeals, **one** appeal has been filed by Emkay Engineering Works (hereinafter referred to as the 'assessee') and

three appeals filed by the Department (one against assessee and two against M/s. Selvanayaki Scaffolding Systems and Shri. R. Chinniah respectively).

1.1 Today, when the matter came up for hearing on behalf of the appellants, Ld. Advocate Ms. P. Srija made a request for adjournment of the matter. We are not however able to appreciate any further request for adjournment since the matter has already been rolling on board for number of years primarily for the reason that appellants have been seeking adjournments. In the last one year itself, appellants have sought adjournment on seven occasions. The dates of hearings and the notings in the cause sheets are reproduced below:

Sl. No.	Date of Hearing	Order
1.	23.08.2017	Adjourned on request of Counsel for appellant to 05.10.2017
2.	05.10.2017	Adjourned on request of Counsel for appellant to 17.11.2017
3.	17.11.2017	Adjourned on request of Counsel for appellant to 22.12.2017
4.	22.12.2017	Adjourned on request of Department to 08.02.2018
5.	08.02.2018	Adjourned on request of Counsel for appellant to 04.04.2018
6.	04.04.2018	Adjourned on request of Counsel for appellant to 03.05.2018
7.	03.05.2018	Adjourned on request of Counsel for appellant to 11.07.2018

1.2 In the circumstances and also considering that the appeal is of the year 2009, we consider it proper to take up the matter for final hearing without acceding to the request for further adjournment.

2. On behalf of the assessee, Ms. P. Srija, Ld. Advocate, argued the matter. She reiterates the grounds of appeal made in the appeal filed by them. In particular, she put forth the following submissions:

(i) The adjudicating authority has not accepted the submissions of assessee with regard to job work carried out by M/s. G. Badri Welding Contractors without any proper justification. The Ld. Advocate draws our attention to para 58 of the impugned order to point out that the adjudicating authority has not considered the contention of assessee that M/s. G. Badri Welding Contractors had done job work for them in spite of affidavits and documents produced by them, only on the grounds that owner of the premises did not cooperate with the Department in ascertaining the factual position. The Ld. Advocate submits that such a ground cannot have any legal basis for denying their contention.

(ii) The adjudicating authority has accepted the affidavits filed by Shri. Karunakaran of M/s. T. Karunakaran & Co. However, the affidavit filed by Shri. Gnanasekaran of M/s. G. Badri Welding Contractors has been burshed aside. Cross-examination of two of the four persons requested has not been granted by the Commissioner.

(iii) Ld. Advocate takes us to para 52 of the impugned order to point out that the adjudicating authority has denied permission for cross-examination of the remaining two persons only for the reason that "they had not furnished the reasons as to why they need Chief examination". Ld. Advocate submits that this was not the case and hence, this finding is incorrect.

(iv) Ld. Advocate submits that in case these contentions and averments of assessee had been properly considered by the adjudicating authority, even the remaining demand of Rs. 28,01,204/- would have been liable to be dropped.

(v) She also drew our attention to para 54 of the impugned order to point out that assessee had produced all documents such as delivery challans, repair bills, etc., for the movement of raw materials to M/s. Selvanayaki and it was also found by the adjudicating authority that they had returned the scaffolding equipments on job charge basis and that M/s. Selvanayaki have also raised labour charges on assessee.

3.1 On the other hand, Ld. AR Shri. B. Balamurugan, on behalf of the Revenue, reiterates the grounds of appeal, in particular, paras 11 to 18 thereof. The Ld. AR further draws our attention to para 63 of the impugned order where the adjudicating authority has worked out reduced duty liability of Rs. 5,64,362/- for 2004-05, Rs. 8,10,357/- for 2005-06, Rs. 14,26,485 for 2006-07 totally amounting to Rs. 28,01,204/- against corresponding demands made in the Show Cause Notice of Rs. 2,15,52,034/- proposed to be demanded in the Show Cause Notice dated 07.05.2008. The investigations had clearly revealed that assessee had indulged in removing excisable goods from their factory under dispatch notice without accounting such removals; in certain cases issuing central excise invoices subsequently, but not accounting the same also. In certain other cases, invoices were issued , several raw materials were shown whereas under the said invoices, only final products were manufactured and supplied. In certain cases, it was noticed that invoices/dispatch notices undervalued 50% of the actual price charged. So also, excisable goods manufactured by them had been removed under the labour invoices of M/s. Selvanayaki. So also, excisable goods manufactured by assessee were removed in the guise of trading activity and the same had been manufactured at the job worker premises.

3.2 Taking all these aspects into account, it has clearly emerged that assessee had adopted this *modus operandi* to keep the value of clearances within the SSI exemption limits, with the sole intent of evading rightful excise duty that was required to be discharged to the exchequer.

3.3 With regard to the submission of assessee that they had got job work done though M/s. Selvanayaki at the time of visit of the officers, no capital goods had been found at the said premises. Only at the time of adjudication, fabricated documentary evidence in the form of delivery challans were produced to show as if they had welding machines, drilling machines, which had been discharged for service and returned. The acceptance of such delivery challans on their face value by the adjudicating authority is not correct in law.

3.4 It is also borne out by investigation that M/s. Selvanayaki did not have any labour force whatsoever to manufacture the goods that was claimed to have been done. Neither did they have any power connection. Hence, the claim of assessee that M/s. Selvanayaki was doing job work for them is not supported by actual facts. The appellant had removed manufactured scaffolding equipments in the guise of raw materials which is proved by evidences obtained from the end of a number of buyers. However, without any counter-evidence or proper analysis of facts and circumstances, adjudicating authority has rejected this allegation in the Show Cause Notice even when it was proved with discharge note/ lorry receipt and ledger extracts obtained from the buyer's end.

3.5 Coming to the other two appeals(M/s. Selva Nayaki Scaffolding Systems Pvt. Ltd. and Shri. R. Chinniah), by no stretch of imagination can it be concluded that M/s. Selvanayaki Scaffolding Systems Pvt. Ltd. and Shri. R. Chinniah have not done any act or omission which will render them to penalty under Rule 26 of the Central Excise Act, 2002. Therefore, the conclusion of the adjudicating authority in para 65 of the order that no penalties on these two persons are warranted, is not correct in law. The Ld. AR drew our attention to para 20 of the grounds of appeal to highlight that Shri. R. Chinniah, Director of M/s. Selvanayaki and proprietor of M/s. Emkay Engineering had played a major role in the activities of removal of excisable goods and hence penalty under Rule 26 ibid. is very much liable.

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

5.1 From para 54 of the impugned order we find that the Ld. Adjudicating authority, on the one hand, has prejudged the matter by his "finding" that the invoices have been able to substantiate the claim by submitting documents of movement of goods showing that raw materials were supplied by assessee on behalf of the buyers. At the same time, in the same paragraph, the adjudicating authority also takes note that the documents retrieved by investigating agency were returned to the noticee after two years and that no investigation was conducted with regard to those papers. We are unable to fathom that such a peremptory conclusion has been drawn by the Commissioner, especially when the Show Cause Notice has clearly relied upon such documents only to establish the allegations against the assessee and the other appellants herein.

5.2 Similarly, in para 53, the adjudicating authority, with regard to the allegation that M/s. Selvanayaki did not have facilities of shearing and cutting, has accepted the defence submissions that there was no charge for the shearing and cutting machines since these preliminary operations were done by “some other job workers” of the noticee. On such an unsubstantiated submission, the adjudicating authority has concluded that “noticee had succeeded in proving that M/s. Selvanayaki had the necessary infrastructure to manufacture”.

5.3 We are also unable to fathom how the adjudicating authority has accepted an affidavit submitted by M/s. T. Karunakaran & Co. and held that the same was conclusively in favour of the assessee. Although in para 58 a similar affidavit and documents were produced, the adjudicating authority refuses to take cognizance of the same only on the grounds that “owner of premises did not cooperate with the Department in ascertaining the factual position”.

5.4 We, thus, find that the adjudicating authority has blown hot and cold on the various issues raised in the Show Cause Notice. The conclusions have been arrived at without reasoned analysis or findings. While in some cases, the adjudicating authority took into consideration various evidences produced by the concerned noticees, in many other cases the authority has rejected the allegations made in the Show Cause Notices without sufficiently countering them or giving reasons for their rejection.

6. In the circumstances, we are of the considered opinion that the interests of justice would be best served for all the appellants herein by remanding the matter back to the adjudicating authority for *de novo* consideration. All issues are kept open. In such *de novo* proceedings, the adjudicating authority will also take into account the contentions raised by the Ld. Advocate in para 2 above and by the Ld. AR in para 3 above. Both the assessee as well as the Department should be provided reasonable opportunity to present their case, including any additional submissions.

7. All these appeals are, therefore, disposed of by way of remand.

(Dictated and pronounced in open Court)

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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