

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

Appeal No.E/41565/2018

[Arising out of Order-in-Appeal No.158/2018 (CTA-II) dt.31.03.2018 passed by the Commissioner of Central Tax (Appeals-II) CGST & Central Excise, Chennai]

Alfred Berg & Co., (I) Pvt. Ltd.

Appellant

Versus

Commissioner of GST & Central Excise-II,
Appeals II, Chennai

Respondent

Appearance:

Sh.M.N.Bharathi, Advocate
For the Appellant

Shri L.Nanda Kumar, AC (AR)
For the Respondent

Per : Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Date of hearing : 4.12.2018

Date of pronouncement : 6.12.2018

FINAL ORDER No. 43003/2018

The appellants are engaged in manufacturing medicines. The allegation of the department is that they removed one input namely Ephedrine HCL on which MODVAT Credit to the tune of Rs.6,72,397/- was taken, in the guise of Ephedrine Tablets IP on payment of duty by raising invoices though they had not manufactured the same. Show cause notice dt.10/6/2003 was issued demanding duty alongwith interest on the inputs cleared as such and also proposing to appropriate the amount of Rs.2,87,986/- paid by them on 14/2/2000. After due process of law, the original authority confirmed the demand

alongwith interest and also imposed penalties. In appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. On behalf of the appellant, the Ld.Counsel, Sh.M.N.Bharathi submitted that the period involved is from 24.8.1998 to 24.3.1999. During this period, the erstwhile MODVAT Credit Rules were in force. As per 57 F of the said Rules, the appellant can remove the inputs as such on payment of duty equal to the amount of credit availed in respect of inputs. The appellant had already paid the duty which is seen from the invoices relating to the clearances made. He referred to Page 25 of the appeal paper book and argued that on all five invoices, the appellant had paid duty to the tune of Rs.4,08,901/-. On 14/2/2000, the appellant in order to buy peace with the department had paid an amount of Rs.2,87,986/-. Thus the total amount paid by the appellant is Rs.6,96,887/-. The demand is only Rs.6,72,397/-. The appellant has thus paid an excess amount of Rs.24,490/- and therefore the confirmation of demand cannot sustain. It is argued by him that Ephedrine Powder was the input and the appellant had cleared them as tablets by paying duty. Though the duty was paid on the items which were removed, the department has not taken into consideration this aspect. During the relevant period, Ephedrine was not a controlled substance coming within the purview of NDPS Act, 1986. It was later brought within the purview of the Act. The appellant having paid duty, the demand raised again cannot sustain. On penalty, he argued that since the appellant has furnished all invoices showing the payment of duty at the time of removal and much before the issuance of show cause notice, he pleaded that the

penalties may be set aside. That these would show that appellant is not guilty of suppression of facts with intention to evade payment of duty.

3. The Ld.AR, Sh.L.Nanda Kumar appeared and argued the matter. He submitted that the appellants had cleared the items to other persons as well as their Head Office, where no manufacturing activity was taken place. The invoices cannot be relied, as these are fake invoices. These documents cannot be accepted for payment of duty. The inputs having been removed as such in the guise of Ephedrine tablets, the demand and penalties imposed are legal and proper.

4. Heard both sides.

5. On going through the records, it is seen that the investigations were started on the premises of the diversion of controlled substances (Ephedrine) from the factory. The period involved is from 24.8.1998 to 24.3.1999. The said substance was notified as controlled substances vide SO 1296 (E) dt.28/12/1999 only. Thus the investigations had emanated on the premises stating that these are controlled substances falling under NDPS Regulations and was prolonged for reasons unknown. The Commissioner (Appeals) then vide Order- in-Appeal No.85/2004 dt.30/6/2004 has transferred the case to Call Book. There after the issue being only wrong availment of MODVAT Credit was taken up for adjudication.

6. The Show cause notice is highly vague and does not give the exact allegation. It is presumed to be alleged that appellant removed inputs as such without reversing the credit and has contravened provisions of 57F. But then it is also stated that inputs are removed as tablets. When the inputs are Ephedrine Powder, then the removal in the form of tablets will not be removal as such requiring reversal of credit. If they are removed as Ephedrine tablets after manufacture then these attract Central Excise duty. The appellants contend that they have paid the excise duty after raising invoices. For the total quantity alleged to have been removed appellants have paid central excise duty of Rs.6,96,887/- (Rs.4,08,901/- + Rs.2,87,986/-). From the facts narrated in the show cause notice, it is not clear whether the allegation is inputs were removed as such or whether Ephedrine tablets manufactured were removed without payment of duty. When Ephedrine Powder is the input, the allegation that they removed inputs as such in the guise of Ephedrine Tablets does not make any sense. However, from the records, it is made out that the appellants have paid the duty demand of Rs.6,72,397/-. Duty of Rs.4,08,901/- was paid on invoices and Rs.2,87,986/- paid by reversal of credit. Taking this aspect of payments into consideration, I am of the view that a further reversal of credit or payment of duty is not required. The amount already paid as above is to be appropriated by Revenue towards the duty demand.

6. The appellants have also prayed to set aside the penalties. When the amount of duty demand have been paid as per the invoices and credit has been reversed, the penalties imposed cannot be

sustained. The impugned order therefore requires to be set aside which I hereby do. The appeal is allowed with consequential relief, if any.

(pronounced in open court on 6.12.2018)

(Sulekha Beevi C.S)
Member (Judicial)

VSR