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

**Appeal No.: E/00421/2010 & E/00427/2010**
**Cross Application No.: E/CO/60/2010**

| Sl. No. | Appeal No. | Appellant | Respondent |
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| 1. | E/00421/2010<br>E/CO/60/2010 | The Commissioner of G.S.T. & Central Excise, Chennai North Commissionerate | M/s. Ashlok, Vyasarpadi Industrial Estate, Chennai – 600 039 |
| 2. | E/00427/2010 | M/s. Ashlok, Vyasarpadi Industrial Estate, Chennai – 600 039 | The Commissioner of G.S.T. & Central Excise, Chennai North Commissionerate |
| **Arising out of Order-in-Appeal No. 29/2010 (M-I) dated 29.03.2010 passed by the Commissioner of Central Excise (Appeals), Chennai** | | | |

Appearance:-
Shri. K. Veerabhadra Reddy, ADC (AR)
for the Appellant
Shri. S. Venkatachalam, Advocate
for the Respondent
*[& vice versa]*

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

Date of Hearing/Decision: **15.11.2018**

**Final Order No. 43043-43044 / 2018**

**Per P. Dinesha :**

The Revenue in its appeal has challenged the findings of the Commissioner of Central Excise (Appeals) *inter alia* on the grounds that the appellant had manufactured and cleared the product 'Earthing Electrodes' during the year 2004-05 (up to

21.03.2005) and thereafter M/s. Ashlok Safe Earthing Electrode Ltd. (hereinafter referred to as 'M/s. ASEEL') continued to manufacture and clear the same product from the same factory; that the manufacture, clearance and excisability of the product had not been negated/disputed by the appellant. Excisability of the product is evident from the fact that the appellant, after transferring the assets of the factory to M/s. ASEEL, the newly formed company, obtained Central Excise Registration on 30.09.2005 for manufacture and clearance of the same product i.e., Earthing Electrode from the same factory premises and started paying duty; that the officers of the Department visited the factory premises only on 13.09.2006 on a specific intelligence that the appellant who functioned in the same premises during 2004-05 evaded Central Excise Duty after crossing the SSI exemption limit of Rs. 100 lakhs; that this fact of non-payment was clearly brought out during investigation and alleged subsequently in the Show Cause Notice; that the Additional Commissioner while passing the Order in Original had examined the facts and discussed in detail in his Order-in-Original No. 05/2008 dated 29.04.2008; that the voluntary payment/deposit of Rs. 20 lakhs by the assessee/appellant towards their duty liability is also a proof of the excisability of the products and that therefore the defence later taken by them at the time of appeal before the first appellate authority that the product manufactured was not classified to attract excise duty is not a justifiable reason; that the credence extended by the Commissioner (Appeals) on this unjust ground appeared not to be in order.

2.1 During the course of hearing, Ld. ADC (AR) Shri. K. Veerabhadra Reddy appearing for the Revenue further argued with regard to Back Filling Compound (BFC) in the value of the Earthing Electrodes; that in the instant case, the value of BFC had been excluded in all cases where the same was supplied and billed separately and also in cases where the value has been shown separately in the bill; that in other cases where the price is indicated as that of the electrodes, that price should be the correct assessable value and no deduction can be given from that price for the reason that the price includes the cost of BFC also.

2.2 He further submitted that there is no finding by the first appellate authority nor has the Commissioner (Appeals) given any justifiable reasons for not including the value of BFC in the assessable value of the Electrodes.

3.1 *Per contra*, Ld. Advocate Shri. S. Venakatachalam appearing for the assessee supported the findings of the Ld. Commissioner (Appeals). He also submitted that there was no suppression of facts with intent to evade payment of duty; that the respondent was under the *bona fide* belief that it was eligible for exemption till crossing the limit of Rs. 3 crores; that the above fact was clearly mentioned in the statement of Shri. Sanjay Mishra dated 13.09.2006 (in page 2 of the Show Cause Notice); that for the above reason the Show Cause Notice had not alleged intention to evade payment of duty. He also stated that it is settled law that without specific allegation of intention to evade payment of duty extended period of limitation could not be invoked and that the adjudicating authority ought to have held that the Show Cause Notice is barred by limitation.

3.2 He relied on the following case-law in support of his contentions :

- *C.C.E. Vs Bripanil Synthetics (P) Ltd. – 2006 (203) E.L.T. 11 (Kar.);*
- *C.C.E. Vs. Punjab Laminates Pvt. Ltd. – 2006 (202) E.L.T. 578 (S.C.);*
- *Larsen & Toubro Ltd. Vs. C.C.E. – 2007 (211) E.L.T. 513 (S.C.);*

- *Petron Engg. & Construction Ltd. Vs. C.C.E. & C – 2009 (243) E.L.T. 272 (Tri. - Bang.)*

3.3 Ld. Advocate thereafter concluded that the Commissioner should have allowed the appeal with consequential relief as well by even ordering the refund of the amount deposited by the respondent and hence, prayed for allowing the cross-objection filed by the assessee.

4. We have heard the rival contentions, perused the documents placed on record and have also gone through the decisions referred to during the course of arguments.

5. On perusal of the impugned Order we find that the first appellate authority has not recorded proper reasons : on the one hand, the first appellate authority holds that the adjudicating authority having not decided the classification, the Show Cause Notice as well as the Order-in-Original are not sustainable; on the other hand, allows the appropriation of the duty paid by the assessee voluntarily; which appear to be contradicting each other. Only when there is a liability towards duty can the authorities order for appropriation.

6. In the light of the above, we are of the considered opinion that the matter requires re-adjudication by the adjudicating authority who shall pass a fresh Order after affording reasonable opportunities to the assessee, for which reason we set aside the impugned Order. The adjudicating authority however shall not be influenced by the findings of the first appellate authority. We also refrain from expressing any view on the merits as well as limitation and the includibility of BFC; all the issues are left open.

7. The appeals and the Cross Objection are therefore allowed for statistical purposes, by way of remand.

*(Operative part of the order was pronounced in open Court)*

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| **(P Dinesha)** | **(Madhu Mohan Damodhar)** |
| Member (Judicial) | Member (Technical) |

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