IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Division Bench B1]

Appeal No.: E/40046/2013

[Arising out of Order-in-Appeal No. 237/2012 dated 25.09.2012 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli]

M/s. The Indian Hume Pipe Co. Ltd., **: Appellant**
Ayothipatti Village,
Sengipatti Post,
Thanjavur – 613 402

Versus

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Tiruchirapalli Commissionerate

Appearance:-
Shri. R. Sai Prasanth, Advocate
for the Appellant
Ms. T. Usha Devi, DC (AR)
for the Respondent

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

Date of Hearing: **11.12.2018**

Final Order No. 43101 / 2018

Per P. Dinesha :

This appeal has been filed by the assessee/appellant against the Order-in-Appeal No. 237/2012 dated 25.09.2012 passed by the Commissioner of Cus. & Central Excise (Appeals), Tiruchirapalli. The dispute pertains to the period from Februrary 2004 to September 2004.

2.1 Brief facts are that the appellants are holders of Central Excise Registration and are engaged in the manufacture of Pre-stressed Concrete Pipes (PSC pipes), Pre-stressed Concrete Cylinder Pipes (PCC pipes) and MS Specials falling under Chapter Sub-heading Nos. 6807.90, 7305.90 and 7307.00 respectively of the Central Excise Tariff Act, 1985. They availed the benefit of exemption from payment of duty on clearance of PCC pipes to be used in water supply projects as per Notification No. 03/2004-CE dated 08.01.2004 as amended by Notification No. 6/2002 dated 01.03.2002.

2.2 Based on intelligence, the Officers of the Directorate General of Central Excise Intelligence (DGCEI), Regional Unit, Madurai visited the appellant's unit on 21.02.2004 and on verification of records, it was noticed that the that the appellants had wrongly availed CENVAT Credit on MS Sheets and MS Specials which were used exclusively for the manufacture of PCC pipes by availing exemption.

2.3 Accordingly, a Show Cause Notice dated 2+1.04.2005 was issued to the appellants proposing to recover the wrongly availed Credit to the tune of Rs. 7,87,638/- on MS Sheets used exclusively for the manufacture of exempted products in terms of Rule 12 of the CENVAT Credit Rules (CCR), 2002 read with proviso to Section

11A(1) of the Central Excise Act, duty of Rs. 1,84,850/- on 44.666 MT on MS Specials, Flanges, Joint Rings and Tees cleared by wrongful availment of benefit of exemption as per Notification No. 03/2004 dated 08.01.2004 under the proviso to Section 11A(1) of the Act and an amount of Rs. 1,184/- being the short reversal/payment and thus wrong availment of Credit on clearances of exempted goods using common inputs after 10.09.2004 in terms of Rule 12 of CCR along with applicable interest and penalties. The adjudicating authority thereafter vide Order-in-Original dated 29.04.2011 confirmed the proposals made in the Show Cause Notice, whereafter on appeal by the assessee, the same came to be upheld by the Commissioner (Appeals) vide Order impugned herein. Aggrieved by the same, the assessee has preferred the present appeal before this forum.

3. Today when the matter came up for hearing, Ld. Advocate Shri. R. Sai Prasanth appeared on behalf of the assessee/appellant while Ld. DC (AR) Ms. T. Usha Devi represented the Department/respondent.

4.1 During the course of hearing, Ld. Advocate for the appellant submitted that present issue is threefold, which is tabulated as under :

Issue/ Sl. No.	Issue in dispute	Amount of duty (in Rs.)
I	Denial of CENVAT Credit availed on MS Sheets used exclusively in the manufacture of exempted PCC pipes	7,87,638/-
II	Duty on MS Specials/Flanges and Tees cleared as pipes falling under Chapter Heading 7305 on non-payment of duty. (the Department has alleged that the same are pipe fittings falling under Chapter Heading 7307)	1,84,850/-
III	Short-paid duty on the ground that the appellant had cleared a dutiable final product upon payment as per Rule 6(3)(b) amount @ 8% instead of @ 10% as amended vide Notification No. 23/2004-CE (NT) dated 10.09.2004 on one Invoice No. 1043 dated 20.09.2004	1,184/-

Ld. Advocate stated that he is contesting the disallowance of input service tax Credit of Rs. 7,87,638/- on MS Sheets alone (Sl. No. I of the above table); the other two demands of Rs. 1,84,850/- and Rs. 1,184/- in Sl. Nos. II & III respectively are not contested on merits. However, Ld. Advocate submitted the penalties imposed for all the three issues are being contested.

4.2.1 With regard to **Issue No. I** relating to the denial of Credit on MS Sheets, Ld. Advocate submitted that the appellants had not maintained separate accounts, but however, they had paid Rs. 21,48,550/- being the amount payable under Rule 6(3)(b) of the CENVAT Credit Rules, 2004 at the rate of 8% on the value of exempted PCC pipes; that such payment was intimated to the

Department vide letter dated 29.01.2004.(Annexure-12 of the Appeal Book). He therefore contended that the Commissioner (Appeals) has incorrectly upheld the denial of Credit availed on MS Sheets without considering the above 8% amount already paid by the appellant during the period of dispute. Ld. Advocate placed reliance on the decision in the case of ***M/s. PSL Ltd. vs. Commissioner of Central Excise, Puducherry in Final Order No. 42390/2018 dated 06.09.2018*** pronounced by this very Bench of the Tribunal wherein, an identical issue has been considered and it has been held by the Bench that the amount so paid by the appellant as per Rule 6 ought to be adjusted against the CENVAT Credit denied. He therefore contended that on these grounds, the appellant was not liable to pay any further amount and thus the demand does not survive.

4.2.2 Ld. Advocate further contended that no penalty is imposable in this regard as there is no suppression on the part of the appellants. The appellant reversed an amount equivalent to 8% of the value of the final product under *bona fide* belief in compliance with the provisions under Rule 6(3)(b) of the CCR. He also relied on the case of ***Continental Joint Venture Foundation Vs. C.C.E. – 2007 (216) E.L.T. 177 (S.C.)*** to contend that the onus is on the Department

to establish any act of suppression on behalf of the appellant with an intent to evade payment of duty, which has not been done in the case on hand.

4.3.1 Ld. Advocate submitted that the demands in **Issue Nos. II & III** were conceded by the appellant. In fact, the appellant had already discharged the neccessary payments of Rs. 1,84,850/- and Rs. 1,184/- vide challan dated 24.06.2011.

4.3.2 However, coming to penalties Ld. Advocate submitted that there was no *mala fide* intention on the appellant's part. The rate of duty for the final products manufactured by the appellant had been increased to 10% from 8% as w.e.f. 10.09.2004 vide Notification No. 23/2004-CE (NT) dated 10.09.2004. He submitted that the payment of duty at the rate of 8% on a clearance effect vide Invoice dated 20.09.2004 was an inadvertent error made on one invoice alone which had been issued within days of the amendment being made. Further, the appellant has already paid the short-paid duty. Hence, no penalty is imposable as no case has been made out by the Department to prove that the appellant has satisfied the ingredients under Section 11AC of the Act ibid.

4.3.3 Ld. Advocate further stated that there is neither any allegation of suppression nor invocation of any provision in the Show Cause

Notice to impose penalty for Issues II & III against the appellant; that there was no finding in either in the Order-in-Original or in the impugned Order-in-Appeal to allege suppression or any other grounds to impose penalty. He therefore contended that when there is no finding, the imposition of penalty or invocation of extended period is unjustified.

5. *Per contra*, Ld. AR supported the findings of the authorities below. She argued that even with regard to the Issues II & III, the appellant had suppressed facts and thus the invocation of extended period as per the proviso to Section 11A(1) of the Act is justified.

6. 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.

7.1 With regard to **Issue No. I** above, we find that the only prayer of the appellant is to be granted the benefit of adjustment of the amount reversed by them. From a perusal of the Order in the case of ***M/s. PSL Ltd.(supra),*** we find that the very same issue has been settled by this very Bench of the Tribunal wherein it has been held as under :

> *"7.6 It is submitted by the Ld. Counsel for appellant that the appellants have reversed 5% of the value of the exempted goods. Hence, we are of the view that the appellant has to be given adjustment of the amount already reversed as above. For this limited purpose of re-quantification of demand on this issue, after*

giving adjustment of the amount already reversed by the appellant, we remand the matter to the adjudicating authority.

8.1 With regard to the issues which the appellant is not contesting on merits and show in the table in para 3.1, the Ld. Counsel for appellant advanced arguments on the ground of limitation. He submitted that the appellants had maintained separate records with regard to HR Coils that were used for the manufacture of exempted goods. All the figures for raising demand have been adopted by the Department from the accounts maintained by the appellant. Thus, in their statutory records, the appellants have disclosed the entire details.

8.2 So also, the credit availed was disclosed in the ER-1 returns. They happen to take the credit only on the bona fide belief that they are eligible for credit. Even in para 7 of the Show Cause Notice, it is seen that the reversal of credit was not proper for the reason that the appellants had adopted a formula for arriving at the amount to be reversed by calculating the weight of the input used in the manufacture of pipes. Thus, it cannot be said that they had suppressed any facts with intent to evade payment of duty. Further, in respect of the credit availed on HR Coils, they have reversed 5% credit which has been disclosed to the Department in their ER-1 returns.

9. We find that there is no positive evidence to show suppression of facts with intention to evade payment of duty attracting the ingredients for invocation of extended period. In such event, the demand for the extended period with respect to the issues which are not contested on merits and stated in the table in para 3.1, requires to be set aside as being time barred, which we hereby do.

10. We make it clear that the appellant is liable to pay the duty demand falling under the normal period. For the same reasons the penalties imposed are also set aside. For the limited purpose of re-quantification, we remand the matter to the adjudicating authority."

7.2 From the discussions made hereinabove, we are of the considered view that the appellant is liable to reverse the CENVAT Credit, however, the amount of Rs. 21,48,550/- already paid by them being over and above the amount of Credit disallowed, the same is required to be adjusted from the amount already reversed as above. Therefore, we deem it fit to remand the matter for the limited purpose of re-quantification of demand on this issue alone after giving adjustment of the amount already reversed by the appellant.

7.3 Similarly, following the reasons given in the case of *M/s. PSL Ltd.(supra)* and also there being no suppression of facts, we set aside the penalty imposed on this count.

8.1 Coming to **Issue Nos. II & III** above, we find that the Ld. Advocate has conceded the same and the respective demands have already been paid by the assessee.

8.2 With regard to penalties, however, we note that there is no whisper of any allegation of suppression of facts with intention to evade payment of duty or invocation of any provision pertaining to extended period in the Show Cause Notice. Ld. Advocate has drawn our attention to paragraph 13 of the Show Cause Notice, wherein the proviso to Section 11A(1) has been invoked with regard to Issue No. I alone. Nor is there any finding with regard to the penalty on these counts in the Order-in-Original or the impugned Order. We also find that there is no positive evidence to indicate suppression of facts with intention to evade payment of duty and thus the ingredients for invocation of extended period are not present in the case on hand. We are therefore of the view that the penalties imposed on these issues are unsustainable for which reason we set aside the same.

9. To sum up :

(i) Demand of Rs. 7,87,638/- with respect to Issue No. I to be adjusted with the amount already paid by the appellants. Issue remanded to the adjudicating authority for the limited purpose of quantification alone.

(ii) Demands of Rs. 1,84,850/- and Rs. 1,184/- with respect to Issue Nos. II & III respectively are upheld as the same are conceded by appellants.

(iii) Penalties imposed with respect to all the issues, i.e., Issue Nos. I, II & III are set aside.

10. The appeal is partly allowed on the above terms.

(Operative part of the order was pronounced in open court)

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

Sdd