IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
Court : SM- B3

Appeal No. E/42758/2018

(Arising out of Order-in-Appeal No. 521/2018 (CTA-I) dated 28.09.2018 passed by the Commissioner of GST & Central Excise (Appeals-1), Chennai).

M/s. KLM Pack : Appellant

Vs.

The Commissioner GST & CCE : Respondent
Pondicherry

Appearance

Shri R. Janardhanan Pillai, Consultant
for the Appellant

Shri L. Nandakumar, AC (AR)
for the Respondent

CORAM :

Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing: **28.02.2019**
Date of pronouncement: **06.03.2019**

FINAL ORDER No**. 40406/2019**

This is the second round of litigation before this Tribunal. Appellant is in appeal against the order of the Commissioner of GST & CE (Appeals-I) dated 28.09.2018.

2. Ld. Consultant, Shri R. Janardhanan Pillai appearing for the appellant made an elaborate oral and written submissions, which are recorded as under:-

- He submitted that appellant cleared the goods on payment of duty by availing Cenvat credit in accordance with law. But, after 01.04.2005 they opted for availing the full benefit of exemption under Notification No. 8/2003. He submitted that in terms of Rule 11 (2) of the Cenvat Credit Rules, 2004 (CCR, 2004) the appellant is required to reverse the Cenvat credit involved on the closing stock of inputs and inputs contained in the finished goods available as on 31.03.2005 and after deducting such amount, credit if any, still remaining, shall lapse. It was alleged by the Revenue that the assessees have not correctly reversed the credit involved in the inputs lying in stock or raw materials in process or finished product as on 01.04.2005 when they opted for availing the benefit of exemption notification. Hence, a Show cause notice dated 09.01.2008 was issued proposing recovery of short payment of duty, interest and penalty under Rule 15(2) of CCR, 2004 read with Section 11 AC of Central Excise Act, 1944. On adjudication, proposals made in the SCN were confirmed and on appeal, the Commissioner (Appeals) rejected the appeal. On further appeal before the Tribunal the matter was remanded to the Commissioner (Appeals) for denovo consideration in the light of specific directions vide Final Order No. 1308/2010 dated 28.12.2010. But, the Commissioner (Appeals) has rejected vide impugned order without addressing main grounds canvassed before it.

- The actual duty liability was Rs. 2,79,578/- against which Rs. 1,15,444/- having already been paid, the SCN should have proposed the demand of the balance alone but, the same having proposed to recover the entire amount of Rs. 2,79,578/- is therefore bad being contrary to Section 11 2B of the Act.
- He submitted that the present impugned order is not sustainable either on the ground of demand being hit by limitation or on the ground of merits. He submitted that the period involved is 01.04.2005, but SCN was issued only on 09.01.2008. The record maintained by the assessee reflects the credit so availed and there is no allegation that duty was not paid when payable, as per law and the assessee has not filed any statutory returns, etc. It is a settled position of law that when statutory returns have been filed properly, suppression cannot be alleged and the demand is clearly hit by limitation.
- The Commissioner (Appeals) has not even considered the Board's Master Circular No. 1053/2017-CX dated 10.03.2017, where in it has been clarified that extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or

non-payment of tax. Hence, the onus of establishing these ingredients lies on the Revenue for invoking extended period.

- Ld. Consultant submitted that Hon'ble Supreme Court, Hon'ble High Courts and Tribunals have consistently held in the following cases that when assessee is opting for exemption under Notification No. 8/2003, the assessee needs to reverse only the unutilized credit balance on the relevant date and once input credit is taken legally it cannot be denied after the issue of exemption notification. He relied on the following case laws in support of his contentions wherein similar view has been expressed:-

a) Dai Ichi Karkaria Ltd. Vs. CCE
1999 (112) ELT 353 (S.C.)

b) Eltek Circuits Vs. CCE
2017 (352) ELT 231

c) Sundeep Electrodes Pvt Ltd.
2017 (349) ELT 781 (Tri. All.)

d) CCE Vs. Gokuldas
2011 (270) ELT 351 (Kar.)

e) Tansi Fabrication Works
2018 (17) GSTL 429 (Mad.)

Ld. Consultant submitted that in the present case also there is no allegation that the credit taken was not legal and no allegation of wrong availment of credit. Suppression of fact is not proved as the records maintained by the assessee reflected the transactions made where there should not be any penal action and invocation of extended period of limitation.

3. Per contra, Ld. DR, Shri L. Nandakumar, AC, supported the findings of the lower authorities. He drew my attention to the Order of the Commissioner (Appeals) at paragraphs 8-10 to say that remand order dated 28.12.2010 spelt out two specific areas for examination and decision, regarding invocation of extended period and destruction of rejected goods. He also relied on the findings in the impugned order and requested for upholding the same.

4.1 I have heard the rival submissions and have gone through the case laws cited by the Ld. Consultant. The SCN is not *ipso facto* adjudication; just a proposal which culminates in the adjudication order and during the adjudication proceedings, the adjudicating authority looks into all aspects of law, facts and explanations offered by the assessee, the final order and the demand follows thereafter and hence the arguments of the Ld. Consultant that for proposing entire demand, in the SCN itself is bad, cannot be accepted and hence, the same is rejected.

4.2. I have also gone through the explanation filed by the assessee vide acknowledgement dated 13.03.2008 in response to the SCN which is filed along with the appeal memorandum at pages 42-44. In the second page i.e., at running page 43, appellant admits that

> "…….the value for the purpose of calculation if duty should only be on the basic value of Rs.14,80,017.31 less value of talc …..thereby the duty payable ……on 01.04.2005 works out to only Rs. 2,20,479/- as given below. Out of which we have already paid Rs.1,15,444/-. So balance amount of duty, if any to be paid by us would be only Rs. 1,05,035.00…..-."

4.3 The admission as to "balance if any, to be paid" appears to be graceful, which should have been done voluntarily and without waiting for the SCN. But the fact remains that there was short payment of duty as on the date of their reply to SCN. This is sufficient proof of non-payment of duty/withholding/short payment of duty which is paid after SCN and after admitting their liability to pay "balance if any, to be paid". State is entitled to get what is rightfully due to it, hece a SCN came to be issued in this case demanding duty. The above fact of admission of "balance if any, to be paid" by the appellant has only proved suppression and hence, it is too difficult to accept appellant's proposition that there was no suppression or that invoking extended period was wrong.

4.4 Further, in the subsequent paragraph/s appellant also indicates that on account of quality issues some of the material manufactured was rejected by its customer and the same was held back it its stock, with the following explanation:

> "….therefore, we may have to apply for destruction of this quantity…. If in case we apply for destruction of this material the excise duty involved on the proportionate quantity of raw materials contained therein will be reversed at the time of destruction….."

4.5 Much after this, as noted by the adjudicating authority, appellant did not file any documentary evidence to prove either the destruction as of above, or the reversal as indicated by it in its reply extracted above. Even if it is to be accepted that the reversal would depend on destruction, learned Commissioner (Appeals) in the impugned order observes at paragraph 8 as under:-

> "…. As for the claim of the appellant regarding their request for destruction of rejected goods, there is no evidence on record placed by the appellant before me….. The appellant has also not made this as a plea before me in their submissions….."

4.6 The date of appellant's reply, as indicated above is 13.03.2008 whereas the date of impugned order (second round) is 26.06.2018; the appellant apparently neither destroyed, nor reversed and nor has it paid the balance, as admitted by it which is extracted in the above paragraphs. Having not furnished any evidence as required or as expected, even for over 10 years, it cannot blame the revenue when in fact its own acts and omissions are not beyond suspicion.

4.7 Rule 11 (2) prescribes guidelines to be followed in the case of a manufacturer opting for exemption under CENVAT scheme, under Notification No. 8/2003 dated 01.03.2003. In the case on hand, there is an observation by the adjudicating authority that the value of closing stock as on 31.03.2005 as indicated by the appellant vide its letter dated 01.04.2005 was Rs. 1,03,975/-. On verification of P & L account of the appellant, the closing stock as on 31.03.2005 was Rs. 17,47,361/- as against the actual figure informed to the revenue. I find from their reply that there is no dispute raised as to the above findings of such a serious mismatch between the closing stock and opening stock, but still works out the "balance if any, to be paid" as indicated in the earlier paragraphs.

5. One hand, appellant claims that there was no suppression, longer period of limitation should not have been invoked; on the other hand it doesn't explain difference in closing stock as at the end of the year and the opening stock as of next year. On being pointed out, it admits the duty liability but gives a working as to correct duty liability. Had there not been the show cause notice, the appellant would not have come forward so gratefully, as there would not have arisen any occasion for an assessee to do so, voluntarily.

6. For the above reasons and after considering totality of circumstances, I do not find any merit in the appellant's grounds as also the present appeal, hence I do not see any reasons to interfere with the findings of the lower authorities. As a result, the appeal being devoid of merits, is dismissed.

(Order pronounced in the open Court on **06.03.2019**)

(P.DINESHA)
MEMBER (JUDICIAL)

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