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

S.No.	Appeal	Appellant	Respondent
1.	E/179/2012	Taj Madras Flight Kitchen (P) Ltd	Commissioner of Central Excise, Chennai-IV
Arising out of Order-in-Appeal No.50/2011 (M-IV) dt. 01.12.2011 passed by Commissioner of Central Excise, Chennai]			
2.	E/180/2012	Raghunandan V. Dole	Commissioner of Central Excise, Chennai-IV
Arising out of Order-in-Appeal No.51/2011 (M-IV) dt. 01.12.2011 passed by Commissioner of Central Excise, Chennai]			

Appearance :

Shri Rahavan Ramabhadran, Advocate
For the Appellant

Shri K. Veerabhadra Reddy, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 20.03.2019
Date of Pronouncement :26.03.2019

FINAL ORDER No. 40597-40598 / 2019

Per Bench

The facts of the case are that appellants are manufacturers of cakes and food items and were clearing the same to various airlines. They were availing SSI exemption under Notification No.8/2003-CE as amended. Appellants had taken out registration and paid excise duty upto March 2004 for cakes and pastries. It emerged that total turnover of all excisable goods during 2003-04, 2004-05, 2005-06 and 2006-07 was Rs.18,39,70,967/-, respectively. It has also been noticed that they had purchased raw materials like suji, maida etc. and manufactured cakes and pastries and cleared the same to various airlines. They had taken out registration and paid appropriate central excise duty upto March 2004 for cakes and pastries. Subsequently, they started availing SSI exemption and stopped paying excise duty from April 2004 onwards in terms of Notification No.8/2003-CE dt. 1.3.2003 to avail duty free exemption . It therefore appeared to the department that appellants had exceeded the limit of value of clearances of all excisable goods of Rs.3 crores as prescribed in the said notification during 2003-04, 2004-05, 2005-06 and Rs.4 crores during 2006-07; hence they were not eligible for SSI exemption during subsequent years. Accordingly, a show cause notice dt. 17.12.2008 was issued to the appellants pointing out these aforesaid apparent discrepancies. It was also alleged in the notice that appellants had not informed regarding production and clearance of food items which were excisable and the value of which should be included for the purpose of eligibility and computation of SSI exemption limit, which is suppression on their part with intention to evade payment of Central Excise duty. Thus, the proviso to Section 11A of Central Excise Act, 1944 for invocation of extended period is invokable in this case. The show cause notice proposed recovery of amount of Rs.28,29,878/- with interest for the years 2004-05 to 2007-08 as also imposition of penalty under Section 11AC of the Act. Penalty under Rule 26 of the Central Excise Rules, 2002 was also proposed on Shri Raghunandan V. Dole, Manager-Finance of the appellant on the ground that non-payment of Central Excise duty was within his knowledge.

2. In adjudication, original authority vide an order dt. 06.8.2009, confirmed amount of Rs.26,50,469/- with interest, imposed equal penalty under Section

11AC ibid. He also imposed penalty of Rs.30,000/- on Raghunandan V. Dole under Rule 26 of the Central Excise Rules, 2002. In appeal, the Commissioner (Appeals) vide order dt. 01.12.2011 reduced the penalty on Dole to Rs.10,000/- however upheld the remaining portion of the order of original authority. Hence these appeals.

3. Today when the matter came up for hearing, on behalf of the appellant Shri Raghavan Ramabhadran made oral and written submissions which can be broadly summarized as under :

(i) It is not disputed that cakes and pastries were dutiable during the period of dispute.

(ii) However, show cause notice has also included cost of bought out items like water bottles etc. The appellant supplied to the airlines not just cakes and pastries but also a number of items including bought out items packed together. Hence they had attained the nature of goods put up in sets; that they required to be classified by Rule 3(d) of the General Rules for the interpretation of the First Schedule to the Central Excise Act. As per the said rule, the goods inter alia, put up in sets shall be classified as if they concerned of the materials or component which gives them their essential character, in so far as this criterion is applicable. In the goods put up in sets and supplied to airlines consisting mostly of food items as such, it was argued that the essential character is of non-dutiable items. This aspect has been ignored by the SCN and by the authorities below. The SCN was issued on 07.12.2008 for the period 2004-05 to 2007-08. Extended period has been invoked on the allegation, in para-6 of the notice, that appellants had not informed regarding production and clearance of food items which are excisable and the value of which should be included for the purpose of eligibility and computation of SSI exemption limit. This allegation is totally incorrect. Department was fully aware of the activities of the appellant. In the first place, periodical returns as required under Central Excise law had been filed all throughout. Secondly, a number of issues relating to the present issue had been in dispute. A SCN dt. 04.08.2004 had been issued to them. Ld. Advocate drew our attention to the notice dt.4.8.2004 in page 30 of the appeal book, wherein in para-2 it has been narrated that appellants were “making payment of excise duty on the manufacture and sale of cakes, pastries and cookies etc. and duly filing monthly returns in ER-1 forms.....”. The said SCN had been issued to include handling and loading charges in the assessable value. On adjudication, the adjudicating authority vide order dt. 21.09.2004 had dropped proceedings initiated in the said SCN.

(iv) Ld. Advocate drew our attention to letter dt. 24.12.2002 in page 40 of the appeal book to point out that appellants had informed the jurisdictional Assistant Commissioner that they were engaged in the business of airline and institutional catering. It had also been informed that cakes, pastries and cookies prepared in the flight kitchen are sold to various airlines without any brand, trademark or logo; that chocolates are not manufactured in house but are produced and supplied to various airlines and these items are also sold without any brand name, trademark or logo, Hence removal of these items is well within the basic exemption limit. They were seeking exemption from payment of excise duty on the manufacture and sale of cakes, pastries, chocolates and cookies. The letter also informed that they had been making payment of excise duty on the production and clearance of above items duly filing monthly RT-12 returns, however they would like to avail exemption. Ld. Advocate fairly submits that this argument is being brought for the first time at the Tribunal stage and that they have not made the same either before the adjudicating authority or before the Commissioner (Appeals).

(v) Ld. Advocate drew our attention to another letter dt. 12.5.2003 of page 42 of the appeal book where it was once again reiterated that appellants did not use any brand name, trademark or logo either on their product or the packing container in which the product is sold to airlines and once again requested for grant of exemption from payment of excise duty as the removals were well within the basic exemption limit. It appears that in response, the department issued a show cause notice dt.30.06.2003 proposing vacation of the protest lodged by the appellants in payment of duty. A corrigendum was also issued on 04.08.2003 proposing to deny the benefit of exemption available under Notification No.8/2002-CE dt. 28.02.2002 and 8/2003-CE dt.28.02.2003.

(vi) In adjudication, the adjudicating authority vide an order dt. 31.10.2003 copy of which is placed in page 49 of the appeal book has disallowed the benefit of exemption claim under the Notification No.8/2002 and 8/2003- for the financial years 2002-03 2003-04 and vacated the protest lodged by appellants. In appeal, however Commissioner (Appeals) vide order dt. 09.03.2004 set aside the said order and allowed the appeal and ordered that appellant was entitled for full consequential relief by way of refund of duty paid under protest.

(vii) In the circumstances, ld. Advocate submits that the facts of the matter were known to the department right from 2002 and hence charge of suppression made in the SCN dt. 17.12.2008 for invocation of extended period of limitation is not legally correct and hence for this reason the proceedings and the confirmation of duty liabilities as proposed in the notice will be hit by limitation and will require to be set aside.

4.1 On the other hand Ld. A.R Shri K. Veerabhadra Reddy supports the impugned order. He submits that appellants are bringing up the plea of classification of items supplied to airlines for the first time in the Tribunal. However, appellants had themselves paid duty and classified the items cakes and pastries etc. as per their own tariff entries and had discharged duty liability thereon which is evident from the monthly returns filed by them from time to time. Hence when they themselves did not have any doubt on the classification of the said items, they cannot bring it up at this point since there was not dispute at all on the issue.

4.2 On the arguments of Ld. Advocate concerning limitation that proceedings are hit by limitation as the department was aware of the facts and issued SCN, it is pointed out that said show cause notices were issued on different disputes. The appellant therefore cannot take shelter of said issue of notices.

4.3 Heard both sides and have gone through the facts of the case.

4.4 Ld. Advocate has brought up an argument that the items, cakes and pastries, are supplied with other items in a set and hence they cannot be classified by Rule 3A of the Interpretative Rules and will require to be classified as per Rule 3B, on the basis of material or component which gives its essential character. Much persuasive as this argument may appear at the first blush, we note the appellant has brought this contention for the first time at the Tribunal stage. Also, as correctly pointed out by the Ld. A.R, they had themselves classified cakes, pastries etc. as per their individual tariff entries on which there was no dispute between them and the department. In the circumstances, we are afraid that this argument does not hold water.

4.5 However, coming to the contention of limitation, we find merit in the argument of Ld. Advocate. A number of related proceedings had earlier been initiated against the appellant, including one of denial of SSI exemption Notification No.8/2002-CE and 8/2003-CE. SCN has proposed penalty on him on the ground of "non payment of central excise duty was within his knowledge". However, we find that appellants were continuously reiterating with the department, at least from 2002, that they were eligible to claim small scale exemption. In the circumstances, employee of the appellant cannot then be saddled with such charge and penalty imposed under Rule 26 ibid. The appellants in their letters dt. 24.12.2002 and 12.05.2003 and also in subsequent communications, had consistently claimed that they were eligible to avail exemption. Even in response to the present SCN dt. 17.12.2008 appellants vide their letter dt. 30.07.2009 had once again contended that they had been consistently of the opinion that they were eligible to avail SSI exemption and hence were not paying duty on the excisable goods "Cakes and Pastries". It is also important to note that an earlier SCN seeking to deny the exemption to vacate the protest lodged by the appellants and also appropriate an amount had culminated in an OIO dt. 31.10.2003 disallowing SSI exemption under Notification No.8/2002-CE and 8/2003-CE for the financial years 2002-03 and 2003-04, vacating the protest lodged by the appellant for the financial years 2002-03 and

2003-04; however this OIO had been set aside by the Commissioner (Appeals) vide OIA No.18/2004 dt. 09.03.2004. From the records, it is not forth coming that any appeal was preferred by the department against the said OIA. This being so, subsequent show cause notices proposing similar denial of SSI exemption should have been issued for the normal period of one year instead of invoking extended period of limitation as has been done in this case. It follows that there cannot also be any ingredients present for imposition of penalty under Section 11AC.

4.6. From the Annexure (C) to the SCN giving details year wise details of the value adopted for calculation of duty, we find that the for the year 2007-08 the last entry relates to sales made upto 02.05.2007. It is therefore obvious that entire period sought to be covered in the SCN dated 17.12.2008, namely, from 2005-06 (from 18.03.2006) to 2007-08 (upto 2.5.2007), is well beyond the period of normal period of limitation from the date of SCN. In the circumstances, the impugned demand *per se* cannot then be sustained, on the grounds of limitation, and will require to be set aside, which we hereby do. As the demand itself along with interest does not survive, the related penalties imposed on the appellant under Section 11AC ibid and Shri Raghunandan V. Dole under Rule 26 of the Rules, will also be required to be set aside, which we hereby do.

5. Appeals E/179/2012 and E/180/2012 are allowed with consequential benefits, if any, as per law.

(order pronounced in court on 26.03.2019)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi, C.S)
Member (Judicial)

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