CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

Excise Appeal No. 40730 of 2013
(Arising out of Order-in-Original No.03/2012 dt. 31.12.2012 passed by Commissioner of Central Excise & Service Tax, Coimbatore]

M/s.Everest Industries Ltd. **Appellant**
(Earlier known as Eternit Everest Ltd.)
Podanur,
Coimbatore 641 023.

VERSUS

Commissioner of Central Excise **Respondent**
6/7, ATD Street, Race Course,
Coimbatore 641 018.

APPEARANCE :

Shri V. Sridharan, 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 MR. P.VENKATA SUBBA RAO, MEMBER(TECHNICAL)

DATE OF HEARING : 12.06.2019
DATE OF DECISION : 12.06.2019

FINAL ORDER No. 40837 / 2019

PER : P.VENKATA SUBBA RAO

The facts of the case, after filtering out unnecessary details, are that the appellants herein are manufactures of Asbestos Cement products falling under Chapter Heading 6804 of Central Excise Tariff Act, 1985. These products are liable to excise duty and appellant has been discharging Central Excise duty at appropriate rates for the period February 1992 to December 1995. They had manufactured some of the products using more than 25% of Fly Ash. The products which contained more than Fly Ash were exempted from Excise duty during the relevant period vide Notification No.60/91-CE as amended from time to time. These products were sold by the appellant as Upgraded Technology Products (UT Products). After 1992, they have discontinued the manufacture of regular products and continued manufacturing only the UT Products. All the goods cleared by the factory were sent to their depots and the goods were thereafter sold from depots only. The depot invoices raised to the customers indicated only the consolidated price and did not separately indicate the amount of excise duty on the products. In respect of the products on which they have paid excise duty, they charged certain price and they charged an identical price in respect of the products containing fly ash on which no excise duty was paid by availing the benefit of exemption. It is the case of the department that as the price charged for the exempted products (UT products) was the same as that of the other products on which excise duty was paid, an amount by way of excise duty was indirectly collected by the assessee from their customers and such amount needs to be deposited in the Government exchequer under Section 11D of the Central Excise Act, 1944. Coming to such a conclusion, 10 show cause notices were issued to the appellant and the demands were confirmed. Deciding the writ petitions filed by the appellant, all ten show cause notices 13.07.1992 to 25.06.1996 were quashed by the Hon’ble High

Court of Madras having jurisdiction over the assessee [Eternit Everest Ltd. Vs UOI – 1997 (89) ELT 28 (Mad.)] since there was no mechanism for recovery of any amount under Section 11D during the relevant period. On appeal by the Revenue, the Hon'ble Apex Court dismissed the same as withdrawn [2002 (41) ELT A285 (SC)]. Thereafter, Section 11D was amended providing for recovery of the amount and accordingly the Commissioner adjudicated the same SCNs which were already quashed by the Hon'ble High Court of Madras and confirmed the demands. Both the appellant and the department filed appeals before the Tribunal seeking to set aside the adjudication order of the Commissioner on the ground that although the Hon'ble High Court of Madras has given the department the liberty to proceed as per law when the provisions for recovery of amount under Section 11D were introduced, the Commissioner should not have adjudicated the SCNs which were already quashed by the Hon'ble High Court. This Tribunal vide its order dated 17.02.2011 set aside the adjudication order for this reason. Thereafter, the department issued fresh a SCN dt. 07.09.2011 covering the entire period in question citing the relevant amendment made in Section 11D and this notice was adjudicated by the impugned Order-in-Original No.3/2012 dt. 31.12.2012. In this order, Ld. Commissioner confirmed the demand of Rs.24,62,40,909/- against which the present appeal has been filed by the assessee. Thus, in this case there were three rounds of litigation. The first one in which the Hon'ble High Court has quashed the SCNs. The second one in which this Tribunal had set aside the adjudication order passed by the

Commissioner (Appeals) and the present third one wherein the fresh SCN dt. 07.09.2011 was issued and adjudicated.

2. Ld. Counsel for the appellant submits that they have not collected any amount as representing duty of excise and therefore Section 11D should not apply. Merely because they have not reduced the price of the products in which they have used more than 25% of Fly Ash and claimed benefit of exemption notification, it does not mean that they have collected any amount as representing the Central Excise duty from their customers. In fact, in none of their invoices they have showed any amount as representing Central Excise duty. They only collected consolidated an amount as all inclusive price and they have not, as a business policy decision, made a distinction between those products in which Fly Ash was used and exemption notification was claimed and those products in which Fly Ash was not used and exemption was not claimed. They charged the same price for both type of products. In other words, they have enhanced their profits in respect of the products in which exemption notification was claimed. The department sought to recover the same by reverse calculation reckoning the amounts which they have collected from their customers as cum-duty prices.

3. As a second argument, Ld. Counsel draws the attention of the Bench to Section 11D as applicable during the relevant period, which casts an obligation on every person who is liable to pay duty under this Act or the Rules made thereunder and has collected an amount in excess of the duty assessed or determined and paid on any excisable goods under the Act or Rules in any manner as representing duty of

excise to forthwith pay the amount so collected to the Central Government Provisions of sub-section (2) & (3) of Section 11D were introduced retrospectively in 2000 providing for recovery of amount under Section 11D if the assessee has not deposited the amount on his own. Thereafter in 2008, sub-section (1A) was introduced in Section 11D further enlarging its scope to cover such products which are wholly exempt or are chargeable to Nil rate of duty but on which any amount was collected as representing Excise duty. He refers to para 30 (d) of the Budget Speech of 2008 which reads as follows :

> "d) According to the provisions of Section 11D of the Central Excise Act, 1944 a person liable to pay duty is required to deposit with the Central Government any amount that he collects as representing duty of excise in excess of the duty assessed or determined and paid on any excisable goods. As such, recovery of amounts collected in this manner is possible only from persons who are liable to pay duty. Sub-section (1A) has now been inserted to enable the Central Government to recover such amounts from **any person.** Besides, it has also been provided that any person who recovers an amount representing it as duty of excise on excisable goods, which are wholly exempt or chargeable to Nil rate of duty, would also be required to deposit it with the Central Government. Consequential amendments have been carried out in section 11 DD to enable recovery of interest on such amounts if they are not deposited in time. The analogous provision contained in section 28 B of the Customs Act has also been amended in the same manner."

He would submit that it is evident from the budget speech that prior to 2008, no amount collected as representing excise duty on products which are fully exempt had to be deposited into the Government account. This provision was introduced in 2008 and it was only prospective and not retrospective. Therefore, prior to 2008, no demand under Section 11D on goods which are fully exempt can be raised. In their case, the entire period is prior to 2008 and all the goods on which the demand is raised were fully exempted by way of the notification. Therefore even on this count, the demands are not sustainable.

4. Ld. counsel's third line of argument was that the original SCN was issued by the department and it had already been quashed by the Hon'ble High Court of Madras but thereafter a new SCN was issued on the same grounds invoking the amended provisions of Section 11D. This is hit by the principle of *res judicata* and therefore demand is not sustainable even on this ground. His fourth argument was that the relevant period is February 1992 to December 1995 while the SCN was issued on 07.09.2011 well beyond the period of five years. Although Section 11D has no time limit to issue a show cause notice, the Hon'ble High Court of Allahabad in the case of *CCE Vs Standard Niwar Mills* [2013 (296) ELT 164 (All.)] has held that limitation under Section 11A should also apply to Section 11D. Viewed from this point, the entire demand is also time-barred and therefore needs to be set aside. He relies on the following judgements / orders to assert that unless an amount is clearly shown as representing excise duty no demand under Section 11D is invokable :

1. Bannari Amman Sugars Ltd. v. CCE [2018 7 TMI 415 – CESTAT CHENNAI]
2. Bharat Petroleum Corpn. Ltd. v. CCE [2016 11 TMI 145 – CESTAT HYDERABAD
3. Bharat Petroleum Corpn. Ltd. v. CCE [2016 2 TMI 1046 – CESTAT NEW DELHI
4. Mayfair Polymers v. CCE [2009 (234) ELT 663 (Tri. – Ahmd.)]
5. Todi Rubber Pvt. Ltd. v. CCE [2018 (361) E.L.T.737 (Tri. – Mumbai)]
6. Shree Shyam Pulp And Board Mills Ltd. v. CCE [2018 (364) E.L.T.205 (Tri. – All.)]
7. Macmohan Pharma Ltd. v. CCE & ST [2019 (5) TMI 45 CESTAT HYDERABAD

5. The learned Departmental Representative reiterates the findings of the lower authorities.

6. He draws attention of the Bench to the fact that the price which is indicated by the appellant to their customers shows a consolidated amount with an expression "inclusive of excise duty". The amount as well as the expression "inclusive of excise duty" is present in both the pricelists in which duty was paid and the UT products on which no duty was paid. This would go to show that the assessee has conveyed to the customer that the price which they were collecting from their customer is inclusive of excise duty although the specific amount of excise duty is not indicated therein. Therefore, the demand was raised reckoning this price as cum duty price. In view of the above, provisions of Section 11D apply in full force in this particular case and the Ld Commissioner has correctly confirmed the demand in the impugned order.

7. Coming to the second question of *res judicata*, he would submit that the original show cause notice was quashed and was treated as *non est* by the Hon'ble High Court of Madras and consequently the order-in-original passed in the second round of litigation by the Ld. Commissioner is also *non est*. If the earlier SCN was *non-est*, naturally the new SCN is the first round of litigation and the principle of *res judicata* does not apply to this case. He further draws to the fact that the Hon'ble High Court of Madras had given the liberty to the department to proceed, if provisions for recovery of any amount under Section 11D were introduced subsequently. In fact, the recovery provisions have been introduced with retrospective effect and therefore SCN was correctly issued by the Commissioner. He further draws attention of the Bench to the judgement of the Hon'ble Apex Court in

the case of *UOI Vs Solar Pesticides Pvt. Ltd*. [2000 (116) ELT 401 (SC)] passed with respect to unjust enrichment under Section 27 of the Customs Act, 1962 or the corresponding provisions of Section 11B of Central Excise Act, 1944. The Hon'ble Apex Court has held that passing of incidence of duty to the customer need not be direct and that it can be indirect as well. Where the goods are imported on payment of duty and thereafter used in manufacture of final products which were sold, if the duty element of the inputs is taken into account while fixing the price of that final product it would amount to indirectly passing of the incidence of duty. The same analogy should apply to Section 11D which is just corollary of concept of unjust enrichment under Section 11B. He further argued that Section 11D specifically states that where any amount has been collected as representing duty from the buyer of the goods in any manner, the same has to be paid to the credit of the Central Government. He would assert that the key words used are "in any manner". In this case the manner in which they have collected the amount as representing excise duty is by charging a consolidated price specifically stating that the price is inclusive of excise duty. Further, the pricing of the products by the appellant can be understood by comparing the pricelist of the exempted gods and the price list of duty paid goods. There is no price difference between the two sets of goods and this matter is undisputed. Therefore, the assessee has collected amount from the customer for the goods representing this as inclusive of excise duty when no duty was payable by them at all. Therefore, the amount so collected is liable to be recovered from the assesse and the adjudicating authority has correctly confirmed the amount.

8. With respect to time limit, he would assert that no specific time was fixed in Section 11D and therefore the demand was correctly raised. Therefore he would urge that the appeal is without merit and may be dismissed.

9. We have considered the arguments from both sides and perused the records. Section 11D of the Central Excise Act required during the relevant period of every person who is liable to pay duty under this Act or Rules and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods in any manner as representing duty of excise to forthwith pay such amount to the Central Government. Evidently, it did not cover the goods which are only wholly exempt from duty but on which manufacturer collects some amount as representing Central Excise duty. This lacuna was corrected by introduction of Section 11D (1A) in 2008. The Budget speech of the Hon'ble Finance Minister for the year referred to above clarifies that prior to 2008 this Section 11D did not cover those goods where the goods were wholly exempted or were chargeable to Nil rate of duty as in the present case. The amendment in 2008 has not been given retrospective effect. For this reason, the liability to Section 11D does not apply to the appellant's goods because undisputedly, the products were fully exempted from payment of duty. A plain reading of Section 11D also shows that what is required to be deposited in the Government exchequer is any amount collected as representing excise duty. In this

case there is nothing on record that they have collected any amount as representing excise duty. They have collected a consolidated amount stating it as inclusive of excise duties. No specific amount was shown as representing excise duty. On this ground also, the demand does not sustain. We have carefully considered the arguments of Ld. D.R that they should have reduced the price and passed on the benefit of exemption notification to customers which they have not. It is true, from a plain perusal of the records that the appellant has resorted to profiteering by not passing on the benefit of the exemption notification to the customers. While they enjoyed the exemption notification, they have not reduced the prices to customers thereby enhancing their own profits. However, non-profiteering is not what is contemplated in Section 11D of the Central Excise Act. Therefore no demand can be raised or sustained on this ground. Unless any amount is specifically collected representing as excise duty, Section 11D cannot be invoked. Whenever duties are reduced or exempted, a shrewd businessman can pocket the windfall by not reducing his prices and such profiteering is not covered by Section 11D.

10. On the last point of *res judicata* however, we find in favour of Revenue because the original SCN has already been quashed as being without legal authority and the Hon'ble High Court of Madras in its judgment (supra) allowed adjudication and enforcement when a provision is made in law. Thereafter, when the law was amended, as per the amended provisions, a new SCN was issued and therefore there is no *res judicata* applicable in the present case. Consequently, we find

that the demand is not sustainable on merits because (a) no amount was shown by the assessee in their documents to their customer as representing Excise duty and collected from them and (b) the goods which were fully exempted were, until 2008, not covered by the provisions of Section 11D. The reliance placed by the Ld. D.R in the case of *Solar Pesticides* (supra) by the Hon'ble Apex Court does not carry their case any further because that judgment was in the context of Section 27 of the Customs Act, 1962 and Section 11B of the Central Excise Act, 1944 where the question is whether the incidence of duty has been passed on to the customer or not and not whether the same amount has been collected as representing duty. Such passing of incidence can be direct or indirect. Section 11D cover only cases where any amount is collected as representing excise duty. In this case, none of documents presented before us show any amount was collected as representing excise duty. In view of the above, we find that impugned order is liable to be set aside and we do so. Impugned order is set aside. Appeal is allowed with consequential benefit, if any, as per law.

(Operative part of the order pronounced in court)

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

(P.Venkata Subba Rao)
Member (Technical)

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