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

E/336/2010 and E/414/2010

(Arising out of Order-in-Appeal No. 72 & 73/2010 (P) dated 17.3.2010 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Palmetto Industries India Pvt. Ltd.
M/s. Arut Jothi Woven Bag Industries Appellants

Vs.

Commissioner of Central Excise, Puducherry Respondent

Appearance

Shri Raghavan Ramabhadran, Advocate and
Shri R. Janardhanan Pillai, Consultant for the Appellants
Shri R. Subramaniyan, AC (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 / Decision: **19.12.2017**

Final Order Nos. 43274 - 43275 /2017

Per Bench

The facts of the case are that a show cause notice dated 20.9.2007 was issued to M/s. Arutjothi Woven Bag Industries (herein after referred to as AWBI) Proprietrix Smt. V. Indurani). The said unit was primarily engaged in manufacture of PP/HDPE strips/ tapes and woven fabrics falling under Chapter 39 of the CTA, on their own account as well as on job work basis. Department took the view that in the event of granule supplier not paying duty on woven fabrics/sacks, the earlier removal of strips / tapes from the job work end is covered by Notification No. 83/94-CE dated 11.4.1994 as amended, which is however available only to SSI units manufacturing goods, specified under SSI Notification No. 8/2003-CE dated 1.3.2003. Department took the view that the benefit under notification 83/94 cannot be availed. It appeared that the strips / tapes manufactured by M/s. AWBI on job work basis and cleared to M/s. Sathjothi ought to have suffered duty, inasmuch as M/s. Sathjothi has not paid duty on the woven fabrics / sacks manufactured and cleared by them out of the strips / tapes received from M/s. AWBI. Accordingly, a show cause notice was issued inter alia proposing recovery of Rs.8,84,985/- with interest thereon and imposition of penalty under various provisions of law. By the time, when the matter came up for adjudication, M/s. AWBI vide letter dated 8.1.2008 informed the concerned authority that they have sold their manufacturing premises to M/s. Palmetto Industries India Pvt. Ltd. and that the said purchaser has given an undertaking dated 11.9.2007, to the effect that any existing and future excise duty liability will be paid by M/s. Palmetto Industries. The director of M/s. Palmetto Industries also appeared for the personal hearing. In adjudication, the original authority confirmed the demand of Rs.8,84,985/- with interest thereon in respect of the strips / tapes cleared by AWBI without

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payment of duty to M/s. Sathjothi. The adjudicating authority, however, ordered recovery of the above demand and interest from M/s. Palmetto Industries, inter alia, relying on the provisions of section 11 of Central Excise Act, 1944 and concluding for duty liabilities of the predecessor are recoverable from the successor. Equal penalty of Rs.8,84,985/- under section 25 of the Central Excise Rules, 2002 r/w section 11AC was however imposed on AWBI (represented by its Proprietrix Smt. Indurani). In appeal, the Commissioner (Appeals) upheld the adjudication order. Hence the appellants are before this Tribunal

2. Today, when the matter came up for hearing, ld. counsel for Shri Raghavan Ramabhadran appearing on behalf of M/s. Palmetto Industries submitted as follows:-

2.1 Appellant entered into agreement dated 01.02.2007 with the four units viz. AWBI, Sath Jothi, Arut Perum Jothi Poly Bag Industries and Arut Jothi Woven Sacks for the purchase of their plant and machinery. AWBI subsequently executed a sale deed dated 17.04.2007 in favour of the appellant for the sale of immovable property viz. factory and shed with electrical installations therein. Similar sale deeds were entered into with the other 3 parties as well. The four units were contiguous and located adjacent to each other.

2.2 The sale and purchase between the appellant and the parties were only in relation to the factory shed and machinery

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and not for the business as a whole or as running concern. The appellant did not take over all the assets and liabilities of the sellers i.e. the appellant is not a successor in business.

2.3 Consequent to the purchase, the appellant while applying for central excise registration was strong-armed to give an undertaking that they would pay any existing and future excise duty liabilities of AWBI, Arut Perum jothi and Sath Jothi.

2.4 Present demand is vitiated inasmuch as the show cause notice was issued only on AWBI and not in the appellant.

2.5 Section 11 is applicable only when the successor company takes over the entire business of the predecessor company along with all assets and liabilities. In the present case, the appellant bought only the plant and machinery from AWBI and not the entire unit as a running concern. Reliance is placed on the following case laws wherein it has been held that Section 11 is not applicable when only the plant and machinery have been acquired from the old unit:

> Rana Girders Ltd. V. Union of India [2013 (295) ELT 12(SC)]; Review Petition dismissed at 2015 (320)ELT A175 (SC)]
>
> Kohinoor Ropes Pvt. Ltd. V CCE [2016 (336) Elt 513 (AP)]
>
> Shreejukrupa Spinners Pvt. Ltd. V. Union of India [2016(332) ELT 601 (Guj.)]
>
> Lamifab Industries v. Union of India [2015 (326) ELT 674 (Guj.)]
>
> Krishna Lifestyle Technologies Ltd. V. Union of India [2008 (229) ELT 173 (Bom.)] affirmed by Hon'ble Supreme Court at 2009 (242)ELT A118 (SC).

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2.6 The undertaking given at the time of seeking central excise registration does not ipso facto bind the appellant with the liability which is otherwise not present. The Hon'ble Supreme Court in the case of Tata Chemicals v. CCE [2015 (320) ELT 45 (SC)] held that something illegal cannot convert itself into something legal by act of a third person. Reliance is also placed on Dunlop India Ltd. & Madras Rubber Factory Ltd. V. Union of India and Others [1983 (13) E.L.T. 1566 (S.C.)]

3. On behalf of M/s. AWBI, ld. consultant Shri R. Janardhanan Pillai submitted as follows:-

3.1 That the proceedings themselves are barred by limitation. He submits that there is a clear cut admission in the order in Original vide para 204. That the appellant unit (AWBI) were registered and have been filing periodical returns since inception i.e. from March 2004 onwards. In the face of this admission by the department, there was no case for invoking the proviso to Section 11A alleging suppression as the activities were well within the knowledge of the department and it cannot be alleged that the appellant held back any information from the department. The law in this regard is well settled by umpteen number of judgments.

3.2 The order in original was passed without hearing the appellants and thus there was violation of principles of natural justice.

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3.3 In terms of the job work Notification 214/86 dated 25.3.1986, is the responsibility of the supplier of the raw materials to give undertaking to the jurisdictional Assistant Commissioner to the effect that duty liability will be discharged by the supplier of the order in Original. Therefore, if the supplier has not rendered such declaration, the appellant could not have been found fault with. No show cause notice was issued on the supplier of the raw material.

3.4 When it is found that the show cause notice is hit by limitation, the question of demand of duty does not arise and so also penalty.

4. On the other hand, the ld. AR Shri R. Subramaniyan supports the impugned order. He pointed out that after taking over AWBI and other units, M/s. Palmetto Industries had sought for new registration to continue the business from the same premises and based on the letter written from the jurisdictional Deputy Commissioner, they had given an undertaking owning all the existing or future liabilities of AWBI. Hence as per the proviso to section 11 of the Central Excise Act, M/s. Palmetto Industries being the successor unit to AWBI, will definitely have to make good the duty liability demanded.

5. Heard both sides and gone through the records.

6. No doubt, section 11 of the Central Excise Act, 1944 contains a provision which provides for recovery of duty

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liability due of the predecessor from the successor. The relevant provision reads as under:-

> *Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable of due, transfers or otherwise disposes of his business of trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purpose of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.]*

7. Discernably, the import of this provision will be restricted to duty and other sums "recoverable or due". From the facts, it emerges that the new registration was obtained by M/s. Palmetto Industries on 14.9.2007, on which date, there were no duty or sums recoverable or due. In respect of AWBI, even though the show cause notice was issued on 20.9.2007, the amount would become recoverable or due only at the time of determination of the liability by the original authority, which was on 25.4.2008. Even so, we find that it is not a case where the entire manufacturing activities or business was continued by the new owners. Ld. counsel for M/s. Palmetto Industries has emphasized that they had bought only the plant and machinery from AWBI. He has also placed before us a letter

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dated 20.8.2007 from M/s. Palmetto Industries to the Assistant Commissioner of Central Excise, Puducherry, they requested for central excise registration, enclosing, inter alia, copy of sale agreements signed by the parties. From the sale agreement, it does not spell out that M/s. Palmetto Industries would be responsible for any central excise dues that may arise in respect of AWBI. We also find merit in the contention put forward by ld. consultant for Ms. Indurani that the proceedings per se are hit by limitation, since the show cause notice for the period December 2004 to April 2005, was issued only on 20.9.2007. Keeping in view all these aspects, we have no hesitation in holding that the impugned order upholding the duty liability demanded by the original authority, but who ordered recovery of the same from M/s. Palmetto Industries on the one hand but chose to impose penalty on Mrs. V. Indurani (Proprietrix of AWBI) cannot be sustained, for which reason it is set aside.

8. In the result, both the appeals are allowed with consequential relief, if any, as per law.

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

Sulekha Beevi

(Madhu Mohan Damodhar)
Member (Technical)

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

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