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

E/416/2010

(Arising out of Order-in-Appeal No. 47/2010 (M-II) dated 29.03.2010 passed by the Commissioner of Central Excise (Appeals), Chennai).

CCE, Chennai-II Appellant

Vs.

M/s. Henkel India Limited Respondent

Appearance

Ms. Hemavathy, Commissioner (AR)
for the appellant

Shri T.R. Ramesh, Adv.,
for the Respondents

CORAM :

Hon'ble Smt. ARCHANA WADHWA, JUDICIAL MEMBER
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: **24.10.2017**

FINAL ORDER No. 42491 **/2017**

Per: Madhu Mohan Damodhar,

The brief facts of the case are that M/s. Henkel India Ltd. (in short HIL) are manufacturers of "Mahabringal Oil" and cleared the product on payment of duty to their holding company M/s. Henkel Spic India Ltd. (in short HSIL). It appeared to the department that since the respondent was selling their goods to their holding company, the normal transaction value at which the said goods are sold by the holding company in the market for the purpose of discharge of central excise duty thereon. Accordingly, proceedings were initiated which culminated in conformation of demand of duty of Rs. 13,77,632/- along with interest thereon and penalties vide the adjudication order dated 28.10.2005. On appeal, the Commissioner (Appeals) dismissed the appeal filed by the respondent vide order dated 14.08.2006 for non-compliance of pre-deposit. In further appeal, respondents approached the Tribunal, who vide Final order No. 1268/2006 dated 12.12.2006 had remanded the matter back to the lower adjudicating authority for the limited purpose for consideration whether in the facts and circumstances, the longer period of limitation would be invokable. In the denovo proceedings, the original adjudicating authority vide an order dated 26.03.2009, held that longer period of limitation would be invokable and demand for that period is sustainable, however, the original authority did not impose any penalties under Section 11 AC of the CEA, 1944 or under Rule 25 of CER, 2002 as proposed in the show cause notice. On appeal, the Commissioner (Appeals) vide impugned order dated 29.03.2010 held that the extended time is not invokable and that the assessees are eligible for refund as claimed by them and set aside the order of the original authority. Hence this appeal by the department before this forum.

2. Today when the matter came up for hearing, on behalf of the department Ld. Commissioner (AR) submits that the Commissioner (Appeals) has not got into the aspect of whether or not there is suppression of facts involved in the matter as directed by the Tribunal in their order. There is thus non-application of mind by the Commissioner (Appeals) and for that reason, the said order should be set aside and the order of the original authority restored.

3. On the other hand, on behalf of the respondent, Ld. Advocate Shri A.R. Ramesh reiterated the correctness of the impugned order. He also pointed out that in the denovo proceedings by the adjudicating authority, no penalties under Section 11 AC had been imposed and it was only held that the extended period was invokable and that differential duty liability was sustainable.

4. Heard both sides and have gone through the facts.

5.1 The core issue that comes up for decision concerns whether the aspect of applicability or otherwise of extended period of limitation has been sufficiently dealt with by the lower appellate authority.

5.2 While the original authority in his order dated 26.03.2009 doubtlessly held that the longer period of limitation would be invokable and the demands thereof are sustainable, however, for reasons best known to him, he has not imposed any penalties whatsoever proposed in the SCN, whether under Section 11 AC of the Act or under Rule 25 of the Rules. These findings and conclusions were **not** appealed against by the department before the Commissioner (Appeals).

5.3 From a plain reading of the provisions of Section 11 AC of the Central Excise Act, 1944, it is clear that mandatory penalty equal to the duty determined is imposable when duty of excise has not been levied or paid put forward by reasons of fraud, collusion or any mis-statement or suppression of facts etc., with intention to evade payment of duty.

5.4 No doubt, the original authority, while justifying invokation of extended period, has observed that there is suppression on the part of the assesse. But, we are unable to fathom how in spite of such an observation, he has chosen not to impose penalty under Section 11 AC.

5.5 When the original authority has chosen not to impose penalty under Section 11 AC, impliedly he has also **not** found any elements of fraud, collusion, suppression or mis-statement in the conduct of the assessee. When no such contumacious conduct is found, there can be no justification for invocation of extended period of limitation provided under Section 11 A (1) ibid. By not challenging this conclusion and order of the original authority and not filing appeal thereat before the Commissioner (Appeals), the Revenue has also allowed that part of the order to become final. This being so, the department cannot at this point of time turn around and contend that the decision of the Commissioner (Appeals) on the issue of suppression in the impugned order is not correct.

5.6 While arriving at this conclusion we also follow the ratio laid down by the Tribunal in *Sakthi Industries Vs. CCE, Chennai* - 2009 (240) ELT 302 (Tri. Chen.).

6. Viewed in this light, we do not find any merit in the appeal of the department, for which reason the same is rejected.

(Order dictated and pronounced in the open Court on)

1/11/17

(MADHU MOHAN DAMODHAR)
TECHNICAL MEMBER

(ARCHANA WADHWA)
JUDICIAL MEMBER

BB

Customs, Excise & Service Tax Appellate Tribunal

प्रमाणित प्रति / Certified True Copy
10/11
सहायक पंजीकार / Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर अपील अधिकारी / (CESTAT)
चेन्नै / CHENNAI