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

E/298/2007

(Arising out of Order-in-Appeal No. 4/2007 (M-II) dated 10.01.2007 passed by the Commissioner of Central Excise (Appeals) Chennai).

CCE, Chennai-II Appellant

Vs.

M/s. Asia Cables Respondent

Appearance

Shri K. Veerabhadra Reddy, JC (AR),
for the appellant

Ms. Minchu Punnoose, Adv.,
for the Respondent.

CORAM :

Hon'ble Smt. SULEKHA BEEVI C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member Technical

Date of Hearing/Decision: 24.04.2017

FINAL ORDER Nos. 40679 /2017

Per: Madhu Mohan Damodhar

The issue relates to the dispute on avaliment of SSI exemption Notification No. 9/1999 dated 28.02.1999. It appeared to the department that the respondent assessee had irregularly availed exemption. Accordingly, in adjudication proceedings

Customs, Excise & Service Tax Appellate Tribunal

differential duty to the tune of Rs.21,56,096/- along with interest thereof was demanded from the assessee, equal penalty imposed under Section 11 AC of the Central Excise Act, 1944 ~~and~~ as also penalty of Rs.10,000/- under 173 Q of the Central Excise Rules. In appeal, the Commissioner (Appeals), vide impugned order dated 10.01.2007, set aside the order of the original authority on the ground that aggregate value of clearances have to be quantified after taking into consideration of the goods cleared under concessional rate of duty as well as full rate of duty, and remanded the matter to the lower appellate authority for passing a fresh order after taking into consideration of the same. Aggrieved, Department is in appeal before this forum.

2. Today when the matter came up for hearing, on behalf of Revenue ld. AR, Shri K. Veerabhadra Reddy, took us to page 60 of the show cause notice, wherein in a tabular column details of the customers to whom goods have been cleared at 16% and 9.6% have been indicated. He also draws our attention to the allegation therein that the assesse had paid duty @ 16% as well as merit rate of 9.6% to the same customers in the same financial year without any basis; that they had not affixed the customer's brand name on the goods so cleared on merit rate of duty even if they had made a mention thereof in the invoices. He also draws our attention to para-4 of the SCN which brings out the fact that all the goods contain the label printed with the name, address and brand name of Asia Cables. The goods cleared at 16% did not contain any

brand name of any customer, irrespective of whether such goods were cleared at merit rate to purported brand name owners or at concessional rate of duty to others. For these reasons, ld. AR contends that the value of these clearances will not get the exemption from aggregate value for clearances under brand name of others, hence the value of these clearances also will required to be added to the value of other clearances. Ld. AR therefore submits that the consequence of the assessee's act would be that thay would not be eligible for the exemption notification ab initio, from the very beginning of the financial year. In support of his contentions, he relies on the Tribunal's decision in the case of *Mona Plastics Vs. CCE, Mumbai-IV* – 2003 (156) ELT 482 (Tri.-Mum.).

3. On the other hand, ld. Advocate for the respondent assessee submits the following:-

a) If the brand name of the respondents have not been affixed or embossed as long as the same has been indicated in the invoices, it cannot be stated that they are not manufactured the goods using logo etc. of the other person owning brand name. She relies on the ratio of the Hon'ble Apex Court judgment in the case of *CCE, Jamshedpur Vs. Tubes & Structurals* -2015 (318) ELT 362 (S.C.) and *CCE, Chennai Vs. Australian Foods India (P) Ltd.*, - 2013 (287) ELT 385 (S.C.).

b) Even if normal duty has been paid on the same consignment before crossing the limit on benefit of exemption, it does not amount to going out of exemption as which is the ratio

Customs, Excise & Service Tax Appellate Tribunal

laid down by the Hon'ble High Court of Karnataka in the case of *CCE, Bangalore Vs. Crescent Polymers Pvt. Ltd.* – 2011 (270) ELT 510 (Kar.).

c) She also placed, reliance on the ratio of the Tribunal's decision in the case of *Ankit Packaging Ltd. Vs. CCE, Hyderabad* – 2004 (165) ELT 228 (Tri.-LB), where it has been held that few clearances in the beginning of financial year on payment of normal duty, could not be considered as defacto opting out of exemption.

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

5.1 No doubt, combined reading of the Hon'ble Apex Court judgments in Ankit Packaging Ltd., and Tubes and Structurals (supra) would mean even if the assessee herein had not affixed the brand name on the goods but mentioned the same only in the invoices, it would not be denied that such clearances are pertaining to usage of brand name of another person. If only this had been the situation here, these impugned clearances made well have given the benefit of not being included in the aggregate value. However, from the facts, what emerges is that to the same buyer, purportedly a brand name owner, the very same goods had been sold by assessee under merit rate in some instances and in other cases claiming notification benefit. We are also unable to digest how entities like Southern Railways, S.E. Railways, one Mr. Gangadara Rao, one Mr. Venkateswara Rao were brand name owners, the first two being Govt. departments and the credentials of the last two not known. It is therefore very obvious that the

Customs, Excise & Service Tax Appellate Tribunal

respondent assessee has effected clearances in clear violation of condionalities of notification No. 9/1999.

5.2 A closer study of the facts thus indicate that the assessee had made these clearances in a well thought and calculated manner and not therefore in inadvertence or error.

5.3 At the same time, much as the ld. AR would have us believe that condition No.2 of the Notification will mean withdrawal from the availment of the exemption notification, and result in ab initio total denial of notification benefits for the beginning of the financial year, in our considered opinion, such a conclusion is neither spelt out in the notification nor is in resonance with the general scheme and intention of the benefit of notification sought to be extended. We find considerable merit in the ld. Counsel's reference to case laws which unequivocally hold that one or two instances of straying from the notification requirements, will not result in total denial of the notification ab initio for the entire period; that is certainly not mandated anywhere in the scheme. In the result, while the acts and omissions of the respondent assessee are calculated ones to keep themselves within aggregate exemption limit of Rs. 50 lakhs provided in the said notification,. they can however, not been denied benefit of exemption ab initio. However as it has been established that the purported clearances of brand name owners have not satisfied the conditionalities provided in the notification, the value of clearances thereof will necessarily have to be added to the aggregate clearances, even if there is mention of the brand name in the invoices.

E/298/2007

5.4 In the event, differential duty liability, if any, will start ticking once the value of the clearances already made by thee assessee in availing benefit of notification and value of the disputed brand name clearances are added and the total thereof exceeds the exemption slabs of Rs.50 lakhs and Rs. 100 lakhs respectively. Duty liability will have to be recalculated accordingly, only for which limited purpose the matter will have to be remanded to original authority. Ordered accordingly. We also hold the penalty imposed under Section 11 AC ibid will very much be imposable, in view of the discussions herein above. However, the quantum of penalty will be equal to the revised duty liability. There shall be no penalty under Rule 173 Q.

6. Appeal filed by the department is partly allowed on above terms and by way of remand.

(Order dictated and pronounced in the open court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

Sulekha Beevi
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

BB

Customs, Excise & Service Tax Appellate Tribunal

प्रमाणित प्रति/Certified True Copy
9/6
सहायक पंजीकार/Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/(CESTAT)
चेन्नै/Chennai