

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

E/113/2006

(Arising out of Order-in-Original No.15/2005 dated 28.10.2005
passed by the Commissioner of Central Excise, Pondicherry)

M/s. Jeevan Diesels & Electricals Ltd.

Appellant

Vs.

CCE, Pondicherry

Respondent

Appearance

Shri K.S. Jain, Auth. Rep. for the Appellant

Shri A. Cletus, Addl. Commissioner (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 : **11.05.2017**

Date of Pronouncement: 22.05.2017

Final Order No. 40734/2017

Per Madhu Mohan Damodar,

Brief facts of the case are that the appellant are manufacturers of DG sets falling under Chapter Sub-Heading 8502.90 of the CETA, 1985. Pursuant to a visit by the officers of the department to the factory of the appellant on 5.12.2000, certain apparent discrepancies were noticed between the number of engines on which CENVAT credit has been availed



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by the appellant compared to the physical stock of engines available in the factory. Subsequently, a show cause notice was issued to the appellant alleging improper and irregular availment of credit of duty without actually receiving the inputs i.e. engines and alternators in their factory and, without maintaining proper records for their receipt and disposal. Notice proposed demand of CENVAT credit to the tune of Rs.61,00,978/- alleged to have been irregularly availed along with interest thereon and imposition of equal penalty under Rule 57I(4) of Central Excise Rules, 1944 / Section 11AC of Central Excise Act, 1944 read with Rule 57AH(ii) of Central Excise Rules, 1944. Five Annexures were issued along with the show cause notice as follows:-

Annexure-A:- Details of engines and alternators mentioned in the input invoices received in the unit from 1.4.99 to 19.5.2011.

Annexure-B:- Details of engines and alternators cleared from the unit from 1.4.99 to 19.5.2001

Annexure-C:- Details of Engines and alternators found in stock as on 19.5.2001;

Annexure-D:- Details of the engines not received in the factory and on which MODVAT/CENVAT credit has been availed of irregularly;

Annexure-E:- Details of the alternators not received in the factory and on which MODVAT/CENVAT credit has been availed of irregularly.

2. In adjudication, the Commissioner of Central Excise vide the impugned order dated 28.10.2005, based on the evidences



and submissions put forth by the appellant reduced the duty liability to Rs.41,72,987/- along with interest thereon, and imposed penalty equivalent to the said liability.

3. Aggrieved, the appellants are before this forum.

4. On 11.5.2017, when the matter came up for hearing, Shri K.S. Jain, Managing Director of the appellant-company reiterated the grounds for appeal and also made oral submissions, which can be summarized as follows:

4.1 Annexures A to E to the show cause notice, contain incorrect figures and are tabulated in a manner which the appellant is not able to decipher as to how the demand of duty has been raised. Even though the appellant sought for repeated clarifications from the Revenue as to how the annexure has been prepared, the department has not been able to explain the same.

4.2 Appellants had furnished reconciliation statement showing details of 30% of the entries of Annexure D, which according to him were also repeated in Annexure B to the show cause notice. The appellants had, vide their letter dated 20.9.2002, expressed their difficulty in replying to the show cause notice because there was no basis for the allegation that inputs mentioned in Annexure D and Annexure E were not received in their factory.



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4.3 In fact, they had repeatedly sought for clarifications on these issues from the department, however, in vain.

4.4 Even during cross-examination, they had persistently sought to clarify from the investigating officer as to the basis, meaning and purpose of the said Annexures, however, no proper answers were forthcoming and in fact the said officer gave evasive answers.

4.5 Instances of engines and alternators cleared on payment of duty, but listed in Annexures D & E, were brought out in Annexure K submitted by the appellant. Similar instances to establish errors in the Annexures to the show cause notice were also pointed by the appellant through Annexures F and G submitted by them.

4.6 In spite of all such evidences put forth by the appellant, the adjudicating authority has not adequately considered them and has confirmed the major part of the demand without any justification.

4.7 In the Annexures, the investigation officers have mixed the stocks of engines and alternators and therefore the tabulation made is faulty. Further, the department has no case that the invoices on which the appellant has availed credit was fake or that the inputs received were removed clandestinely.

5.1 On the other hand, learned AR Shri A. Cletus appearing on behalf of Revenue supports the adjudication. He contends



that the quantum of irregular CENVAT credit allegedly availed by the appellant had been worked out in the Annexures to the show cause notice based on the appellant's own records. He also contended that the appellant's reply to the show cause notice and the evidences submitted by them during adjudication have been carefully considered and only after such exercise, the adjudicating authority has reduced the duty liability from Rs.61,00,978/- to Rs.41,72,987/-, along with interest thereon and penalty.

5.2 Learned AR further argues that it is for the appellant to show how the annexures are incorrect and onus is also on the appellant to prove otherwise. For these reasons, learned AR submits that there is no merit in the ^{appeal} ~~appellant~~ filed by the appellant.

6. We have heard both sides and perused the records.

7.1 The entire controversy has emanated on the apparent discrepancies detected by the investigating officers during their visit to the appellant's factory on 5.12.2000, between the number of engines on which CENVAT credit had been availed by the unit and the actual physical stock of engines available in the factory. Based on such a finding, the show cause notice alleged that the appellant had not received the inputs namely engines and alternators in their factory but had availed credit thereof irregularly.



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7.2 From the facts on record, it emerges that after the show cause notice was issued, the appellant vide letter dated 30.7.2002, sought clarification from the Commissioner, with regard to the basis for the allegation that they had not received the said inputs. Vide another letter dated 12.8.2002, it appears that the appellant had requested for copies of Annexures and letters and also sought reasons why investigations had been restricted to 1999 – 2000.

7.3 Vide another letter dated 20.9.2002, the appellant conveys that they had tried to meet the Commissioner to express the difficulty in replying to the show cause notice because no basis for the allegation with reference to the inputs listed in Annexures D and E had been given in the show cause notice. Appellant has been very persistently following up with the department with their contention that the Annexures relied upon in the show cause notice were incorrect.

7.4 Reconciliation statement was also produced by the appellant to show that around 30% of the entries of Annexure D were also featured in Annexure B to the show cause notice. From paragraphs 18 and 19 of the impugned order, it appears that the investigating officer vide note dated 15.10.2003 had reported that the claim amount by the assessee through Annexures F, G and K were reconciled and agreed to most of the entries therein. However, the discrepancies pointed out



and found correct worked out only to Rs.12 lakhs. It is seen from para 19 that in a meeting for reconciliation held under the aegis of the Commissioner, the investigating officer maintained that it is for the assessee to reconcile the remaining amount.

7.5 We find that in para 32.3 of the order, the appellant's objections and contentions with regard to the discrepancies in Annexures have been largely considered in principle. The said paragraph is reproduced below:-

"Whereas the other Annexures are pertinent and it must be fairly conceded that the claims of the assessee through these annexures are very well found. In fact, most of the errors pointed out by the assessee stand admitted by the IO himself. The IO had been asked to verify the claims of the assessee through these Annexures who had vide his Note dated 15.10.2003 has stated that the Annexures F, G & K have been reconciled and had agreed that out of the total demand, an amount of about Rs. 12 lakhs has been reconciled (i.e. the demand is incorrect to this extent). As far as the other entries are concerned, he has stated that it is for the assessee to reconcile whereas the assessee had taken a stand that it is for the department to rework the demand. The I.O. during the cross-examination on 29.7.2003 had justified the non-consideration of 61 numbers of engines and 35 numbers of alternators lying in the unit (as per S. No. 43 & 44 of Annexure A of the mahazar and S. No. 97 & 98 of Ann. B of the mahazar) while drawing the Show Cause Notice by stating that when the mahazar was drawn on 19.5.2001, he was told that the engines and alternators lying in the unit without number plates were very old. In this regard, I find that with reference to the entries in Sl. No. 44 of Annexure A and Sl. Nos. 97 & 98 of Annexure B to the mahazar, it has been clearly mentioned that the engines and alternators were without any number plates. The mahazar has been drawn in the presence of Shri N.Purushothaman, Sr. Accounts Officer and Authorized Signatory of the assessee unit and he has also signed the mahazar. Further, till now the assessee has also not come up with any evidence to show that such engines and alternators were having number plates and to the effect that such engines have been cleared on payment of duty etc. As the mahazar to the effect that the engines and alternators did not have number plates is authenticated by the assessee unit's authorized signatory and nothing contrary to the same has been produced before the adjudicating authority, it is established that the same did not have any number plates. As the various Annexures to the notice have been drawn by taking as basis the serial numbers of the engines and



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alternators on which credit has been taken by the assessee on or after 1.4.1999 and the above referred 61 engines and 35 alternators did not have number plates, the same have not been rightly considered while drawing the Annexures."

7.6 However, in the very next para i.e. 32.4, the adjudicating authority inexplicably takes the stand that in case of CENVAT credit, proof of admissibility of the credit lies on the person who has taken the credit, that the assessee had not come forward to explain the discrepancy at the initial stages of investigations and we are unable to digest such a view. It is not disputed that the entire investigation was conducted by the Revenue based on the appellant's own records. From the records, we find that the Revenue has not recovered any other evidence to corroborate their allegations. When this is so, the appellant is fully justified in seeking clarification from the department about the indecipherability of the data worked out by the Revenue and relied upon in the Annexures to the show cause notice.

7.7 One of the allegations put forward by Revenue is that the appellants have not been able to give one to one correlation of the inputs and the output. Needless to say, that while availing credit such one to one correlation is not necessary.

7.8 The main defense put forward by the appellant, as discussed above, that the Annexures appended to the show cause notice are faulty. The appellant draws support from the evidence adduced from the cross-examination of the



investigating officer. Revenue, however, has not been able to explain the same nor it is brought out from the records also.

7.9 From the impugned order, it also emerges that the adjudicating authority has entrusted to the investigating officer to verify the correctness of the claim of the reconciliation statement submitted by the appellants, through Annexures F, G and K.

7.10 It is further evident that the adjudicating authority has acted on the findings and recommendation of the said investigating officer without any self-application of mind on the issue at stake. We are also distressed to note that neither the note submitted by the investigating officer nor for that matter, the report made by the preventive unit were made available to the assessee. Evidently, the adjudicating authority has relied upon on whatever reports that were given to him. In a way, what the adjudicating authority has done is a delegating and "outsourcing" of his quasi-judicial powers to the investigating officer which is not the conduct expected in the delivery of justice.

8. From the above discussions, we find that the entire basis of the show cause notice is in question and the department has not proved the basis for the Annexures and the allegations raised in the show cause notice. The entire proceedings are obviously hobbled ab initio ^{↳ with ↳} incoherence and errors. The



appellant then, is being asked to defend the indefensible and to show cause to allegations which are shredded is unintelligibility.

9.1 There is plethora of judgments by various higher appellate Courts which have consistently ruled that SCNs issued in a casual manner with missing ingredients cannot be bridged by adjudication proceedings and such SCNs loses its foundation to bring the assessee to proper charge under law.

9.2 In the case of *Delta International Limited Vs. CC* – 2012 (281) ELT 400 (Cal.) that a SCN will fall through when it is devoid of any grounds or reasons or particularly in support of its claim for short payment. The relevant portion of the judgment is reproduced below:-

“15. In our opinion, the flaw in the show cause notice is fundamental. The subject says “non-realization of customs duty”. The body of the show cause notice does not disclose how there is non-realization of customs duty or short payment of it. However, documents have been brought on record including an affidavit-in-opposition and notes of submission purporting to establish what was to be collected was central excise duty and that such duty is computed as customs duty, but nevertheless, collected as central excise duty.

The customs authorities by virtue of the above notifications had power to issue the show cause, it was submitted.

16. In our opinion, whether they have the power to do so or not is very secondary. No case has *prima facie* been made out against the appellant/writ petitioner which he can be required to answer.



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Under well settled principles if a show cause notice does not disclose any contravention or infraction of any provision of law the person or such show cause notice is a nullity. But, here, it is not such a case. The grounds made in the show cause notice allege that customs duty of Rs. 7,08,98,160/- is due but the reasons in support of such claim in the show cause notice are very ambiguous so much so it is impossible to understand anything else by reasonably any prudent person. Therefore, the appellant/writ petitioner, in our opinion, is not in a position to answer such show cause notice, which is against the rules of natural justice.

9.3 The Hon'ble High Court of Madras, in the case of *J.A.Motor Sport Vs. State of Tamil Nadu* as reported in 2017 (345) ELT 205 (Mad.) has ruled that issuance of SCN is an empty formality but it is a statutory requirement which should be complied with to satisfy principles of natural justice and a requirement that should be complied with by the authorities to satisfy the principles of natural justice. The Court inter-alia held as follows:-

"10. One more ground, on which, the impugned show cause notices are to be held as bad in law is that the notices are bereft of particulars and in the sub-column, it is stated as 'proposal received'. Obviously, this proposal is from the officials of the Enforcement Wing. If such is the case, then the petitioner is entitled to know as to why the officials of the Enforcement Wing sent a proposal, though the petitioner had given an elaborate reply to the officials of the Enforcement Wing on 8.2.2016 as undertaken by them in their statement recorded by the officials of the Enforcement Wing on 31.12.2015."



9.4 In the case of *Everest Educational Charitable Trust Vs. CST, Chennai* – 2014 (36) STR 79 (Tri.-Chen.), the Tribunal held that a lack of specific proposal in the SCN is fatal to the proceedings. The relevant portion is quoted below:-

“7. We have considered the submissions by both sides. We find that there is a specific finding in the initial adjudication order to the effect that training courses conducting by the appellants were vocational training. There is no specific proposal in the revision show cause notice to revise this finding. Even when this issue was raised by the appellant in reply to the revision show cause notice and during the personal hearing also, no finding is given by the revisionary authority on this issue. This in our view is fatal to the proceedings because the finding that they were eligible for the exemption under Notification 24/2004-S.T. had become final and there was no proposal for revising the finding in the show cause notice and here is no finding in the order and no reasoning has been given on this issue. Therefore, the preliminary objection raised by the Id. Advocate for the appellant is valid and we are not going into merits of this issue whether the appellants were running a commercial institute or whether the training was really a vocational training or the question whether extended period of time would be invoked in the original show cause notice.”

9.5 In the case of *Ispat Industries Ltd. Vs. CCE, Nagpur* – 2012 (280) ELT 236 (Tri.-Mum.) the Tribunal held that for every case, SCN is the foundation and the assesseees are required to defend the allegation made in the show cause notice. In the case of *Apex Fluidomatics Limited Vs. CCE, Ahmedabad* – 2014 (3113) ELT 106 (Tri.-Ahmd.) held that any infirmity in the SCN cannot be bridged by



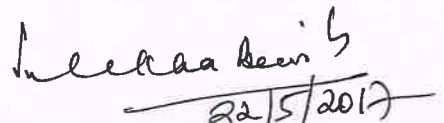
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adjudication proceedings and order passed by the adjudicating authority and first appellate authority.

10. In view of the discussions and findings herein above and also following the ratio of the case laws cited in para-9 supra, we hold that the flaws in the SCN are fatal to the proceedings and hence the impugned order will require to be set aside, which we hereby do. In consequence, appeal is allowed with consequential relief, if any, as per law.

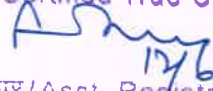
(Pronounced in open court on 22.5.2017)


(MADHU MOHAN DAMODHAR)
Member (Technical)
Rex


(SULEKHA BEEVI C.S.)
Member (Judicial)



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