CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

CHENNAI

SOUTH ZONAL BENCH,COURT HALL No.III

EXCISE APPEAL No.41448 of 2014

(Arising out of Order-in-Appeal No.55/2014 dated 08.03.2014 passed by Commissioner (Appeals), Central Excise and Service Tax, Large Tax Payer Unit, 1775, J.N. Road, Anna Nagar (W) Extn., Chennai 600 101).

M/s. Simpson And Co. Ltd. ...**Appellant**
No.861/862
Anna Salai
Chennai 600 002

Versus

The Commissioner of GST and Central Excise ...**Respondent**
LTU, 1775, J N Road
Anna Nagar, West Extn., Chennai 600 101

APPEARANCE:

Ms. Manasa Srinivasan, Advocate for the Appellant
Mr. N. Satyanarayanan, Authorised Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.40706/2024

Date of Hearing :14.06.2024
Date of Decision: 14.06.2024

ORDER : Per Ms. SULEKHA BEEVI C.S.

The above appeal arises out of a refund claim filed by the appellant for refund of excess duty paid by them.

2. Brief facts are that the appellant is engaged in manufacture of I.C. Engines and clear these engines for use in the manufacture of tractors to M/s. TAFE Ltd. which is subsidiary of the appellant. The valuation of such engines was being done in terms of Rule 8 of the Central Excise valuation (Determination of Price of Excisable Goods) Rule, 2000. A special audit was conducted at the unit of the appellant and in the final audit report it was reported that the fixed overheads (Depreciation and Lease rent) for 2004 – 05 has been de-rated by 30% on account of abnormal idle capacity in spite of actual production being higher than the normal production. Further, the appellant had incorrectly adopted the installed capacity as the normal production capacity as opposed to taking average production of the last 3 years.

3. Based on the above special audit report, Show Cause Notice was issued to the appellant proposing to demand duty of Rs.14,93,525/- along with interest and for imposing penalties alleging that appellant adopted incorrect cost of production by depressing the cost of production by way of derating the fixed overheads contrary to the CAS-4 standards while determining the assessable value for discharge of duty for clearances made to M/s. TAFE Ltd. during the period from 01.10.2004 to 14.11.2005. After due process of law, the Adjudicating Authority confirmed the demand of Rs.12, 17, 015/- under Section 11 A along with interest and imposed equal penalty.

4. Aggrieved by such order, the appellant filed appeal before the Commissioner (Appeals). As per Order in Appeal No. 82/2012 dated 30.11.2012 the Commissioner Appeals set aside the demand of duty on merits as well as on the ground of limitation. The relevant part of the order passed by the Commissioner (Appeals) reads as under:

> "5.8 I find force in the above argument, that the taking of abnormal years into consideration in calculating the "Normal capacity" is incorrect. In the present case, I find that the assessment was done after taking into account the de-rating of overhead costs as per the CAS-4 guidelines. Thus, in determining the cost 30% of overhead was de-rated. Accordingly, I hold that the de-rating of overheads, as discussed above which has been arrived at as per the CAS-4 quidelines, is in order.
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> 6. Thus, the issue on merits is in favour of the appellant and therefore, there is no need to go into other issues. As the demand itself is not sustainable, the question of invocation of extended period of limitation, Interest and penalty on the appellant does not arise. In view of the above, the impugned order is set aside and the appeal is allowed".

5. Pursuant to the order passed by the Commissioner (Appeals) setting aside the demand of duty and penalties, the appellant filed refund claim before the Assistant Commissioner for refund of Rs.12,17,015/- paid by them. The refund was sanctioned vide Order in Original dated 17.06.2013 wherein it was held that the refund claim is not hit by time bar or the principle of unjust enrichment. The refund sanctioning authority sanctioned refund of Rs.12,17,015/- and allowed the appellant to avail credit of the said amount in their CENVAT account.

5. Against such order of sanction of refund the department filed appeal before the Commissioner (Appeals) mainly challenging the issue of valuation. Commissioner (Appeals) after considering the grounds raised by the department, allowed the appeal filed by the department and set aside the order of sanctioning the refund, holding that appellant is liable to pay duty.

6. Aggrieved by such order, the appellant is now before the Tribunal.

7. The Ld. Counsel Ms. Manasa Srinivasan appeared and argued for the appellant. It is submitted that the department had initiated proceedings against the appellant pursuant to an audit and issued Show Cause Notice dated 16.10.2009 disputing the valuation adopted by the appellant for the period 01.10.2004 to 14.11.2005. The said Show Cause Notice was adjudicated and the Additional Commissioner vide OIO dated 16.03.2011 had confirmed the duty demand of Rs.12,17,015/- and also imposed penalty. The appellant had filed appeal before the Commissioner (Appeals) against such order. The Commissioner (Appeals) allowed the appeal filed by the appellant and set aside the demands on merits holding that the valuation adopted by the appellant was correct and that the appellant was entitled to de-rate the overheads in terms of CAS-4 standards as the period between 2000-01 to 2003-2004 was an abnormal period.

8. The department filed an appeal against the above Order in Appeal dated 30.11.2012 before the Tribunal as Appeal No.E/40612/2013. The department appeal was dismissed by the Tribunal as withdrawn by the department in terms of litigation policy vide Final Order no.42407/2018 dated 11.09.2018. Therefore, the order passed by the Commissioner (Appeals) dated 30.11.2012 setting aside the demand of duty and upholding the valuation adopted by the appellant has attained finality.

9. Consequent to the order passed by the Commissioner (Appeals), the appellant filed an application for refund claiming the refund of duty paid by the appellant under protest. The Assistant Commissioner had sanctioned the refund observing that the

appellant has satisfied the test of unjust enrichment as well as the issue of limitation.

10. The department filed appeal before the Commissioner (Appeals) against the said Order in Original dated 17.06.2013 sanctioning refund. However, the grounds raised in the appeal was not in respect of the rejection of refund but the department opted to once again agitate the issue of valuation.

11. It is submitted that Show Cause Notice No.245/2013 dated 24.09.2013 was issued for recovery of the erroneous refund of the amount pending disposal of the department appeal challenging the sanction of refund. The appellant had filed reply to such Show Cause Notice.

12. It is explained by the Ld. Counsel that during the disputed period the appellant was facing slump market conditions and therefore the appellant resorted to derating of cost of overheads by 30% in terms of CAS-4 standards (PARA 5.17) for arriving at the cost of production. This issue in respect of valuation has been finally settled in favour of the appellant and has attained finality.

13. However, the Commissioner (Appeals) in the impugned order has considered the very same issue of valuation and observed that abnormalities are characterised by inconsistency and therefore the periods cannot be treated abnormal. After reagitating the issue on merits the refund sanction has been set aside. It is argued by the Ld. Counsel that the impugned order is without any jurisdiction as the issue of valuation was not a subject matter for consideration by the Original in Original dated 17.06.2013. The Commissioner

(Appeals) ought not to have traversed in to the issue of valuation as the same has attained finality when the department appeal was dismissed by the Tribunal vide Final Order dated 11.09.2018. It is submitted that the Commissioner (Appeals) has become functus officio after passing Order in Appeal dated 30.11.2012 as regards the issue of valuation.

14. It is submitted by the Ld. Counsel that since there are no grounds for setting aside the refund and the only finding is with regard to the issue of valuation, the impugned order may be set aside. The Ld. Counsel prayed that the appeal may be allowed.

15. The Ld. AR Shri N. Satyanarayanan appeared and argued for the department. The findings in the impugned order was reiterated.

16. Heard both sides.

17. The issue to be decided is whether the order passed by the Commissioner (Appeals) setting aside the sanction of refund is legal and proper.

18. From the narration of facts, it can be seen that the issue of valuation was held in favour of the appellant by the Commissioner (Appeals) vide OIA No.82/2012 dated 30.11.2012. The department had filed appeal against this order before the Tribunal. The appeal has been withdrawn by the department on the ground of monetary limits. It has to be said that the issue of valuation has therefore attained finality in favour of the assessee / appellant.

19. The appellant then filed refund claim for consequential refund before the refund Sanctioning Authority. As per OIO dated 17.06.2013, the Original Authority sanctioned the refund claim after examining the issue of unjust enrichment and time bar. The amount sanctioned was allowed to be taken as CENVAT credit by the appellant. The department filed appeal against this order dated 17.06.2013. The grounds raised in the appeal was mainly regarding the issue of valuation. The Commissioner (Appeals) however, considered the grounds raised by the department and then held that the derating of overheads by 30% done by the appellant is not proper. The order of sanctioning the refund was set aside. We find that the Commissioner (Appeals) has traversed beyond his jurisdiction as the issue of valuation was not the issue considered or decided by the Adjudicating authority vide order dated 17.06.2013. At the cost of repetition, it has to be said that the issue of valuation has attained finality when the Tribunal dismissed the appeal filed by the department in terms of litigation policy.

20. After considering the facts, we are of the opinion that the order passed by the Commissioner (Appeals) can not sustain and require to be set aside. In such circumstances the sanction of refund ordered by the Original Authority has to be restored.

21. In view of the foregoing the impugned order is set aside. The appeal is allowed with consequential reliefs if any.

(Pronounced in open court)

(VASA SESHAGIRI RAO)
Member (Technical)

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

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