CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. I

Excise Appeal No. 41399 of 2016

(Arising out of Order-in-Appeal No.90/2016 (CXA-I) dated 03.04.2016 passed by Commissioner of Central Excise (Appeals-I), Chennai)

M/s Abi Showatch India Limited **.... Appellant**
Pulivalam Village,
Banavaram 632505

Versus

Commissioner of GST & Central Excise, **.... Respondent**
Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai – 600 040.

APPEARANCE :

Shri S. Murugappan, Advocate, for the Appellant
Shri M. Selvakumar, Authorised Representative for the Respondent

CORAM :

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V. MEMBER (JUDICIAL)

FINAL ORDER No.41569/2024

DATE OF HEARING : 22.11.2024
DATE OF DECISION :06.12.2024

Per AJAYAN T.V.

The appellant has preferred this appeal being aggrieved by the impugned order in appeal by which the learned appellate authority has upheld the order in original confirming the demand of duty made on the appellant by denying the claim of benefit of exemption notification No.67/1995-C.E. dated 16-03-1995 as amended along with demand of interest at appropriate rates and penalties imposed.

2. The facts relevant to the dispute, in brief, are that M/s. ABI Kandigal, a Division of ABI Showatech (India) Ltd, Pulivalam Village, Banavaram 632505 (hereinafter referred to as appellant) are

manufacturers of parts of turbo chargers falling Central Excise Tariff Heading No. 84149090. The appellant had received an amount of Rs.4,24,46,490/- for the period from March, 2010 to January, 2013 towards tool development charges from M/s Brakes India Limited, Chennal and from M/s. LAP Ross Engineering Limited Banavaram. The appellant had manufactured the tools and sold them to the aforementioned customers after raising invoices and paying appropriate VAT without payment of cenvat duty, while retaining the tools in the factory for the purpose of processing job work goods.

3. The Revenue was of the view that though there was no physical removal of goods, the factum of sale indicates a transfer of ownership of the goods and that certainly amounted to nothing short of physical removal of goods and therefore the appellant ought to have paid the duty along with applicable interest. Alleging contravention of the provisions of Rules,5,6,8,10 and 11 of the Central Excise Rules, 2002 for such nonpayment of duty as well as suppression of the information about the manufacture of tools with intention to evade payment of duty, a notice demanding Rs.44,60,239/- was made invoking the extended period of limitation along with demand of interest and proposal to impose penalty under Section 11AC of the Central Excise Act, 1944 for the period March, 2010 to January, 2013. A statement of demand of duty of Rs.8,03,400/- along with appropriate interest and proposal for penalty under rule 25 of the Central Excise Rules, 2002 was issued for the subsequent period from March 2014 to September 2014.

4. In reply to these demands, the appellant stated that the captive use of these tools within the factory of production is on availment of

exemption under Notification No.67/1995 dated 16.03.1995 is available to them. Though the goods were sold to their customers and VAT was paid, it was submitted that excise duty is levied on manufacture and thus the said exemption is available to them. It was also submitted that change of ownership will not affect their entitlement to such an exemption. The appellant also stated that all records including sale invoices showing VAT were maintained by the appellants and therefore, there is no suppression. Original authority rejected these contentions and confirmed the demand with interest and imposed equal penalty in respect of the show cause notice as well as statement of demand through a common order. On appeal, the learned appellate authority rejected the appeal and upheld the order passed by the original authority. Hence this appeal.

5. The learned counsel Shri S. Murugappan appearing for the appellant submits that the notification No.67/1995 aforementioned, is squarely applicable to the present case and when the tools manufactured by the Appellants are used within the factory for producing components on account of its customers, exemption is available.

6. He submits that the fact that the tools were sold to customers by raising invoices will not disentitle the appellant from claiming the exemption under the above notification, as the goods remained within the factory of production. That the appellant in fact has raised proper sales invoices showing NIL Excise duty and also paid applicable VAT on account of sales. Therefore, in this background the charge that there is suppression with an intention to evade duty is not sustainable.

7. He would further submit that the issue is no more res-integra being covered by the decisions of the Tribunal in favour of the appellants in: -

(a) Commr. of Central Excise, Vadodara vs. Automotive Stamping & Assemblies Ltd. [2013 (298) E.L.T. 591 (Tri. – Ahmd)]

(b) Elcon Clipsal India Ltd. vs. Commissioner of Central Excise, Ahmedabad-I [2002 (146) E.L.T. 360 (Tri. – Del.)]

(c) Thermax Surface Coatings Ltd. vs. Commr. of C. Ex., Chennai-III [2002 (148) E.L.T. 783 (Tri. – Mumbai)]

8. Learned authorized representative, Shri M Selvakumar, takes us through the findings of the learned appellate authority and reiterates the same.

9. We have heard both sides, bestowed our consideration to the submissions and have also perused the records.

10. The learned appellate authority has rendered his finding in para 7 of the impugned Order in Appeal that the appellant's contention that they are eligible from payment of central excise duty in terms of notification No.67/95 CE dated 16.03.95, is untenable. The reasons given by the learned appellate authority are that the appellant has raised central excise invoices, paid VAT and received tool development charges and thus it cannot be construed that the tools were manufactured and used in the factory alone for captive consumption and hence the benefit of the aforementioned notification claimed is not available to the appellant. He has also rendered a finding that in view of the definition of sale in section 2(h) of the Central Excise Act, 1944, it is obvious that there was a transfer of possession of goods at the time of sale of goods

by appellant to their customers and the tools were again transferred to them for use in job work. Once the tools have been sold to their customers it has to be held that there was a deemed removal of tools.

11. These nebulous findings of the learned appellate authority are unsustainable as they fail to appreciate the facts conceded in the show cause notice, namely, that the appellant retained the tools manufactured in the factory for the purpose of processing job work goods and that there was no physical removal of the goods. These findings also militate against the provisions of notification 67/95 CE, the benefit of which was claimed by the appellant, and further betrays a lack of appreciation of the statutory provisions in their proper perspective, as would become evident from the discussion below.

12. The allegation against the appellant, as distilled in para 5 of the SCN is that the appellant manufactured tools and sold them to M/s. Brakes India Ltd, Foundry Division and M/s. LAP Ross Engineering Limited by raising invoices and payment of appropriate VAT. The appellant retained the tools in the factory for the purpose of processing job work goods. The tools having been sold, there was transfer of ownership of the goods, though, there was no physical removal of the goods. However, it certainly amounts to nothing short of physical removal of the goods and in the circumstances, it appears that the appellant ought to have paid duty of excise along with applicable interest. This is the sequence of the rationale for raising the demand as reflected in the show cause notice.

13. The appellant had countered these allegations before the original adjudicating authority and the learned appellate authority on the plank

that though the goods were sold to their customers and VAT was paid, the excise duty is for manufacture and for the captive use of these tools within the factory of production the exemption under notification No. l67/1995 dated 16.03.1005 is available to them and that change of ownership will not affect such an exemption.

14. Section 3 of the Central Excise Act, 1944 stipulates, inter-alia, that there shall be levied and collected in such manner as may be prescribed, a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India. The charging section thus makes it clear that excise duty is on manufacture of excisable goods and not on their sale. What constitutes manufacture also stands defined in Section 2(f) of the Central Excise Act ibid.

15. Sub-rule (1) of Rule 4 of the Central Excise Rules, 2002, among other things, mandates that every person who manufactures any excisable goods or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8. Rule 4 also stipulates the prohibition that no excisable goods on which any duty is payable shall be removed without payment of duty from any place where they are produced or manufactured or from a warehouse, unless otherwise permitted.

16. Rule 5 of the Central Excise Rules, 2002 stipulates, inter-alia, that the rate of duty or tariff value applicable to any excisable goods shall be the rate or value in force on the date when such goods are removed from a factory or warehouse and Rule 8 of the Central Excise Rules ibid details, inter-alia, the manner of payment of duty on the goods removed from the factory or the warehouse during a month.

17. Thus, the excise duty levied as per Section 3 of the Central Excise Act ibid on the goods produced or manufactured is payable by the person identified in Rule 4 of the Central Excise Rules ibid as the one who has to pay the duty leviable, namely, the person who produces or manufactures any excisable goods or who stores such goods in a warehouse. However, the rate of duty or tariff value applicable thereon is determined as per Rule 4 of the Central Excise Rules ibid on the basis of the rate or value in force on the date when such goods are removed from the factory or a warehouse as the case may be and the payment of such duty is also to be made in the manner indicated in Rule 8 on the dates specified. It is thus clear that the collection of duty is postponed till the date of actual removal of the excisable goods and the rate of duty or tariff value applicable thereon is also determined as that in force on such date of removal.

18. However, the explanation appended to Rule 5 also stipulates that if any excisable goods are used within the factory, the date of removal of such goods shall mean the date on which the goods are issued for such use.

19. Therefore, in the instant case when the Appellant manufactured the tools, they attract the levy of excise duty. Be that as it may, since the tools are not removed and are used within the factory, in view of the aforementioned explanation appended to Rule 5, the date when such tools are issued for use within the factory, becomes the date of removal of such tools by virtue of the explanation to Rule 5, thereby giving rise to the requirement to discharge the duty liability thereupon.

20. However, the Central Government has, in exercise of the powers conferred by sub-section (1) of Section 5A, being satisfied that it is necessary in the public interest so to do, exempted, inter-alia, capital goods as defined in Cenvat Credit Rules, 2002 manufactured in a factory and used within the factory of production by way of the notification No.67/95-CE dated 16-03-1995 as amended. It is the benefit of this notification to which the appellant has staked claim. Since the said notification providing for exemption from duty is a beneficial exemption that the Central Government has notified in public interest, we find that the claim for exemption made by the appellant in respect of the tools manufactured in the factory and used within the factory is tenable, given that admittedly there is no physical removal of the said tools from the factory.

21. We are therefore unable to appreciate the learned appellate authority's finding that in view of the definition of sale under Section 2(h) of the Central Excise Act, 1944, there was an obvious transfer of possession of goods by the appellant at the time of sale of tools by the appellant which has to be treated as a deemed removal of tools that attracts payment of duty. In our view such a deemed removal as envisaged by the learned appellate authority with an attendant liability to discharge excise duty, neither flows from the said definition of sale under Section 2(h), nor appears to emanate from the charging section 3 of the Central Excise Act, 1944 in the light of the said definition of sale under Section 2(h). If at all, a proposition that there is a deemed removal of tools by the appellant, that would attract a liability to discharge excise duty, can be rooted in the aforementioned explanation to Rule 5 which mandated that if any excisable goods are used within

the factory, the date of removal of such goods shall mean the date on which the goods are issued for such use. This liability that is otherwise attracted stood effaced by the aforementioned exemption No.67/95- CE the benefit of which has been claimed by the appellant.

22. We also notice that this Tribunal had in earlier instances had addressed such availment of the benefit of notification No.65/95 ibid in similar situations and despite the appellant bringing the decisions in the case of Elcon Clipsal India Ltd v CCE, Ahmedabad and CCE Vadodara v Automotive Stamping & Assemblies Ltd, cited supra to the notice of the learned appellate authority, he has not followed the same. The learned appellate authority has attempted to make a specious distinction that the decision of the Tribunal in BPL Electronics Ltd v CCE, Bangalore, reported in 1994(71) ELT 801 (Tri), that had been relied on in these subsequent decisions, was in the context of an earlier notification 220/86-CE dated 2-4-86 and therefore the subsequent decisions of the Tribunal on which reliance was placed by the appellant are not applicable to the appellant's case.

23. We find this attempt inane since the notification 220/86-CE dated 2-4-86 the benefit of which was claimed in the said decision also dealt with providing exemption to specified goods manufactured in a factory and intended for use in the factory in which they are manufactured from the whole of the duty of excisable leviable thereon. The tribunal had, after giving a finding based on rulings cited therein, held that it is a settled law, that excise duty is on manufacture and not on sale and thus the finding given by ld. Collector, that the sale invoice by itself has created a liability for sale is without any substance and against the

very concept of chargeability and leviability of excise duty as laid down in the charging Section 3 of Central Excises & Salt Act, 1944. Thereafter the ratiocination given therein, that once the goods are exempted from payment of duty on its further utilization in the factory itself, then the question of collecting duty does not arise, the levy of excise duty being on manufacture and not on saleability; was binding on the learned appellate authority. Therefore, it was inappropriate on the part of the learned appellate authority not to have adhered to the same as required by judicial discipline and his attempt to make a distinction of the ratio, where there is none, is disapproved.

24. We find that this Tribunal had in its decision in ***Elcon Clipsal India Ltd v CCE, Ahemdabad-I, reported in 2002 (146) ELT 360 (Tri-Del)***, wherein the exemption of notification No.67/95-CE ibid claimed by Elcon Clipsal India Ltd, the appellant therein, was disallowed on the ground that as per invoices raised by the said appellant goods had been sold to M/s.Gerald Industries Pvt Ltd; held as under:

> "3. *We have considered the submissions of both the sides. Notification No. 67/95-C.E. exempts capital goods manufactured in a factory and used within the factory of production. It has not been disputed by the Revenue that the impugned goods were used within the factory of production only. The exemption has been disallowed on the ground that as per the invoices raised by the Appellants the impugned goods had been sold to M/s. Gerald Industries Pvt. Ltd. The Notification is applicable if the Capital goods are used within the factory of production. We agree with the submissions of the learned Advocate that Notification nowhere provides that the use should be on the account of manufacturer. The exemption is available on the basis of place of use i.e. "within the factory of production" which has not been disputed by the Revenue. The decision in the case of BPL Electronics Ltd., supra, is applicable on all fours to the facts of this case. It has been held as under :*
> *"The goods are dutiable, irrespective of sale or not. But once they are exempted from payment of duty on its further utilization in the factory itself, then the question of collecting duty does not arise. The grant of benefit of exemption under notification in question is only on the criteria of the goods being "manufactured in a factory and intended for use in the factory in which they are manufactured". Admittedly, the goods manufactured, were intended for use in the factory in which they were manufactured, thus the question of discharging duty on the basis of mere fact of raising an invoice in favour of B.P.L. Finance Ltd. does not create a liability for charging duty at all. So*

long as the goods have been manufactured in a factory and are intended for use in the factory in which they were manufactured, the exemption straight away applies."

4. The Appellants are thus eligible for the benefit of exemption under Notification No. 67/95-C.E.. Accordingly, the Appeal is allowed."

25. The appellant herein has also rightly relied on the decisions of this Tribunal in ***Thermax Surface Coatings Ltd. vs. Commr. of C. Ex., Chennai-III, reported in 2002 (148) E.L.T. 783 (Tri. – Mumbai)*** and ***Commr. of Central Excise, Vadodara vs. Automotive Stamping & Assemblies Ltd, reported in 2013 (298) E.L.T. 591 (Tri. – Ahmd)***, wherein on similar facts the benefit of the notification No.67/95-CE have been extended as claimed.

26. In view of the discussions and findings above and in the light of the aforementioned decisions of the Tribunal, we find that the appellant is entitled to the benefit of the notification No.67/95 dated 16-03-1995 as amended, as claimed and the demands of duty, appropriate interest and penalties imposed by the original authority as upheld by the learned appellate authority, are untenable. Having found that the appellant herein has succeeded on merits, we find no necessity to examine the claim of limitation raised and have not done so. Accordingly, we set aside the impugned Order in Appeal and allow the Appeal with consequential benefits, if any, in law.

(Order pronounced in the open court on 06.12.2024)

(AJAYAN T.V.)
Member (Judicial)

(VASA SESHAGIRI RAO)
Member (Technical)

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