CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 51111 of 2019

[Arising out of the Order-in-Original No. 03-05/PR. COMMR./CEX/BPL-1/2019 dated 01/03/2019 passed by The Principal Commissioner CGST & Central Excise, Bhopal.]

M/s H.L. Passey Engineering Pvt. Ltd. **Appellant**
72-A, Industrial Area,
Bhopal (M.P.) – 462 023.

VERSUS

Principal Commissioner, **Respondent**
Central Goods Service Tax & Central Excise
48, Administrative Area, Arera Hills,
Hoshangabad Road Zone – II,
Bhopal (Madhya Pradesh) – 462 011.

APPEARANCE

Shri J.M. Sharma, Consultant and Ms. Pooja Agarwal, C.A. – for the appellant.

Shri V.B. Jain, Authorized Representative (DR) – for the Respondent.

WITH
Excise Appeal No. 51302 of 2019

[Arising out of the Order-in-Original No. 03-05/PR. COMMR./CEX/BPL-1/2019 dated 01/03/2019 passed by The Principal Commissioner CGST & Central Excise, Bhopal.]

Principal Commissioner, **Appellant**
Central Goods Service Tax & Central Excise
48, Administrative Area, Arera Hills,
Hoshangabad Road Zone – II,
Bhopal (Madhya Pradesh) – 462 011.

VERSUS

M/s H.L. Passey Engineering Pvt. Ltd. **Respondent**
72-A, Industrial Area,
Bhopal (M.P.) – 462 023.

APPEARANCE

Shri V.B. Jain, Authorized Representative (DR) – for the appellant.

Shri J.M. Sharma, Consultant and Ms. Pooja Agarwal, C.A. – for the Respondent.

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50718/2020

DATE OF HEARING : 24/01/2020.
DATE OF DECISION : 14/07/2020.

C.L. MAHAR :-

The brief facts of the matter are that the appellant M/s H.L. Passey Engineering Pvt. Ltd. is engaged in undertaking work of fabrication of steel structures in the factory and erection of the same at the site as per the purchase orders received by them from various oil companies for supply of canopy for various petrol pumps. The articles of Iron fabricated by the appellant are classifiable under the Chapter Heading No. 73089070 of the Central Excise Tariff Act, 1985. The appellant before undertaking manufacture of canopy, first visits the petrol pump site and prepares a detailed design as per specifications provided by the oil companies and then accordingly manufactures certain structures and assemblies for erection of the complete canopy at the site of the petrol pump. The canopy which is manufactured by the appellant contains not only the components fabricated at the factory site but certain other bought items also and cleared from the factory in knocked down condition through trucks for further erection, welding and affixing of the same to earth is done at the site.

2. It has been the contention of the Department that the appellant had cleared the canopies in knocked down condition comprising of certain structural parts manufactured at the factory and certain bought out items and the canopies were sent for assembly and erection at the site of the petrol pumps of various oil companies. It has been the contention of the department that all parts of the canopy system presented together at the

customers site were integral part of the entire canopy system and together constituted the term "pre-fabricated canopy" supplied by the appellant to their buyers. It has further been added that so called bought out items were not accessories but integral components of the canopy without which the identity of the canopy cannot be acquired and the canopy cannot be assembled and erected at site.

3. Accordingly, the Department has issued three show cause notices details of which are given here below, primarily on following grounds :-

(i) That the pre-fabricated canopies supplied by the appellant to oil companies have a composite item in their contract for supply of canopies/structures and the subsequent erection of same at site. The department is of the view that the transaction value of the pre-fabricated canopies/structures should be taken by deducting the cost of erection, installation and commissioning of these canopies. Thus the goods cleared have not been valued as per the provisions of Central Excise Valuation Rules, 2000. In the subsequent show cause notices except the show cause notice dated 21 December 2015, it has also been contended that benefit of the exemption Notification No. 8/1996-CE dated 23 July 1996 and Notification No. 12/2012-CE dated 17 March 2012 has wrongly been availed by the appellant;

(ii) The appellant has availed Cenvat credit on all the inputs which have gone in manufacture of both dutiable as well as non-dutiable goods. However, no separate account for receipt, consumption and inventory have been maintained and, therefore, the appellant has been asked to reverse the Cenvat credit as per the provisions of Rule 6 (3) (1) of the Cenvat Credit Rules, 2004.

4. In total three show cause notices came to be issued. The detail are given here below :-

Sl. No.	SCN No. & Date	Period	Amount Central Excise duty (Rs.)	Involved An amount under Rule 6 (3) (Rs.)	Cenvat credit (Rs.)
1.	23/COMMR/CEX/ADJ/ BPL-1/2015 dated	April, 2010 to	4,21,80,793/-	1,86,20,036/-	35,01,685/-

	28/04/2015	20th February 2015			
2.	03/PR. COMMR/CEX/ ADJ/BPL-1/2016 dated 02/02/2016	21st Feb, 2015 to 30th Nov 2015	1,28,73,845/-	78,67,799/-	---
3.	21/COMMR/CEX/ADJ/ BPL-1/2016 dated 30/12/2016	1st Dec, 2015 to 31st Oct 2016	2,08,91,880/-	61,12,920/-	---

5. These show cause notices were adjudicated at the first stage of adjudication vide following order-in-originals :-

Sl. No.	Order-in-Original No. & Date	Period	Amount Central Excise duty confirmed (Rs.)	Involved An amount under Rule 6 (3) confirmed (Rs.)	Demand dropped & allowed Cenvat credit (Rs.)
1.	24/PR. COMMR/CEX/ ADJ/BPL-1/2015 dated 21/12/2015	April, 2010 to 24th February 2015	4,21,80,793/-	1,86,20,036/-	35,01,685/-
2.	01/PC/CEX/ADJ/BPL-1/2017 dated 31/01/2017	21st Feb, 2015 to 30th Nov 2015	1,28,73,845/-	78,67,799/-	---
3.	12/COMMR/CEX/ADJ/ BPL-1/2018 dated 27/04/2018	1st Dec, 2015 to 31st Oct 2016	2,08,91,880/-	61,12,920/-	---

6. The appellant had come before this Tribunal in the first round of the litigation and the Tribunal by its final order dated 7 May 2018 and final order dated 13 July 2018 remanded the matter for a fresh adjudication. The observations made by the Tribunal in the final orders, are as follows :-

Final Order dated 07/05/2018 :-

"3. After hearing both the parties and on perusal of record, it appears that up to August 2014, the appellant had paid only the duty on Canopy fabricated but after 1.9.2014, the appellant has claimed exemption.

4. During the course of arguments, the ld. Counsel was unable to tell the reason why the exemption was claimed after 1.9.2014. In these circumstances, we set aside the impugned order and remand the matter to the original authority to decide the issue de novo but by providing the reasonable opportunity to the appellant.

5. The second grievance of the appellant is pertaining to the Cenvat credit.

6. After hearing both the parties and on perusal of record, it

appears that para 15 of the impugned order, the adjudicating authority has observed that :

> "Copy of trial balance as on 30.11.2012 was submitted to audit and the same is on records. This very clearly shows that they are maintaining separate accounts for different activities and are quite aware of the provisions of CENVAT Credit Rules, 2004".

7. On the other hand, in para 29.6, the adjudicating authority observed that:

> "The appellant had opted not to maintain separate account of inputs in respect of the two categories of clearances, would be liable to pay the amount in terms of Rule 6(3)(b) and there can be no other interpretation on the admitted facts as above."

8. From the above, it appears that the adjudicating authority has taken the conflicting views where it is stated in one para that accounts were maintained and another para that accounts were not maintained. When it is so then we set aside the impugned order in this regard and remand the matter to the adjudicating authority to decide the issue de novo but after providing reasonable opportunity to the appellant, with the liberty to file fresh evidence, as per law".

9. In the result, impugned order is set aside and both the appeals are allowed by way of remand".

Final Order dated 13/07/2018 :-

"3. From the preceding order of this Tribunal in appellant's own case being Final Order No. 51718-51719/2018 dated 7th May 2018, this Tribunal found that there is conflict in the facts as recorded in the order-in-original impugned in the earlier appeal of the assessee. Accordingly, the matter was remanded with direction to the adjudicating authority to decide the issue de-novo after providing reasonable opportunity of hearing to the appellant with liberty to file fresh evidence, as per law. As the issue in this appeal in similar to the issue in the precedent appeal, which have already been disposed of by way of remand, we deem it just and proper to allow this appeal by way of remand to the adjudicating authority. We further direct appellant – assessee to file the representation in reply to the show cause notice within a period of 60 days from the date of receipt of the copy of this order and then to appear before the adjudicating authority and seek opportunity of hearing. The learned Counsel for the appellant – assessee undertakes that they will not seek unnecessary adjournment in the matter and cooperate in the adjudication proceedings. Accordingly this appeal is allowed by way of remand."

7. In view of the above directions of this Tribunal, the matter was taken up by the Commissioner for adjudication and vide his order-in-original dated 01/03/2019 decided the matter afresh.

The operative portion of the above-mentioned order-in-original is reproduced below :-

"A. In respect of the Show cause Notice No. 23/COMMR/CEX/ADJ/BPL-I/2015 dated 28.04.2015

(i) I confirm that the pre-fabricated canopy structural [Tariff Heading 73089010) manufactured in the factory (off site fabrication) are not entitled for exemption provided under Notification No. 8/96—C.E., dated 23-7-1996 to Notification No. 12/2012-C.E., dated 17-3~2012;

(ii) I confirm the demand of Central Excise Duty amounting to Rs. 59,33,969/- [Rupees Fifty Nine lakh Thirty Three Thousand Nine Hundred Sixty Nine only) (including Cess) out of total demand of Rs. 6,08,01,009/- for the period April' 2010 to 2041 Feb 2015 as proposed in the notice and is ordered to be recovered from the noticee under Section 1 1A(1) of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iii) I confirm the demand of interest at appropriate rate, on the amount at Sr. No. A(i) above, from the relevant date till the date of actual payment of Central Excise duty, under Section 11AA of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iv) I impose a penalty of Rs. 59,33,969/- (Rupees Fifty Nine lakh Thirty Three Thousand Nine Hundred Sixty Nine only) on Noticee under Section 11AC of the Act readwith Rule 25 of the Central Excise Rules, 2002. The noticee is directed to pay the same forthwith.

As per proviso to Section 11 AC (I)(a)of Central Excise Act 1944, the noticee is also given an option to avail the opportunity of reduced penalty as under :

if duty as determined above and interest payable thereon under section 11AA is paid within 30 days of the date of communication of this order, the amount of penalty shall be equal to 25% of the penalty so imposed shall be payable, provided that such reduced penalty is also paid within 30 days of the date of communication of such order.

(v) The demand of Cenvat credit amounting to Rs 1,86,20,036/— (Rs. One Crore Eighty Six Lakhs Twenty Thousand Thirty Six only), being unsustainable, is dropped.

B. In respect of the Show cause Notice No. 03 I Pr. Commr. / CEXI ADJ /BPL-I/2016 dated 02.02.2016

(i) I confirm that the pre-fabricated canopy structural (Tariff Heading 73089010) manufactured in the factory (off site fabrication) are not entitled for exemption provided under Notification No. 8/96-C.E., dated 23-'?-1996 to Notification No. 12/2012-C.E., dated 17-3-2012;

(ii) I confirm the demand of Central Excise Duty amounting to Rs. 70,55,671 /- (Rupees Seventy lakh Fifty Five Thousand Six Hundred Seventy One only) (including Cess) out of total demand of Rs. 2,07,41,644/- for the period 21" Feb 2015 to Nov' 2015 as proposed in the notice and is ordered to be recovered from the noticee under Section l1A(1) of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iii) I confrm the demand of interest at appropriate rate, on the amount at Sr. No. B(i) above, from the relevant date till the date of actual payment of Central Excise duty, under Section IIAA of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iv) I impose a penalty of Rs. 7O,55,671/- (Rupees Seventy lakh Fifty Five Thousand Six Hundred Seventy One only) on Noticee under Section IIAC of the Act read with Rule 25 of the Central Excise Rules, 2002. The noticee is directed to pay the S8l1'lC forthwith.

As per proviso to Section 11 AC (1](a)of Central Excise Act 1944, the noticee is also given an option to avail the opportunity of reduced penalty as under :

if duty as determined above and interest payable thereon under section IIAA is paid within 30 days of the date of communication of this order, the amount of penalty shall be equal to 25% of the penalty so imposed shall be payable, provided that such reduced penalty is also paid within 30 days of the date of communication of such order.

(v) The demand of Cenvat credit amounting to Rs 78,67,'799/- (Rs. Seventy Eight Lakhs Sixty Seven Thousand Seven Hundred Ninety Nine only], being unsustainable, is dropped.

C. In respect of the Show cause Notice No. 21/commr/CEX/BPL-I/2016 dated 30.12.2016

(i) I confirm that the pre-fabricated canopy structural (Tariff Heading 73089010) manufactured in the factory (off site fabrication) are not entitled for exemption provided under Notification No. 8/96-C.E., dated 23-7-1996 to Notification No. 12/2012-C.E., dated 17-3-2012;

(ii) I confirm the demand of Central Excise Duty amounting to Rs. 93,85,640 /- (Rupees Ninety Three Lakh Eighty Five Thousand Six Hundred Forty only) (including Cess) out of the total demand of Rs.2,70,04,800/- for the period Dec'2015 to Oct'2016 as proposed in the notice and is ordered to be recovered from the noticee under Section 11A(l) of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iii) I confirm the demand of interest at appropriate rate, on the amount at Sr. No.C (i) above, from the relevant date till the date of actual payment of Central Excise duty, under Section IIAA of the Central Excise Act, I944. The noticee is directed to pay the same forthwith.

(iv) I impose a penalty of Rs. 93,85,640/- (Rupees Ninety Three Lakh Eighty Five Thousand Six Hundred Forty only] on Noticee

> under Section 11AC of the Act readwith Rule 25 of the Central Excise Rules, 2002. The noticee is directed to pay the same forthwith.
>
> As per proviso to Section 11-AC (I)(a)of Central Excise Act 1944, the noticee is also given an option to avail the opportunity of reduced penalty as under :
>
> if duty as determined above and interest payable thereon under section 11AA is paid within 30 days of the date of communication of this order, the amount of penalty shall be equal to 25% of the penalty so imposed shall be payable, provided that such reduced penalty is also paid within 30 days of the date of communication of such order.
>
> (v) The demand of Cenvat credit amounting to Rs 61,12,920/- [Rs. Sixty One Lakhs Twelve Thousand Nine Hundred Twenty only], being unsustainable, is dropped".

8. It can be seen from the above orders that the central excise duty has been confirmed by the Adjudicating Authority by denying the benefit of Notification No. 8/1996-CE dated 23 July 1996 and Notification No. 12/2012-CE dated 17 March 2012 to the appellant. However, the demand of the reversal of the Cenvat credit under Rule 6 (3) (1) of the Cenvat Credit Rules, 2004 has been dropped by the Adjudicating Authority.

9. Learned Advocate contended that benefit of the Notification No. 12/2012-CE was available to the appellant as fabrication works undertaken at the site have specifically been exempted from levy of central excise duty. The learned Advocate has taken us to the contents of the notification and the clarifications issued by the CBEC on the same and has claimed that as per the clarification issued by the CBEC vide Circular No. 1036/224/2016-CX. dated 06 July 2016, the fabrication work undertaken at the factory premises (away from site) amounts to work done at site which makes them entitled for exemption Notification No. 12/2012 in terms of the conditions of the exemption notification and as per terms of contract entered by them with various oil companies.

10. We have also heard learned Departmental Representative who has vehemently supported the impugned order-in-original.

11. Before proceeding in the matter, it will be relevant to have a glance at the relevant provisions of the notification which have been claimed by the appellant for availing exemption from the central excise duty :-

"Notification No. 3/2005-C.E. dated 24/02/2005

64.	7308	All goods fabricated at site of work for use in construction work at such site	Nil

Notification No. 12/2012-CE dated 17/03/2012

206	7305 or 7308	All goods fabricated at site of work for use in construction work at such site	Nil	-

12. It can be seen that the above notification was primarily for construction activity undertaken at site under various infrastructure projects such as roads, flyovers, bridges etc. The appellant is having an independent manufacturing unit at Bhopal where the appellant is carrying out fabrication and manufacturing activity. The pre-fabricated structures classifiable under Central Excise Tariff Heading 73089010 are being taken in the CKD/SKD condition to different locations all over India. Manufacturing is the primary work undertaken at the factory of the appellant and the pre-fabricated structures are only erected, installed and commissioned at the site of the various petrol pumps. So far as applicability of the Notification No. 12/2012-CE is concerned, the construction work of a road or flyover is being primarily undertaken at the site and only some components, blocks are manufactured by the contractor at different site. In that case the benefit of the Notification No. 12/2012-CE is available. However, in case of the appellant, the primary activity is of manufacturing and fabrication and then only goods are being taken for assembly, erection or commissioning at a given petrol pump. We are of the view that by no stretch of imagination, the benefit of Notification No. 12/2012-CE can be extended to a manufacturing

activity which is being undertaken at a factory and thereafter the fully manufactured pre-fabricated structures are taken in the form of the CKD/SKD condition for installation at the given site.

13. In view of above, we find no force in the arguments advanced by the learned Advocate for allowing them the benefit of Notification No. 12/2012-CE dated 17/03/2012 as well as previous Notification No. 3/2005-CE dated 24/02/2005. Accordingly, we find that there is no merit in the appeal of the appellant.

14. So far as the appeal filed by the Department is concerned, the only ground on which the appeal has been filed by the Department is that the Adjudicating Authority erred in holding that there is no allegation in the show cause notice that the assessee/respondent was also availing Cenvat credit on the goods used for exempted goods. It has further been submitted that the Adjudicating Authority was wrong in holding that the figures/amounts/description mentioned in the trial balance for the relevant period do not show the amount of the Cenvat credit availed by the assessee/respondent on purchases of raw material used in exempted goods. It has also been contended by the Department that Cenvat credit availed by the assessee/ respondent was available only for the list containing invoice numbers and date, amount of Cenvat credit availed on inputs produced before audit officers and, therefore, it was wrong on the part of the Adjudicating Authority to hold that separate records/accounts were maintained by the respondent/assessee. This was a substantial amount of demand has been dropped.

15. It is seen that the Adjudicating Authority has gone in detail on this subject and in paragraph 57 of the impugned order has discussed in the financial statement of the company and it is only after a meticulous perusal of the trial balance and other financial details that the Adjudicating Authority reached conclusion that the respondent/assessee had maintained a separate record with

regard to inputs which have gone in the manufacture of non-taxable goods/services. The Department has not adduced any concrete evidence to contradict the findings given by the Adjudicating Authority. There is, therefore, no substance in the appeal filed by the Department.

16. Thus, the appeal filed by the Department is dismissed.

17. In view of above findings, both the appeals filed by the appellant as well as by the Department are dismissed.

(Order pronounced in open court on 14/07/2020.)

(Justice Dilip Gupta)
President

(C.L. Mahar)
Member (Technical)

PK