

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

(BY VIDEO CONFERENCING)

Excise Appeal No. 51905 of 2018-SM

(Arising out of order in appeal No. 79(SJ)CE/JPR/2018 dated 27.03.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur).

M/s Arora Products

Ramnagar, Pushkar Road
Ajmer (Raj). 305001.

Appellant

VERSUS

**Commissioner, Central Excise
& Central Goods & Service Tax**

NCR Building, Statue Circle, C-Scheme,
Jaipur-302005.

Respondent

APPEARANCE:

Shri Hemant Bajaj with Ms. Sukriti Das, Advocates for the appellant
Shri Pradeep Gupta, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.50873/2020

DATE OF HEARING: 21.09.2020

DATE OF DECISION: 26.10.2020

ANIL CHOUDARY:

The issue in this appeal by the appellant – M/s Arora Products is whether the demand of interest is to be calculated from the date of clearance of goods upto the date of actual payment of duty or from the date of determination of due amount till actual date of payment of duty.

2. The period of dispute is September, 2005 to March, 2015. The brief facts are that the appellant is engaged in the manufacture of chewing tobacco falling under Chapter 24 of the CETA and the goods

being notified under Section 3 A of the Central Excise Act, the appellant was working under Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty Rules) 2010 ("in short **CTPM Rules**").

3. The retail packs of chewing tobacco packed in pouches of 3 gms., 5 gms., 8 gms., 10 gms. & 12 gms. were further packed in wholesale packages containing 32 pouches, 20 pouches, which were finally cleared from the factory in bulk pack in cartons containing number of wholesale packages.

4. Chewing tobacco was brought under 'Retail Sale Price' (RSP) based valuation under Section 4 A vide Entry No.24 A in Notification No.13/2002-CE (NT) dated 01.03.2003, therefore, the appellant valued and paid excise duty under Section 4 A of the Excise Act. The appellant, considering that the retail packages weighing upto 10 gms were exempt from affixing of RSP under erstwhile Standards of Weights & Measures (Packaged Commodity) Rules, therefore, the provisions of Section 4 A are not applicable to retail packs upto 10 gms. Hence, the appellant stopped assessing the goods packed in retails packages weighing upto 10 gms under Section 4A, and cleared the said pouches on the 'transaction value' determined under Section 4 of the Excise Act. However, the retail packs weighing more than 10 gms were cleared on RSP basis under Section 4A of the Excise Act.

5. The officers of Anti-Evasion visited the factory premises of the appellant and objected to the clearance of retail packages of less than 10 gms. further packed in wholesale packages being cleared under

Section 4 of the Excise Act instead of Section 4 A of the Central Excise Act, as it appeared to Revenue that the retail packs of less than 10 gms further packed in wholesale packages are 'multi piece packages' as defined in Rule 2 (j) of the Standard Weight & Measures (Packaged Commodity) Rules and thus, the same are liable to be assessed on RSP based valuation under Section 4 A of the Central Excise Act.

6. Show cause notice dated 01.02.2005 was issued for the period 8.3.2004 to 28.09.2004 proposing to demand differential excise duty amounting to Rs.2,45,643/- on wholesale packages (of retail packs weighing upto 10 gms.). This show cause notice was adjudicated by the Dy. Commissioner confirming the proposed demand vide an order-in-original no.37/2005 dated 25.08.2005 and further, imposing penalty of Rs.25,000/-. The first appeal before the Commissioner (Appeals) was rejected by the Order-in-Appeal dated 23.01.2006 and further, the appeal before this Tribunal was dismissed by the Tribunal confirming the demand by Final Order No.738/2011 dated 12.08.2011 reported at 2012 (276) ELT 77.

7. A show cause notice dated 16.09.2005 was issued for the subsequent period 29.09.2004 to 31.07.2005 proposing demand of Rs.4,75,733/- on the same allegations. The demand was confirmed vide an Order-in-Original dated 30.11.2005 with interest and further penalty of Rs.25,000/- was imposed under Rule 25 of the Excise Rules. The appeal of the appellant /assessee was allowed by the Commissioner (Appeals) vide an order-in-appeal no.269/CE/JPR-II/2006 dated 9.4.2006 observing that the retail packs weighing upto 10 gms. is not

liable for MRP based assessment and excise duty has been rightly paid under Section 4 of Central Excise Act.

8. Accordingly, being successful in appeal, they filed refund claim, which was allowed vide an Order-in-Original No.44/2006-Refund dated 29.08.2006. The appellant, being successful in appeal vide order-in-appeal dated 9.4.2006 passed by the Commissioner (Appeals) continued to pay excise duty on retail packs upto 10gms on the transaction value under Section 4 of the Excise Act till 7.3.2010, as w.e.f. 8.3.2010, compounded levy scheme was introduced.

9. Against the Order-in-Appeal dated 9.4.2006, Revenue preferred appeal before this Tribunal, being Appeal No.E/2314/2006, which was decided vide Final Order No.52942 of 2015 in favour of the appellant and against the Revenue.

10. Pending litigation before this Tribunal, Revenue issued 25 show cause notices for the succeeding period 1.8.2005 to 31.12.2006 and for 1.1.2006 to 8.3.2010. Meanwhile, Rule 2 (j) and Rule 17 of the Package Commodity Rules (Successive Rules to SWM Rules) were omitted from the Statute vide Notification dated 17.07.2006 w.e.f. 14.01.2007.

11. Pending adjudication of the aforementioned 25 show cause notices, the appellant closed down its manufacturing activities and surrendered its registration in May, 2011. Pending show cause notices were taken up for adjudication in August, 2012 and vide an order-in-original dated 31.12.2012, the Additional Commissioner confirmed the demand raised under 25 show cause notices with interest and also imposed penalty equivalent to 50% of the duty confirmed.

12. Being aggrieved, the appellant/assessee preferred appeals before the Commissioner (Appeals) for the period August, 2005 to Jan. 2007, which were rejected and the demand was confirmed by the Commissioner (Appeals) relying on the order of the Hon'ble Supreme Court dated 04.01.2012 in the appellant's own case.

13. For the demand raised for the period 14.01.2007 to 09.03.2010, in appeal, the Id. Commissioner (Appeals) set aside the demand on the ground that after omission of Rule 2 (j) read with Rule 17 of PC Rules w.e.f. 14.01.2007, there was no statutory requirement of declaring RSP on the Retail Packs weighing upto 10 gms and hence, not liable to be assessed under Section 4 A of the Excise Act.

14. In order to buy peace with the Department, the appellant deposited the differential duty of Rs.10,74,940/- for the period August, 2005 to 13.01.2007 on 31.03.2015 and also paid interest of Rs.15,903/- for the period 1.3.2015 to 31.03.2015 i.e. from the date of Order-in-Appeal dated 28.02.2015 till the date of deposit i.e. 31.03.2015, under intimation to the Department.

15. Further, being aggrieved with the imposition of penalty vide Order-in-Appeal dated 28.02.2015, the appellant preferred appeal No.E/52968/2015 before this Tribunal. Further, 22 appeals were filed by the Revenue relating to the period 14.01.2007 to 09.03.2010 contesting the dropping of demand of differential duty. This Tribunal vide Final Order No.56217-56239/2017 was pleased to allow the appeal of the assessee, setting aside the penalty imposed and was further pleased to dismiss all the appeals filed by the Revenue.

16. During the pendency of the appeals before the Tribunal, the Department vide letters dated 10.09.2015, 01.10.2015, 27.10.2015 and 21.01.2016 directed the appellant to pay interest of Rs.14,46,997/- on differential duty amounting to Rs.10,74,490/- confirmed vide Order-in-Appeal dated 28.02.2015, for the period 05.09.2005 to 31.03.2015. In response, the appellant vide letter dated 02.02.2016 objected to manner of calculation adopted by the Department for demanding interest. In addition, vide order-in-appeal dated 28.02.2015, the Id. Commissioner (Appeals) has not determined the amount of interest but has directed to pay interest as per law. Inasmuch as, the appellant paid excise duty on transaction value in view of Order-in-Appeal dated 10.04.2006, duly affirmed by the Tribunal vide Final Order dated 21.09.2015. Therefore, interest is payable from the date on which the said amount became due in terms of Section 11AA of the Excise Act, i.e. from 28.02.2015, the date of Order-in-Appeal to the date of payment i.e. 31.03.2015 and thus, requested the Department to calculate the interest from the date it became due.

17. The Department vide letter dated 23.02.2016 again directed the appellant to pay interest of Rs.14,46,697/- in terms of Section 11 AB of the Excise Act as held under Order-in-Original dated 31.12.2012. However, the appellant vide its letter dated 09.03.2016 informed the Department that interest was payable from the date of Order-in-Appeal dated 28.02.2015 till 30.03.2015 (i.e. the date of payment of duty), in terms of Section 11 AA of the Excise Act.

18. The Department vide its letters dated 21.03.2016 & 29.04.2016 directed the appellant to pay the interest and stated that interest is not payable under Section 11 AA of the Excise Act, as contended by the appellant, inasmuch as the same Section 11 AA was brought in statute book w.e.f. 08.04.2011, whereas the period of demand is prior to 08.04.2011 and hence, interest is payable under Section 11 AB of the Excise Act, otherwise coercive action will be initiated under Section 11 of the Excise Act read with Section 142 of the Customs Act, 1962.

19. The appellant against the Department's letter dated 29.04.2016 being coercive in nature, filed an appeal before the Commissioner (Appeals), Central Excise & CGST, Jaipur. The Id. Commissioner (Appeals) by the impugned order dated 27.03.2018 firstly rejected the appeal as not maintainable under Section 35 of the Excise Act, as the letter issued by the Department advising the appellant to pay interest is not an appealable order and also further held on merits that interest is payable under Section 11 AB not under Section 11 AA of the Excise Act.

20. Being aggrieved with the aforesaid impugned order, the appellant is in appeal before this Tribunal, amongst others, the following grounds:-

21. Ld. Counsel for the appellant urges that the impugned order passed by the Id. Commissioner (Appeals) is self-contradictory and deserves to be set aside as the Id. Commissioner (Appeals) held in the impugned order that the appeal filed by the appellant against the letter dated 29.04.2016 is not maintainable in terms of Section 35 of the

Excise Act and further in support of his contention, he places reliance on the following decisions:-

(1) Gujarat Container Ltd. – 2019 (370) ELT 476 (Tribunal-Ahmd.).

(2) Vikash J.Shah – 2016 (334) ELT 491 (Madras)

(3) Kancor Ingredients Ltd. -2017(4) GSTL 240 (Tri.-Bang.)

(4) Bhagwati Gases Ltd – 2008 (226) ELT 468 (Tri.-Delhi)

22. Ld. Counsel further urges that as during the relevant period, the appellant paid excise duty by the due date prescribed under Rule 8 of the Excise Rules on the transaction value under Section 4 in accordance with the order-in-appeal dated 9.4.2006, duly affirmed by the Tribunal vide Final Order dated 21.09.2015, therefore, interest liability arises only from the date, the duty became due.

23. Further, it is clear that during August, 2005 to 13.01.2007, the appellant paid excise duty on transaction value under Section 4 of the Excise Act. The differential duty became due (crosstallised) only on the date of passing of order-in-appeal dated 28.02.2015, against which the appellant deposited the differential duty on 31.03.2015, hence, interest is payable from 28.02.2015 till 31.03.2015 i.e. the date on which the appellant paid the differential excise duty in terms of Order-in-Appeal dated 28.02.2015. Therefore, the demand for interest from 05.09.2006 to 31.03.2015 is not sustainable. In support of his contention, he places reliance on the following decisions:-

(i) CCE Vs. Premier Industries Ltd. -2009(248)ELT 833(T-Delhi)

(ii) CCE Vs. Lucas TVS Ltd. -2010(262)ELT 444 (T-Chennai)

Affirmed by the Hon'ble Madras High Court in CCE Vs.

Lucas TVS Ltd. -2016(333) ELT 259 (Madras).

(iii) Madura Coats Pvt. Ltd.-2015 (317)ELT 152 (T-Chennai)

(iv) Consumer Associates – 2019(11) TMI 233 (CESTAT-Chennai).

24. Accordingly, the Id. Counsel urges that the impugned order passed by the Id. Commissioner (Appeals) is not sustainable and is liable to be set aside and further, prays for allowing their appeal with consequential relief.

25. On the contrary, Id. Authorised Representative for the respondent/Department relies on the findings in the impugned order and prays for dismissal of the appeal.

26. Having considered the rival contentions, I find that similar issue arose before the Division Bench of this Tribunal in the case of **CCE Vs. Lucas TVS Ltd. – 2010 (262) ELT 444 (Tribunal-Chennai)**, wherein the facts were that vide adjudication orders dated 9.1.1995 and 10.02.1995, the demand of over Rs.34 lakhs was determined. These demands were set aside by the Commissioner (Appeals) vide an order dated 20.06.1995. The order-in-appeal was set aside by the Tribunal and the matter was remanded to the Commissioner (Appeals) vide Final Order dated 24.01.1997. The demand was re-confirmed by the Commissioner (Appeals) vide order dated 26.12.2000. It was the contention of the Revenue that since the demand of Rs.34 lakhs, earlier confirmed in Jan., /Feb., 1995, although set aside by the Commissioner (Appeals) earlier in June, 1995, was restored by the subsequent order of the Commissioner (Appeals) dated 26.12.2000. As the determination of the duty had taken effect in Jan./Feb., 1995, therefore, due to delay

in payment of duty, the assessee was liable to pay interest from August, 1995. This Tribunal held that final determination can be said to have been made on 26.12.2000 with passing of the order of the Commissioner (Appeals) after remand. The Tribunal applying the ratio of the ruling of the Hon'ble Bombay High Court in the case of **Blue Star & Another – 2009-TIOL-659-HC-MUM**, held that the assessee is not liable to pay interest for the period Jan./Feb, 1995 to December, 2000.

27. In further appeal by the Revenue, the Hon'ble Madras High Court, reported in **2016 (333) ELT 259 (Madras)**, framed the issue – whether CESTAT has not erred in law in holding that duty liability arises and commences from the date of the determination and not from the date of the actual liability, especially when an order of determination always dates back to the actual date of liability? The Hon'ble Madras High Court taking notice of the provisions of the interest and further taking notice of the ratio laid down by the Hon'ble Bombay High Court in **Blue Star Ltd. case (supra)**, held that setting aside of the original order and remanding the matter for de novo consideration means, that there is no order and party is relegated to fresh adjudication and adjudication culminates into an order.

28. Accordingly, holding that determination of duty liability took place only in December, 2000, upheld setting aside of interest for the period from 26.08.1995 to 31.03.2001.

29. Following the ratio of the Madras High Court in the case of **Lucas TVS Ltd. (supra)**, I find that in the facts of the present case also, the Commissioner (Appeals) has redetermined the duty liability by his order

dated 28.02.2015, as the demand was set aside for the period 14.01.2007 to 09.03.2010 and only re-determined for the period August, 2005 to Jan. 2007. Accordingly, I hold that the appellant /assessee is liable to pay interest for one month i.e. from 1.3.2015 to 31.03.2015, which they have admittedly paid. Accordingly, the appeal is allowed and the impugned order is set aside. The appellant is entitled to consequential benefit in accordance with law.

(Pronounced on 26.10.2020).

(Anil Choudhary)
Member (Judicial)

Ckp