CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV…..

Excise Appeal No. 53152 of 2018 [SM]

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APPP-229-18-19 dated 17.07.2018 passed by the Commissioner (Appeals), Central Goods & Service Tax & Central Excise, Indore]

M/s. Mahendra Industries ...**Appellant**
46, Udyog Nagar, Palda,
Indore, MP.

VERSUS

Commissioner of Central Excise, ...**Respondent**
Customs and Service Tax, Indore
B. No. 10, Manik Bagh Road,
Manik Bagh Palace, Indore,
Madhya Pradesh - 452001

APPEARANCE:

Mr. Ankur Upadhyay, Advocate for the Appellant
Ms. Tamanna Alam, Authorised Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING/DECISION:**17.05.2022**

FINAL ORDER No. 50465 / 2022

DR. RACHNA GUPTA

The appellant herein are engaged in manufacture of Sugar Boiled Confectionery. The department during the scrutiny of records of the appellant for the period covering 2012-13, 2013-14 and 2014-15 observed that some machineries were imported by the appellant and were removed as such on the strength of invoices to M/s. Mayank Food Products, Indore and to M/s. Mahendra Industries Unit-II, Indore. The officers of Central Excise Audit, Indore also observed that while raising those invoices, the appellants have collected CVD and also the additional duty levied but the said amount collected has not been deposited by the appellants to the Government Exchequer. Being unsatisfied with the reply to the aforesaid query that the Show Cause Notice No. 2490 dated 16.08.2017 was served upon the appellants proposing demand of Rs.10,44,436/- as an amount of CVD (Rs.7,54,864) along with the amount of additional duty (Rs.2,89,572) as was allegedly collected by the appellant during the aforesaid period but was not allegedly deposited with the Government Exchequer. The amount was proposed to be recovered along with the proportionate interest, respective penalties were also proposed to be imposed. The said proposal was initially confirmed vide the Order-in-Original No. 27/2017-18 dated 28.03.2018. The appeal thereof has been rejected by Commissioner (Appeals) vide the Order-in-Appeal No. 229-18-19 dated 17.07.2018. Being aggrieved the appellant is before this Tribunal.

2. I have heard learned Advocate Mr. Ankur Upadhyay, learned Counsel for the appellant and Ms. Tamanna Alam, learned DR for the department.

3. Learned Counsel for the appellant has mentioned that all requisite documents as that of commercial invoices, bills of entries and the invoices for the transfer as such of the imported machineries have been submitted before this Tribunal on 13th May, 2022. Learned Counsel emphasized that perusal of these documents for all the years in question reveals that what has been imported by the appellant vide the respective commercial invoice.

The entire amount of duty inclusive of CVD as well as additional duty has already been paid by the appellant at the time of filling the bill of entries for those machines. It is submitted that in terms of Rule 3 of Cenvat Credit Rules, 2004 appellants should have taken the Cenval credit of the amount of CVD and additional duty paid but the said Cenvat credit was never availed due to which while transferring the imported machines to further customers that the said amount of CVD and additional duty has been charged from them. Again paying back the same in terms of Section 28 B of the Customs Act, 1962 shall amount to case of double taxation on single import. Otherwise also, while not availing the Cenvat Credit on impugned CVD and additional duty but charging the same amount from the customers is a revenue neutral situation. Appellant has wrongly been held liable to still pay the amount of CVD and the additional duty that too with interest. Question of imposition of penalty does not at all arise. The order under challenge is accordingly prayed to be set aside.

4. While rebutting the submissions learned DR has relied upon the findings of Commissioner (Appeals) in Para 9 of the order under challenge with the emphasis that appellant had not produced any evidence to prove the payment of duty (CVD and additional duty) to the Government Exchequer as was charged from its customers. Impressing upon no infirmity in those findings due to the lack of evidence to said effect, learned DR has prayed for appeal to have been dismissed.

5. After hearing the rival contentions and perusing the entire records, I observe and hold as follows:

5.1 The basic allegation against the appellant is that appellants while transferring the imported machines to its customers, had charged amount of CVD and additional duty on the machines imported by him but the said amount has not been deposited by the appellant in the Government Exchequer. However, it is observed that while making submissions before the Adjudicating Authorities below appellant had time and again submitted about making payment of said amount of CVD and additional duty right at the time of filing the bills of entries, but had not taken the Cenvat credit thereof. As per Rule 3 and 5 of Cenvat Credit Rules the appellant was entitled to claim the Cenvat Credit of the duty, if any, paid by him while getting clearance of the machines imported by him. There is no denial to the submission of the appellant that no Cenvat credit has been availed by the appellant. These observations are sufficient for me to hold that Commissioner (Appeals) has committed an error while holding *" I find that there is no reference to availment of credit in the said provisions (Sec 28B or Sec 11D) whether credit is availed by the Appellant or not. Since the duty has been collected from customers, the appellant has no other option but to pay the same to govt. exchequer. Accordingly, I hold that the adjudicating authority has correctly held that the Appellant is liable to pay the duty amount of Rs.10,44,436/- along with interest collected from their customers under the provisions of Section 28B of Customs Act, 1962 read with Section 11D of Central Excise Act, 1944."*

5.2 Appellant while submitting today has produced on record documents in the form of commercial invoices through which the appellant has purchased the machines which got imported after purchase. The bill of entry filed for those machines has also been produced on record. Perusal thereof shows that all the articles mentioned in the commercial invoices are mentioned in the said bill of entry (nine different machines and several spare parts). Further perusal of bill of entry reveals that the amount of additional duty along with CVD has duly been mentioned in the said bill of entry. The appellant has also place on record the copy of the challan vide which the total amount of duty on the imported articles inclusive of CVD and additional duty was paid by the appellant at the time of getting cleared the said imported articles. The trade invoices shows that all machines and spare parts ordered vide said commercial invoices and got cleared vide aforesaid bill of entry were transferred to customers including the sister concern of the appellant.

5.3 As it has already been observed that admittedly the appellant has not availed the Cenvat credit of the aforesaid duty paid it cannot be denied that appellant was entitled to claim the same under Rule 3 and 5 of Cenvat Credit Rules. No irregularity is opined to have been committed while charging the said amount of CVD and additional duties, the credit whereof was not taken by the appellant, from its customers.

5.4 Though Commissioner (Appeals) could not have the opportunity to look into the documents as have been mentioned above proving the payment of CVD and additional duty by the appellant to the Government Exchequer still the findings of Commissioner (Appeals) in Para 9 of the order under challenge itself are found erroneous as the demand has been confirmed for the reason that there is no mention of amount of excise duty. The finding/the reason quoted is apparently wrong as appellant has been an importer and not the manufacturer. Question of any amount of excise duty does not at all arise to ever be the liability of the appellant. Further the silence of any reference to the availment of credit in Section 28B of Customs Act or Section 11D of Central Excise Act is also observed to be an erroneous finding for the reason that irrespective both the sections are silent about the availment of credit but the simultaneous provisions in Rule 3 and Rule 5 of Cenvat Credit Rules entitle the appellant to avail the said credit. Admittedly the same has not been availed. Hence, the collection of amount of said duty from the customers was justified. Question of depositing the same to the Government Exchequer post collection does not at all arise as the amount was already deposited with the Government Exchequer at the time of clearance of the goods itself. Confirmation of such demand is nothing but amounts to paying what has already been paid. Double payment of same tax liability is not permissible and shall be without authority of law.

6. In view of the entire above findings the order under challenge is hereby set aside. Consequent thereto appeal stands allowed.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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