CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 50927 of 2021 [SM]

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-149-2020-21 dated 23.03.2021 passed by the Commissioner of CGST & Central Excise Headquarters (Appeals), Indore]

Shri Radha Raman Sharma **...Appellant**
M/s. International Biotech Products,
H.No. 490, Indira Nagar,
Ratlam (M.P) 457001

VERSUS

Commissioner of Central Excise,
Customs & CGST – Indore **...Respondent**
Manik Bagh Palace,
Post Box No. 10, Indore,
Madhya Pradesh - 452001

APPEARANCE:

Mr. R.K. Verma, Advocate for the Appellant
Mr. Ishwar Charan, Authorised Representative for the Respondent

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

DATE OF HEARING/DECISION: **12.07.2022**

FINAL ORDER No. 50627/2022

DR. RACHNA GUPTA

Present appeal has been filed to assail Order-in-Appeal No. 149-2020-21 dated 23.03.2021, vide which the imposition of late fee for filing the service tax appeals, for an amout of Rs.5,42,700/- has been confirmed in terms of Rule 12(6) of Central Excise Rules, 2002. The delay for filing returns has been considered for a period from December' 2014 to June' 2017.

2. I have heard Mr. R.K. Verma, learned Counsel for the appellant and Mr. Ishwar Charan, learned DR for the department.

3. Learned Counsel for the appellant has mentioned that the show cause notice was issued for proposing, in addition to the demand of impugned amount of late fee recovery of the Cenvat credit amounting to Rs.40,67,709/- along with the interest at appropriate rate and the proportionate penalty. It is submitted that Original Adjudicating Authority had rejected the entire proposal except confirming the demand of late fee of Rs.5,42,700/-. Commissioner (Appeals) has upheld the said order. Learned Counsel further submitted that both the authorities have failed to consider the fact that for most of the period in question the payable central excise duty has been shown as 'NIL' in the respective ER-1 returns. Late fee on account of delay in filing such 'NIL' returns is therefore wrongly imposed. It should not have been demanded as the returns are to be filed by the person who is liable to pay tax and 'NIL' returns means that there was no liability of assessee to pay tax for the period w.r.t. 'Nil' returns.

4. In addition, it is submitted that the entire period is beyond the normal period of limitation. Since the returns of the entire impugned period of demand, though have been filed after some delay, but the fact remains is that the factum of each delay was in the notice of the department since December' 2014 itself. Extended period has therefore wrongly been invoked by the learned Commissioner (Appeals). Learned Counsel has also objected about the penalty as has been imposed under Rule 27 of Central Excise Act, 1944 for an amount of Rs.5000/-. While relying upon the decision of the Hon'ble Supreme Court in case of **Pahwa Chemicals Private Limited Vs. Commissioner of C.Ex., Delhi**

reported in 2005 (189) E.L.T. 257 (S.C.) and the decision of this Tribunal in the case of **B.S. Rathore Construction Vs. Commr. Of Central Excise, Jaipur reported in 2019 (22) G.S.T.L. 27 (Tri.-Del.),** learned Counsel has prayed for the order under challenge to be set aside and appeal to be allowed.

5. While rebutting these submissions, learned DR has laid emphasis upon the findings in para 8 of the Order-in-Appeal. It is mentioned that Commissioner (Appeals) after considering Rule 12 (6) of Central Excise Rules and the amendment therein w.e.f. 01.03.2015 has rightly held that the adjudicating authority is left with no discretion to forego the late fee for delayed filing of returns even if the returns are 'NIL' Returns. Impressing upon no infirmity in the said order, the appeal in hand is prayed to be dismissed.

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

6.1 The appellant herein is observed to have been engaged in manufacturing and supply of animal/vegetable/mix fertilizers, insecticide etc. and related pharmaceutical products. On ACES scrutiny of appellant's records by the department it came to its notice the appellant had filed that ER-1 returns, with substantial delay during the period December' 2014 to June' 2017 and that the central excise duty has been paid only through utilization of Cenvat credit account. Based on those observations that vide Show Cause Notice No. 1649 dated 25.06.2020 in addition to the impugned late fee of Rs.5,42,700/-, Cenvat credit of Rs. Rs.40,67,709/- was proposed to be recovered. However, the Adjudicating Authorities below have rejected the proposal of disallowing the Cenvat credit but have confirmed the demand of mandatory late fee due to impugned delay, in terms of Rules 12 (6) of Central Excise Rules, 2002 Commissioner (Appeals). In para 8 of Order-in-Appeal, it has been held that the said Rule 12 w.e.f. 01.03.2015 leaves no discretion with the Adjudicating Authority to forego the late fee for delayed filing of returns.

7. To adjudicate the correctness of these findings it is important to look into Rule 12 (6) of CER, 2002 (as amended). It reads as follows:

> "*where any return referred to in this rule is submitted by the assessee after due date as specified for every return or statement the assessee shall pay to the credit of the central government an amount calculated at the rate of one hundred rupees per day subject to a maximum of twenty thousand rupees for the period of delay in submission of each return or statement"*

The unamended Rule 12 (6) used words "person who is liable to tax" instead of word "assessee". The perusal makes it clear that the provision is applicable upon the assessee who has failed to file the return in the specified period given in the said rule. 'Assessee' in terms of sub-section (7) of Section 65 of the Finance Act, 1994 is defined to mean a person liable to pay tax and includes its agent. Central Excise Act has no where defined the term assessee. Since the Central Excise Act and the Finance Act are the statutes charging duty/tax, the respective provisions have to be considered *pari materia*. As there is no definition of assessee in Central Excise Act, by virtue of Section 83 of the Finance Act, 1994 the definition of 'assessee' given in the Finance Act, 1994 is hereby adopted. In light thereof, it is held that Rule 12 (6), even after amendment, is applicable on such a person who is liable to pay duty/tax.

8. As apparent from the table given in para 5.2 of the impugned show cause notice, it is observed that out of alleged 31 delayed returns, 18 returns therein are 'NIL' returns i.e. for the respective period of said returns i.e. the appellant was not liable to pay duty for the respective period of returns. Hence, appellant cannot be called as "assessee" for the said particular period. Resultantly, Rule 12 (6) (the amended one) will actually not be applicable upon the appellant for the period during which 'NIL' returns were filed. To support these observations, I rely upon the decision as impressed upon by the learned Counsel for the appellant in the case of **B.S. Rathore Construction (supra).** Hence it is held that late fee for 18 nil returns have wrongly been charged by the Commissioner (Appeals).

9. Coming to the remaining 13 returns for the respective period in the aforementioned table of show cause notice, it is observed that the period for all those returns is of the year 2015-2017. The Show Cause Notice proposing late fee for these returns has been issued on 25.06.2020 i.e. after 3 years of the period to which demand pertains. Hence Show Cause Notice is much beyond the normal period of limitation. Once it is department's own case as is again apparent from the aforesaid table of show cause notice that returns though have regularly been filed but with delay, it is clear that the factum of said delay was in the notice of department since December' 2014. Raising this issue in ACS scrutiny of the year 2019 cannot give the benefit to the department for invoking the

extended period of limitation. The fact rather remains is that the allegations of delay were in the notice of the department and that it failed to take any action against the appellant during the prescribed period for taking the said action. Otherwise also extended period can be invoked only in the case when there is willful mis-declaration or willful suppression.

10. There is no iota of any evidence nor even of any allegation about any such positive act on part of appellant which may amount to willful suppression on part of the appellant. Since the tax admittedly stands already paid by the appellant no question of intention to evade tax arises. It is clear that the present case does not come under the purview of proviso to Section 73 (1) of the Finance Act, 1944. Hence, it is held that demand of late fee w.r.t. to the remaining 13 returns in the table of show cause notice gets hit by the bar of limitation especially for the reason that many of the delayed returns were 'NIL' returns.

11. The facts as discussed above are sufficient to hold that there is no iota of any mis-declaration or suppression. Question of it being willful does not at all arise. The law now stands settled that mere failure to declare does not amount to willful mis-declration or willful suppression. There has to be some positive act on the part of the assessee to establish the alleged willful mis-declaration and willful suppression. The Hon'ble Apex Court also in *Pahwa Chemicals Private Limited (supra)* has appreciated that where all the facts are already before the department and the party has failed to make a declaration, the said failure cannot be called as willful mis-declaration or willful suppression. The present case is at much

better footing where there is no failure of declaration but merely a delay in declaring i.e. in filing the returns. At least the extended period could not have been invoked by the department. For this technical reason itself the entire period of demand herein being beyond the normal period of limitation. The demand for entire period is not sustainable.

12. Further perusal of Rule 12 (6) of Central Excise Rules shows that the late fee cannot be charged over and above Rs. 20,000/- for a period of delay in submission of each return. Seen from that angle, the demand of Rs. 5,42,700/- as late fee is held to be on excessive side.

13. In view of the entire above discussion, it is held that there is no restriction in Rule 12 (6) as has been mentioned by Commissioner (Appeals) in its findings at para 8 of order under challenge. Above all the entire period of demand is held to be beyond the normal period for which the demand could have been raised. Resultantly, the order of demand even for late fee on delayed return is held highly against the settled provisions of law and is also against the several decisions of Hon'ble Apex Count as well as of this Tribunal. For the above discussed reasons, the order under challenge is hereby set aside. Consequent thereto, the appeal stands allowed.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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