

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

PRINCIPAL BENCH,
COURT NO. IV

EXCISE APPEAL NO. 52700 OF 2018

[Arising out of the Order-in-Appeal No. 114 (AK) ST/JPR/2018 dated 07/06/2018 passed by The Commissioner (Appeals), Central Excise & CGST, Jaipur – 302 005.]

M/s Continental Engines Ltd.
SP-312, RIICO Industrial Area, Bhiwadi,
Distt. Alwar (Raj.).

...Appellant

Versus

**Commissioner, Central Excise
& Service Tax,**
"A" Block, Surya Nagar,
Alwar (Raj.).

...Respondent

APPEARANCE:

Shri Shashwat Arya, Advocate for the appellant.
Shri O.P. Bisht, authorized representative for the Department

CORAM:

**HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER NO. 50957/2023

DATE OF HEARING/DECISION : 11.07.2023

P.V. SUBBA RAO

M/s Continental Engines Ltd., Alwar¹ filed this appeal to assail the order-in-appeal dated 07.06.2018 passed by the Commissioner (Appeals), Jaipur, whereby he rejected the appellant's appeal and upheld the order-in-original dated 16.02.2017 passed by the Assistant Commissioner, Alwar.

¹ appellant

2. We have heard learned counsel for the appellant and learned Departmental Representative for the Revenue.

3. The appellant manufacturers automotive components and castings, falling under Chapter Heading 8409 of the Central Excise Tariff Act, 1985². During the period April 2011 to March 2013, it supplied these products to its sister unit and paid duty under Rule 8 and 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000³ on 110% of the cost of production as per the Cost Accounting Standard-4 (CAS-4) Certificate issued by the Cost Accountant. The cost indicated in CAS-4 was based on the previous year's cost of production. At the end of the financial year, the cost of production during that financial year was calculated and it was found that the appellant had paid more central excise duty than what was due during some months and less than what was due during others. For the period of dispute, the appellant paid duty, overall, in excess by Rs. 4,90,298/-.

4. The appellant's records were audited and it was pointed out that the appellant had to pay the duty short paid during some months amounting to Rs. 10,21,295/- without reckoning the duty paid in excess during other months. Since the goods were being transferred to its own sister unit, the appellant deposited the entire amount of Rs. 10,21,295/- by debit entry No. 5413 dated 20.03.2014 in its Cenvat credit account.

² CETA 1985

³ Valuation Rules

5. Thereafter, show cause notice⁴ dated 14.08.2015 was issued to the appellant demanding the duty of Rs. 10,21,295/- and proposing to appropriate the amount already deposited by the appellant. It was also proposed to demand interest on the amount and impose penalties. It needs to be pointed out that the entire period of demand was beyond the normal period of limitation for raising demand under Section 11A of the Central Excise Act⁵. The extended period of limitation was, therefore, invoked giving the following as reasons :-

"8. It further appears that the assessee had never submitted CAS-4 certificates and also not disclosed the fact to the Deptt. That they had not paid Central Excise Duty on the value arrived as per Rule 8 & proviso to Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 amounting to Rs. 10,21,294/- during the period from April, 2011 to March, 2013. However, it has come to the notice of the department during the course of audit of the records of the assessee. **Had the audit of the records of the assessee not conducted, the above short payment would have not come into notice of the department, thus, it appears that the assessee have suppressed the facts willfully with an intent to evade payment of Central Excise Duty and therefore, Central Excise Duty amounting to Rs. 10,21,294/- appears recoverable from the assessee along with interest under the provisions of Sub-Section (4) of Section 11A & Section 11AA respectively of the Central Excise Act, 1944. The assessee also appears liable for penal action under Section 11AC of the Act ibid for contravening the provisions of Rule 8 & Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000".**

6. The appellant contested the demand, which was, however, confirmed by the Assistant Commissioner and an equal amount of penalty was also imposed. This order was upheld by the Commissioner (Appeals) in the impugned order.

7. On behalf of the appellant, the following submissions were made :-

⁴ SCN

⁵ CEA

(i) If duty is paid in excess during some months it can be adjusted against the duty short paid during other months and if the adjustment is done there is no short payment of duty at all. In fact, there will be an excess payment of duty of Rs. 4,90,298/-. Reliance is placed on the following case laws :-

- **Jindal Steel & Power Ltd. versus CCE, Raipur – I⁶**
- **ESSAR Steel India Ltd. versus CCE, Raipur⁷**
- **Godrej Consumer Products Ltd. versus CCE & ST, Indore⁸**
affirmed by the Hon'ble High court of Madhya Pradesh in **Principal Commissioner CGST & CE versus Godrej Consumer Products Ltd.⁹**
- **Bhagirath Coach versus CCE, C & ST, Indore¹⁰**
Affirmed by Hon'ble Madras High Court in **CCGST & CE versus Bhagirath Coach¹¹**
- **Hindustan Zinc Ltd. versus CCE, Udaipur¹²**

(ii) The entire period of demand is beyond the normal period of limitation and there is no evidence of suppression of facts. No intention to evade can be attributed to the appellant because this is a revenue neutral situation where the duty paid by the appellant was available to its own sister unit as Cenvat credit. In the absence of any evidence of fraud, collusion, willful mis-statement or suppression of facts, extended period of limitation cannot be invoked. Reliance is placed on the following case laws :-

- **Nirlon Ltd. versus CCE, Mumbai¹³**
- **Accurate Chemicals Industries versus CCE, Noida¹⁴**
Affirmed by Hon'ble Allahabad High Court in **CCE, Noida versus Accurate Chemical Industries¹⁵**
- **Polymer Papers Ltd. versus CCE, Meerut¹⁶**

⁶ 2016 (342) E.L.T. 253 (Tri. – Delhi)

⁷ 2017 (345) E.L.T. 139 (Tri. – Delhi)

⁸ 2017 (12) T.M.I. 1091 – CESTAT New Delhi

⁹ 2019 (5) T.M.I. 222 – Madhya Pradesh High Court

¹⁰ 2018 (6) T.M.I. 864 – CESTAT New Delhi

¹¹ 2019 (11) T.M.I. 832

¹² 2019 (12) T.M.I. 850 – CESTAT New Delhi

¹³ 2015 (320) E.L.T. 22 (S.C.)

¹⁴ 2014 (300) E.L.T. 451 (Tri. – Del.)

¹⁵ 2014 (310) E.L.T. 441 (All.)

¹⁶ 2019 (369) E.L.T. 1369 (Tri. – All.)

- **RT Packaging Ltd. versus CCE, Delhi – IV¹⁷**
- **Daman Ganga Board Mills Pvt. Ltd. versus CCE, Daman, Vapi¹⁸**
- **Ispat Industries Ltd. versus CCE, Raigad¹⁹**
- **India Cements Ltd. versus CCE, Tirupati²⁰**

(iii) For both the above reasons, the SCN is not sustainable and its confirmation by the Assistant Commissioner and the Commissioner (Appeals) needs to be set aside.

8. Learned Departmental Representative for Revenue made the following submissions :-

(i) The appellant is not disputing the valuation of the goods in terms of Rule 8 & 9 of the Valuation Rules. The issue is whether the duty has to be paid based on the provisional value determined based on the previous year's CAS-4 Certificate or based on the CAS-4 Certificate of the same financial year ;

(ii) The appellant itself calculated the differential duty payable and paid the same ;

(iii) Central excise duty is to be paid on each invoice on the transaction value arrived at on the basis of CAS-4 Certificate and, therefore, excess paid duty in some months cannot be adjusted against short duty paid during the other months.

(iv) Revenue neutrality cannot be accepted as a plea for short payment of duty. Reliance is placed on **M/s Star Industries versus Commissioner of Customs (Import), Raigad²¹**

(v) Extended period of limitation has been correctly invoked because the assessee was required to ensure that the duty is correctly paid and reflect in its ER-I returns. The Departmental Officers, on the other hand, as per the departmental instructions issued by Circular No. 882/7/2009 –CX dated 11.05.2009, were only required to conduct preliminary scrutiny of 100% returns and scrutiny of the

¹⁷ 2017 (357) E.L.T. 597 (Tri. – Chennai)

¹⁸ 2012 (276) E.L.T. 532 (Tri. – Ahmd.)

¹⁹ 2007 (213) E.L.T. 439 (Tri. – Mum.)

²⁰ 2023 (2) T.M.I. 1091 – CESTAT Hyderabad

²¹ 2015 (324) E.L.T. 656 (S.C.)

assessment, on the basis of risk parameters, in some cases only. In this case, the scrutiny was not done for this reason;

(vi) Had the audit not been conducted the short payment of duty would not have come to light.

9. We have considered the submissions on both sides and perused the records.

10. It is undisputed that the entire demand was beyond the normal period of limitation. The case of the revenue for invoking the extended period of limitation is that the Revenue had not scrutinized the returns filed by the appellant in view of the departmental instructions. Therefore, short payment of duty came to light only when the audit was conducted. Had the audit not been conducted the short payment would not have come to light. Therefore, the appellant had suppressed the facts willfully with an intent to evade payment of central excise duty, therefore, the extended period of limitation can be invoked. In other words, according to the Revenue, its own inaction (due to departmental instructions) establishes the intent of the appellant.

11. We find that as per Section 11A, extended period of limitation can be invoked only in case of fraud, collusion, willful mis-statement, suppression of facts or violation of the Act or Rules with an intent to evade payment of duty. It is a well settled legal position that suppression does not mean mere omission, but a positive act of suppressing facts with a willful intent. In this case, the Department seeks to attribute this intent to the appellant because the Department itself chose not to scrutinize

the returns based on Departmental instructions. Had the Department scrutinized the returns the alleged short payment would have come to light. The Department is seeking to use its own inaction as the basis to impute the motive of suppression of facts with intent to evade on the appellant. This cannot be permitted. The Department's inaction cannot be the basis for invoking extended period of limitation, let alone basing such inaction to impute motive to the appellant. We also find that the appellant was supplying the goods to its own sister unit and, therefore, every rupee which the appellant paid as duty would have been available to its sister unit as Cenvat credit. Therefore there cannot be any intention to evade.

12. For the above reasons, we find that the entire demand is time barred and neither the demand of duty nor the interest nor the penalty can be sustained.

13. In view of the above, the impugned order is set aside and the appeal is allowed with consequential benefits to the appellant.

(Order dictated and pronounced in open court)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)