

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

EXCISE APPEAL No. 51666 OF 2021

(Arising out of Order in Appeal No. 122 (CRM)/ST/JDR/2021 dated 08.06.2021 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jodhpur)

M/s. Mumal Marble Pvt. Ltd.

N.H.-8, Amberi, Badgaon,
Udaipur (Raj.) – 313004.

...Appellant

Versus

**Commissioner of Customs,
Central GST, Udaipur**

142-B, Hiran Magri,
Sector-11, Udaipur (Raj.) - 313001

....Respondent

APPEARANCE:

Shri Bipin Garg, Advocate for the appellant

Shri Mahesh Bhardwaj, Authorized Representative for the Respondent

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

DATE OF HEARING: 16.01.2024

DATE OF DECISION: 26.04.2024

FINAL ORDER NO. 55640/2024

DR. RACHNA GUPTA

The appellant in the present case is engaged in the manufacture of rough marble slabs and polished marble slabs. During the course of audit of records of appellant for the period from January, 2017 to June, 2017 it was observed from ER-1 Returns vis-à-vis sale invoices issued by the appellant that they were clearing rough marble slabs and were discharging their excise duty liability at the specific rate of Rs.60/- per Sqr. Mtr. In terms of entry at Sl. No.54 of Notification No.12/2012-CE dated 17.03.2012. Department observed that in

respect of clearance of rough marble slabs less quantity has been shown by the appellant by way of adopting the incorrect formula for converting the quantity of square feet (Sq. Ft.) of rough marble slabs into Square Meter (Sq. Mtr.) in their sale invoices. Due to this Central duty for an amount of Rs.357302/- has been short paid by the appellant during the aforementioned period. With these observations a Show Cause Notice No.1394 dated 20th February, 2020 proposing the recovery of the amount of RS.357302/- alleging it to be the short paid duty alongwith the proportionate interest and the appropriate penalties. The show cause notice was issued by invoking the extended period of limitation of 5 years on the allegations that the appellant has failed to reflect the correct information in the ER-1 Returns. The said proposal was initially confirmed vide Order-in-Original No.08/2020 dated 28.10.2020. The appeal against the said order has been rejected vide Order in Appeal No. 122/2021 dated 08.06.2020. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Bipin Garg, Id. Counsel for the appellant and Shri Mahesh Bhardwaj, Authorised Representative for the Department.

3. Ld. Counsel for the appellant mentions that the appellant being the manufacturer of marble slabs from rough marble opted to discharge his Central Excise Duty liability as per the option given in Chapter Note 5 of Chapter 25 of Section V of First Schedule to Central Excise Tariff Act 1985 with respect to the rough block of marbles. The entire production of marble block being converted into slabs

based upon the aforementioned formula is being duly recorded. The record for the impugned period was also available and was duly provided by the appellant. The said record has not been considered. It has wrongly been alleged that appellant has applied a wrong formula despite that the formula of treating one cubic meter of marble block to be equal to 30 Sq. Meter of marble slabs has correctly been applied. The findings under challenge are alleged to be just presumptive in nature. The order is accordingly prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, Id. Departmental Representative has mentioned that the formula used by the appellant for converting Sq. Ft. of marble in to Sq. Mtr. is erroneous. The correct formula is that the Sq. Ft quantity needs to be multiplied by a factor of 0.0929 to convert it into Sq. Mtr. on which the duty is payable at the rate of Rs.60/- per Sq. Mtr. Applying wrong formula has resulted into short payment of duty to the extent of the amount of duty confirmed. Hence there is no infirmity in the order under challenge. The appeal is prayed to be dismissed.

5. Having heard the rival contentions, I observe that the appellant is admittedly a manufacturer of marble slabs out of the marble blocks. Thus it is clear that appellant is converting irregularly shaped rough marbles into the marble slabs of specific length, breadth and width. The area of slabs with specific dimensions can readily be calculated into Square Feet/ Sqr. Meters. However for the rough block/irregular shaped marble it is only the volume in cubic meters

which can be ascertained to some extent of precision. I also observe that there is no dispute about Chapter Note V of Chapter 25 of Customs Tariff Act, 1985. The said note reads as follows:-

"In relation to marble slabs of heading 2515, if a manufacturer clears irregularly shaped marbles he shall have the option to discharge the duty on the slabs by treating one cubic meter of marble blocks as equivalent to 30 square meters of marble slabs, the volume of the blocks being determined with reference to the maximum length, width and height of the block."

6. It is appellant's case that the production quantity of marble slabs has been calculated by adopting the aforesaid option given. There is also no denial to the fact that the slabs are manufactured in various thickness of 16 mm, 18 mm, 20 mm & 30 mm width out of rough /irregularly shaped marble. In the light of these facts, it cannot be denied by the reasonable prudence that once a particular volume of marble block will be converted into slabs of different thicknesses, the area in Sq. Ft./Sq. Mtr. For the slab having more thickness will be less. From the given standards it can be judicially noticed that the area for a slab of 16 mm thickness shall be 175 Sq Ft. per ton of the marble whereas for 18 mm Thick slab it will be 165 Sq, Ft. per ton and for 20 mm thickness slab it will be 150 Sq. Ft. per Ton.

7. The invoices as have been examined by the Department to allege a wrong calculation are observed. It is seen that the invoice is only mentioning the quantity sold in Sq. Mtr. without mentioning the

thickness of the slab sold. In absence thereof and in absence of comparative calculation based under afore mentioned chapter Note V the observations are held to be nothing but the presumptive in nature. Otherwise also I do not find any basis the formula as has been impressed upon by Id. D.R. On the contrary the formula admittedly applied by the appellant is the formula as mentioned in the Central Excise Tariff. No evidence is produced by the department to even demonstrate as to how the formula has wrongly been applied. In the absence of the evidence as discussed above, the said calculation cannot be held to be a wrong calculation.

8. Now coming to the aspect of invoking the extended period of limitation, I observe that the only ground taken for the same is that the right quantity was not mentioned in the ER-1 Returns and had no audit would be conducted the short-payment by the appellant would not have come to the notice of the department. However, I observe it to be a matter of fact that all details were available in the records of appellant whatever was mentioned by the appellant in the ER-1 Returns was as per their records maintained by applying the formula given in the Tariff Act. I am of the opinion that the above all mere oral allegations. There is no evidence to prove that the intent of the appellant was to evade duty. Admittedly the appellant as per self-assessment has discharged his duty liability. The returns have also been furnished. It was now for the Department to scrutinize the

returns and to ascertain if the service tax had been paid correctly or not.

9. The respective officer of the department can make the best judgment assessment under section 72 of the Central Excise Act. For the purpose he may require the assessee to produce such accounts documents or other evidences as he may deem necessary. Such being the legal position, if some tax has escaped assessment which came to light later during the audit, all it shows is that either there was no error in the self-assessment or it was noticed by the audit later. However, the allegation that short payment came to light only during audit is highly insufficient to prove the intent to evade the payment of service tax by the appellant. For these findings I draw support from the decision of this Tribunal, Principal Bench in the case titled as **M/s. Kalia Consruction Pvt. Ltd. Vs. Commissioner, Central Excise Udaipur in Service Tax Appeal No. 54385 of 2015 decided on 15.11.2023**. The Hon'ble Supreme Court also in the case of **Pushpam Pharmaceuticals C. vs. Collector of Central Excise, Bombay reported in 1995 Supp (3) SCC 462 SC**. The Hon'ble Supreme Court holds that "suppression of facts" as used in the penalising section (section 11A of Central Excise Act) has been used in the company of strong words such as fraud, collusion or wilful default. Hence irrespective it is the mildest expression yet because of its surroundings it has to be construed strictly. Resultantly mere omission is not sufficient to be called as suppression of facts to invoke

the extended period. Department has to prove that the act was deliberate to not to pay or to short pay the duty

10. As discussed above there is no evidence for the same. Hence, I hold that even extended period has wrongly been invoked. Resultantly, the Show Cause Notice itself is barred by time.

11. In the light of the discussion above the demand under challenge does not sustain on its merits. It also stands hit by the bar of limitation. Hence the demand is held to have wrongly been confirmed. The order under challenge is therefore set aside. Consequent thereto the appeal stands allowed.

[Pronounced in the open Court on **26.04.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)