

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/2021/2005 - EX[DB]

Date 23/02/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E.NOIDA

OFFICE OF COMMISSIONER OF CUSTOMS,CENTRAL
EXCISE AND SERVICE TAX, C-56/42, SECTOR-62,
NOIDA - 201307
C.C.E.NOIDA

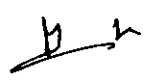
Appellant

Vs
Respondent

M/S VARDHMAN PRECISION PROFILES & TUBES LTD.

I am directed to transmit herewith a certified copy of **Final order No. A/209/**
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**

2012 EX[DB] dated 22-2-12


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S VARDHMAN PRECISION PROFILES & TUBES LTD.
SIKANDRABAD

2. Adv. / Consult *SH. MAYANK JAIN, ADV.,*
B-9, SAGAR APARTMENTS,
6 -TILAK MARG, N. DELHI-1

3. C.D.R

4. Bar association. CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15

10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file


Assistant Registrar
(Excise Appeal Branch)

**APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III**

Excise Appeal No. 2021 of 2005

[Arising out of Order-in-Original No. 12/Commr/NOIDA/ 2004 dated 31.3.2004 passed by the Commissioner of Central Excise, NOIDA (UP)]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

- | | |
|--|------|
| 1. Whether Press Reporters may be allowed to see :
the Order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982? | No |
| 2. Whether it should be released under Rule 27 :
of the CESTAT (Procedure) Rules, 1982 for
publication in any authoritative report or not? | Yes |
| 3. Whether Their Lordships wish to see the fair :
copy of the Order? | Seen |
| 4. Whether Order is to be circulated to the :
Departmental authorities? | Yes |

Commissioner of Central Excise
Noida

Appellants

Vs.

M/s. Vardhman Precision Profiles &
Tubes. Ltd.

Respondent

Appearance:

Shri Sunil Kumar, SDR for the Appellants

Shri Mayank Jain, Advocate Proxy for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

Date of Hearing : 29.11.2011
Date of Pronouncement : 22.2.2012

FINAL ORAL ORDER NO. A/209/2012-EX (BR)

Per Archana Wadhwa (for the Bench):

Being aggrieved with the order passed by Commissioner vide which he had dropped the proceedings against the respondents, Revenue has filed the present appeal.

2. We have heard Shri Sunil Kumar, learned DR appearing for the revenue. Shri Mayank Jain, appears for the respondents. The respondents have also filed written submissions which we have gone through.

3. After hearing both sides, we find that the respondents are engaged in the manufacture of angles, shapes and sections, fabricating structures and pre-fabricated building (hereinafter referred to as PFB) classifiable under Chapter 72, 73 and 94 of the Central Excise Tariff. During the period relevant for the purpose of appeal, they were availing the benefit of small scale exemption notification. Their factory was visited by the audit on 21.1.02 and 31.1.02, who entertained a view that the respondents were clearing fabricated building. *in guise of structurals.*

4. On the above basis, the show cause notice dated 4.8.03 was issued to the respondents alleging that various steel structurals were cleared by them during the period June, 1998 to March, 2003 by declaring the same as pre-fabricated building. Inasmuch as the rate of duty on PFB was

less than the duty on fabricated structures / sections, demand to the tune of Rs.93,83,470/- was raised. The show cause notice mentioned that the party procured contracts for design, supply and erecting PFBs including civil works from various customers. PFB is mainly an assembly of various elements e.g. columns, trusses, purlins, roof and wall panels etc. It is alleged in the show cause notice that for execution of the contracts the party manufactured and supplied only some of the required elements of PFB, like columns and top structure of the shed, ~~in~~ from its factory. Other items, viz., galvanised steel sheets, asbestos sheets etc., which are essential elements for making PFB were purchased from the market and directly supplied at the site for erecting PFB. It is further stated in the show cause notice that columns and top structures are appropriately classifiable under Chapter 72 of the Central Excise Tariff but the party had classified them under sub-heading No. 9406.00 as PFB for avoiding payment of appropriate duty. PFB is defined under Note 4 of chapter 94 of the Central Excise Tariff and it is mentioned in the show cause notice that the products manufactured and cleared by the party were not in conformity with the definition given under said Note-4. Goods cleared from the factory as PFB were not actually PFB as only some of the elements were cleared from the factory. As per the notes of HSN, parts of the building, if presented separately, are not classifiable as building but are classifiable in their own appropriate headings. A statement of Shri Sumit Mittal, Manager (Accounts) was recorded on 18.06.03 under section 14 of the Central

Excise Act, 1944, wherein Shri Mittal deposed that his factory cleared PFB in CKD condition as it would not be possible to clear complete building in assembled condition in a single vehicle. He further deposed that some components of the building were also supplied directly to the assembling site without bringing the same in the factory. He also stated that they did not submit any intimation to the Department that they were clearing building in CKD condition.

5. The said notice was challenged by the appellant on merits as also on limitation. As regards merits, the Commissioner relied upon the provisions of Rule 1 of the Interpretation Rules to the Central Excise Tariff ~~has~~ also examined sub heading 9406.00 as also Chapter Note 4 of Chapter 94. By relying upon the precedent decisions of the Tribunal in the case of National Steel Industries [1999 (111) ELT 80 (Tri)], he held that the goods cleared from the respondents factory in CKD condition was pre-fabricated building. Tribunal in the case of National Steel Industries case held that the expression cleared together appearing in Chapter Note 4 of Chapter 94 would not amount to presenting together all elements and had no bearing on the classification under sub heading 9406 of the Central Excise Tariff since supply of goods falling under this heading could be spread over a period of time due to its huge size and Chapter Note 4 would not be read as meaning that all the elements of the prefabricated building should be supplied at the same time. Similarly, Tribunal observed that the supply of certain bought out items would not alter the classification of the product.

6. Examining the records of the respondents, during the relevant period Commissioner observed that on receiving the orders from their customers for supply of pre-fabricated building, their technician visited the proposed site of erection of the building and prepared suitable drawing for making the building. He examined the drawing and the elaborate proposal for manufacture and supply of PFB. Examining the contract received from Central Warehousing Corpn., he concluded that in the drawing, all the items were shown in assembled condition and ultimate sketch was clearly recognisable as building. The design report clearly reveals that all the elements of PFB had specific dimensions and design. The roof panels and walls with specific requirement and measurements was also shown. As such, he concluded that the supply was of pre-fabricated building and not of structures. He also examined the other contracts entered into by the respondents and by following the Tribunals decision referred supra, he held that supply was of pre-fabricated building and not of parts.

7. The adjudicating authority also extended the benefit of limitation to the respondents by observing that there was no suppression of facts, mis-statement, fraud etc. attributable to the appellants and in the absence of the same, extended period of limitation cannot be invoked. He further observed that the assessee had obtained Central Excise registration for the manufacture of PFB, amongst other goods and have been regularly filing the classification mentioning the fact of manufacture of PFB. He also referred to the correspondence between

the respondents and their jurisdictional Central Excise authorities. For better appreciation, we reproduce the relevant paragraphs from the impugned orders.

“13.... It is noticed that the jurisdictional range office had written letter dated 22.11.2000 asking the party that they were not entitled to avail exemption from duty on the intermediate goods i.e. angles, shapes, sections etc., used in the manufacture of PFB as PFB during the relevant period was exempt from payment of duty. The range office also demanded copy of contract against which supply of PFB was effected. The party produced copy of letters dated 2.2.01 & 5.01.02 which were duly receipted in the range office and in those letters the party had categorically stated that different types of structures fabricated from various shapes & sections by sizing, cutting, drilling etc. were supplied to the customers as PFB. It is also significant to note that the party had paid an amount equal to 8% in terms of rule 57CC on the clearances of PFB as per direction of the range office. It indicates that what was demanded by the Department or was required under the law was always done by the party.

14. All the above clearly establishes that there was no suppression or mis-declaration of any kind on the part of the party. I thus find force in the argument of the party that invocation of longer period in this case is not justified. The demand is, therefore, not sustainable on the ground of limitation also.”

8. As against the above finding of the adjudicating authority, the revenue in their memo of appeal has drawn our attention to the Chapter Note 4 of Chapter 94 and has insisted that in terms of said

Chapter Note 4 all the elements of pre-fabricated building should be cleared in one go. Reference also stand made to the Explanatory Notes of HSN. It further stands contended that roof panels and wall panels were not manufactured ~~by~~ the respondents factory and were purchased from outside and supplied directly to their customers premises. They have contended that the Tribunal's decision in the case of National Steel Industries relied upon by the Commissioner is not applicable to the facts of the case inasmuch as the value of bought out items does not stand included in the total clearance of the respondents in the present case. As such, they have contended that it should be held that what was cleared from the factory was not pre-fabricated building.

9. It is their contention that the department was mislead by the respondents by not disclosing the true and correct information regarding the nature and classification of the goods. As such, the respondents have suppressed the material facts from the department.

10. After carefully considering the submissions made by both the sides, we note that though the issue on merits stand concluded by the Tribunal in the case of National Steel Industries [1999 (111) ELT 80 (Tri)] and the facts in that case are fully applicable to the facts of the present case, but we think it fit to dispose of the appeal on the point of limitation.

11. While extending the limitation, the Commissioner has referred to the correspondence entered into by the appellant with their jurisdictional Central Excise authorities. As is clear from the paragraphs reproduced

above, the respondents were questioned by their jurisdictional Range Officer vide his letter dated 22.11.2000 on the issue of exemption in respect of intermediate goods used in the manufacture of PFB as during the relevant period PFB was exempted from payment of duty. Copy of the contract was also demanded, which was produced by the respondents under the cover of their letters dated 2.2.01 and 5.1.02. Revenue has not contested the fact of correspondence on the above issue, as recorded in the impugned order of the Commissioner. If that be so, we really fail to understand as to how suppression or mis-statement with any malafide intent could be attributable to the respondents so as to invoke the longer period of limitation against them. The adjudicating authority relied on the Supreme Court decision in the case of Cosmic Dye Chemical [1995 (75) ELT 721 (SC)] is appropriate. The list of Hon'ble Supreme Court's decision on the issue of time bar is quite long and it is well settled law that for invoking the proviso to Section 11A, there has to be suppression, or mis-statement with an intent to evade payment of duty on the part of the assessee. As such, malafide intention is one of the relevant ingredient for ^{invocation} inclusion of the said proviso. The Revenue has not referred to any evidence reflecting upon the intent on the part of the respondents to evade duty. The Hon'ble Supreme Court in the case of Sarabhai M. Chemicals [(2005) 2 Supreme Court Cases 168] has referred to the distinction between the reopening of the approvals / assessments and raising the demand in relation to the extended period of limitation, by observing that as the gate passes, invoices and

monthly returns stand filed by the appellants in that case, the invocation of extended period of limitation is not justified. By applying the ratio to the facts of the present case and also by taking note of declaration of law by Apex Court in various other decisions, we hold that inasmuch as the Revenue was having full knowledge of the respondents activities and was entering into correspondence with them as regards the dutiability of the intermediate products as also the appellants were filing the declarations, it cannot be held that there was any suppression on their part so as to justifiably invoke the longer period of limitation. As such, we are of the view that the adjudicating authority has rightly held the demand to be time barred.

12. Inasmuch as the revenue's appeal stand rejected on the point of time bar, we do not consider it necessary to deal with the merits of the case, ^{though} ~~However~~, we find that the issue is otherwise covered by the decision of the Tribunal in the case of National Steel Industries.

13. In view of the above, Revenue' appeal is rejected.

(Pronounced in the open court on 22/2/12)

(~~Archan~~ Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)