IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Appeal No. E/764/2008-CU [DB]

[Arising out of Orders in Original No. 52/Commr/CEX/07 dated 18.12.2007, passed by the Commissioner, Central Excise & ST, Bhopal]

For approval and signature:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Commissioner of Central Excise & ST, Bhopal ….Appellant

Vs.

Western Tobacco Limited ….Respondent

Appearance:

Shri Amresh Jain, DR for the Appellant - Revenue
Shri R.K. Hasija, Advocate for the Respondent- Assessee

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing: 07.12.2016

Date of Pronouncement: 13.01.2017

FINAL ORDER NO. 50341/ 2017 -EX [DB]

Per V. Padmanabhan

The present appeal filed by Revenue is directed against Order-in-Original dated 18.12.2007, passed by Commissioner of Central Excise, Bhopal.

2. Respondent is engaged in the manufacture of Cigarettes. A part of the goods manufactured, was also exported to foreign buyers. Authorities of DGCEI investigated an intelligence indicating that the respondent was diverting Cigarettes cleared for export duty free into local market and were creating fake/ forged proof in respect of such

consignments to regularize the same. The investigation undertaken as well as scrutiny of records revealed that the respondent exported following three consignments of Cigarettes through M/s. Lumiere Impex and M/s. United Enterprises:-

(i) AR4 No. 40 dated 01.1.2001 for export of 10,00,000 numbers of MIDLANF brand Cigarettes valued at Rs. 2,76,000/- involving Central Excise dutyof Rs. 12,60,000/- for export to M/s. Ajman Suthshu General Trading LLC, Ajman (UAE) through M/s. Lumiere Impex, 13, Alka Mansion, 259, I.R. Road, Near Mandavi Post Office, Mumbai. This consignment was cleared under Central Excise invoice No. 42 dated 03.01.2003 purportedly by truck No. MH 31 6355.

(ii) AR4 No. 08/01-02 dated 15.05.2001 for export of 3440000 numbers of JET brand cigarettes valued at Rs. 5,28,946/- and involving Central Excise duty of Rs.49,88,000/- for export to M/s. Sunrise General Trading LLC, Ajman (UAE) through M/s. United Enterprise, 4, Gupta Compound, Gamdevi Road, Poisar, Kandiwali (East), Mumbai. This consignment was cleared under Central Excise Invoice No. 08 dated 15.05.2001 purportedly by Truck No. MP 04A 1867.

(iii) ARE I No. 02/01-02 dated 04.01.2002 for export of 4000000 Nos of JET brand cigarettes valued at Rs. 6,15,053/- and involving Central Excise duty of Rs. 58,00,000/- for export to M/s. Sunrise General Trading LLC, Ajman through M/s. United Enterprises, Mumbai. This consignment was cleared under Central Excise Invoice No. 56 date 08.01.2002 purportedly by truck No. MP 09 KB 2077

3. In the light of investigation as above, Show Cause Notice was issued proposing for recovery of duty payable to the extent of Rs. 1,20,47,600/- on the goods allegedly diverted in the local market in the guise of export. After the due process of adjudication, vide the impugned order, Commissioner dropped the demand of excise duty as well as associated penalties on the respondent. Aggrieved by the impugned order, Revenue has filed the present appeal.

4. With the above back ground, we have heard Shri Amresh Jain ld. DR appearing for the Revenue and Shri R.K. Hasija, ld. Advocate appearing for the respondent-assessee.

5. Ld. DR submitted that the ld. Commissioner in the impugned order has wrongly dropped entire demand of excise duty. The stand adopted by the adjudicating authority is that the goods were cleared from the respondent's factory for export through merchant exporters. The merchant exporters have executed the bond to safe guard the duty subject to providing proof of export. The proof of export furnished by the merchant exporters was found to be fraudulent. The Commissioner has taken a view that the liability for excise duty payment on the goods would stand transferred from the manufacturer i.e. the respondent to the merchant exporter who has executed the bond. Accordingly, the Commissioner has dropped the entire demand against the manufacturer.

Ld. DR submitted that the merchant exporters on investigation were found to be non-existent at the addresses furnished by them. Accordingly, the bond executed by merchant exporters ceased to have any legal validity. He further submitted that the responsibility for payment of excise duty on the goods manufactured in any factory, remains with the manufacturer. Accordingly, his submission is that the demand of excise duty may be confirmed on the respondent.

6. Ld. Counsel for the respondent strongly opposed this plea. He brought to our notice the CBEC instructions issued vide Circular dated 26.12.1994 which deals with the procedure for export of goods without payment of excise duty under bond. His submission is that, in cases where export is proposed through merchant exporters, the bond needs to be executed by the merchant exporters and on the basis of the above bond the goods will be cleared without payment of duty from the factory. On receipt of proof of export, the bond shall be closed. His submission is that once the merchant exporter have executed the bond and the same stands accepted and the goods are cleared on the basis of such bonds, there can be no demand of excise duty from the manufacturer. As has been held clearly by the Commissioner in the impugned order, no duty can be demanded from the respondent. He further submitted that the inability of the Revenue to recover the duty from the merchant exporters cannot be cited as a reason for demanding duty from the respondent.

7. Consignments of Cigarettes have been cleared from the respondent’s factory on the basis of bond executed by two merchant

exporters. It is also on record that the proof of export also stand submitted. However, during the course of investigation undertaken by DGCEI, it has emerged that the consignment of Cigarettes cleared for exports were never exported. It was further proved that the proof of export submitted were fabricated and fraudulent. It has further been established that the merchant exporters who have come forward with the offer of export of the goods are proved to be non-existent at the addresses declared by them. Even some of the vehicle numbers mentioned in the export documents were found to be fake and found to be moped, tanker etc. In the statement of Shri Abdul Tahir, General Manager (Commercial) of the respondent, recorded under section 14 of the CE Act, 1944 on 23.08.2003, he has admitted that the three consignments cleared for export through M/s. Lumiere Impex and M/s. United Enterprises were not exported out of India by merchant exporters. He further added that the merchant exporters have given fake proof of exports. He admitted that he came to know about the shipping bills being fake but could not do anything against the merchant exporters as they were not traceable. All this fairly indicate the fact that fraud has been committed and the goods cleared from the factory for the purpose of export were never ultimately exported. Such being the case, the duty due on such goods is required to be paid; but the dispute is hinging on who is liable to pay the excise duty. In normal course, the excise law mandates that the goods are liable for payment of excise duty at the time of clearance from the factory after manufacture. The picture becomes hazier when we consider the bonds executed by the merchant exporters. The procedure for duty free clearance from the factory through merchant exporters for export purposes prescribes that merchant exporters will execute the bond and undertake to pay the excise duty. They will stand discharged only when the proof of export is given. From the wordings of the bond, it appears that in the present case, where merchant exporters have failed to produce genuine proof of export, the liability to pay excise duty is required to be fastened on the merchant exporters. However, during the course of investigation it has emerged that merchant exporters were found to be non-existent, at the addresses submitted by them to the department. In such circumstances, it has to be presumed that no such merchant exporters existed at their declared addresses and the bonds executed by such merchant exporters have ceased legality to be a valid document. In the absence of valid bond from the merchant exporters, the liability for payment of excise duty reverses back to the original manufacturer who manufactured the goods i.e. the respondent in the present case.

8. It is also on record that the respondent has received the entire payments for all the consignments allegedly cleared by them to merchant exporters. It is also on record that payments have been received in the form of 19 demand drafts, out of which 18 demand drafts were made from a bank in Hyderabad each amounting to less than Rs. 50,000/-. Further, all the 18 demand drafts have been made in the name of different persons who were found to be non-existent at the bogus addresses given to the banks. The fact that the respondent does not appear to have raised any doubt or any enquiry regarding such mode of payment, leads us to doubt the bonafides of the respondent.

9. In the light of the above observation, the impugned order is modified and we uphold the demand of excise duty amounting to Rs. 1,20,47,600/- on the respondent. Further, the respondent will also be liable for payment of appropriate interest on the above duty as well as liable for penalty of equal amount under section 11AC of the Central Excise Act, 1944.

10. The appeal is partly allowed in the above terms.

[Pronounced in the open Court on 13.01.2017]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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