IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing: 21.11.2016
Date of Pronouncement: 20.2.2017

Appeal No. E/1397-1398/2012-EX.(DB)

(Arising out of Order-in-Original No. 4/2012/C.Ex/JPR-II-Commr. dated 29.2.2012 passed by the Commissioner of Central Excise, Jaipur)

M/s Technique Diabrasive India Ltd. — Appellant
Manvendra Singh, Working Director

Vs.

CCE, Jaipur — Respondent

Appearance

Shri Prabhat Kumar, Advocate	-	for the appellant
Shri Yogesh Agarwal, D.R.	-	for the respondent

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

Final Order No. 51889-51890/2017

Per V. Padmanabhan :

These two appeals have been filed against the Order-in-Original dated 19.3.2012 passed by the Commissioner, Central Excise, Jaipur.

2. The appellant-assessee is engaged in the manufacture of abrasive stones falling under Sub-Heading No.6801.90 of the Central

Excise Tariff Act, 1985. The officers of anti evasion branch of the Central Excise Commissionerate made a surprise visit to the factory premises on 7.3.2001 and conducted various checks. On physical verification of the stock of polished abrasive stones and raw materials, it was found that the stocks were tallying with the balance recorded in the statutory record. During checks, the officers recovered some private records of the assessee and 62 nos. of loose kucchi slips from the factory premises. The records recovered by the officers included three outward despatch registers. On scrutiny of the 62 loose kucchi slips, it was noticed that these slips pertained to the period 1.1.2001 to 7.3.2001. Statement of Shri Manvendra Singh, Director of the assessee, was recorded on the spot under Section 14 of the Central Excise Act, 1944. In his statement, Shri Manvendra Singh admitted that these loose slips pertained to the clearances of abrasive stones from their factory premises made without payment of Central Excise duty. He further admitted that in respect of such clearances no invoices under Rule 52A of the erstwhile Central Excise Rules, 1944 have been issued by them. After further investigation, the officers concluded that these kucchi slips covered clandestine clearance of 1557.5 boxes and 632 pcs. of abrasive stones. (detailed in Ann-A of Show Cause Notice).

3. Statements of Shri Manvendra Singh as well as Shri Mukesh Sahu, authorised signatory were recorded by the officers under

Section 14 of the Central Excise Act. Shri Manvendra Singh, in his statement admitted that the three outward despatch registers covered the period 5.6.2000 to 5.3.2001 and pertains to abrasive stones cleared without payment of duty. After detailed scrutiny and further investigation, the department concluded that 1898 boxes and 286 loose pcs. of abrasive stones were cleared without payment of duty (detailed in Ann-B of Show Cause Notice).

4. Statement of Shri Jeetendra Hinger, Marketing Executive was recorded by the officers on 30.4.2001. He admitted that the abrasive stones covered by the kucchi slips as well as dispatch registers were cleared without payment of duty. He stated that the goods were cleared without payment of duty on the strength of loose slips which were normally destroyed by them afterwards. With reference to the three outward dispatch registers, he stated that these registers contained the details of clearances for the period 1.6.2001 to 6.3.2001 from two units M/s Technique Diabrasive India Ltd. (appellant in the present case) and M/s Technique Super Diatools Ltd., Udaipur. Both these units were situated within one common boundary wall and hence outward dispatch registers were maintained commonly.

5. Shri Jitendra Hinger in his statement dated 30.4.2001 also stated that out of the total production of abrasive stones,

approximately 70% were of the 'Fickert' variety, 15% 'Frankfurt' variety, 10% 'Triangle' variety and 5% 'Chamfering' variety. Neither Shri Manvendra Singh nor Mukesh nor Jitendra Hinger could give the complete details pertaining to the quality, number of pieces in one box and value per piece charged from the buyer.

In this way, the departmental officers after investigations arrived at total quantity of 3455.5 boxes + 918 pcs. of polished abrasive stones (1557.5+1898 boxes and 632+286 pcs.) allegedly cleared clandestinely by considering that the clearance was entirely of Fickert A quality and the highest value of Fickert A quality was adopted. By adopting the value of Rs. 274 per piece, the total value of abrasive stones allegedly cleared clandestinely was worked out to Rs.4,56,98,268/- and the Central Excise duty on such clearances amounting to Rs.73,11,723/- was demanded from the assessee vide Show Cause Notice dated 16.5.2005.

6. The Commissioner, Central Excise, Jaipur decided the Show Cause Notice vide the order in original dated 28.10.2005 in which the demand was confirmed along with an order for payment of interest and penalty equal to the duty evaded. Further, penalties of Rs. 10 lakh and Rs. 2 lakhs was imposed on Shri Manvendra Singh, Director as well as Shri Jitendra, Hinger, Marketing Executive. Being aggrieved with the order in original dated 28.10.2005 the appellant

assessee as well as Director filed appeals before the Hon'ble CESTAT, who vide the Final Order No. 409-410/2010-EX. dated 8.6.2010 set aside the order in original and remanded the matter to the adjudicating authority to decide the same afresh after giving an opportunity to the appellants to file reply to show cause notice and to defend their case.

7. The ld. Commissioner passed the impugned order dated 19.3.2012 in the de novo proceedings in which he once again confirmed the duty amounting to Rs.73,11,723/- along with interest and imposition of penalty of an equivalent amount. He imposed penalty of Rs. 5 lakh and Rs. 2 lakh on Shri Manvendra Singh, Director as well as Shri Jitendra Hinger, Marketing Executive. Aggrieved by this order, the present appeals have been filed by the assessee as well as Director.

8. With the above background, we have heard Shri Prabhat Kumar, ld. Counsel for the appellants as well as Shri Yogesh Agarwal, ld. DR appearing for the Revenue.

9. The main grounds of appeal agitated by the ld. Counsel are summarized below:

(i) Order has been passed without observing the principles of natural justice inasmuch as request of cross-examination of Shri Mukesh Sahu as well as Shri Jintendra Hinger have been denied.

(ii) The physical verification of stock of both finished as well as raw materials have tallied with that recorded in the statutory records. Thus there was no discrepancy in the physical stock.

(iii) The entire demand has been raised on the basis of 62 kucchi slips as well as three outward registers which are private records. Independent corroboration of the details found in these private records have not been carried out by the Revenue. In the absence of such corroboration demand made one on the basis of private records cannot be sustained.

(iv) To substantiate allegation of clandestine clearances the Revenue has failed to undertake any investigation and to bring evidence regarding purchase of unaccounted raw materials, and consumption of such inputs. No verification has been undertaken at the end of regular suppliers of raw material or transporters. Revenue has also not carried out any investigation at the ends of the alleged recipients of such clandestinely cleared goods.

Without prejudice to the above arguments, they have raised further grounds:

(a) The demand has been confirmed by arbitrarily adopting the highest value of the abrasive stones manufactured and cleared by the assessee. The adjudicating authority has not taken note the Chartered Accountant's certificate indicating the selling price of various type of goods cleared by the assessee for the last 11 financial years. They have also submitted a statement of purchase of empty corrugated boxes for the relevant years but these have not been considered by the adjudicating authority.

(b) Explanation offered by Shri Jitendra Hinger, Marketing Executive with reference to the 62 pieces of loose slips recovered has not been considered by the adjudicating authority. Further, he has also not given credence to the submissions made by him that the boxes shown in the outward registers (Ann-B) were only empty corrugated boxes and empty plastic folders.

(c) The show cause notice has been issued after a gap of 1529 days after the search in the factory on 7.3.2001 and since delayed it is hit by limitation. Finally, he submitted that the demand for excise duty made on the basis of assumptions and presumptions may be set aside.

10. The ld. DR, on the other hand opposed the arguments made on behalf of the appellants,. He submitted that Shri

Manvendra Singh, Director has admitted in his statement on 7.3.2001 categorically that the goods covered by the 62 kucchi slips as well as the three outward dispatch registers were cleared without payment of duty clandestinely and without issue of invoices. He submitted that what has been admitted by the Director need not be proved by way of detailed investigation by the Revenue. He further submitted that in any case of clandestine clearance, it will not be possible for the Revenue to prove the same with mathematical precision as has been held by the Tribunal and even in Apex Court in several decisions.

11. During the visit of the departmental officers to the assessee's factory on 7.3.2001, on physical verification of the stock of polished abrasive stones and raw materials no discrepancies were noticed and the stock were tallying with the last recorded balance in the statutory records. The allegation of clandestine clearance of abrasive stones was built up by the Revenue on the basis of 62 kucchi slips which were recovered from the factory at the time of visit. These private records pertained to the period 1.1.2001 to 7.3.2001. On examination of these kucchi slips and tabulation of the same in the form of Ann.-A, Revenue concluded that the appellant has cleared 1557.5 boxes as well as 632 pieces of abrasive stones without accounting and without payment of duty. On the basis of the three outward

dispatch registers recovered at the gate of the common compound where the assessee' s factory as well as M/s Technique Super Diatools Ltd., are situated, Revenue concluded that 1898 boxes and 286 loose pieces of abrasive stones have been cleared without payment of duty. The initial statements recorded from Shri Manvendra Singh, Director, Shri Mukesh, Sahu, authorized signatory as well as Shri Jitendra Hinger supported the above view. However, in the subsequent statements recorded from Shri Jitendra Hinger, he started offering explanation for such details. These include the following:

(i) He stated that many of the despatches found in Ann-B were by way of replacement of abrasive stones to various parties who have returned the same on account of damage.

(ii) Two consignments of 60 and 50 boxes respectively were cleared to M/s Pacific Granites, Udaipur on 7.2.2001 and 22.2.2001. These were initially supplied with kuccha challan, but proper invoices were issued afterwards for these consignments,

(iii) In respect of 47 entries found in the three dispatch registers, goods actually dispatched were empty corrugated boxes and plastic folders without any abrasive stones. However, he was unable to supply any documentary evidence to substantiate his statement as above. Accordingly, the adjudicating authority has brushed aside such statement as an afterthought.

12. During investigation, the departmental officers' placed together the total number of boxes and a few pieces on the basis of Ann-A and Ann-B prepared from the kucchi slips as well as outward dispatch registers. In the statements recorded from Shri Mukesh Sahuas well as Shri Jitendra Hinger, the officers were unable to get clear details as to the number of pieces in each box. Further, no details were available from which the detailed distribution of various qualities of abrasive stones could be made between the various numbers of boxes in Ann-A and Ann-B. For conclusion of the investigations, the departmental officers have adopted the stand that the entire clearances of abrasive stones covered by Ann-A and Ann-B were of the quality 'Fickert'. Further, on the basis of sale invoices dated 10.8.2000 as well as 7.8.2000, they adopted the value of Rs. 234 per piece for the entire consignment. Accordingly, the total value of alleged clandestine clearance was determined to be Rs.4,56,98,268/- and the Central Excise duty payable thereon was worked to Rs.73,11,723/-.

13. We have heard both the sides and gone through the relevant records of the case. Central Excise duty demand amounting to Rs.73 lakhs approx. has been raised on the basis of investigation undertaken by Revenue. The main evidences produced by Revenue

are in the form of kucchi slips as well as outward registers. The demand stands quantified on the basis of the details culled out from the kucchi slips as well as outward register. Even though Shri Manvendra Singh, Director has admitted in his statement on 7.3.2001 that the goods covered by these recovered documents were cleared without payment of duty, the same has been contradicted by subsequent statements recorded from Shri Mukesh Sahu as well as Shri Jitendra Hinger. Shri Jitendra Hinger, in his statement, has offered an explanation that many of the despatches figuring in the outward despatch registers were in fact clearances of empty corrugated boxes and plastic holders. We find that the adjudicating authority has not discussed in his findings about such contentions. Further, we also note that the outward despatch registers were recovered from the gate of the compound where two factories were functioning – the appellant's factory as well as another factory manufacturing abrasive stones. The adjudicating authority has not given any findings as to what is the proportion of goods arising from the appellant's factory in the total despatches found in the outward despatch registers.

14. We also note that the quantification of the demand has been made by considering the entire abrasive stones as pertaining to the quality 'Fickert'. Further, the value per piece adopted is Rs. 234 for the entire clearances. It has been argued in the appeal that this is the

costliest abrasive stone and its value has been adopted to value the entire alleged clandestine removal, which is arbitrary.

15. From the records, it appears that the appellant has submitted a Chartered Accountant's certificate indicating the percentage of clearance of various types of abrasive stones. They have also submitted the average price prevalent in various time periods for the various types of abrasive stones. But we find that the adjudicating authority has not considered these submissions and in any case not discussed the same in the impugned order. He has also gone ahead and adopted the valuation of the entire abrasive stones as pertaining to one type and adopted the higher value of such abrasive stones. The appellants have also sought the cross-examination of Shri Mukesh Sahu as well as Shri Jitendra Hinger which was denied. To satisfy the principles of natural justice, we are of the view that the adjudicating authority should permit the cross-examination of these witnesses.

16. In the light of the above observations, we are of the view that the case needs to be remanded back to the original adjudicating authority for making good the observations in the above paragraphs. He is directed to consider the arguments advanced by the appellant during the course of the appeal and summarised in the

above paragraphs and give detailed findings on the above points. He is also directed to offer the two witnesses for cross-examination before passing the de novo order. Additional evidence may be admitted as per law.

17. In view of the above discussions, the impugned order is set aside and the case remanded for de novo decision in the light of the observations in the above paragraphs.

(Pronounced in Court on 20.2.2017)

(V. Padmanabhan) (Justice Dr. Satish Chandra)
Member (Technical) President

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