IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI
COURT-I

Date of Hearing/ Decision : **28.02.2017**

Appeal No. E/5857-5858/2004 - (DB)

[Arising out of the Order in Original No. 03/2004 dated 23.02.2004 passed by Commissioner, Central Excise, Jaipur]

M/s. Vikas WSP Limited … Appellants
Shri B.D. Aggarwal, MD

vs.

Commissioner of Central Excise, Jaipur … Respondent

Appearance:

Rep. by Shri Puneet Bansal, Advocate for the Appellants
Rep. by Shri HC Saini, DR for the respondent

Coram: Hon'ble Mr. M.V. Ravindran, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 51983-51984/2017 –EX (DB)

Per Mr. M.V. Ravindran

These appeals are directed against OIO No. 03/2004 dated 23.02.2004.

2. Heard both sides and perused the record.

3. The Order-in-Original was disposed of by this bench by final order No. 736-737/2006 dated 28.07.2006 holding that the impugned order is liable to be set-aside. As against this order, the Revenue preferred an appeal before the Hon'ble High Court. The Hon'ble High Court by the judgment dated 14.12.2006 in Central Excise Appeal No. 12/2008, upheld the order of the Tribunal as to the classification of the goods. The Hon'ble High Court in Para 12, remanded the

matter back to us for a limited purpose of appreciating the evidences as to the imposition of equivalent amount of penalty on the HSD which was used by DTA, though the same was procured for EOU. The amount of the duty liability on the HSD was Rs. 4,52,585/- was paid by the appellant at the time of investigation along with interest. The Tribunal had held that the duty liability with interest having been discharged before the issue of show cause notice, no penalty arises. The Hon'ble High Court stated that it is incorrect to come to such a finding and the factual matrix should be appreciated.

4. Ld. Counsel takes us through the show cause notice and Order-in-Original as also through the submissions and the statement of the Managing Director. He, to emphasize and canvas, submits that the consumption of HSD procured duty free for EOU by DTA was an error which was inadvertent, and they had discharged the duty liability as soon as it was pointed out. He would rely upon the decision of the Apex Court in the case of *CCE, Vapi vs. Kisan Moulding Limited – 2010 (260) ELT 167 (SC) and CCE vs. Gaurav Agro Plast Limited – 2009 (236) ELT 31 (Guj.)*, for the proposition that the imposition of equivalent amount of penalty need not be done in every case where there is only wrong availment of Cenvat credit.

5. Ld. DR reiterates the findings of the lower authority.

6. On perusal of the impugned order, we find that the adjudicating authority, in Para-32, for imposition of penalty, has specifically held as under:-

> **"32.** Now, I come to the second issue. I find that clearance of HSD from EOU to DTA is an admitted fact and duty amounting to Rs. 4,52,585/- involved in the matter has already been deposited by the assessee. However, imposition of penalty under Section 11AC and recovery of interest under Section 11AB has been disputed by the assessee on the ground that duty has been voluntarily deposited before issue of show cause notice and that there was no intention to evade payment of duty. I find that the visiting Central Excise officers detected that the 'High Speed Diesel' (HSD) was being used as fuel in Dryer machines installed in all the units and also in DG sets installed in Unit I & IV. Whereas the HSD Storage Tanks were located only in Unit-II (EOU-I)-3 Tanks and Unit-IV -1 Tank. All the

> Dryer machines & DG Sets installed in the units were found connected with the storage tanks of HSD through underground pipelines and the HSD was regularly supplied from the said tanks. The visiting officers succeeded in recovery of four registers showing therein Date-wise details of HSD supplied to each unit during the period from 27.05.2000 to 01.02.2002. The EOU-I (Unit-II) was procuring duty free HSD against CT-3 in terms of Notification No. 1/95-CE dated 04.01.1995 under Bond as permitted by the Development Commissioner, NEPZ, Noida. Therefore, it is established that the said EOU-I cleared the 'HSD procured duty free' through pipeline to DTA unit (Unit-I) without any permission and without payment of duty. The assessee deposited Central Excise duty amounting to Rs. 4,52,585/- on the quantity of 233580Ltrs. of HSD valued at Rs. 28,28,653/- and cleared to Unit-1 (DTA unit) during the said period (27.5.2000 to 01.2.2002) only on detection of the irregularity by the Central Excise officers. Hence, it is incorrect to say that the assessee voluntarily deposited the duty. Had the visiting Central Excise officers not detected supply of HSD from 100% EOU to DTA Unit through underground pipelines, the assessee would have continued to evade the duty. In view of the above facts, assessee's submission in this regard is not acceptable and penalty under Section 11AC is imposable on the assessee and interest as per the provisions of Section 11AB is also recoverable from the assessee."

It can be seen from the above reproduced Para-32, that the adjudicating authority has recorded the factual matrix of transportation of duty free diesel received from EOU to DTA. In the grounds of appeal, there is no rebuttal by the appellant. On a specific query from the bench, as to whether the appellant had informed to the departmental authority as to the existence of underground pipelines, the ld. Counsel admits fairly that it was not informed to the department. On the face of such factual position, we find that the adjudicating authority was correct in imposing equivalent amount of penalty on the appellant i.e. amount of Rs. 4,52,585/-.

7. In view of this, we do not find any reason to interfere with the order passed by the adjudicating authority.

8. As regards the decisions relied upon by the ld. DR, we find that the facts in those cases are totally different from the facts of the case in hand recorded by the adjudicating authority.

9. In view of the above foregoing, we hold that the impugned order to the extent of confirming duty liability along with interest and imposing equivalent amount of penalty for the removal of duty free Diesel from EOU to DTA unit is correct and does not require any interference.

[Order dictated and pronounced in the open court]

(**V. Padmanabhan**)
Member (Technical)

(**M.V. Ravindran**)
Member (Judicial)

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