CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 12.04.2017
Date of Pronouncement: 07.06.2017

Appeal No. E/3091-3095/2009-EX[DB]
[Arising out of the Order-in-Appeal No. 149 to 154/CE/DLH/2009 dated 01.09.2009, passed by the Commissioner of Central Excise, New Delhi]

M/s. Ambey Laboratories,
M/s. D.K. Traders,
M/s. Aggarwal Agencies,
M/s. S.D. Distributors,
Shri Puran Chand satish Kumar … Appellant

Vs.

CCE Delhi-I ... Respondent

Appearance:

Present Shri J.P Kaushik, Advocate the appellant
Present Shri R.K. Mishra, DR for the respondent

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

FINAL ORDER No.53701-53705/2017

Per V. Padmanabhan:

These appeals have been filed by M/s. Ambey Laboratories (Assessee) and other dealers from whose premises goods have been seized. The assessee is manufacturer of soap based cleaner, powder, naphthalene balls falling under Chapter 38 of the Central Excise Tariff. On information, their factory premises along with the premises of other traders were searched by the

Departmental officers. On 12.09.2006 as a result of the search and also the investigation conducted thereafter, show cause notice dated 09.03.2007 stands issued to the assessee and other traders. The matter was adjudicated by the Additional Commissioner in which duty demands on various counts were upheld. The goods totally valued at Rs.4,17,407/- seized in the factory were ordered for confiscation. The goods which were seized in the premises of various traders were also ordered for confiscation and penalties were imposed on the assessee, Shri Kewal Sehgal, Partner as well as on the various traders. The order of the Original Authority was challenged before the Commissioner (A) who upheld all the demands and penalties except that imposed on the partner. Aggrieved by the impugned order of Commissioner (A), the present set of appeals has been filed. All these appeals are being disposed of through this common order.

2. With the above background, we have heard Shri J.P Kaushik, Advocate the appellant and Shri R.K. Mishra, DR for the respondent.

3. The various grounds on which the impugned order has been challenged are discussed below one by one alongwith our decisions thereon:

i) Quantity discount

The assessee have been clearing black disinfectant fluid (Black phenyl), on payment of duty under section 4A on the basis of the MRP printed on the container. The Department noticed that along with invoiced quantities, the assessee was also clearing additional quantities as free supply to their traders and customers without payment of duty. It was further noticed that the assessee did not take into consideration the value of black phenyl cleared as free supply without payment of duty, while computing total value of the clearance of Rs.1 crore for the purpose of availing benefit of Small scale exemption notification no. 08/2003-CE dated 01.03.2003. Duty demand of Rs.8,97,999/- + Cess of Rs. 10,456/- stands confirmed on the above ground for the period 01.03.2003 to 12.09.2006.

The submission of the appellant is that discount in any form will be allowable and even under the provisions of section 4A, such discounts will be admissible as has been held by the Tribunal in the case of ***Vinayak Mosquito Coil Manufacturing Vs. CCE 2004 (174) ELT 107 (Tri-Bang.).*** It is argued that such benefits should be extended since the appeal filed by the Department in the Hon'ble Supreme Court has been summarily dismissed.

We have gone through the decision cited by the appellants. However, we note that the said decision is no longer applicable in as much as the same has been distinguished and overruled by the judgment of the Larger Bench of Tribunal in the case of ***Indica Laboratories Pvt. Ltd. Vs. CCE Ahmedabad 2007 (21) ELT 20 (Tri-LB).*** In the terms of the Larger Bench decision quantity discount will not be allowable for determination of duty liability under section 4A. However, we find that the appellant assessee has been following the long standing practice of granting such quantity discount to their traders. This was being mentioned in ER-1, RG-1 and invoices regularly. The records of the assessee were also being periodically audited by the Department. Consequently, we are of the view that any allegation of willful suppression of facts with intention to evade payment of duty cannot be held against the appellant. Consequently, the demand will have to be restricted to that falling within the normal time limit.

ii) Classification dispute

The appellant had classified black phenyl under CTH 3808.90 which entitled the abatement of 40% of the MRP for payment of duty in terms of section 4A. Department was of the view that these goods are rightly classifiable under 3808.10 for which the abatement available was only 35%. Appellant has submitted that the CBEC has clarified in its circular number 446/12/99-CEX dated 17.03.1999 that such goods will be rightly classifiable under 3808.90. The circular is binding on the department which cannot take a contrary view.

We have gone through the CBEC Circular dated 17.03.1999. Even though the circular suggests classification of impugned goods under 3808.90, we find that the classification of these goods have been decided by the Hon'ble Supreme Court in the appellants own case for an earlier period under 3808.10. In view of the Hon'ble Apex Court's decision, we uphold the classification of the goods under 3808.10 which will be entitled to abatement of 35%. Consequently, differential duty demand is upheld.

iii) Seizure of goods at dealers premises.

During the course of search proceedings, the Department seized the goods at the premises of various dealers in the belief that these goods were received from the appellant's factory without payment of duty. The appellant also failed to produce evidence showing the clearance of the same. The claim of the appellants before the authorities below, as well as in the present proceedings is that the goods alleged to have been cleared clandestinely and seized at the buyer's premises are the goods which were given to them under invoice as part of the free supply under the quantity discount scheme. In the above para, it has been held that quantity discount was a long standing practice of the appellant, and hence demand is to be restricted to the normal time limit. The seized goods are claimed to be those supplied free along with invoiced quantity. Consequently we do not find any justification for confiscation of the same at the dealer's premises. Hence the order of confiscation as well as imposition of redemption fine and penalties on this score are vacated.

iv) Production as per input : output ratio

Duty demand to the extent of Rs.9,24,917 + cess of Rs.18,498 has been raised on the basis of allegation that production of goods, was suppressed when it is estimated in terms of the input output ratio. Revenue has taken the view that the unaccounted production has been clandestinely cleared. This allegation is based on one consumption of the raw material, 'rosin'. The Department, during the course of investigation determined that the basic raw material 490 kgs of rosin produces 3500 ltrs of black phenyl. This raw material consumption has also been accepted by the appellant. On the basis of periodical returns, stock registers, daily stock account mentioned by the assessee the total quantity of black phenyl manufactured was worked out and duty demand was raised on the quantity which was not accounted.

The grievance of the appellant is that same raw material rosin is also used in the manufacture of another commodity, 'Trishul cleaner black'. However the Department has not taken into account quantity of rosin used in the production of the second finished product. It has also been submitted that the production has been worked out for the period 01.02.2002 to 12.09.2006, but the figure has been taken from 01.01.2002 which is erroneous. They also have submitted the Chartered Accountant certificate in support of their arguments.

The quantum of goods manufactured has been estimated on the basis of consumption of one raw material rosin by the department. While this course of action can give an indication as to the quantity of goods manufactured, however the same cannot be used as a measure to determine the quantum of goods actually manufactured and for alleging clandestine clearances of the quantity which is not accounted. The allegations of clandestine production and clearance are grave and hence is required to be backed by tangible evidence. The onus is on the Revenue to establish on the basis of evidences, the quantity of goods alleged to have been clandestinely manufactured and cleared. In the present case we find that other than the mathematical projection of the possible production, no corroborative evidence has been produced by Revenue to support the charge of clandestine manufacture and clearances. It is settled position of law that without tangible evidence, charge of clandestine clearances cannot be upheld. In the light of this observation we conclude that the duty demand merits to be set aside on this ground.

v) Seizure at Factory

At the time of search of the factory by the Departmental officers on 12.09.2006, the officers noticed that a part of the production was not accounted in the statutory records. Such accounted goods totally valued at Rs.4,17,405/- was seized and subsequently confiscated. The submission of the appellant in this case is that the excess goods seized were the production of 10.09.2006 and 11.09.2006 and were yet to be packed in big cartons as such they were not entered in RG-1. We find that the goods said to be excess were found within the factory. The reason advanced by the appellant is fully justified and since the goods remained within the factory there is no justification for seizure and confiscation of such goods. Consequently, the confiscation is set aside and redemption fine and penalty imposed are vacated. The goods will be accounted in RG-1 and cleared on payment of duty in due course, if not already done.

4. In view of the above discussions the appeals are disposed of in the following terms:

i) Duty demand of goods cleared free under quantity discount is upheld within the normal time limit.

Adjudicating authority is directed to re-quantify and restrict the demand.

ii) Black phenyl is ordered to be classified under 3808.10 during the relevant time and will be entitled to redemption of 35% on the MRP. Duty demand on this ground is upheld.

iii) Duty demand on the goods seized at dealer's premises is set aside along with redemption fine and penalty imposed on the dealers.

iv) Duty demand of goods alleged to be unaccounted and clandestinely cleared is set aside.

v) Confiscation of the seized goods at the factory is set aside.

5. The case is remanded to the adjudicating authority for the limited purpose of re-quantifying the demand as per the previous paragraph as well as to re-determine the penalties imposed.

[Order Pronounced in the open court on 07.06.2017]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Technical Member

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