CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

COURT-I

Date of hearing: 11.04.2017
Date of Pronouncement: 08.06.2017

Appeal No. E/57351/2013-EX[DB]

[Arising out of the Order-in-Original No. 24/2012-13 dated 08.02.2013, passed by the Commissioner of Central Excise, New Delhi]

M/s. Concrete Logical … Appellant

Vs.

CCE Delhi-II ... Respondent

Appearance:

Present Shri Hemant Bajaj, Advocate the appellant
Present Shri H.C. Saini, DR for the respondent

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

FINAL ORDER No. 53857/2017

Per V. Padmanabhan:

M/s. Concrete Logical ("the Appellant") is a proprietary concern of Shri Pankaj Kateja and engaged in the manufacture of immersion concrete vibrators falling under the tariff item 8467 89 90/ 8479 90 90 and Electrical voltage converters falling under the tariff item 8504 90 10, under its own brand name 'Accentrix'. The manufacturing facility of the Appellant is at WH-51, Mayapuri Industrial Area, Ph-I, New Delhi. The manufactured goods were cleared under Retails Invoices (RI) on payment of appropriate duty.

2. Apart from the aforesaid manufacturing activity, the appellant is also engaged in trading of the aforesaid goods from its premises located at 215, Vishwadeep Tower, Janakpuri, New

Delhi. The trading goods never enter the manufacturing premises and the vice versa. The trading is done in relation to the goods imported by the Appellant on which appropriate customs duties have been paid. The traded goods were cleared by the Appellant under Trade Invoices (TI).

3. The appellant claimed that the goods imported are sold as such by the Appellant, however, at times on the specific request of the buyers, the brand name 'Accentrix' of the Appellant is affixed on such goods prior to supply to the buyers.

4. SCNs dated 30.03.2009 and 03.06.2009 were issued to the appellant alleging that the manufactured goods were cleared clandestinely in the guise of trading under the trade invoices on the sole allegation that imported goods did not bear 'Accentrix' brand whereas the goods supplied under the Tarde invoices bore such brand name.

5. Reply to the aforesaid notice submitted countering the allegations made in the SCNs and categorically stating that the imported goods were being traded by the Appellant was given on 27.07.2009. At times, at the specific request of the buyers, the Appellant brand 'Accentrix' was affixed on such goods. Further, the goods traded by the Appellant were not covered under the Third Schedule of the Central Excise Act, 1944 and there is no specific Section Note or Chapter Note to the Central Excise Tariff Act, 1985 deeming the process of affixing brand name on these products as manufacture.

6. Order-in-Original dated 26.03.2010 passed by the Commissioner, New Delhi confirming the demand solely on the

ground that there was admission in the statement of the Proprietor recorded during investigation that the imported goods were traded without being branded. Thus, the branded goods cleared on Trade Invoices were the goods which were manufactured by the Appellant and cleared without payment of duty. It is pertinent to note that in the said order, the Commissioner did not give any evidence of clandestine manufacture, in the nature of procurement of raw materials, extra labour charges for manufacture, excess electricity consumption, shortage/ excess of raw material/ finished goods noticed during visit of the officers to the Appellant's premises, cash dealings. Aggrieved by the order the Appellant filed the appeal before the Hon'ble CESTAT-New Delhi.

7. Final Order No. 326/2011-EX dated 21.03.2011 passed by the Hon'ble CESTAT-New Delhi, setting aside the impugned order passed by the Commissioner, New Delhi on the ground that the sole observation made by the Commissioner in the OIO to confirm demand was factually incorrect inasmuch as the appellant clearly stated in the reply that the brand name was affixed on traded goods on specific request of the buyers and further, that no evidence of clandestine manufacture was led by the department. The Hon'ble Tribunal remanded the matter to the Commissioner, New Delhi for denovo adjudication, with the following direction in Para 8 of the order:

> *"8. The stand taken in response to the show cause notice as above clearly discloses that though initially the appellant might have stated that the traded goods were not bearing the brand name. The reply to the show cause notice discloses the*

circumstances in which such traded goods were affixed with the brand name. Obviously, in such circumstance, it was necessary to ascertain whether the appellants were having necessary material in support of their contention that the goods in question were really traded goods unconnected with the manufacturing activity. Simultaneously, it was necessary for the department to place on record the material in support of their contention that those goods were actually manufactured goods. In the absence of such exercise being done, it was not open for the Commissioner to proceed to impose duty demand against the appellants. On this ground itself, the impugned order is not sustainable and is liable to be set aside and matter remanded for denovo enquiry bearing in mind the above observations. Accordingly, the appeal succeeds, the impugned order is set aside. Matter is remanded for denovo enquiry."

8. The impugned order passed by the Commissioner confirming the demand in violation of the remand directions, on account of which the present appeal has been filed by the Appellant. The following recorded by the Commissioner to confirm the demand against the appellant:

i) Form 3CD, which is a part of tax audit report, issued by the Chartered Accountant of the Appellant does not mention that the appellant is engaged in trading of goods.

ii) On the basis of comparison of bills of entry for imported goods with the Trade Invoices, it emerges that the goods sold in India were different from the imported goods.

iii) Quantity wise import could not be matched with the traded goods in the absence of opening and closing balance of such imported goods with the department.

iv) The Appellant has also traded the goods in respect of which no import documents are available.

v) In the balance sheet, the Appellant has also shown substantial amounts spent as assembling charges. However, it has not been clarified whether these assembling charges relate to manufacturing activities or to trading activities.

9. Aggrieved by the impugned order, the appellant has filed the present appeal.

10. With the above background we have heard Shri Hemant Bajaj, Advocate for the appellant and Shri H.C. Saini, DR for the respondent.

11. The main grounds on which the present appeal has been filed are summarized below.

i) The matter was remanded to the Adjudicating Authority with specific directions for de-novo adjudication, but the Ld. Commissioner has not adhered to the remand directions. Even though the Tribunal directed the Adjudicating Authority to place on record the evidence in support of the charges that the traded goods were actually manufactured goods, the impugned order does not lay down any tangible evidence for the above charge. Since the impugned order has been passed in blatant violation of the remand directions, it is liable to be set aside on this ground alone.

ii) The CESTAT directed the Department to place on record the evidence collected during the investigation to support the charge of clandestine manufacture. However, the Department admitted to re-investigate the case by way of seeking fresh information issuing summons etc., which is legally untenable.

iii) No corroborative evidence of purchase of raw material, dispatch of finished goods from the trading premises, actual disposal of the imported goods, etc. has been adduced by the Department. Since the demand has been confirmed merely on assumptions and presumptions, the same cannot be sustained.

iv) Appellant also relied upon the Larger Bench case laws to support their arguments.

12. Heard arguments from both the sides and perused the records.

13. The basic allegation raised in the show cause notices is that the appellant, who was engaged in the manufacture of certain equipments, such as vibrators, converters, etc. were also indulging in trading of similar goods which were imported by them. The manufactured goods were sold using invoice bearing "RI (Retail Invoice)" whereas trading goods were covered by "TI (Trading Invoice)". The Department alleged that manufactured goods, without payment of duty, were cleared in the guise of traded goods, on the basis of their observation, that the trading invoice also covered goods with a brand name "Accentrix". It is the claim of the appellant that manufactured goods were cleared

bearing this brand name whereas the imported goods did not bear such brand name. In the first round of litigation before the Tribunal, the issue was remanded back to the Adjudicating Authority for de-novo decision after placing on record the material in support of the Department's contention that traded goods were actually manufactured goods. However, the Department attempted to re-investigation of the case by seeking details of the goods imported by the appellant. After considering the details of imported goods, the Commissioner upheld the demand in the de-novo proceedings by observing that on comparison of the goods covered by the Bills of Entry as well as trade invoices it emerges that the goods covered by trade invoice were different from the imported goods. He has further recorded that the tax auditor in report '3 CD' has not mentioned anything about the appellant being engaged in the trading of the goods. With the above observation the adjudicating authority has upheld duty demand.

14. The Department has alleged clandestine clearances on the part of the appellant by adopting the modus operandi of selling goods manufactured in the guise of imported / traded goods. Such a charge will need to be supported by tangible evidence regarding the manufacture of such goods in the factory. This will require corroborative evidence such as purchase of additional raw material, dispatch of finished goods to the trading premises etc. Further, the modus operandi also should be established to the effect that the manufactured goods have been sold in the guise of the imported goods. Unfortunately, we find that no such

evidence has been placed on record by Revenue. The purpose of remanding the case by Tribunal was to enable the appellant to be put to specific notice regarding the specific evidence based on which the Revenue is proposing to uphold the charge. However, Revenue has attempted re-investigation of the case. Further, the evidence recovered by way of re-investigation has not been made available to the appellant to enable them to rebut such evidence. The adjudicating authority observes that the model numbers of various goods appearing in the trade invoices are different from those appearing in the import of bills of entry. This by itself cannot be considered as sufficient evidence to uphold the charge that the appellant has indulged in manufacture and clearance without payment of duty.

15. The various case laws cited by the appellant emphasis the fundamental point that the allegation of clandestine clearance is a serious charge and will require to be supported by tangible evidence and the onus is on the Department to establish the charge. We are afraid that Revenue has failed to support the allegation with tangible evidence. Consequently, the impugned order is liable to be set aside and appeal is allowed.

[Order Pronounced in the open court on 08.06.2017]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Technical Member

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