IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH : NEW DELHI
COURT No.

APPEAL Nos. E/1152 & 1153/2008-EX[DB]

(Arising out of Order-in-Original No. 06/2008 (C.Ex.) Commissioner dated 18/02/2008 passed by Commissioner of Central Excise, Jaipur-I)

M/s Dee Chem Plastics (in Appeal No. 1152/2008) **&**

Shri Ashok Agarwal, Director of M/s Dee Chem Plastics (in Appeal No. 1153/2008)

Appellant(s)

Vs.

Commissioner of Central Excise, Jaipur-I **Respondent(s)**

Appearance:

Shri S. Jaikumar & Kartik Jindal, Advocates for Appellant(s)
Shri H.C. Saini, DR for Respondent(s)

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Date of Hearing : 30/05/2017
Date of Pronouncement : 20/09/2017

FINAL ORDER NOs 56676-56677/2017

Per: Anil Choudhary

The appellant M/s Dee Chem Pvt. Ltd is registered as manufacturer of formaldehyde and thinners falling under Chapter sub Headings 2912 and 3814 of the Schedule to CETA, 1985 respectively. The raw materials for the manufacture of formaldehyde and thinners are Methanol, Organic Composite Solvent (OCS for short), stabilizers, etc. Whereas the manufacturing process of formaldehyde involves highly technical oxidation process involving heating, vaporising with oxygen, reaction with silver catalyst etc. The manufacture of thinner is relatively simple. In case of thinner, the OCS procured from various petrochemical manufacturers, either in tankers or in drums/carboys and are stored in evaporation-free storage tank and subsequently such OCS is mixed with prescribed quantities of methanol and various additives and stabilizers, agitated mechanically, which results in production of thinner. The thinners so manufactured are subsequently cleared on payment of duty to various customers by transportation through tankers or in drums/carboys.

2. On 24 September, 2002, the officers of the Department visited the appellant's premises and conducted a search. During the search/inspection the officers resumed various documents, including certain invoices pertaining to RVS Petrochemicals Private Ltd, Bahadurgarh (RVS for short) and Amkap Marketing Private Ltd. Raebareli (Amkap for short), who were the suppliers of OCS to the appellant. After investigation, show cause notice dated 02 August, 2005 was issued alleging non-receipt of raw material, namely OCS, from RVS and Amkap for the period from September, 2001 to October, 2002 and thereby demanding recovery of Cenvat Credit to the tune of Rs. 4,25,90,804/- as detailed in Annexure-A to the SCN, as per the provisions of Cenvat Credit Rules, 2001/2002. It was also proposed to demand duty amount of Rs. 8,954/- on alleged clandestine removal of

goods being formaldehyde 93.58 kg, found short at the time of physical verification. The SCN also proposed to levy penalty. The SCN was adjudicated on contest vide Order-in-Original dated 29 August, 2006 conforming the proposed demand along with equal amount of penalty. Further, personal penalty of RS. 20 lacs was imposed on Shri Ashok Agarwal, Director of the appellant company.

3. This is the second round of litigation. This Tribunal in the earlier round vide Final Order No. 343–344/2007 – EX dated 09 July, 2007, allowed the appeal by way of remand for a fresh decision after granting opportunity of hearing to the appellants. The operative part of the order is as followed: –

"We find that the case of the Revenue is that the applicant had not received the inputs and only received the duty paying documents on the strength of which they took credit. The contention of the applicant is that inputs were used in the manufacture of final product on which duty was paid and in fact more duty has been paid, than the credit availed. A portion of the duty has been paid through PLA. The appellant filed ER-1 and RT-12 returns for the relevant months showing payment of duty through PLA as well as from Cenvat Credit. Copies of bank statements showing payments were made for inputs, through bank channels, and the payment for sale of final products were also received through banks. The Adjudicating Authority had not considered this evidence. The appellants paid duty on the final product, which is manufactured out of the disputed inputs. In the circumstances, we find it is a fit case for reconsideration by Adjudicating Authority. The impugned order is set aside and the matter is remanded to the Adjudicating Authority, after waiving the pre-deposit of duty and penalty. The Adjudicating Authority will decide the matter after granting opportunity of hearing to the appellant."

4. The learned counsel for the appellant urges that upon remand the learned Commissioner vide the present impugned order dated 12 February, 2008, have once again confirmed the same amount for recovery of entire Cenvat Credit along with interest and also imposed equal amount of penalty. Further penalty under Rule 26 of CER, 2001 have been imposed on the Director, Shri Ashok Agarwal.

5. The learned counsel for the appellant urges that the ground of the Department for demanding recovery of Cenvat Credit from the appellant is that the appellant have not received the raw material, namely OCS from the suppliers, namely RVS and Amkap. Hence, they are not eligible to avail the credit of the same. In this context, the Department had conducted the investigation at the end of RVS and Amkap and recovered 4 parallel invoices from RVS, wherein it could be seen that out of the 824 transactions between the period from September, 2001 to September 2002, the Department found parallel set of invoices on four occasions only and that too in the hands of RVS. But the Department have chosen to deny the Cenvat Credit to

the appellant for all 824 transactions/invoices. It is further urged that assuming (not admitting) that there had been instances of parallel invoices at the hands of RVS, firstly it shall not have any impact at the appellants hands as they have genuinely purchased the inputs from RVS on payment of appropriate duty and have rightly availed the credit. Further, they have made payment for such purchases through banking channel. If at all there is any discrepancy in the hands of RVS, the duty can only be demanded from RVS and not from the appellant. Further, in the enquiry held at the end of RVS, there is no material to implicate these appellants. Statement of one Shri Sadhu Ram Sharma, plant in charge of RVS was recorded on 16 November, 2002, who have deposed that the major quantity of solvent manufactured by RVS is dispatched to the appellant. The Department have ignored this vital deposition of the responsible person and by selectively relying on the evidence on record, have relied on the deposition of employees of RVS who are sweepers and guards. It have further come on record that these sweepers and guards were recently employed just about 3-4 months ago. Thus, the allegation of Revenue regarding non receipt of OCS from RVS during the disputed period is wholly baseless and have got no legs to stand.

6. So far the purchases from Amkap is concerned the prime allegation is that out of 446 transactions between Amkap and the appellant during the disputed period, the Department has picked up

six instances wherein it has been alleged that the goods receipts (GRs) are bogus. The appellant had for transporting OCS from Amkap, engaged the services of few goods transport agents, namely M/s Deep Raodlines, M/s Balram Transport Company, etc. Amkap who are situated at Raebareli – UP, procured the raw material from Kandla, Gujarat. Generally the tankers from Gujarat on which they had received their raw materials were used to transport the OCS to the appellant's factory at Bhiwadi, Rajasthan. Due to the fact that the appellant's factory is enroute from Raebareli to Kandla, for economy of operation, the appellant used to coordinate mainly with the agents, who arranged vehicles, preferably from the returning vehicles from Raebareli to Kandla and/or other vehicles from the open market, whichever is economical. There could be a few instances, wherein the transport agents have engaged the return vehicles, on a reduced tariff without the knowledge of the transport owner and issued LR/GR not corresponding to the said vehicle. This is a common prevalent practice in the transport business. The learned counsel further reiterated that this different trade tactics by the agents, by any means, cannot take way the fact of actual transportation of goods and receipt of inputs by the appellant. It is also an undisputed fact that the appellant have manufactured the final product namely thinner and cleared the same on payment of duty. Further both the transaction of purchase of inputs and sale of output is through banking channels. Thus, for a minor discrepancy in about six GRs out of total 446 transactions/invoices of OCS received, the adverse inference drawn by Revenue is erroneous and fit to be set aside. Further, from a perusal of the depositions of Shri Aman Deep Singh, proprietor of M/s Deep Roadlines and Shri Rajendra Kumar Gupta, proprietor M/s Balram Transport Company reveals that all the transactions with respect to transport handled by them are genuine. In view of the evidences and the depositions in favour of the appellant, the learned Commissioner have erred in drawing adverse inference by holding that no transportation whatsoever of OCS from the supplier to the appellant have taken place. So far the allegation of the Department that some of the vehicles used for transportation of OCS from the suppliers to the appellant are open body trucks as well as old trucks, the learned counsel urges that both raw material – OCS as well as finished goods – thinners are capable of being transported both in tankers as well as in drums/carboys. Whenever the materials are packed in drums/carboys the same is normally transported in open trucks and thus, the adverse conclusion drawn by learned Commissioner is wholly erroneous. The learned counsel further urges that it is also an admitted fact that the appellant have also paid duty through PLA in addition to the duty paid through Cenvat. Further, there is no case by Revenue that the appellant have procured inputs from some other source for manufacturing and clearance of their output on payment of duty. So far as enquiry conducted with the Commercial Tax Department, Bhiwadi, the same is not reliable in any manner whatsoever, because the same has been done at the back of the appellant and they were not aware of the correspondence, communication between the two departments. Further the allegation is only a bald allegation, it does not stand in the face of overwhelming evidence in favour of the appellants.

7. The learned Commissioner in the impugned order has neither appreciated the various evidences put forth by the appellant nor have followed the directions of this Tribunal in the remand order. The learned Commissioner have erred by proceeding to confirm the allegations in the SCN and have replicated the earlier Order-in-original. Thus the impugned order is cryptic and have been passed by way of non-application of mind. Moreover, the directions of this Tribunal to consider the evidentiary value of the payments effected through banking channels, have not been considered properly, which is evident from the observations of learned Commissioner in Para-28.3 of the order – "As far as their plea that the payments were made for inputs through banking channel and the payment of sale of final products was also received through bank is concerned, I am of the view that such payments can be suggestive that some transactions might have taken place but these payments cannot be considered as the certificate to the effect that purchases/sale transactions have

actually been taken place". Accordingly the learned counsel prays for setting aside the impugned order and allowing the appeals with consequential benefits. The learned counsel strongly place reliance on the ruling of this Tribunal in the case of Ajinkya Enterprises v/s CCE, 2013 (288) ELT 247 (Tri.- Mumbai), wherein it have been held that clearance of output on payment of duty, wherein the allegation by Revenue is that there have been no manufactured, amounts to reversal of duty. The same have been confirmed by Hon'ble Bombay High Court reported at 2013 (294) ELT 203. The learned counsel also relies on the following rulings in support of their contentions: –

-Aum Aluminum Private Ltd v/s CCE 2014 (311) ELT 354 (Tri. Ahmd.),

-Commissioner v/s Dhanlaxmi Tubes and Metal Industries 2012 (282) ELT 206 (Gujarat),

-Monarch Metals Private Ltd v/s CCE 2010 (261) ELT 508 (Tri. Ahmd.), Commissioner of Central Excise, Chandigarh v/s Neepaz Steels Ltd 2008 (230) ELT 218 (P & H),

-Adhunik Alloys Ltd. v/s CCE 2016 (344) ELT 426 (Tri. Chan.)

8. The learned counsel for Revenue have relied on the impugned order. He further draws our attention to the findings of the learned Commissioner, wherein it have been observed that on going through the statements of various persons as per the show cause notice, the case is not made out on the basis of a statement alone. There are other material evidence on record which to go to establish that only duty

paid documents were supplied and the goods were not actually supplied. This is evident from statement of Shri Kailash Chandra Agarwal, accountant of appellant, wherein he confirmed that under the cover of invoices “Serial No. 508 to 511” RVS did not send any goods to them and only the invoices were issued. He further confirmed that goods related to the said invoices were not received in the factory premises. Further the learned Commissioner have observed as regards purchases from Amkap, Raebareli enquiries of transportation from vehicles, reveals that these vehicles never came to Bhiwadi. Evidences on record indicate that transport vehicles shown in the invoices, wherein fact carrying Naphtha from Kandla to Raebareli. Therefore, these vehicles cannot be said to have carried inputs to appellant's factory on the same day when the vehicle is transporting Naphtha to some other place. The learned Commissioner also observed that mere making some payment through PLA does not lead to conclusion that the impugned Cenvatable inputs were actually received in the factory premises of the appellant and out of this, thinner was manufactured by the appellant. Investigation conducted at buyer end, two of the buyers to whom appellant has made sales of the thinner on payment of duty, they were not found in existence. The learned Commissioner also observed that during the period in question appellant have cleared thinner to the tune of Rs. 2347.52 lakhs and against the so-called clearances of thinner, the appellant have paid meager amount of 21.03

lakhs from PLA only. This amount is less than 1% of the value of the so-called clearances of the thinner. Similarly, they are filing ER-I returns also do not mean that the thinner was manufactured out of the disputed solvent.

9. We have considered the rival submissions and also perused the records. This Tribunal vide Final Order dated 09 July, 2007 (in the first round), had remanded the case back to the Commissioner with a direction to consider the evidence relating to the bank statement and/or transactions showing payment for inputs and receipt of payment for sales through banking channel. In the said order this Tribunal had given clear finding that the appellants had paid duty on the final product which is manufactured out of the disputed inputs. This finding of the Tribunal have not been challenged by Revenue in further appeal. Thus it was not open for the learned Commissioner in the remand proceedings to reconsider or redetermine the issue of manufacture out of the disputed inputs or the payment of duty on final products. The learned Commissioner was required to verify as to whether the payment for the purchase of inputs and payment received for sale of final products, claimed to have been made through banking channel is correct or not. But the learned Commissioner in spite of observing that there are proper transactions through the banking channel, both for purchase of inputs and sale of final products have observed that it is suggestive that some transactions might have taken

place. Thus, in so many words, the learned Commissioner have accepted the genuineness of the transaction, but have erred in observing that such transactions cannot be considered as certificate of genuineness. We also find that the duty paid by the appellants on the clearance of the finished goods, particularly thinner, have been accepted by the Revenue. We also find that in addition to paying duty through Cenvat account, appellant have also paid part of the duty payable through PLA. The learned Commissioner have erred in observing that such payment through PLA is about only 1% of the sales value or turnover. We also find that there is no allegation in the show cause notice that the input – OCS have been procured by the appellant from elsewhere. It has also been brought to our notice in the course of argument that the storage tank of OCS in the factory of the appellant also has a beater for processing in order to manufacture thinner. We further find that there is evidence on record that the appellant have deputed manpower for production and there has also been electricity consumption regularly. We further find that the learned Commissioner have selectively relied upon the evidence on record by ignoring the evidence of Sadhu Ram Sharma, who is the responsible person, being the plant incharge of RVS and rather have relied upon statement of menial staff namely sleepers/watchmen. We further find that the reliance on such statements by the learned Commissioner is also hit by Section 9D of the Central Excise Act as such persons, the statement of whom, reliance is placed by the learned Commissioner were neither re-examined in the adjudication proceedings nor the same were offered for cross-examination. Further no expert report had been obtained by the Revenue as regards manufacturing capacity of the appellant for thinner in view of observation of some rust in the kettle at the time of inspection. Further, the contention of the appellant that manufacture of thinner requires only a mechanical agitation of the OCS with addition of certain additives and stabilizers, the same can also happen in the Storage tank itself, is also convincing and not found to be untenable by Revenue. Accordingly, we find that the show cause notice is not sustainable, save and except the demand of Rs. 8,984/-, towards the shortage of inputs found at the time of inspection. Accordingly, we set aside the impugned order save and except the demand of Rs. 8,984/- along with equal amount of penalty.

10. The appeal is allowed in part as indicated above.

(Pronounced in court on 20/09/2017)

(B. Ravichandran)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Ankit