CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 26.09.2017
Date of decision: 06.10.2017

Excise Appeal Nos. 1661 to 1665 of 2012
Excise Appeal No. 56058 – 56059 of 2014
(Arising out of order-in-original No. 30/2012(CE), dated 26.03.2012 passed by the Commissioner of Central Excise, Jaipur-I).

M/s Sorabh Cement Limited Appellant
Rajesh Modi
Brahm Dutt Modi
Ram Kishor Sharma
Bhawani Singh Sekhawat
M/s Kamdhenu Cement Limited
Lt. Col. (Retd) Satish Kumar Kabu

Vs.

CCE&ST, Jaipur-I Respondent

Appearance:

Sh. Arun Goyal, Advocate for the appellant (E/A No. 1661-1665/2012)
None for Excise Appeal No. 56058 – 56059 of 2014
Sh. M. R. Sharma, AR for the respondent

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order Nos. 56970-56976/ 2017

Per: <u>**B. Ravichandran:**</u>

These seven appeals are against common impugned order dated 27.03.2012 of Commissioner of Central Excise, Jaipur-I. M/s Saurabh Cement Limited (main appellant) are engaged in the manufacture of cement clinker and ordinary Portland cement liable to Central Excise duty. They have availed concessional rate of duty in respect of cement cleared by them during the period 01.10.2006 to 03.09.2008 under the Notification No. 4/2006 dated 01.03.2006. The said Notification did not allow concessional rate for cement manufactured from clinker not manufactured within the factory and cement bearing brand name or trade name (whether registered or not) of another person. The dispute in the present case relates to the liability of the main appellant to pay Central Excise duty on the cement cleared by them. The Revenue held a view that the main appellant availed the concessional rate of duty when they have cleared cement with brand name of another person. The charge of clandestinely unaccounted clearance of branded cement was also made against the main appellant. Accordingly, proceedings were initiated against main appellant as well as various other persons to demand and recover Central Excise duty due to wrong availment of Notification No. 4/2006 as well as unaccounted clearance of branded cement. Penalties were also proposed to be imposed on various noticees. The original authority adjudicated the case. He confirmed a total Central Excise duty liability of Rs. 78,47,657/- on the main appellant. Equal amount of penalty under Section 11AC of Central Excise Act, 1944 was also imposed. Penalties of Rs. 15 lakhs (Sh. Brahma Dutt Modi, Director of main appellant) Rs. 5 lakhs (Rajesh Modi, Director of main appellant) Rs. 15,000/- each (Sh. Ram Kishor, Authorised Signatory and Sh. Bhawani Singh Sekhawat, Munim of the main appellant), Rs. 5 lakhs on (M/s Kamdhenu, brand owner) and Rs. 2 lakhs (Sh. Satish Kumar Kabu, Director of M/s Kamdhenu Cement Limited) were also imposed under Rule 26 of Central Excise Rules, 2002.

2. Ld. Counsel appearing on behalf of the main appellant and four other persons (Director and employees of the main appellant) submitted that the appellants were not liable to pay differential duty as confirmed in the impugned

order. There is no contract between the main appellant and M/s Kamdhenu Cement before 01.12.2006. The restriction for availing concessional rate of duty will apply only when the main appellant manufactured and cleared cement with other established brand and not with their own brand. They have cleared cement with their own brands “Jai Kisan” and “Modi Plus”. During the validity of agreement they have paid royalty to M/s Kamdhenu Cement and after termination of agreement w.e.f. 01.01.2008 no royalty was paid. They have filed statutory returns indicating clearance of cement with brand of M/s Kamdhenu Cement and own brand. There is no inquiry with the buyers of cement about the brand name of cement cleared by them. No verification was made in this regard. There is no need for maintenance of separate records for production of cement under various brand names. There is no clandestine clearance of cement. The difference between record maintained and the invoices issued is due to the fact that the dealers name is mentioned in the record and invoice is issued in the name of ultimate buyers. The Revenue has taken all the clearances as if made with brand name of another person and demanded higher rate of duty. No inquiries was conducted to substantiate the claim of the Revenue. Ld. Counsel also submitted that they have been regularly filing returns indicating the benefit of notification. The correctness of the exemption availed by them should have been verified by the department. Regarding penalties imposed, the ld. Counsel submitted that there is no role of any individual employee in any of the activities inviting penal action. The paid employees cannot be subjected to penal proceedings in case of dispute with the company.

3. A letter dated 22.09.2017 was received from the ld. Counsel for M/s Kamdhenu Cement Limited and Sh. Satish Kumar Kabu stating that these two

appellants were not the main parties. Only penalties have been imposed on them. As the ld. Counsel has to leave for outstation, a request was made for adjournment. We note that the case has been listed on various occasions earlier – 12.6.17, 13.07.17, 19.07.17, 17.08.17 and today. On these occasions either no one appeared on behalf of the appellant inspite of notice or they sought adjournment on one pretext or other. As such we proceed to dispose of these appeals alongwith appeals filed by the main appellant, based on appeal records.

4. Ld. AR for the Revenue reiterated the findings of the original authority. He submitted that the main appellant never maintained any separate detailed accounts regarding manufacture of cement with Kamdhenu brand and in their own brand. There is no evidence to support that they did manufacture cement in their own brand. Invoices clearly bear the brand name “Kamdhenu”. During the course of verification the officers found large quantity of stock of packing box with “Kamdhenu” brand. The original authority has examined all the evidences before arriving at the decision.

5. We have heard both the sides and perused appeal records.

6. The point of dispute is mainly with reference to eligibility of the main appellant for benefit of Notification No. 4/2006 dated 01.02.2006. The said notification allowed concessional rate of duty for cement cleared by the appellant. One of the conditions to be fulfilled is that cement manufactured should not be from such clinker which is not manufactured within the factory and cement should not be bearing brand name or trade name (whether registered or not) of another person. The Revenue claimed that the appellant manufactured and cleared cement with brand name of “Kamdhenu” which belongs to M/s Kamdhenu Ispat/ M/s

Kamdhenu Cement. The Revenue during investigation collected material as well as oral evidence to support the case that the main appellants had violated the conditions and avail ineligible exemption. The stationary used by the appellant, the packing material available in the factory and the statements of responsible person of the main appellant corroborated the case of the Revenue. The unaccounted clearance is also evidenced by private document corroborated by the statement of the Director of the main appellant. Admittedly, the main appellant did make clearances of cement which were not entered into in the RG-I register. It is relevant to record the findings of the original authority in this regard.

> *"15. Coming to the issue of alleged use of brand name of another person and cement manufactured from clinker not manufactured within the same factory, it is clear that the legal position is that the assessee would not be entitled to the benefit of the exemption under said notification if they use the brand name or trade name whether registered or not, of another person, and also in case if cement manufactured from such clinker which is not manufactured within the same factory. It is absolutely clear that the concessional duty benefit is not available on the cement manufactured from clinker not produced out of clinker produced in their factory or on the cement bearing brand name of another whether produced from own clinker or clinker produced from outside. Therefore in order to be eligible for concessional rate of duty under notification No. 4/2006 the assessee should not only produce his own clinker but also should not use brand name of any other person on cement manufactured by them. The contention of the assessee is that during the relevant period, they had also cleared cement without affixing brand name of "Kamdhenu" and also with their own clinker and thus according to them demand made in respect of cement cleared during entire period covered under the impugned show cause notice is not correct. Thus circumstances of the case requires that instead of discussing the provisions or scrutiny of law, it is to be ascertained factually as to how much quantity cleared during the impugned period was cleared under the brand name of "Kamdhenu" or manufactured out of outside clinker.*
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> *16. The noticees have contended that their agreement for use of brand name 'Kamdhenu' with M/s Kamdhenu Ispat Ltd. was effective during 1.12.2006 to 30.06.2007 and agreement with Kamdhenu Cement Ltd. (new entity) was effective during 1.7.2007 to 31.12.2007 and the same was terminated w.e.f. 1.1.2008. It is further contended by them that during the period 1.10.2006 to 30.09.2008 they had manufactured and cleared quantity of 36172 MT with outside clinker and under brand name of*

'Kamdhenu' on which duty was paid at full rate without availing concession under Notification No. 4/2006-CE dated 1.3.2006. Further a quantity of 46928 MT cement was manufactured out of own clinker and cleared under brand name of 'Jai Kisan Super Gold' at concessional rate of duty. While giving details of the purchase of HDPE bags an attempt has been made to claim that only 36172 MT of cement was manufactured from outside clinker and cleared under brand name of 'Kamdhenu' therefore thee was no short payment. It was further stressed by them that as per the understanding with Kamdhenu Ispat Ltd and M/s Kamdhenu Cement Ltd. their brand name could be used only on the cement manufactured out of the clinker taken from big mills in order to maintain the quantity and accordingly they had purchased 35711 MT clinker from outside (from Big Mills) which corresponds to the quantity of 36172 MT cement on which they had paid full duty. It was also submitted that their agreement with the said brand name owner terminated w.e.f. 1.1.2008, therefore there was no question of manufacture and clearance of cement with brand name 'Kamdhenu' thereafter.

17. It is to be seen whether in totality of circumstances the contentions carry enough weight to tilt the equilibrium in their favour. I find tha as per the clause (j) of the agreement with brand owner M/s Kamdhenu Ispat Ltd. and M/s Kamdhenu Cement Ltd. dated 31.12.2006 and 1.6.2007 respectively assessee was debarred from manufacture and sell of cement of any brand name other than 'Kamdhenu' from their plant situated at Village – Jhalara Maonda, Tehsil Neem Ka Thana, Distt Sikar. I observed that the claim of the assessee that they had manufactured and cleared the cement under the brand name 'Jai Kisan Super Gold' and 'Modi Plus' does not get supported with the invoices for the period 1.4.2007 to 21.09.2007 on which duty was paid at concessional rate but invoice did not bear the rubber stamp of 'Jai Kisan Super Gold' or 'Modi Plus'. I observe that the following facts prove the contents of the noticees absolutely untenable. Availability of stock of empty HDPE bags bearing 'KAMDHENU' cement on 4.9.2008 with Central Excise officers visited the factory premises/ 800 bags of cement found in Truck No. HR-46-B-5300 on 4.9.2008 with brand name 'KAMDHENU' along with its logo/ that relevant invoice i.e. invoice no. 955 dated 4.9.2008 did not contain any rubber stamp of other brand name/ statement dated 4.9.2008 of Sh. Raju S/o Sh. Nathu Ram store keeper of the unit to the effect that only HDPE bags with brand name of 'KAMDHENU' were stored and used in the factory/ availability of 9088 bags of cement with brand name of 'KAMDHENU' on 4.9.2008 at the factory premises/ admission of Sh. Ram Kishore Sharma, authorised signatory in his statement dated 4.9.2008 that 800 bags of cement found loaded in the Truck No. HR-46-5300 were manufactured out of outside clinker and affixed with brand name 'KAMDHENU'. These facts which can not be controverted are sufficient enough to establish that the assessee were manufacturing and clearing goods bearing brand name 'KAMDHENU' upto 4.9.2008 i.e. the date of visit of Central Excise officers to their factory. The contention of the assessee that ..... pre printed 'KAMDHENU' brand was used in cases where cement was of other than 'KAMDHENU' brand is *devoid of merits because the buyer would not accept the quality which is different from the quality borne on the invoice. The invoices undoubtedly imply that assessee during their transaction were specific about the brand of the cement cleared under the invoice. The sale invoices conspicuously mentioned the 'KAMDHENU' brand name. It can be no body's case that the brand name was written on these documents every time without any purpose or meaning. Thus the circumstances and facts of th case support the clear cut finding that the quantity of cement cleared during the relevant period was of 'KAMDHENU' brand.*

18. As regards contention of the assessee that their agreement with brand owner terminated from 1.1.2008 it does not find support from the other available evidence in the form of letter dated 23.2.2008 and statement dated 29.2.2008 .... Brahma Dutt Modi, Director of the assessee and letter dated 2.4.2008 of M/s Kamdhenu Cement Ltd. addressed to jurisdictional Assistant Commissioner in which there is a categorical mention that assessee was manufacturing 'KAMDHENU' brand cement. Had the agreement terminated on 1.1.2008 there would have been mention of the same in the said letter and they would not have written that assessee was engaged in the manufacture of 'KAMDHENU' brand cement. The argument that old stationary was used to prepare the invoice which contained the brand name 'KAMDHENU' and rubber stamp of brand name 'Jai Kisan super Gold' or 'Modi Plus' was affixed at the time of clearance also does not get corroborated the invoices for the period 1.4.2007 to 4.9.2008 which were resumed by the department and therefore not available with the assessee, as there was no such stamp on the invoices issued during the said period. The attending circumstances only lead to the view that the assessee in an attempt to .... such stamps on a later date on the invoices available with them... (without admitting) it is taken that the said agreement was terminated on 1.1.2008 even then the benefit of said Notification was not available to the assessee as they manufactured and cleared the goods in the brand name of 'KAMDHENU' and condition of notification does not require that brand name has to be used under the agreement only.

19. It is also observed that assessee failed to maintain separate record in respect of production of cement manufacture from outside clinker and that made from own clinker."

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22. Now coming to the demand of Central Excise duty on the quantity of 2834.5 MT alleged to have been cleared by the assessee clandestinely (as mentioned in the private notebook found in the premises of the assessee), it can be seen that statement of Sh. Brahm Datt Modi, Director of M/s Sorabh Cement Ltd. Jhalara was recorded under Section 14 of the Central Excise Act, 1944 at the premises of the assessee on 22.09.07 wherein he stated that Central Excise officers had found a "Kachhi Slip" (private notebook) in their premises wherein the details of some clearances of cement in the *month of September, 2007 were given. He stated that as per his knowledge, the duty paid clearances had also been included alongwith the quantity for which invoices were not prepared and duty was not paid and he was ready to pay the Central Excise duty on such clearances. It was never disputed that the said private note book was recovered from their factory premises and entries therein were related to clearance in their unit. Sh. Brahm Datt Modi, Director is not an ordinary worker but a Director of the Company. Being Director of the unit he is prejumed to be well-informed and it cannot be accepted that he was under any pressure while accepting the contents of the note book. There is plethora of decisions on the validity of "notebook evidence". The said register was recovered from the premises of the assessee and contained clearance details. There can be no reason for any one to scribble entries in the said register hypothetically and keep in the premises. Thus the said register has reliability. However in the instant case I am not relying on said private notebook entries alone. The Director of the company in his voluntary statement admitted that the said register contained clearance details some of which were not recorded in the RG-1 register. Thus said statement is not a mere confession without basis. The statement corroborates believable and admissible evidence in the form of a private note book recovered during search. In the wake of such high quality evidence and in view of the fact that assessee is not claiming that the said private note book is unreliable, I do not intend to discuss it in length as it is settled law that admitted fact need not to be proved. Argument that out of the said quantity they had already paid duty on 1740 MT is also devoid of fact because when the details contained in the note book is compared with the invoices it is found that except for the vehicle no. other details such as quantity, name and place of buyers do not match with those appearing in the invoices against which duty was paid. Thus I am of the considered view that contrary to the claim of the assessee that they had paid duty on 1740 MT of cement the entries appearing in the said note book are related to clandestine clearances of cement on which no duty was paid by the assessee. Accordingly, the charge of clandestine removal against assessee is proved. Thus I have no hesitation to hold that assessee had suppressed the clearance of finished goods involving Central Excise duty of Rs. 10,21,856/- (Duty Rs. 9,92,093/- + Edu. Cess Rs. 19,842/- + S&H Ed., Cess Rs. 9921/-) and this amount of duty is recoverable from them under proviso to Section 11A of the Central Excise Act, 1944. The use of brand name 'KAMDHENU' on the cement cleared during the impugned period of demand is also established as discussed herein above and accordingly assessee were required to pay full rate of duty in respect of clearances entered in the said private note book. Since the assessee deliberately with intent to evade payment of duty suppressed the material fact of production and clearance of the finished goods, without payment of duty they are also liable to penalty under section 11AC of the Act ibid".*

7. Against above findings, the main appellant raised various objection which we have recorded earlier in this order. We note that admittedly, the appellant did

manufacture cement with brand name "Kamdhenu". There is no dispute on this. The main appellant is claiming that part of the goods were cleared with their own brand names. It is necessary for them to support their claim with sustainable documentary evidence. It is the main appellant who claims the concenssional rate of duty available to cement cleared without using another person's brand name. Hence, it is imperative for them to establish the existence of such fact.

8. On careful consideration of the submissions made by the appellant, we are of the considered view that they have failed to establish such fact categorically. The reasons recorded by the original authority are based on material as well as oral evidences gathered during investigation. The appellant's present appeal cannot bring in any categorical contrary evidence to persuade us to interfere with the said impugned order. Accordingly, we find no merit in the appeal fined by the appellant and two of its Directors against confirmation of demand and imposition of penalties. However, we find penalties imposed on the paid employees namely Sh. Ram Kishor, Authorised Signatory and Sh. Bhawani Singh Sekhawat, Munim/ Supervisor of the main appellant are not justifiable. They acted as per the direction of the Directors, as paid employees. They did not gain personally in these transactions. We find that imposing penalty under Rule 26 of the Central Excise Rules, 2002 on them is not justifiable. Accordingly, we set aside the penalties imposed on these two persons and allow their appeals.

9. Regarding penalties imposed on M/s Kamdhenu Cement and Sh. Satish Kumar Kabu, Director of M/s Kamdhenu Cement, we note that the only allegation in the proceedings against them is that they were part of alleged document in the form of letter dated 31.12.2007 to claim termination of agreement for use of

"Kamdhenu" brand. We note that the termination *per se* by itself will not help the main appellant to claim the concession under the said notification. This was quoted as corroboration by the main appellant for their claim. This situation is not covered by provisions of Rule 26(2) (ii) of the Central Excise Rules, 2002. No other action or role on the part of these two appellants have been discussed to justify penalty on them under Rule 26 of the Central Excise Rules, 2002. Further, the forged nature of the termination letter could not be categorically established with corroboration as no verification was made from the signatories of the said letter. We also note that the provision which is invoked in the impugned order was notified only w.e.f. 01.03.2007. Considering all these facts and legal reasons, we find the penalties imposed on these two appellants are not justified. Accordingly, we set aside the same and allow their appeals.

10. In view of the above discussions and analysis the appeals filed by the main appellant and two of its Directors are dismissed. The other appeals are allowed.

(Pronounced on 06.10.2017).

(Justice (Dr.) Satish Chandra) (B. Ravichandran)
President Member (Technical)

Pant