IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT –IV

Excise Appeal No.E/2577/2012 [SM]

[Arising out of Order in Appeal No. IND/312/2010 dated 06.10.2010 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Indore]

M/s.Neeluka Metal Power and Chemicals ...Appellant

Vs.

C.C.E., Indore ... Respondent

Present for the Appellant : Mr.Deepak Kumar Bajpai, C.A.
Present for the Respondent: Mr.G.R. Singh, D.R.

Coram: HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing : 17/10/2017
Pronounced on : _30/11/2017

FINAL ORDER NO. ___58189_/2017

PER: ANIL CHOUDHARY

The issue in this appeal is whether the appellant has removed inputs as such and thus failed to reverse the cenvat credit taken as required under the scheme of the Act & under Rules.

2. The brief facts of the case are that the appellant a registered manufacturer is engaged in manufacturing of emulsion and thinner falling under Chapter heading 271400- 2471500 and 381400 of CETA 1985. They also filed Cenvat Credit on inputs used in the manufacture of final products.

3. As per show cause notice dated 6th July, 2009, it was proposed to demand excise duty of Rs.8,817/- under Section 11A of the Act and Cenvat Credit amounting to Rs.2,87,492/- under Rule 14 of CCR, 2002 alongwith interest. Further penalties were also proposed. This proposal was based on the ground that appellant had removed input – Bitumen, as such on which Cenvat Credit was availed but they did not reverse – pay an amount equal to the credit availed on removal of such input. It was also observed that the sale value shown in the balance sheets of the appellant is more than the value in the ER-I Returns. The show cause notice in absence of any reply filed was adjudicated ex-parte and the proposed disallowance of Cenvat Credit was confirmed with equal amount of penalty under Rule 15 (2) of CCR, 2004. Further, duty of Rs.8,817/- was ordered to be recovered alongwith interest and also equal amount of penalty was imposed under Section 11AC of the Act.

4. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) on the ground that the demand is *prima facie* time barred as it has been raised beyond the period of one year as prescribed. It was further urged that the adjudicating authority has made baseless findings about the removal of the Bitumen as such. In fact the appellant have not cleared 'Bitumen' as such, but cleared 'Bitumen emulsion' falling under different Chapter. The Bitumen purchased by them was classifiable under CTH 2713.20 and the 'Bitumen emulsion' cleared was classifiable under 2714.90. It was further stated

that they have already paid the duty on the differential sale value before issuance of show cause notice. As such, the demand of Rs.8,817/- is not sustainable and therefore, does not attract penal provisions. The ld. Commissioner (Appeals) took notice that the amount of duty involved Rs.8,817/- was paid by challan dated 24.07.2009 and the same is not disputed except payment of interest on the same. So far, the input Bitumen is concerned, it was procured by the appellant from Indian Oil Corporation Ltd. The seller was classifying the same as Bitumen 80/100 under Chapter 2713.20 of CETA. As the sale invoice of the appellant, they cleared it under Chapter heading 2714.90 mentioning the description as Bitumen and according to the appellant, it was a manufactured product different than the original received from their seller/supplier of input.

5. The ld. Commissioner (Appeals) further took notice of the classification of Bitumen under CETA, 1985 as follows:-

"2713 *–Petrolium Coke – petroleum Bitumen, and other residues of petroleum oils or of oils obtained from Bituminous minerals –*

2714*- Bitumen and asphalt, natural; bituminous or oils shale and tar sands; asphaltites and asphaltic rocks*

2715 *– Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (for example, bituminous mastics, cut-backs)."*

6. Thus, it was observed by ld. Commissioner that the appellant was procuring petroleum Bitumen and Chapter 2714 relates to natural Bitumen. Hence petroleum Bitumen cannot be

converted to the natural bitumen. Therefore, appellants contention that it was bitumen falling under Chapter heading No. 2714 of CETA cannot be accepted as it is not possible to reverse the reaction of any compound and change the property from synthetic to natural.

7. Further, the contention of the appellant on reply to the show cause notice that due to oversight they have mentioned Bitumen in their invoice for removal in place of Bitumen emulsion. This plea was rejected by the adjudicating authority. In the first appeal, the ld. Commissioner (Appeal) has observed that appellant put up a new contention to establish activity of manufacture and to avoid equal reversal in case of removal as such. Thus, it was concluded that appellant had removed petroleum Bitumen by classifying the same as natural Bitumen. Accordingly, he decided to dismiss the appeal.

8. Being aggrieved, the appellant is before this Tribunal.

9. The ld. Counsel for the appellant states that the selling price of Bitumen emulsion is lower than the purchase price of Bitumen. No person of ordinary prudence will adopt a business model so as to sell his output or'end' product at a loss. He also explained the manufacturing process of conversion of Bitumen to Bitumen emulsion. Bitumen 80/100 as received from the supplier, is heated in a column for about 8 Hours and also blown. Thereafter, they mix the same with furnace oil. Thereafter, they get the end-product, which is 'bitumen – cut back' or 'Bitumen emulsion'. The same after testing is packed and is ready for

dispatch. The ld. Counsel also refers to their profit and loss account for the financial year ending 31st March, 2007, which has been duly certified by the CA pursuant to audit. As per the profit and loss account the appellant have got net sales of Rs.2,75,16,227/- against the consumption of raw-material valued at Rs.21,129,333/-. They have a net profit of Rs.3,22,843.04 after charging depreciation of Rs.4,42,263/-. Thus, the appellant have net profit of more than Rs.7.5 Lakhs against turnover of about Rs.2.75 Crores. If the allegation of Revenue is to be believed, appellant should have incurred a net loss, as they are removing their input at a lower price as such. Thus, the whole allegation of Revenue is only based on assumptions and presumptions with total disregard to the facts on record. Only for the clerical mistake of mentioning Bitumen in the invoice instead of Bitumen emulsion, although right classifications have been mentioned, the whole proceedings have been initiated which are prima facie frivolous.

10. The ld. A.R. relied on the impugned order.

11. Having considered the submissions, I find that the contentions of the ld. Counsel are correct. If the allegation in the show cause notice are taken on their face value, the appellant will never incur a profit, rather always put to loss on selling their inputs. Further, I take notice that Bitumen emulsion is a diluted form of Bitumen and the sale of the same is always having a

lower price than the input. Further, the ld. Counsel have also demonstrated from their price "rate contract" valid for the period 16th October 2012 to 30th September, 2013, wherein they have quoted prices for bitumen emulsion of various grades. Further, final product having higher grade, which has better packing in new containers, whereas emulsion of lower grades is packed in reconditioned drums for clearance. Further, there is price variation clause, which mentions that the rates of bitumen emulsion are based on the rate of bitumen as on 1st January, 2012 for supplies in bulk (exclusive of Excise Duty and Sales Tax). The price taken for the purpose of working out the price variation will consist of basic price of bitumen only, prevailing on the rate 15 days prior to the date on which the said lot was offered for inspection, as indicated in the Inspection Note. The basic rates quoted in the quotation list are subject to the price variation clause.

12. Thus, from the appreciation of the facts on record and the contention of the parties, I am satisfied that the appellant was removing Bitumen emulsion and not bitumen as such. Accordingly, after setting aside the impugned order, I allow the appeal with consequential benefit in accordance with law.

[Pronounced in the Open Court on __30/11/2017_]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Anita