

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

West Block No.2, R.K. Puram, New Delhi – 110 066

COURT NO. I

Appeal No. E/876,2986/2010, E/59167-59168/2013 -DB

Date of Hearing : 26.12.2017

Date of Decision : 25.01.2018

[Arising out of Order-in-Appeal No. 31(DK)-CE-JPR-I/2010 dated 22.01.2010 and OIO No. 19/2010-CE dated 17.06.2010 passed by the Commissioner (Appeals)/Commissioner, Jaipur]

M/s. Kusum Industries : **Appellant**
Shri Mithlesh Mathur

vs.

Commissioner of Central Excise & ST, Jaipur : **Respondent**

Appearance:

Shri Bipin Garg, Advocate for the Appellant(s)
Shri M.R. Sharma, A.R. for the Respondent(s)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No.50319-50322/2018

Per : Ashok Jindal

The appellants are in appeal against the impugned orders for demanding duty, imposing penalty and confiscation of goods alleging that appellants are using the brand name of another person and clearing the goods on the strength of parallel invoices.

2. The facts of the case are that the appellant is a proprietary concern of Smt. Kusum Rani Mathur, located at A-61, Manu Vihar, Road No. 9F2, V.K.I. Area, Jaipur engaged in the manufacturing of water treatment and fertilizer quality improvement chemicals and availing the benefit of Notification No. 08/2003-CE dated 01.03.2003 as an SSI Unit. The appellants were selling the goods to M/s. Tata Chemicals Limited (TCL for short). There was another unit in the name of M/s. Neelam Aqua and Speciality Chemicals Private Limited (NASCP for short) having a Director namely Dr. Suresh Singh, husband of Smt. Kusum Rani Mathur, Proprietor and her two sons Shri Awadhesh Mathur and Shri Mithlesh Mathur. This unit is also manufacturing the same product

under the brand name Neelco, Neelcoat, Flocsep, Floculent. These brands were not registered and Shri Mithlesh Mathur, Director was looking after the day to day affairs of the appellants. On 04.02.2008, the unit of the appellant was visited by the Central Excise officers and it was found that 94 bags of finished goods were lying there of brand name NASCPL. On investigation, it was explained that due to shortage of space, the said quantity was kept there, but the said goods, having the value of Rs. 50,760/-, were seized. After investigation, three show cause notices were issued to the appellant for the period 2005-06 to 09/2009, alleging that appellant is using the brand name of NASCPL therefore, they are not entitled to avail benefit of SSI exemption Notification No. 8/2003-CE dated 01.03.2003. As the appellant has cleared the goods during the period 08.04.2004 to 01.08.2008, of the value of Rs. 1,97,68,141/-, on which duty of Rs. 32,32,300/- is payable by the appellant. The other allegation was that during the course of investigation, certain parallel invoices were issued to M/s. TCL were found and on the basis of allegation that appellant has cleared the goods on the strength of parallel invoices, a demand of Rs. 23,48,350/- was proposed. It was also alleged that as per the goods receipts, the appellant has sold 58,000 Kgs. of Defoamer to M/s. TCL whereas, invoices shows the quantity of 23,854 Kgs. The said show cause notices were adjudicated and demand of duty was confirmed along with interest and penalties on both the appellants were imposed and the goods were also held liable to confiscation. Consequently, redemption fine of Rs. 7,500/- and penalty of Rs. 4,000/- was also imposed. Against the said orders, the appellants are before us.

3. Ld. Counsel for the appellant submits that the appellant has never used the brand name of NASCPL and there is no evidence to that effect. The appellant has not cleared any goods under the brand name of NASCPL. It is only in the purchase order the name of the product Defoamer Neelco is mentioned and this does not establish that appellant has used brand name of another person. To support, he relied on the decision in the case of *CCE, Jamshedpur vs. Superex Industries – 2004 (174) ELT 4 (SC)* and *CCE, Indore vs. Gayatri Engineers – 2007 (214) ELT 345 (Tri. Del.)*. He further submitted that for an abundant portion, assignment deed was written by M/s. NASCPL through its Director Shri Suresh Singh, husband of Smt. Kusum Rani Mathur, Shri Awdhesh Mathur and Shri Mithlesh Mathur authorising the appellant to use the brand name, namely Neelco, Neelcoat, Flocsep, Floculent but the same were not used on the products manufactured by them. In support

of that, the assignment deed was also placed on record. He further submitted that even otherwise also both the firms were run by the family members and has not acquired any such reputation that it can be associated with NASCPL, therefore the demand is not sustainable. He relied on the decision in the case of *Minimax Industries vs. CCE, Delhi – 2010 (261) ELT 535 (Tri. Del.)*, which has been affirmed by Hon'ble Delhi High Court reported at – 2011 (269) ELT 166 (Del.). He also relied on decision of this Tribunal in the case of *M/s. SIP Industries vs. CCE vide Final Order No. A/54334/2017-EX [DB]* dated 23.06.2017.

4. With regard to issue of clandestine clearance on the strength of parallel invoices, it is his submission that supplies were made to M/s.TCL. As per agreement, the appellant was clearing these goods on proforma invoices and payment was required to be made by TCL on performance basis hence the appellant raised final invoice on monthly basis. These final invoices were provided by M/s. TCL to excise authorities and the said fact was explained by Shri Arvind Simlot on 04.02.2008, at the time of investigation and has been further explained by Shri Mithlesh Mathur in his statement recorded on 14.02.2008. As regards the other demand raised on account of GRs stating that the quantity mentioned in the invoices is less than the actual invoices raised by the appellant, it is his submission that as per agreement between the appellant and M/s. TCL, the bills is to be raised on the performance basis and therefore, the bills were raised on the advice given by M/s. TCL on proforma based as per the purchase agreement. It is his submission that NASCPL is registered with the Central Excise authorities and were clearing their goods on payment of duty. The Range officers were regularly visiting the factory however has never advised or raised any objection to that effect. It is further submitted that there is no evidence at all that the goods were cleared twice to M/s. TCL or cleared to somewhere else. The only reason for denial of SSI benefit and alleging that the explanation given by the appellant is an afterthought. It is his submission that the above facts were explained on the spot as well as later, in detail and hence the observations made by the adjudicating authority is not sustainable. It is also submitted by the Id. Counsel that investigation was made by the officers from M/s. TCL who has also explained the same. Therefore, in the absence of any evidence of clandestine removal, demand is not sustainable as the burden to prove charge of clandestine removal is on the Revenue with tangible evidence which the department has failed to do so. Alternate submission of the Id. Counsel is that even if the appellant

is liable to pay any duty, that has to be calculated on the basis of cum-duty price. He further submits that the appellant was running their unit bonafidely hence, the question of suppression of facts does not arise. Therefore, extended period of limitation is not invokable as the appellant has nothing suppressed any fact from the department. He also submitted that even though if it is presumed that clearances on the parallel invoices were made extra, though not admitted, the liability can be at the most, is Rs. 4,75,876/-. He also submitted that demand is based only on brand name and pertaining to the period March 2008 to September 2009 and all the facts were in the knowledge of the department while issuing earlier period show cause notice on 06.04.2009. Therefore, he submits that in the light of decision of Hon'ble Apex Court in the case of *Nizam Sugar Factory vs. CCE – 2006 (197) ELT 465 (SC).*, the show cause notice is not sustainable.

With regard to confiscation of the goods, it was explained on the spot that due to shortage of space in the premises of NASCPL, the goods were stored in the premises of the appellant and those goods were manufactured in the name NASCPL, the goods are not liable to confiscation and imposition of penalty and redemption fine are not imposable.

In view of the above submissions, the Id. Counsel prayed for seting-aside the impugned orders.

5. On the other hand Id. AR supported the impugned orders and submitted that it is a fact on record that NASCPL is a Private Limited Company and the appellant is not the Director of the said Company. Moreover, the Director of a Private Limited Company is not related to each other, therefore, the appellant is using the brand name of others and is not entitle to SSI exemption. It is his submission that parallel invoices as recovered from the premise of the appellant, therefore demand of duty is rightly confirmed on the appellant alleging that appellant is clearing goods clandestinely without issuing the proper invoices. Therefore, Id AR prays that impugned orders are to be upheld.

6. Heard the parties and considered the submissions. On careful consideration of the submissions made by both sides, we find that the demand has been confirmed against the appellants on two grounds;

- (a) that appellants are using the brand name of others therefore, they are not entitled to avail the benefit of SSI exemption Notification No. 08/2003-CE dated 01.03.2003; and
- (b) that the appellant is clearing the goods on the strength of parallel invoices, without payment of duty clandestinely.

As regards issue (a) above that that appellants are using the brand name of others and they are not entitled to avail the benefit of SSI exemption Notification No. 08/2003-CE dated 01.03.2003, we find that in this, M/s. TCL is issuing purchase order for supply of goods namely, Defoamer under the brand name Neelco. Neelco is the brand of M/s. NASCPL. It is also a fact on record that the appellant is not using the said brand name on their products. Moreover, on the invoices also, the said brand name is not found mentioned in the invoices. These facts are not in dispute. However, we find that during the course of investigation, certain goods were found having the brand name of NASCPL. In that circumstance, the appellant cannot absolve their liability of using the brand name of another person, therefore, using the brand name of another person on the said goods found in their factory. Therefore the decision in the case *Superex Industries (supra)* is of no help to the appellant as in the said case, the goods were not having the brand name and not indicated on their invoices but in this case, some goods under the brand name of NASCPL were found in the premises of the appellant. We find that the appellant has placed on record the assignment deed in their favour, the same is extracted as below :-



NEELAM AQUA & SPECIALITY CHEM (P) LTD.

(In technical Collaboration with CML, U.K. & QEMI Inc., U.S.A.)
Member : NACE - USA, FAI & CII



ISO 9001-2000

Assignment Deed

Date: 03.11.2003

We Neelam Aqua & Speciality Chem Pvt Ltd are using brand name: Neelco, Neelcoat, Flosep, Flocculant on our final product which is not registered brand name. By this assignment deed we assign and authorise M/s Kusum Industries, proprietor Smt. Kusum Rani Mathur, A-61, Manu Vihar, V.K.A.I., Jaipur, on behalf of all the directors of Neelam Aqua & Speciality Chem Pvt Ltd., namely Dr. Suresh Singh, husband of Smt. Kusum Rani Mathur and Avdhesh Mathur & Mithlesh Mathur, both son of Smt. Kusum Rani Mathur, to utilise the said Brand Name i.e. Neelco, Neelcoat, Flosep, Flocculant on their product, if she desires.

Neelam Aqua & Speciality Chem Pvt Ltd.

Dr. Suresh Singh,
(Director)

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As per the assignment deed, the appellant was entitled to use the said brand name. In that circumstance, it cannot be said that appellant is using the brand name of another person. Further, the similar issue came before the Hon'ble Apex Court in the case of *CCE, Ahmedabad vs. Vikshara Trading & Invest Pvt. Limited – 2003 (157) ELT 4 (SC)* wherein the Hon'ble Apex Court observed that if there was an assignment of trademark in fact of the assessee, the mere fact that the assignment deed is not registered can not alter the position. Therefore, as the appellant is using the brand name of another person but it was by way of assignment deed. In that circumstances, the appellant is not using the brand name of another person but they are using their own brand name as assigned to them. In that circumstance, benefit of SSI exemption Notification No. 08/2003-CE

dated 01.03.2003 cannot be denied to the appellant. Therefore, we hold that appellants are entitled to the benefit of SSI exemption Notification No. 08/2003-CE dated 01.03.2003.

As regards issue (b) above that appellant is clearing the goods on the strength of parallel invoices clandestinely, without payment of duty. At the time of investigation and as per the purchase agreement, the appellant was required to supply goods as per following terms :-

“SUPPLY, INCORPORATION, PERFORMANCE MONITORING, SUPERVISION OF NELCO 8060 DEFOAMER AT OUT PHOSPHORIC ACID PLANT FOR SMOOTH RUNNING OF OUT PRODUCTION WIHTOUT ANY DISRUPTION. COST OF USAGE OF DEFOAMER NOT TO EXCED Rs. 65/- T OF P205 PRODUCED. THIS PRICE IS INCLUSINVE OF ALL TQAXES, DURIES AND FREIGHT CHARGES FOR DELIVERY OF DEFOAMER AT OUT HALDIA PLANT. ALSO IT WILL COVER THE COST OF MANPOWER AND MACHINES. ALL OTHER TAXES AND DUTIES ALONG WITH SERVICE TAXES, IF ANY ARISING OUT OF APPLICATION OF THIS DEFOAMER WILL BE BORN BY YOU. ACTUAL PRODUCTION WILL BE CERTIFIED BY THE PLANT MANAGER MONTHLY BASIS AND WILL BE GIVEN TO YOU FOR RAISING BILLS. ALL TERMS AND CONDITIONS WILL BE AS PER ANNEXURE 1 (MOU COPY) ALREADY WITH YOU”

As per the said position, the invoices are to be raised on monthly basis as per the quantities received by M/s. TCL. Admittedly, at the time of clearances of goods, the appellant has issued invoices and the said quantity was reduced on performance basis by M/s. TCL as per their purchase agreement and on the basis of that quantity appellant has raised, monthly invoices. In that circumstance, the burden cast on the Revenue to produce the evidence contrary to the explanation given by the appellant during the course of investigation itself. The Revenue has not come up with any positive evidence contrary to the explanation given by the appellant. Therefore, the Revenue has failed to come up with positive evidence in support of clandestine removal of goods. As no corroborative evidence has been produced by the Revenue and allegingd that on the strength of parallel invoices the appellant has cleared the goods, then the allegation of clandestine removal is not sustainable when M/s. TCL itself has explained that the explanation given by the appellant at the time of investigation is in terms of purchase agreement and monthly invoices has been raised as per purchase agreement. Further, Revenue has not alleged that at the time of clearance of goods the appellant has raised invoices in the name of TCL and diverted the goods somewhere else, therefore, charge of clandestine removal of goods is not sustainable against the appellants. The same is supported by the decision of *Golden Steel Corporation Limited vs. CCE, Kolkata – 2017 (347) ELT 570 (Tri. Kolkata)*. Further, the same has been taken by the Hon’ble Allahabad High Court in the case of *Continental Cement Company vs. UOI – 2014 (309) ELT 411 (All.)*. Further, a similar view has

been taken by this Tribunal in the case of *CCE, Raipur vs. Heliwal Polypackers Pvt. Limited – 2016 (340) ELT 204 (Tri. Del.)*.

In view of the above analysis, we hold that demand on both the issues are not sustainable against the appellant. Further, we find that the show cause notice dated 13.04.2011 is not sustainable as on the same issue, by invoking the extended period as on the same grounds, show cause notice dated 06.04.2009 was issued to the appellant and in the light of the decision of Hon'ble Apex Court in the case of *Nizam Sugar Factory (supra)*.

7. In view of the above analysis, we set-aside the impugned orders and allow the appeals with consequential relief, if any.

(Order pronounced in the court on 25.01.2018).

B. Ravichandran
Member (Technical)

Ashok Jindal
Member (Judicial)

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