

E/51150/2017

IN THE CUSTOMS, EXISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing: 04.04.2018

Date of Pronouncement: 18.04.2018

Appeal No. E/51150/2017

[Arising out of Order-in-Original No. 85-PR-COMMR-CEX-IND-2016-17 dated 31.03.2017 passed by the Principal Commissioner of Customs, Central Excise & Service Tax (Appeals), Indore (M.P.)]

M/s Texmo Pipes & Products Ltd.

...Appellant

Vs.

CCE, Indore

...Respondent

Appearance:

Represented by Shri Rohit Chaudhary

Ms. Preeti Khiwani, Advocates for the appellant.

Represented by Shri S.K. Bansal, DR for the respondent.

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

Final Order No. 51388/2018

Per V. Padmanabhan:

The present appeal is against the Order-in-Original No. 85/2016-17 dated 31.03.2017. The appellant is engaged in the manufacture of HDPE pipes and LLDPE pipes and related products. A part of the manufactured goods are cleared on payment of duty and some part is also cleared availing exemption from payment of duties. The appellant was also availing

the facility of CENVAT credit on the inputs, input services and capital goods under CENVAT credit Rules, 2004. During the course of search conducted by DGCEI on 26.09.2015, the department recovered incriminating documents, investigated an offence case and issued show cause notice dated 04.10.2016. The impugned order came to be issued after the adjudication proceedings. Demands have been raised on various grounds against which the present appeal has been filed.

2. With the above background, we heard Shri Rohit Chaudhary and Ms. Preeti Khiwani, learned Advocates, as well as S.K. Bansal, learned DR for Revenue.

3. The various issues dealt with in the impugned order against which the present appeal has been filed are discussed one by one in the succeeding paragraphs:

1. “Non-payment of an amount equivalent to 6% of the value of exempted goods during July 2014 to March 2015 – Rs. 1,78,64,112/-“

The appellant is clearing finished products on payment of duty and partly by availing exemption. With effect from 20.11.2012, the appellant opted to pay an amount as required under Rule 6(3(i)), in the view of the fact that they were not maintaining separate accounts

for inputs and input services used towards dutiable and exempted products. Such option was changed with effect from 01.07.2014 vide their letter dated 29.08.2014 and they started maintaining separate accounts and stopped the payment of an amount at the rate of 6%. Department was of the view that Explanation (I) under Rule 6(3) of the CENVAT Credit Rules, 2004, forbids a manufacturer from changing the option during the remaining part of a Financial Year. Accordingly, demand stands raised for the period July 2014 to March 2015 for an amount at the rate of 6%.

It has been argued on the behalf of the appellant that such Explanation is not applicable in view of the non-obstante clause at the beginning of Rule 6(3). It is argued that they have opted to follow Rule 6(2) and maintained separate accounts with effect from 01.07.2014, and hence the demand is not justified.

From the record, we note that with effect from 20.11.2012, the appellant has opted to pay an amount at the rate of 6% as per Rule 6(3). Explanation (I) in Rule 6(3) is categorical in its provision that once a manufacturer exercises the option under Sub-rule 3, such option shall not be withdrawn during the remaining part of the financial year. Appellant has changed the option already exercised with effect from 01.07.2014. In view of Explanation (I) forbidding such

change in the middle of the Financial Year, we are of the view that such change can be given effect to only with effect from 01.04.2015 and the appellant is required to pay an amount at the rate of 6% as per Rule 6(3) till the end of the financial year 2014-15. Consequently, we find no infirmity in the demand confirmed by the adjudicating authority, and hence the same is upheld.

2. “Suo Moto credit of the extra amount paid on account of turnover discount allowed to buyer”

On account of the turnover discount later allowed to certain buyers, the appellant noticed that Central Excise duty originally paid was in excess. Instead of claiming refund, appellant took credit in their CENVAT account of such excess amounts. On being pointed out, the entire amount of Rs. 20,14,961/- was deposited along with interest before the issuance of show cause notice. The appellant is aggrieved by the imposition of mandatory penalty of an equal amount and pressed that it should be restricted to 15% of the duty amount paid.

After perusal of record, we are of the view that imposition of full amount of mandatory penalty is not justified since the incorrectly availed credit has since been paid back along with interest. Hence,

we set aside the imposition of mandatory penalty and restrict penalty to 15% of the duty amount.

3. “CENVAT credit availed at the time of merger of various entities with the appellant in the year 2009”

The department has objected to the availment of CENVAT credit of an amount of Rs. 2,39,995/-, lying in the unutilized accounts of the merged entities, for the reason that the appellant failed to provide any CENVAT documents issued under Rule 10 of the CENVAT Credit Rules, 2004. Even though the said amount has already been reversed along with the interest, the appellant is aggrieved by the fact that mandatory penalty has also been imposed.

Since the entire amount of credit stands with reversed, hence we find no justification for imposition of the penalty which is set aside.

4. “Demand of differential duty by including amount of incentive received on account of capital subsidy.”

The appellant received subsidy amounts under the Madhya Pradesh Udyogik Samvardhan Sahayata Yogna, equal to 50% of the VAT/CST paid. The department was of the view that such amounts are required to be included in the assessable value of goods by the

appellant in the light of the decision of the Supreme Court in the case of Commissioner vs. Super Synotech Ltd., 2014 (301) ELT 273 (SC).

It has been argued on behalf of the appellant that the VAT/CST collected from the buyers is deposited in full with the State Government and a part of the same is paid back by way of incentive for investment in capital goods in backward area. Since no part of the VAT collected is retained by the appellant, it is submitted that such amounts cannot be included in the assessable value, as held by the Tribunal in the case of Khanna Polyware Pvt Ltd vs. Commissioner vide Final Order No. 50837/2018 dated 23.02.2018.

4. The dispute is with reference to the incentive amounts received by the appellant from the Madhya Pradesh Government as part of the scheme for setting up of new industrial units in backward areas. In terms of the scheme, the appellant is required to collect VAT/CST from the buyers and deposit the same in full with the state Government. Subsequently, a part of the said amounts deposited is sanctioned as incentive by the Madhya Pradesh Trade and Investment Facilitation Corporation Ltd. Since no part of the VAT/CST collected by the appellant is retained by them, the situation is clearly distinguishable from the case decided by the honourable Supreme Court in Super Synotech (Supra). Similar views have been taken by the Tribunal in the case of Khanna Polyware (Supra). By following the

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earlier decision of the Tribunal, we are of the view that such amount of incentive received under the scheme formulated by the Madhya Pradesh Government cannot be included in the assessable value for payment of Central Excise Duty. Consequently, we set aside demand of Rs. 17,85,516/- raised on this ground..

5. In view of the above discussion, the appeal is disposed off in the above terms.

[Pronounced in open court on 18.04.2018]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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