CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 51533 of 2018

[Arising out of Order-in-Appeal No. 299 (SRM)/CE/JPR/2018 dated 15 March, 2018 passed by the Commissioner(Appeals), Central Excise & Central Goods & Service Tax, Jodhpur]

M/s Sidhi Vinayak Industries **...Appellant**
C-82/A, MIA, Basni 2nd Phase
Jodhpur–342005

Vs.

Commissioner(Appeals), Central Excise
& Central Goods & Service Tax **...Respondent**
G-105, New Industrial Area
Opp. Diesel shed, Basni
Jodhpur

APPEARANCE:

Ms. Priyanka Goel, Amaeus Curie for the Appellant
Mr. K. Poddar, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. 50681/2019

DATE OF HEARING/ DECISION : 07 May, 2019

RACHNA GUPTA

The appellant herein is engaged in manufacture of SS Patta/ Patti and has been working under the special procedure for Compound Levy Scheme for the said product as prescribed by Notification No. 17/2007-CE dated 01 March, 2007 issued under Rule 15 of Central Excise Rules, 2002. The appellant filed a claim of refund of Rs. 1,16,910/- in respect of duty paid for the month of October 2016 to February 2017. The Department on the scrutiny of said refund claim observed that the appellant had deposited compound duty of Rs. 2,80,000/- @ Rs. 40,000/- per cold rolled patta/ patti machine for six machines used for the purpose for the month of October 2016 to February 2017. The Department formed the opinion that there is no provision in the said Notification for refund of duty paid for the non operative period of the machines during the month. Accordingly the refund claim was proposed to be rejected vide show cause notice No. 1307 dated 09 May, 2017. The original Adjudicating Authority vide the Order No. 109/2017-R dated 30 May, 2017 while accepting the aforesaid proposal had rejected the refund claim of the appellant. The Appeal as was preferred against the said Order which was also dismissed vide Order-in-Appeal No. 299/JDR/2018 dated 14 March, 2018. It is this Order which has been challenged by the appellant vide the impugned Appeal.

2. I have heard Ms. Priyanka Goel, learned Advocate for the appellant and Mr. K. Poddar, learned Authorised Representative for the Department.

3. It is submitted on behalf of the appellant that the Order under challenge despite acknowledging the admissibility of benefit of proportionate duty to the appellant as the appellant had opted for compounded levy scheme, has still rejected the claim holding that the said option was not exercised for the first time. The findings are impressed upon to have been an absolute in contradiction to Section 3 of Central Excise Act. Decision of Hon'ble High Court of Rajasthan in the case of **C.C.E., Jaipur–II Vs. Jupiter industries** reported in **2006 (206) E.L.T. 1195 (Raj.)** has been impressed upon alongwith the decision of this Tribunal in the case of **M/s. Paradise Steels Pvt. Ltd. Vs. C.C.E. & C.G.S.T., Jaipur** reported in **2018 (9) TMI 1480 (Del.)**. Appeal is accordingly prayed to be allowed after setting aside the Order of Commissioner(Appeals).

4. While rebutting these arguments, learned Departmental Representative has impressed upon para 4.3 of the Order under challenge. It is submitted that the finding of Adjudicating Authority about appellant to not to be exercising the option of compounded levy scheme for the first time is very much in furtherance of condition number 3, second proviso of the Notification No. 17/2007-CE dated 01 March, 2007. It is submitted that the benefit of pro-rata payment is available only for those assesses who are opting for compounded levy scheme for the first time. Departmental Representative has also impressed upon that Commissioner(Appeals) has clearly distinguished the facts of the present case from that of the **Jupiter Industries**

(supra) case as was decided by the High Court of Rajasthan impressing upon the justification of the Order under challenge. The Appeal is accordingly prayed to be dismissed.

5. After hearing both the parties and perusing the entire record, I observe that there is no dispute about the fact that the appellant had regularly been opting for the compounded levy scheme as provided vide Notification No. 17/2007-CE dated 01 March, 2007. It is also an admitted fact that for the month of October 2016 and February 2016 for which the refund has been applied for by the appellant, all the cold rolling machines of the appellant were not functional, one or the other thereof being dismantled. The only dispute is that according to the Department since the machine was dismantled in the mid of the month pro-rata benefit is available only to the assessee who has opted for the compounding scheme for the first time which admittedly is not the case of appellant. Whereas, according to the appellant, the Notification makes no such distinction. To adjudicate this dispute, condition 3 proviso 2 of the aforesaid Notification is perused. It reads as follows:

> "Provided further that when a manufacturer makes an application for the first time under paragraph 2 for availing of the procedure contained in this notification, the duty liability for the month in which the application is granted shall be calculated pro-rata on the basis of the total number of days in that month and the number of days remaining in the month from the date of such grant.
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> (2) The sum payable under sub-paragraph (1) shall be calculated by application of the appropriate rate to the maximum number of cold rolling machines installed by or on behalf of such manufacturer in one or more premises at any time during three calendar months immediately preceding the calendar month in which the application under paragraph 2 is made."

5.1 Perusal thereof makes it clear that this proviso talks about the discharge of duty liability of the assessee for the month in which he has moved his application opting for the said compounding fee, as required under Rule 2 of the said Notification, and in such a circumstance, this proviso says that the payment of duty shall be made as calculated on pro-rata basis. This observation makes it clear that the second proviso is not applicable in case where the benefit of compounding scheme is to be availed by the assessee in the form of a refund when any of its rolling machine has not been functional for any number of days in a given month.

6. I further observe that duty of excise can only be levied in accordance of Section 3 of the Central Excise Act, 1944. In accordance whereof this duty is leviable only on manufacture of excisable goods and the Department can only collect the duty on the machines manufacturing excisable goods. When this second proviso is read alongwith the said Section 3, the argument of the learned Departmental Representative justifying the findings of the Commissioner(Appeals) in para 4.3 becomes absolutely redundant. The conjoint reading of both statutory provisions makes it clear that duty can be paid only for the period during which there has been the process of manufacture in progress.

7. Otherwise also, the matter is no longer *res integra* as it has already been decided in the case of **Jupiter Industries vs. CCE, Jaipur** (supra) and in the case of **ACME Industries vs. CCE, Jaipur – II – 2011 (269) E.L.T. 523 (Tri. – Del.)**.

8. The relevant extract of the relevant paras of Hon'ble Rajasthan High Court order in case of **CCE, Jaipur – II vs. Jupiter Industries – 2006 (206) E.L.T. 1195 (Raj.)** is reproduced here below :-

> "23. It goes without saying that, if in any particular month, no machine is operated and no production had taken place, there cannot be any levy of excise Duty. The manufacture of goods is condition precedent for charging of excise duty without which no levy can be made. Therefore, the rule cannot be made to go beyond the scope of charging provision. On the undisputed premises that no production had taken place from the cold rolling machine which has been removed on 29th May, 1998. In other words, no production has been taken place in respect of cold rolling machine which ceased to operate before the first July, 1996, no review could have been allowed in respect of estimated production in that machine. This is the simple logic which prevailed within the Tribunal and in our opinion rightly. No contrary view can be taken from the reading of the Rules also. 6 EX/51414 of 2018 We are, therefore, of the opinion that the conclusion reached by the Tribunal was valid.
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> 24. Moreover, when there is no production of any articles in relation to the machine which was not in existence, the question of passing on duty to consumers of existing goods can arise so as to require the invocation of principle of unjust

> enrichment to deny refund. Therefore, there is no justification for taking the view that since the tax has been paid under the special provision it is not subject to refund. Refund is a consequence of recovery of duty which is not leviable under the provisions of taxing statute or of excess payment of Duty. In given circumstances, such excess collection of Duty may be refused to be refunded, if it results in unjust enrichment because passing of duty to buyers of goods. It depends on furnishing satisfactory proof by the manufacturer that such duty has been passed on to buyers. However, in case like the present where goods have not at all been manufactured and yet on estimated basis of imaginary production Duty has been demanded, the question of passing of such duty collected from the assessee to buyers of the nonexistence production cannot arise.
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> 25. We are therefore, also of the opinion that the direction of the Tribunal to refund excess amount received in respect of machine which had ceased to function during the month of July to August also does not call for any interference. Consequently, the question referred to us is answered affirmative that is to say in favour of the assessee and against the revenue There shall be no orders as to costs".

9. Though the emphasis has also been laid on para 4.4 sub-para 2 of the Order under challenge where this decision in **Jupiter Industries vs. CCE, Jaipur** (supra) case has been distinguished by Commissioner(Appeals) but the perusal of said para shows that irrespective of difference of fact about the payment of duty for three successive months as was made by the assessee in **Jupiter Industries vs. CCE, Jaipur** (supra) and the payment of duty with respect to all number of rolling machines as made by the appellant under the compounding scheme in the present case, the crux of the matter in both the cases remains is as to whether the duty has to be paid for the period during which there has been no manufacture by any of the machines of the appellant. Hence, the distinction of two decisions by the Commissioner (Appeals) is opined absolutely unreasonable. In view of entire above discussion, the Order under challenge is hereby set aside and the Appeal stands allowed.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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