CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

S.No.	Appeal No.	Appellant	Respondent	Impugned Order No. & date
(1)	E/324/2008	CCCE&ST, Hyderabad-IV	Lokesh Machines Ltd.	OIO No: 13/2007-CEX, dt. 30.11.2007 passed by CC&CE, Hyderabad-IV
(2)	E/399/2008	Lokesh Machines Ltd.	CCCE&ST, Hyderabad-IV	OIO No: 13/2007-CEX, dt. 30.11.2007 passed by CC&CE, Hyderabad-IV
(3)	E/253/2008	Mahindra & Mahindra Ltd.	CCCE&ST, Hyderabad-IV	OIO No: 13/2007-CEX, dt. 30.11.2007 passed by CC&CE, Hyderabad-IV

Appearance

Shri Y. Srinivasa Murthy, Superintendent/AR for the Appellant (1)
Shri Y. Srinivasa Reddy, Advocate for Appellant (2).
Shri G. Prahlad, Advocate for the Appellant (3)

Shri Y. Srinivasa Reddy, Advocate for the Respondent (1)
Shri S.D. Sharma, Asst. Commissioner/AR for the Respondent. (2)
Shri Guna Ranjan, Superintendent/AR for the Respondent (3)

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. MADHU MOHAN DAMODHAR, MEMBER(TECHNICAL)

Date of Hearing: 30.01.2018
Date of Decision: 30.01.2018

FINAL ORDER No. A/30368-30370/2018

[Order per: M.V. Ravindran]

1. These three appeals are directed against Order-in-Original No: 13/2007-CEX, dt. 30.11.2007 and corrigendum issued to the said Order-in-

Original. Appeal No. E/253/2008 and E/399/2008 are filed by the assessee M/s Mahindra & Mahindra Limited and M/s Lokesh Machines Limited respectively while appeal No. E/324/2008 is filed by Revenue. Since all the three appeals are challenging the findings in the same Order-in-Original, they are being disposed of by a common order.

2. The relevant facts that arise for consideration, after filtering out unnecessary details, are that the appellant M/s Lokesh Machines Limited (hereinafter referred to as LML) are manufacturers of CNC machines and Cyliner Blocks used for manufacture of vehicle engines. The said LML manufactures CNC machines on their own and cylinder blocks for Mahindra & Mahindra Limited (hereinafter referred to as M&M) at their Medchal and Balanagar units, out of machines supplied by M&M for manufacture of blocks. Appellant LML also finishes the rough castings which are manufactured by M/s Kirloskar Ferrous Industries Ltd (KFIL) for M&M, on receipt of such rough castings from KFIL directly. The said KFIL is manufacturing rough castings on the materials/machineries supplied by M&M. Detailed investigation was carried out wherein it was noticed that LML was clearing the engine blocks and machined blocks to M&M on payment of duty, but the value on which the duty was discharged was not including various costs like amortisation charges, sales tax, freight charges for transportation of castings, cost of free items supplied by M&M and value of supplementary invoices of raw materials. Show cause notice was issued for demand of differential duty for under valuation, which was contested by the appellant. The adjudicating authority, after following the principles of

law, confirmed the demands of Rs. 64,19,124/- in the Order-in-Original and dropped the demand of approximately Rs. 61.64 lakhs by corrigendum dated 07.03.2008 enhanced the duty liability to Rs. 69.33 lakhs and confirmed demand of Rs. 12.43 lakhs on the machines alleged to have been under valued, demanded and confirmed the interest on such duty liability and imposed equivalent penalty. The appellant herein discharged the entire differential duty, interest and 25% of the penalty of the demands raised on cylinder blocks and CNC machines. The adjudicating authority also imposed a penalty of Rs. 50.00 lakhs under rule 25 of Central Excise Rules on M&M.

3. Ld. Counsel Shri Y. Srinivasa Reddy appeared for LML, after giving a broad outline of the case, submits the date wise chart which is reproduced herein below:

S.No.	Details	Date/period	Amount (Rs.)	Page No.
1.	Show Cause Notice	23.8.2006		77
2.	Period involved	2003 to 2004-05		
3.	Date of original order where under duty was demanded on Cylinder Blocks	30.11.2007	64,19,124	75
4.	Date of Corrigendum Order	7.3.2008	69,33,442	12
5.	Duty paid before issue of Notice on Cylinder Blocks		64,88,962	12
6.	Interest paid o duty on Cylinder Blocks		7,63,146	19
7.	Duty demanded on CNC Machines		12,43,482	-
8.	Duty paid on CNC machines		12,20,000	-
9.	Interest paid on CNC machines		2,80,000	41
10.	Payment of differential duty, interest, and 25% of penalty on Cylinder Blocks	24.01.2008		163 & 165
11.	Payment of differential duty, interest and penalty on CNC machines	24.01.2008		163

After taking us through the above chart, he submits that duty cannot be enhanced by way of corrigendum to the adjudication order as has been held by the Tribunal in the case of Asmi Industries [1996(85)ELT 313 (Tri.-Del.)], Shree Mahaganesh Tespro Ltd [2001(34)ELT 779 (Tri.-Mumbai)] and the judgment of Hon'ble High Court of Rajasthan in the case of Banswara Syntex Ltd [2007(216)ELT 12 (Raj.)]. It is his submission that the adjudicating authority has accepted that the amount attributable to sales tax is deductable from the assessable value but not the CST while determining the value of the cylinder blocks and CMC machines; duty demands on CNC machines, the value which has been taken should be considered as cum duty and excise duty needs to be re-worked out. It is also his submission that when the duty is paid alongwith interest before issuance of show cause notice, penalty cannot be imposed under Section 11 AC of Central Excise Act, 1944 and if the amount of CST is not included, the duty amount paid would be more than the amount of duty liable to be paid and on this ground itself, appeal needs to be allowed. It is his further submission that in case of non inclusion of amortisation charges etc., extended period is not invokable, and hence penalty should not have been imposed. Finally, it is his submission that in view of the foregoing, corrigendum issued to the Order-in-Original may please be set aside and penalty imposed under section 11 AC of Central Excise Act, 1944 be set aside.

4. Ld. Counsel Shri G. Prahlad appearing on behalf of M&M Ltd, draws our attention to the findings recorded by the adjudicating authority and the

show cause notice issued by Revenue. It is his submission that show cause notice which was issued, is directing the appellant M&M to show cause as to why penalty should not be imposed under rule 26 of Central Excise Rules, 2002 while the adjudicating authority has imposed penalty under rule 25 of Central Excise Rules, 1944. It is also his submission that penalty under rule 25 of Central Excise Rules, 1944 cannot be imposed in these proceedings on the appellant and penalty imposed under the provisions which were not invoked in the show cause notice, is unsustainable in the law settled by following cases:

1. Essar Oil Ltd. Vs. CC Preventive [2015(329)ELT 401 (Tri.-Ahmd.)]
2. Guarniflon India Pvt.Ltd vs.CCE Vapi [2013(293) ELT 703 (Tri.-Ahmd.]
3. Lanco Industries Ltd Vs. CCE, Tirupati [2011(265)ELT 118 (Tri.-Bang.]

It is his further submission that the penalties imposed under rule 25 of Central Excise Rules, 1944 are not applicable in this appellant's case as the said rule is invokable in respect of producer, manufacturer, registered person of a Warehouse or registered dealer, whilst the appellant is receiver of goods from LML and the under valuation if any, is done by M/s LML Ltd. is not attributable to them and under valuation was result of improper calculation of dues in respect of the clearances by LML and M&M had, time and again, issued circulars to the said LML regarding valuation of components, thus the onus of requirements of the statute rests with LML and if not done so, the blame cannot be shifted to M&M for imposing such a huge penalty.

5) Ld. DR would argue that the confirmation of demands raised on LML is not disputed seriously by the said appellant as it is an accepted fact that there was under valuation by not including the amortization charges, sales tax, transportation charges etc. while evaluating the finished goods cleared on job work basis and there is an acceptance of the fact that they had collected an amount of Rs. 2.00 crores in cash for CNC machines cleared from their factory premises. It is his submission that the adjudicating authority has correctly come to the conclusion while confirming the demand with interest and imposing penalties. However, it is his submission that the adjudicating authority has dropped the demand of approximately Rs. 61.64 lakhs which is totally incorrect inasmuch that the adjudicating authority has replaced the amortising cost of the machine from Rs. 38/- per piece to Rs. 23.80 per piece by relying upon various submissions made by LML, taking amortising cost as nil in respect of clearances of goods from M&M as mentioned in Annexure D-1, D-2 and D-3 to the show cause notice; by excluding differential value wherever job work charges are mentioned as nil; by excluding transportation charges and sales tax w.e.f. 15.12.2014. The adjudicating authority included only part of the cost of supplies made by M&M free of cost and also holding that supplementary invoices raised on M&M, hence not received by LML, duty cannot be demanded. It is his further submission that all evidences indicate that LML have wilfully evaded the central excise duty by under valuing their goods i.e. CNC machines and also the cylinder blocks cleared on job work to M&M. It is his submission

that the impugned order to the extent it reduces the duty liability on the said LML be set aside. As regards the penalty imposed on M&M, it is his submission that M&M being principal to the job work from LML, was required to exercise control over them and should have ensured that LML followed the law properly. It is his further submission that by not mentioning the proper provisions for confirming the penalty on M&M, should not be a hurdle as these provisions have been invoked correctly under rule 26 in show cause notice.

6) We have considered the submissions made at length by both sides and perused the records. At the outset, we find that the entire issue against appellant M/s LML is regarding the under-valuation of their own machineries and cylinder blocks cleared by them to M/s M&M after undertaking job work. The penalty imposed on M&M is also in respect of the said job worked cylinder blocks received by them on which duty liability has been paid albeit on under valuing the goods.

7) We take up the appeal filed by LML and find that the adjudicating authority in para No. 3 set out clearly the issues which has led to incorrect determination of valuation of the goods cleared to M/s M&M. They are as under:

a. Non-inclusion of the pattern amortization charges in respect of Balanagar Unit.

b. Non addition of Sales Tax to the Basic Cost for Medchal Unit.

c. Non inclusion of freight charges for Medchal Unit.

The following issues are related to the under valuation of the final goods:

d. Non-addition of amortization cost of machinery for Medchal Unit.

e. Non-addition of cost of free items supplied by M&M for Medchal Unit.

f. Non-inclusion of the value of supplementary invoices for Medchal and Balanagar Units.

8) After considering the entire case records before us and the factual matrix as also the submissions made by the representatives of LML, the adjudicating authority has in para 5.1 to 5.6 has clearly recorded the findings which are very correct while upholding the demands raised on the appellants LML as indicated in para No. (3). We find that the adjudicating authority has given detailed reasonings for arriving at various demands confirmed by him which, in our view, are correct and legal and does not require any interference. As regards the deductions claimed by the said LML Ltd from the demands raised in the show cause notice, the adjudicating authority has also given detailed reasonings as to why he is convinced that the demands needs to be re-determined after coming deductions claimed by LML and also ascertaining himself about the correctness of the claim. We find no reason to interfere in such a reasoned order of adjudicating authority.

9) As regards the under valuation of CNC machines, we find that the adjudicating authority has clearly recorded that LML received some amount in cash for the value suppressed by them on CNC machines and has correctly included the value thereof for payment of the amounts on CNC machines. In our view, the adjudicating authority was correct in doing so and we do not find any reason to interfere in such a reasoned order.

10) The appeal of LML on limitation also does not carry the case any further, as we find that it is an accepted fact that there was under valuation of CNC machines and cylinder blocks by not including various costs, which stands confirmed against LML, hence the extended period has been correctly invoked.

11) As regards the claim of Ld. Counsel for LML i.e. corrigendum which was issued on 7.3.2008 to Order-in-Original dated 30.11.2007 is incorrect and needs to be set aside as it enhances the duty liability on the appellant without issuing of show cause notice, we find that this claim of Ld. Counsel is totally baseless, as on perusal of the corrigendum dt. 7.3.2008, we find in para No.2 that the adjudicating authority has specifically stated that the corrigendum does not change or modify any part of the discussions and findings or merits of the issues decided and is issued only for correction of arithmetical and accounting errors in computation and calculation of total duty payable on account of various reasons. On deeper perusal of the said corrigendum, we find it so. Hence, the corrigendum being in respect of correction of arithmetical calculation and rectify the accounting errors, we find it is correct and the case of LML does not carry any further by challenging the said corrigendum issued.

12. The appellant LML had, as stated by Ld. Counsel, settled the entire issue by discharging the entire duty liability confirmed by the lower authorities and annexing the challans thereof in the appeal memorandum

which we find as correct and also notice that appellant had paid the penalty of 25% of the demand of duty confirmed by the adjudicating authority. Since the appellant has paid the entire amount of differential duty, interest and 25% of the amount as penalty, we consider the same asacceptable as per statute.

13. As regards the appeal filed by M&M, we find merits in their submissions. On perusal of the Order-in-Original, we find that the adjudicating authority in para No. 9 has stated that this appellant had clear knowledge of under valuation of goods received by them but deliberately chose to ignore the same with intention to evade payment of duty. We find that adjudicating authority has come to a conclusion that M&M had not guided LML on the valuation of the goods, which were received by them from LML and hence they acquiesced with the under valuation. We find that these observations of the adjudicating authority are not supported by any evidence. We find that the statements recorded by investigating authorities of individuals do not indicate that appellant M&M had knowledge of under valuation by LML, on the contrary the various circulars and notes issued by them to LML as regards a correct valuation pattern to be adopted for clearance of cylinder blocks has not been referred to or addressed to by the adjudicating authority while recording the findings that LML needs to be penalised under rule 25 of Central Excise Rules, 2002, which in our considered view, is uncalled for.

14. Looking at the entire issue of imposition of penalty on LML from another angle, we find that the penal provisions are invoked under rule 26 in the show cause notice could not have been implemented by the adjudicating authority as it is on records that M&M are and have been directing LML to follow the correct pattern of valuation and hence they could be under the bonafide impression that M/s LML is following the correct provisions of the law while discharging the duty liability and they could not be held responsible for the same, is the view which any one would carry. On this count, we find that the bonafide impression M&M carried that the goods cleared by LML was on correct discharge of duty liability, cannot be faulted with. Further, we also note that the duty discharged on cylinder blocks cleared by LML was consumed by M&M in the manufacture of vehicles on which duty liability is discharged which would mean that M/s M&M would have availed the cenvat credit of any duty on such cylinder blocks. The discharge of incorrect duty by LML is due to the wrong appreciation of provisions by LML and it cannot be attributed to M&M; we hold that penalty cannot be imposed without bringing on record any evidence indicating that M&M had any role attributable for under valuation by LML. In our view, when the penalty is not imposable under rule 26 itself, the question of imposing penalty on M&M under rule 25 does not arise, as in this case M&M is recipient of the cylinder blocks cleared by the said LML on discharge of duty liability; M&M is not a manufacturer, purchaser or warehouse or a registered dealer in this case for imposing penalty under rule 25 of Central Excise Rules, 2002. We find that there is merit in the appeal filed by the said M&M.

15. As recorded earlier, herein above, that the adjudicating authority has considered the entire issue on payment of duty from LML quite pragmatically, we hold that the appeal filed by Revenue is devoid of merits inasmuch in appreciation of the evidences before us, the adjudicating authority has in the Order-in-Original clearly recorded as to why he is allowing the deductions claimed by LML during the course of personal hearing. We notice and recorded earlier that adjudicating authority was correct in coming to such a conclusion and the same findings would apply, it has to be held that Revenue's appeal is devoid of merits.

16. In sum, appeals filed by LML and Revenue against impugned order and the corrigendum are rejected and the appeal of M&M is allowed.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(MADHU MOHAN DAMODHAR) (M.V. RAVINDRAN)
MEMBER (TECHNICAL) MEMBER (JUDICIAL)

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