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

Appeal No. E/2257/2010

(Arising out of Order-in-Appeal No.08/2010 (H-II)CE, dated 26.07.2010 passed by CCCE & ST (Appeals-II), Hyderabad)

Alam Printers ….. Appellant(s)

Vs.

CCCE & ST, Hyderabad-II ….. Respondent(s)

Appearance
Shri N. Anand, Representative for the Appellant.
Shri Bhanu Kiran, Asst. Commissioner/AR for the Respondent.

Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 07.08.2018
Date of Decision: 07.08.2018

FINAL ORDER No. A/30890/2018

[Order per: P.V. Subba Rao.]

1. This appeal is filed against the Order-in-Appeal No.08/2010 (H-II) CE dated 26.07.2010.

2. Heard both sides and perused the records.

3. The appellant herein is a partnership firm and manufactured "Printed Slides" on job work basis for M/s ITC Ltd and M/s VST Ltd. They had cleared goods on payment of duty on provisional basis for the years 2005-06 and 2006-07 because the full details required for determining the assessable value were not available at the time of clearance of goods. Thereafter, as per CAS-4 report submitted by them, their assessments were finalized and it

was found during the year 2005-06, they paid an amount of Rs.9,23,335/- in excess and for the period 2006-07, they paid an amount of Rs.11,91,063/- in excess. The appellant herein had not claimed refund of this amount because the credit of duty has already been availed by their customers i.e., M/s ITC Ltd and M/s VST Ltd. Thereafter, the department noticed that the appellant had not included the cost of corrugated fibre cartons (CFCs) and gum tapes which were used for packing their material, while submitting the data for finalization of assessments. A show cause notice was issued dated 14.12.2009 asking the appellant why an amount of Rs.1,44,977/- towards duty and Rs.2,900/- towards education cess should not be recovered from them under proviso to Sec.11A of the Central Excise Act, 1944 since they have not included the value of the CFCs and gum tapes in the data submitted to the department at the time of assessment. They were also asked as to why a penalty should not imposed upon them under Sec.11AC and why the aforesaid amounts of duty and cess should not be appropriated against the excess amounts already paid by them as detailed in the show cause notice. After following due process of law, the original authority confirmed the demand and ordered same to be appropriated against the excess amount already paid by them and also imposed a penalty of Rs.1,47,879/- under Sec.11AC of Central Excise Act.

4. Aggrieved, the appellant preferred an appeal before the first appellate authority, who vide the impugned order dismissed the appeal. The appellant appealed before this Bench against the impugned order on the following grounds:

(a) That the order is not a speaking order.

(b) They have neither acted deliberately in defiance of law nor are dishonest in discharge of their obligations. There is no evidence to prove that they have a culpable mental state and they have been wrongly subjected to penalty which is bad in law.

(c) Revenue has not challenged the orders for finalization of provisional assessments which are appealable orders and therefore the orders have attained finality and therefore the department cannot commence fresh proceedings for recovery of duty.

(d) The payment is hit by limitation of time and the proviso to Sec.11A cannot be invoked in their case as they have no intention to evade duty.

(e) The department is aware of the alleged short payment since 2008, since they had written to the appellant on 26.05.2008 asking them to pay the differential duty.

(f) The value of CFCs and gum tapes should not be included in the assessable value because they are recycled / reused and hence, cannot be called inputs of the final products.

(g) Even if CFCs and gum tapes are includible in the value of the final products, there cannot be an intention to evade payment of duty as their customers would have got credit of the same.

5. The appellant prayed that the impugned order be set aside and it be held that that the appellant is not liable to pay the differential duty imposed in the Order-in-Original or the interest and penalty.

6. Learned counsel reiterated the above arguments and prayed that the impugned order be set aside. On specific query from the Bench, learned

counsel explained that for subsequent years, they have included the cost of CFCs and gum tapes in the assessable value and thus the department learnt that these elements were not included in the data by then submitted for the previous years at the time of finalisation of assessments.

7. Learned Departmental Representative argued that the appellant had not disclosed full data as required by them at the time of finalization of the provisional assessments. They had submitted CAS-4 certificate from the Chartered Accountant which does not give the details of the inputs included under the head “raw materials”. The value of the raw material which they have included in the certificate did not include CFCs and gum tapes. It is not in dispute that appellant themselves have, for the subsequent period, included the value of these in their assessable value. It is only on inquiry by the departmental officers it was revealed that this value was not included in the assessable value during the relevant period. Therefore, there was indeed, suppression of facts which led to short payment of duty by the appellant and hence, the proviso to Sec.11A applies in full force in this case. Consequently, the provisions related to interest and penalty also apply in this case. Learned Counsel for the appellant, countering the arguments made by the learned departmental representative submits that even if this amount is taken into account, their net tax liability will not be higher. In fact, they still would have paid duty in excess of what they were due to pay.

8. We have considered the arguments on both sides and examined the records. It is not in dispute that the appellant had, during the relevant period, not included the value of CFCs and gum tapes which went into the manufacture of the final products in the data provided to the department at the time of finalization of provisional assessment. As a result, the value of

these two items was not included in the assessable value. For subsequent periods they have been including value of these two items as well. Had the appellant provided this data at the time of finalization of provisional assessment, the differential duty paid in excess would have been lower than what was indicated above. Therefore, there is no denial that there was short payment on this account while there was excess payment overall during the relevant period. On the question of limitation, we agree with the departmental representative that the appellant has not disclosed full facts and had suppressed the value of these two items in the data provided to the department. However, the appellant has already paid duty in excess of the proposed demand. Therefore, the demand needs to be set off against the excess duty paid, as done by the lower authority. As far as penalty under Sec.11AC is concerned, the penalty which can be imposed is equal to the amount of duty not paid or short paid or erroneously refunded. In this case, the net effect of the finalization of the assessment after taking into consideration the value of CFCs and gum tapes would be that the appellant had still paid duty in excess. Therefore, there is no scope for imposing penalty under Sec.11AC because the net differential duty would be negative. Consequently, the penalty imposed vide Order-in-Original by the original authority and upheld by the first appellate authority is set aside. The demand is confirmed.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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