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

Appeal No. E/11/2009

(Arising out of Order-in-Appeal No. 45/2008 (H-IV) CE dated 30.09.2008 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals-III), Hyderabad)

Commissioner of Customs & Central Excise, Hyderabad - IV …..**Appellant(s)**

Vs.

M/s Bharat Biotech International Ltd., …..**Respondent(s)**

Appearance
Shri Pawan Kumar, Superintendent (AR) for the Revenue.
Shri M.V.S. Prasad, Advocate for the Assessee.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 03/08/2018
Date of Decision: 12/09/2018

FINAL ORDER No. A/31156/2018

[Order per: M.V. Ravindran]

This appeal is filed by the Revenue against Order-in-Appeal No. 45/2008 (H-IV) CE dated 30.09.2008.

2. Heard both sides and perused the records.

3. On perusal of records, it transpires that the issue involved in this case is regarding denial of SSI exemption to the

appellant on the ground that for the year 2003-2004 he has exceeded the SSI limit by not declaring the value of exempted goods manufactured and cleared so also for the subsequent period. For the period 2003-2004 to 2006-2007 (up to September, 2006), it is the case of the Revenue in the show cause notice that the appellant had crossed the threshold limit of Rs. 300 Cr during the year 2002-2003 and has wrongly availed SSI benefit for the subsequent years and subsequent years also did not declare the value of clearances of vaccines which are exempted from payment of duty. Adjudicating Authority after following due process of law, confirmed the demands raised. Aggrieved by such an order, an appeal was preferred before the First Appellate Authority. The First Appellate Authority after following due process of law, set aside the order on the ground that the assessee/appellant before him were regularly filing monthly returns and indicating there in the clearances of the vaccines though they had not indicated the value of such clearances. Aggrieved by such an order, Revenue has preferred this appeal before the Tribunal.

4. Learned Departmental Representative draws our attention to the findings recorded by the First Appellate Authority vis-a-vis the Adjudicating Authority. It is his submission that the First Appellate Authority has not considered the issue on factual matrix inasmuch, there is no dispute that the appellant had not included the value of exempted goods cleared during the year 2002-2003 to arrive

the aggrieved value of the clearances for availing benefit of SSI exemption notification in the year 2004-2005 and subsequent years. It is the submission that non-declaration of the value had an effect of Revenue not knowing that the appellant had clearances of exempted goods which would have exceeded the SSI exemption threshold limit.

5. Learned Counsel appearing on behalf of the Respondent submits that the issue involved is whether respondent had suppressed any facts with intention to evade payment of duty and availed ineligible SSI exemption by not showing value of non-dutiable goods in the ER-1's. He submits that the First Appellate Authority in paragraph No. 5 has come to a correct conclusion and nothing prevented the lower authorities to seek information from the respondent. It is his submission that the respondent was under bonafide belief that non-dutiable vaccines are not excisable goods mentioned in clause (vii) of para 2 of SSI exemption notification and acted accordingly and hence it cannot be held that they had intention to evade duty.

6. On careful consideration of submissions made by both sides, we find that the findings of the First Appellate Authority in respect of the extended period cannot be invoked in the case in hand is in paragraph No. 5 which is reproduced:

> "***5***. *As seen from the case records and the submissions made by the appellants, it is evident that they were submitting the monthly ER1 returns regularly, wherein they have indicated the quantity of exempted goods*

> *cleared, though the value was not declared. It is also seen that the appellants were seeking the approval of the department from time to time for availing the SSI exemption and informing the jurisdictional Assistant Commissioner about crossing the threshold value. It is further seen that they were regularly seeking approval from the department for Excise duty exemption whenever a new vaccine was launched and the jurisdictional Range Officers have been religiously making an endorsement to the effect that the vaccines were exempt from excise duty and the appellants could go ahead with the manufacture of the said products. Thus, the act of manufacture of the exempted goods was very much within the department's knowledge right through. The lower authority has invoked the proviso to Section 11A of the Act by arguing that the appellants had not furnished the value of vaccines in the ER1's willfully with an intention to evade payment of duty. This argument is not tenable for the simple reason that nothing prevented the department from verifying the value of clearances once the ER1s indicated the manufacture of the exempted goods and the fact of manufacture of the exempted goods were intimated to the department from time to time. Once it was in the knowledge of the department that the appellants were operating under the SSI scheme and manufacturing exempted goods also, the onus shifts on to the department to cross check the facts. In such a situation, it is totally unfair to cast aspersions on the appellants. The reliance placed by the lower authority on the judgment in the case of V. Ramakrishna Rao Vs. CCE, Hyderabad is thoroughly misplaced as the facts of this case are clearly distinguishable. For invoking the proviso to Section 11A of the Act, ibid, mens rea is an essential ingredient which is clearly absent in the present case. Hence, I hold that the demand is clearly hit by limitation of time."*

7. In our view, the above said factual findings are not countered effectively in the appeal memorandum.

8. Reliance placed by the Learned Departmental Representative on the judgment of the Tribunal in the case of *Tech Mahindra Ltd.,* [2015 (38) STR 1200] may not carry the case any further, in that case, fact of non-disclosure of transaction in ST-3 returns was recorded inspite of specific instructions. While, in the case in hand the respondent in monthly did declare the quantities of exempted goods clearances, though may not have declared the value of clearances. Nothing prevented Revenue from seeking details of value from respondent. Learned Departmental Representative relied

upon the decision of the Hon'ble High Court of Allahabad in the case of *N.P. Agro (I) Industries Ltd.,* [2015 (315) ELT 481] wherein, demand by invoking extending period was upheld, recording a finding that asseessee wanted to take advantage of their own fault by not maintaining record for captive consumption properly. The facts of the case are totally different, in the case in hand. Reliance was also placed by the Learned DR on the Constitutional Bench of judgment in the case of *M/s Dilip Kumar and Company* to submit that appellant herein is not eligible for SSI exemption and the notification should be interpreted strictly. We have no hesitation, to state that the Apex Court has settled the law on that point the case in hand, but in the case entire demand has set aside by the Adjudicating Authority on the ground of limitation and not on eligibility to avail SSI exemption.

9. In view of the foregoing, we hold that the impugned order is correct and legal and does not suffer from any infirmity. The impugned order is upheld and appeal stands rejected.

(Order pronounced on 12/09/2018 in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….