CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench

Court - I

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Appearance:

Shri P. Rosi Reddy, Advocate for the Appellants

Shri B. Guna Ranjan, Superintendent/AR for the Respondents.

Coram:

HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)

HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 21.02.2019
Date of Decision: 28.02.2019

FINAL ORDER No. A/30273-30282/2019

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

1. All these appeals are involve the same issue and hence are being disposed of together. The main appeal in this case is by the appellant M/s Mohan Steels Corporation (MSC) in appeal E/30306/2017 and other appeals are against co-noticees with respect to confiscation of the goods seized from their premises and the imposition of penalties.

2. Heard both sides and perused the records.

3. The facts of the case in brief are that the main appellant MSC are registered with Central Excise department as a trader for issue of duty paid documents in respect of the steel sheets which they purchase from M/s JSW Steel Ltd and sell to others. They also have taken registration from the Central Excise department for rendering 'business auxiliary services' and 'storage and warehousing services'. The officers of the DGCEI gathered intelligence that the appellant is, under the guise of trading activity, manufacturing colour coated profile sheets (in short 'profiles') and cleared the same without accounting for them and without discharging the Central Excise duty. On gathering such intelligence, the officers of DGCEI conducted searches at the factory premises and also premises of their dealers both local and outstation. They have also recorded statements of various officers of the appellant and came to a conclusion that the appellant has indeed manufactured profiles out of steel sheets which they purchased from M/s JSW Steel Ltd and have not discharged excise duty on them. Accordingly, a show cause notice dated 30.06.2015 has been issued to the appellant seeking to recover appropriate amount of Central Excise duty invoking extended period of limitation on the profiles manufactured and cleared by them along with interest. It was also proposed to impose penalties under Sec.11AC of Central Excise Act.

4. Learned counsel for the appellant submits that they are engaged in trading of JSW steel sheets. These sheets come in large coils which they need to uncoil, cut into sizes required by the customers and sell them. It is not in dispute that such cutting of sheets into smaller sheets does not amount to manufacture. In some cases, they also take these sheets and put them through a machine to corrugate them (create profiles) before selling them. They do not dispute that they are undertaking this activity. He,

however, submits that this activity was well within the knowledge of the department and they have been paying service tax on the process of corrugation under the head of 'business auxiliary service'. He takes the bench through some of the invoices and shows that whenever they sold corrugated sheets to their customers, they have issued tax invoices for the sheet as shown in Pg.191 of the paper book in appeal E/30306/2017. Correspondingly, they have also issued a separate invoice for the corrugation work undertaken by them for the same goods as shown in Pg.210 of the same paper book. He would argue that mere uncoiling sheets from the rolls, cutting them into sizes and corrugating them into corrugated sheets does not amount to manufacture. The sheet continues to be sheet whether or not the profiles are made in the sheet. The profiles are made so as to make it suitable for use as roof. The entire activity of the appellant, both on the trading front and on the profiling is known to the department. They have always held the belief that corrugation does not amount to manufacture but it was a service which they were rendering to their clients as per their requirement. They were collecting service charges for corrugation and have been paying service tax on such charges. The payment of service tax on these services under the head 'business auxiliary services' has been duly reflected in all their ST-3 returns.

5. Learned counsel would, therefore, submit that the department cannot allege that they have suppressed or wilfully misstated or violated any Act or Rules with an intention to evade payment of duty. Therefore, the entire demand covering the period January, 2013 to October, 2014 issued vide show cause notice dated 30.06.2016 is completely time barred. He, therefore, submits that:

(a) The activities which are undertaken cannot be held as amounting to manufacture.

(b) Even if it is held that the activities amount to manufacture, these activities are completely within the knowledge of the department and have been declared in their returns and appropriate service tax has been paid on the same. Therefore, the entire demand is time barred and the show cause notice is not sustainable.

(c) The demand is also not computed correctly because if it is held that they are liable to pay excise duty on the final products, they are entitled to the credit of the duty paid on the steel sheets which are their inputs. Once, the CENVAT credit is allowed, the bulk of the demand would extinguish anyway as can be seen from the invoices. Bulk of the price which they recover from their customers is towards steel sheets and only a small amount is collected towards the corrugation.

(d) In view of the above, it cannot be alleged that they had an intention to evade payment of duty because on the raw material cost they would have got CENVAT credit anyway and on the value addition by way of corrugation, they have been paying service tax at the rate of 12%. Therefore, by no stretch of imagination can it be said that they have gained anything by evading payment of duty.

(e) As the demand itself is not sustainable, neither will the demand of interest nor imposition of penalties sustain.

(f) As the demand on the main appellant is not sustainable, the proposals for confiscation of goods and imposition of penalties on the co-noticees also do not sustain.

6. Learned departmental representative reiterates the arguments in the impugned orders and asserts that it is now well settled that in the case of Proflex Systems [2017 (353) ELT 142 (Gujarat)] that the sheets in coils and those cut and corrugated to make them suitable for use of making roofs are distinct commodities and they cannot be said to be the same. This decision of the Hon'ble High Court of Gujarat has been upheld by the Hon'ble Supreme Court in the case of Proflex Systems v Commissioner [2017 (355) ELT A83]. As a new distinct commodity as known to the market has come into existence, the corrugated roofs so manufactured by the appellant from the sheets would attract Central Excise duty. Therefore, the demands are sustainable on merits. He also submits that the appellant neither took Central Excise registration for manufacture of the products nor has he paid the duty thereon. While he was selling the profiles to be used as roof, he was invoicing them as sheets and was raising separate invoices for service charges. This shows that the appellant had the malafide intention of evading payment of Central Excise duty and accordingly, he has been misdeclaring the description of the goods in the invoices and evading excise duty. On the question of payment of service tax on the corrugation, the learned department representative would assert that the appellant never disclosed the nature of the activities to the department and has only filed ST-3 returns indicating that they have paid some amounts as service tax under 'business auxiliary service'. There is nothing on record to show that they appellant has described nature of the activity or sought any clarification from the department whether this activity amounts to manufacture. It was incumbent

upon the appellant to have disclosed the true nature of the activities and pay excise duty which they have not done. Therefore, the demand for excise duty and interest as well as the confiscation an penalties are liable to be upheld.

7. We have considered the arguments on both sides and perused the records. The short issues to be decided are as follows:

(1) Whether the appellant has undertaken an activity which amounts to manufacture in uncoiling the sheets, cutting them to sizes and corrugating them into form to be used as roofs.

(2) Whether the appellant is liable to pay excise duty on such activity.

(3) Whether a demand can be raised invoking extended period of limitation.

(4) Whether confiscation of the goods from the appellants is sustainable and

(5) Whether penalties can be imposed upon the appellants.

8. On the first issue, we find that the appellant has purchased steel sheets and coils, cut them into pieces and corrugated them by putting them through a machine and sold them. Such corrugated sheets/ profiles are used as roofs. The question as to whether this process of corrugation brings into market a new distinct commodity or it is only a minor processing of the goods itself and the commodity continues to be the same has been settled in the case of Proflex Systems (supra) held by the Hon'ble High Court of Gujarat and affirmed by the Hon'ble Apex Court. The decision in that case is that corrugated sheets meant to be used as roofs are distinct commodities from the sheets which are purchased in the form of coils. As the appellant is

bringing into existence a new commodity as known in the market, we have no hesitation in holding that the appellant has indeed manufactured the profiles from the sheets. We do not agree with the learned counsel for the appellant that the processing does not amount to manufacture.

9. On the issue of limitation of time, we find that the appellant was registered with the Central Excise department both as a trader and also as a service provider. He has been paying service tax as a service provider on the corrugation part of his work. The service tax payable on the corrugation is 12% of the service charges which he collected for such corrugation. He has been reflecting this activity in the ST-3 returns under these circumstances we find it inconceivable that even with minimum scrutiny of the service tax returns, the range could not be aware of the nature of the activity undertaken by him on which he is paying service tax. The contention of the learned departmental representative that he has not declared the nature of goods correctly in the invoices does not carry their case any further because the invoices were anyway not required to be submitted with the ST-3 returns. However, when a return is filed with the range officer or when registration is taken from the range officer, it is not inconceivable that the range officer would know the nature of the activity being undertaken by the assessee. We also find force in the argument of the learned counsel for the appellant that they would not have gained much by evading any excise duty as the overwhelming part of the cost is of sheets on which they are entitled to CENVAT credit paid by the suppliers anyway. They are also paying service tax on corrugation element on it. So what is escaping tax is the small profit margin between the purchase price of the sheets and the sale price of the sheets. If the appellant is required to pay excise duty they

will be entitled the CENVAT credit. In this factual matrix, we do not find that the revenue has made out a case to invoke extended period of limitation.

10. We find the entire demand in the show cause notice is beyond the normal period of limitation and therefore, the demand and interest do not sustain. Consequently, the confiscations and penalties also do not sustain. In view of the above, we find that appeals are liable to be allowed and the impugned orders are set aside and we do so.

11. The impugned orders are set aside and the appeals are allowed.

(Pronounced in the Open Court on 28.02.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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