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

Appeal No. E/264/2008

(Arising out of Order-in-Appeal No.53/2005 (H-I) CE dated 31.03.2005 passed by CC & CE (Appeals), Hyderabad)

M/s P.M. Telelinnks Ltd., ….. Appellant(s)

Vs.

CCE, C & ST, Hyderabad - I ….. Respondent(s)

Appearance

Shri MVS Sridhar, Advocate for the Appellant.

Ms. B.V. Siva Naga Kumari, AR for the Respondent.

Coram:

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

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 06.03.2019
Date of Decision: __________

FINAL ORDER No. A/______________

[Order per: M.V. Ravindran]

1. This appeal is directed against Order-in-Appeal No. 53/2005 (H-I) CE dated 31.03.2005.

2. The relevant facts that arise for consideration are during the period July 2000 to June 2001, appellant cleared to their sister concern consignments of HR strips falling under chapter sub-heading 7211.59/7208.39 of the first schedule Central Excise Act 1985, discharged the central excise duty on the clearances made to their own unit at Patancheru under proper invoices on payment of duty based upon the assessable value declared therein as a sale. It was noticed by the lower authorities that assessable value is not correct, sales to their own unit has to be treated as captive consumption and resultantly a show cause notice was issued for demand of the differential duty on the ground that the value that needs to be applied by the appellant is cost of production plus 15%. The said show cause notice was adjudicated by the lower authority and after following due process of law, an amount as differntial duty was confirmed along with interest and a penalty was also imposed.

3. Learned Counsel after taking Bench through the case records submits that they had cleared the HR stripes manufactured from their factory on sale basis to their own unit at Patancheru for further use in the manufacture of final products. The transaction consists sale within the meaning Section 2(h) of the Central Excise Act 1944, as possession and control of the goods is transferred to the purchasing unit of the same manufacturing, even though the seller and buyer are sister concerns. It is also his submission that the allegation in the show cause notice is that the clearance of the goods from one unit to another unit has to be treated as

captive consumption and valuation should be done at 115% of cost of production is not correct as provisions of Notification No. 67/95-CE dated 16.03.1995 granted total exemption from liability of central excise duty for captively consuming goods. It is the submission that payment of duty on HR stripes by the appellant is revenue neutral situation as the respondent unit i.e. its own concern work by the name and style of the clearing unit. It is his submission that the law is on this point by the judgment of the Tribunal in the case of *Kansai Nerolac Paints Ltd., [2016 (339) ELT 467 (Tri-Ahmd)]* and by the Hon'ble High Court of Gujarat in the case of *Commissioner of Central Excise and Customs, Vadodara-II Vs Indeos ABS Ltd., [2010 (254) ELT 628 (Guj)].*

4. Learned DR on the other hand would draw our attention to the show cause notice and submit that the show cause notice is demanding the differential duty only on the basis of the goods being cleared from appellants unit to their own unit for captive consumption and is not a sale, needs to be valued at the cost of production plus 15% as per Rule 8 of valuation rules. Having not done so, the differential duty demand is correctly confirmed by the adjudicating authority. It is her further submission that question of revenue neutrality defence could be only for non-invokation of extended period for the demand of the duty, while in the case in hand, the demand of the duty is within the normal period of limitation.

5. Considered the submissions made by both sides and perused the records.

6. The issue is regarding the demand of differential duty from the appellant for the period July 2000 to June 2001 on the goods cleared by them to their own unit situated at Patancheru under proper invoices. Appellant had resorted to discharge the central excise duty based upon the value declared by him as a transaction value while the revenue authorities seek to demand the duty based upon the valuation as per Central Excise Valuation Rules, 2000.

7. Undisputedly, the demand which has been raised on the appellant is for under valuation on the goods cleared to their own unit at Patancheru.

8. There is no doubt as to the fact that the Patancheru unit is functioning under the name and style of PM Telelinnks Ltd., and consuming the HR sheets in their factory premises for manufacturing of CR sheets. The findings of the lower authorities is that the valuation should be based upon the Rule 8 of Central Excise Valuation Rules 2000, is also correct to the extent that it has been cleared for captive consumption to their own factory. To that extent, we find that the order of the First Appellate Authority as well as the adjudicating authority is correct. However, we notice that the lower authorities have not considered the fact

that the HR sheets which are manufactured by the appellant are cleared to their own concern under duty paying document.

9. We find that the Learned Counsel argued that the entire demand becomes revenue neutral as the clearances were to their own sister concern who availed the CENVAT Credit is correct as Tribunal in the case of Kansai Nerolac Paints Ltd., (Supra) (wherein one of us Shri M.V. Ravindran was a Member) in para no. 8 held as under:

> *8. On perusal of records, we find that during the relevant period i.e. that April-2003 to December-2005 that the appellant was discharging duty on the goods manufactured and cleared for further use by their sister concerns by adopting valuation under the provisions of Rule 8 of the Central Excise Valuation Rules. The valuation which has been adopted by the appellant was being erroneous, as confirmed from the facts that the appellant has paid the duty liability on being pointed out. We find ourselves in agreement with the submissions of Ld.C.A. that question of demanding interest or penalty could not have arisen in this case, as the appellant herein has claimed revenue neutrality. We find that the contention raised by the appellant as to revenue neutrality has got strong force in as much as there is no dispute that clearance of resins was to their own sister unit. There cannot be, to our mind, any intention to evade duty on such clearances made to their own sister concern, as the said sister concerns admittedly are discharging the duty liability on the final products manufactured by them; which would mean that the sister concerns could have availed the Cenvat credit of any duty paid by the appellant on clearance of resins to them.*

The above said views of the Tribunal were confirmed by the Hon'ble High Court of Gujarat in the case of Indeos ABS Ltd., (supra). We reproduce the entire judgment which is as under:

> " *This appeal, preferred by Appellant-Revenue proposes following three questions stated to be substantial questions of law:*
>
> *(a) "Whether in the facts and circumstances of the case, CESTAT is right in allowing appeal filed by the assessee on the ground of revenue neutrality which issue has been kept opened by the Hon'ble Supreme Court in the two cases relied upon by CESTAT?*

(b) Whether CESTAT is right in ignoring the main issue of undervaluation adopted by the assessee?

(c) Whether determination of correct assessable value for the purpose of charging central excise duty can be done away with simply on the ground of revenue neutrality?"

2. Heard Learned Counsel for the appellant. It was submitted that the Tribunal has committed an error in not dealing with the aspect of undervaluation of goods manufactured by assessee despite the fact that the Adjudicating Authority had discussed the said issue at length in the adjudication order.

3. As can be seen from order of the Tribunal dated 10-11-2008 impugned in this appeal, the Tribunal has disposed of the appeal holding that the goods manufactured by the assessee were being cleared to its own sister concern, who is availing the benefit of Modvat Credit. The Tribunal has further found that as such whatever duty the assessee was paying was available as credit to its own unit (sister concern) and hence the entire exercise was revenue neutral.

4. The aforesaid findings of facts are not disputed. The grievance was that the aspect of undervaluation has not been considered by the Tribunal at all. Grievance would have merited acceptance if the ultimate exercise would have benefited the Revenue by collection of duty in the coffers of the exchequer. In the facts of the present case, admittedly no such benefit accrues to the exchequer. In the circumstances, if the Tribunal has chosen not to determine an academic issue, it is not possible to state that any legal infirmity exists in the impugned order of the Tribunal.

5. In the circumstances, in absence of any substantial question of law, the Appeal is dismissed."

Further, we note, in an identical situation rose in the case of Mafatlal Industries Ltd., [2009 (241) ELT 153 (Tri-Ahmd)] it was held as under:

2. Learned advocate Shri J.C. Patel, appearing for the appellant does not dispute that the correct assessable value of grey fabrics cleared by them to their unit, should have been adopted at 110% of the cost of the product, but submits that the duty paid by them was available as Modvat credit to their other unit. In fact, the said other unit has already taken credit of duty paid by them. As such, he submits that the entire situation is Revenue neutral and the differential duty now being demanded from them is available as credit to their own unit, who was in a position to utilize the same for payment of duty in respect of the goods cleared from their unit. For the above proposition, reliance is placed upon the various decisions.

3. Dr. M.K. Razak, learned SDR appearing for the Revenue submits that the fact that the duty now being raised and confirmed against the present assessee was available as credit to their own unit, should not be made ground for setting aside the demand against the appellant. It stand strongly contended before us that the issue before Tribunal is only to adjudge the correct assessable value of the goods cleared from the appellant's factory and their liability to pay differential duty. In as much as the appellants have admitted that there was under-valuation in respect of the fabrics, demand should be confirmed against them.

4. After carefully considering the submissions made by both sides, we find that if the appellants would have paid higher duty by adopting higher assessable value at the time of clearance of the fabrics, their unit situated at Nadiar would have taken credit of the same. It is not a case where the goods are being sold by one assessee to another. It is basically taking out money from one pocket and putting the same in other pocket of same trouser. The other unit at Nadiar was appellant's own unit and it was only for the procedural and technical purposes that the duty was required to be paid at the time of clearance from the assessee's unit. Tribunal, in number of cases, has held that where the duty paid in one unit is available as credit to other unit of the same assessee, the entire issue is Revenue neutral and the demand should not be confirmed on the said count. Reference in this regard is made to Tribunal's decision in case of *M/s. P.T.C. Industries* v. *CCE, Jaipur* - 2003 (159) E.L.T. 1046 (Tri.-Del.) as also in case of *M/s. MRF Limited* v. *CCE* - 2004 (170) E.L.T. 69 (Tri.-Bang.) and in case of *CCE, Daman* v. *M/s. Rishi Packers,* 2007 (80) RLT 181 (CESTAT-Ahbad.). Even Hon'ble Supreme Court in case of *CCE* v. *M/s. Coca-Cola India Pvt. Ltd.,* 2007 (213) E.L.T. 490 (S.C.), has held that Excise duty payable on the beverage bases/concentrates and Modvat credit available to the assessee being identical, consequence of payment of excise duty after availing Modvat credit was Revenue neutral, in view of which confirmation of demand was not justified.

5. In view of the above, we find merits in the appellant's contention that the entire demand being available as credit to their own unit, confirmation of the same was not justified.

This case was taken to Apex Court by Revenue in civil appeal, which was dismissed as reported at *2010 (255) ELT A77 (SC)*. Further we find in another case of *Tarapur Grease India Pvt Ltd., [2016 (334) ELT 416 (Bom)],* the Hon'ble High Court, on discharge of tax on removal of cenvatted inputs to sister concern, held that issue being revenue neutral demand is not sustainable.

10. The same views are expressed by Hon'ble Supreme Court in the case of *Commissioner of Customs and Excise Vs Textile Corporation, Maratwada [2008 (231) ELT 195]*.

11. In view of the foregoing and in facts and circumstances of this case the impugned order is set aside and the appeal is allowed.

(Order pronounced in open court on ______________)

(P.VENKATA SUBBA RAO) MEMBER (TECHNICAL)	(M.V. RAVINDRAN) MEMBER (JUDICIAL)

Jaya…