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

Division Bench

Court – I

Appeal No. E/2355/2011

(Arising out of Order-in-Appeal No. 31/2010 (H-IV) (D) CE dt.29.07.2010 passed by CCCE & ST (Appeals-II), Hyderabad)

M/s Ultracon Structural Systems Pvt Ltd
A-9, Co-operative Industrial Estate, Lane next to
Amar Jyothi Petrol Station, Balanagar,
Hyderabad – 500 037 **......Appellant**

VERSUS

Commissioner of Central Excise, Customs
& Service Tax – Hyderabad - IV
Posnett Bhawan, Tilak Road, Ramkoti,
Hyderabad, Telangana – 500 001 **......Respondent**

Appearance
Present for the Appellant: Shri Anand Sashidharan, Advocate
Present for the Respondent: Shri A.V.L.N. Chary, Authorized Representative.

Coram:

HON'BLE MS. SULEKHA BEEVI C.S, MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30486/2019

Date of Hearing: 23.04.2019
Date of Decision: 29.04.2019

[Order per: P. VENKATA SUBBA RAO]

1. This appeal is filed by the appellant against Order-in-Appeal No. 31/2010 (H-IV) (D) CE dated 29.07.2010.

2. Heard both sides and perused the records.

3. Receiving intelligence, officers of Central Excise searched the premises of the appellant at Balanagar on 25.02.2008 and subsequently their premises at Gachibowli. The search and the investigations which followed revealed that the appellant was buying Galvanized Iron Strips falling under Chapter No. 7210 49 00 which they were converting through a two stage

process into corrugated ducts or hollow pipes classifiable under Chapter heading 7306. This process involved use of two machines viz., "Sintra 110 Duty Machine" and "Duct Flattening Machine". The department came to a conclusion that the appellant was manufacturing these ducts from strips and the ducts so manufactured are liable to excise duty which the appellant has wrongly not discharged and that they have also not obtained Central Excise registration. It is the case of the revenue that the process undertaken by the appellant results in a product which has a distinctive name, character and use. It is capable of being marketed and was indeed being marketed, though not by the appellant, on several websites. Since a new distinct commodity as known to the market has come into existence and since such product is also marketable, the appellant is liable to pay excise duty. However, the appellant were not marketing this product but were using these products in their works contracts at various locations in their construction sites after transporting them to the sites under cover of delivery challans. Sometimes these products are also sent to the appellant's other locations outside Hyderabad as stated by the appellant's General Manager in his statement given before the Central Excise officers on 23.05.2008. After completing the investigations, a show cause notice dated 03.07.2008 was issue covering the period 2006-2008, demanding a duty of Rs.37,46,296/-. It was also proposed in the show cause notice to impose a penalty under Sec.11AC of the Central Excise Act for contravening the provisions of Rules 4, 6, 8, 9, 10 and 11 of Central Excise Rules, 2002 with an intent to evade payment of duty. Further, it was proposed to recover interest under Sec.11AB of the Central Excise Act read with Rule 8(3) of Central Excise Rules, 2002. During the investigation, some goods were also seized valued at Rs.10,61,760/- and it was proposed to confiscate the goods under Rule 25 of Central Excise Rules, 2002.

4. After following due process, the lower authority vide his Order-in-Original dated 03.02.2010 held that the activity undertaken by the appellant does not amount to manufacture and also the required machinery kept moving from place to place depending upon the requirement of the construction. Consequently, the question of payment of Central Excise duty does not arise. Holding so, he dropped all proceedings with consequential relief.

5. Aggrieved by the order of the lower authority, the Revenue appealed before the first appellate authority who, by the impugned order set aside the order of the lower authority and allowed the appeal of the Revenue. However, in the impugned order, he has not quantified the amount of duty payable, interest chargeable or the penalties imposable. Therefore, the issue of quantification was not decided in this case.

6. Learned counsel for the appellant submits that their machines can be moved from place to place depending upon the availability of the place at the construction site and when there is no sufficient place at the construction site, they manufacture/produce the disputed goods in their premises at Balangar and Gachibowli, and transfer them under delivery challans. Since, the entire manufacture is at site, no Central Excise Duty can be charged from them, in view of the exemption notification 03/2005 which at Sl.No.64 exempts goods fabricated at the site of work for use in construction work at such site. He would submit that they are squarely covered by the exemption notification. His second argument is that the demand has been raised under Chapter heading 7306 69 00 as products of other non-circular cross section. However, they have not welded their products and therefore, they are not covered by this chapter heading, in view of the specific requirement of welding in 7306 40 00 and 7306 50 00 which immediately precede the heading 7306 69 00. The relevant portion of the chapter heading is as follows:

*"**7306** – Other tubes, pipes and hollow profiles (for example, Open seam or welded, riveted or similarly closed) of iron or steel*

	- Line pipe of a kind used for oil or gas pipeline:
7306 11 00	*-- Welded, of stainless steel kg.*
7306 19	*-- Other:*
	--- Galvanized pipes:
7306 19 11	*---- of iron*
7306 19 19	*---- Other.*
	--- Non-galvanized pipes:
7306 19 21	*---- of iron.*
7306 19 29	*----Other*
	- Casing and tubing of a kind used in drilling for oil or gas:
7306 21 00	*-- Welded, of stainless steel*
7306 29	*-- Other:*
7306 29 11	*---- of iron*
7306 29 19	*---- Other*
7306 30	*- Other, welded, of circular cross-section, of iron or non-alloy steel:*
7306 30 10	*--- of iron*
7306 30 90	*--- Other*
7306 40 00	*- Other, welded, of circular cross-section, of stainless steel*

7306 50 00	*- Other, welded, of circular cross-section, of other alloy steel*
	- Other, welded, of non-circular cross-section:
7306 61 00	*-- Of square or rectangular cross section*
7306 69 00	***--- Of other non-circular cross section**"*

7. His third line of argument was that the period of dispute is from 2006-07 to 2007-08, of which there were no Tariff heading under 7306 69 00 during 2006-07 in the Tariff at all. It was introduced only in the subsequent year and therefore, the demand to that extent has to fail. His fourth point of argument was that the prayer of the department in the appeal filed before the first appellate authority speaks about an exemption notification only and it does not talk about the manufacture of the product or its marketability. He, further, submits that there are no elements of wilful suppression of facts which can be attributed to the appellant and therefore, extended period of limitation cannot be invoked. He would, further argue that if they are liable for payment of Central Excise duty, they also have been eligible for benefit of Cenvat Credit. Lastly, he would argue that even if the demand is held against them, the penalty may be waived.

8. Countering the arguments of the appellant, the learned departmental representative submits that demand in the show cause notice is only to the extent the goods were manufactured in the assessee's Plants at Balanagar and Gachibowli and transported by delivery challans as can be seen from the show cause notice and not on the goods manufactured at site. Therefore, there is no force in the argument of the appellant that the goods were manufactured at site. On the question of whether the goods were manufactured at all, learned departmental representative would submit that it can be seen what was used were GI Strips and what were manufactured were GI Ducts and both are distinct commodities as known in the market. GI Ducts are clearly marketable as can be seen from the various websites on which such ducts are being marketed. Therefore, they are liable to pay Central Excise duty on those products. On the question of there being no welding in the products, learned departmental representative would submit that Chapter heading No. 7306 69 00 nowhere requires the products to be welded. Products under Chapter heading 7306 40 and 7306 50 are separate type of products which requires welding. Therefore, the description under one heading cannot be imputed on to another. He would submit that the

appropriate way of reading 7306 69 00 is along with 7306 heading itself as "other tubes, pipes and hollow profiles (for example, open seam or welded, riveted or similarly closed) or iron and steel of other non-circular cross sections." He would submit that as can be seen from this, some products which are not welded are also covered under this heading. Therefore, there is no force in the argument of the appellant that the products are not welded and therefore, they cannot be classified under 7306 69 00. On the question of limitation, he would submit that the appellant has neither taken the Central Excise registration nor have they filed ER-1 returns and have not declared to the department in any manner that they are manufacturing these goods and therefore, they have suppressed all these facts from the department and accordingly, the extended period of limitation can be invoked. For the same reason, he would submit that there is no scope for waiver of penalty. On the question of Cenvat Credit, he would submit that availability of Cenvat Credit is a different issue which is beyond the scope of this show cause notice and therefore, the demand cannot be reduced on the ground that the appellant would have been entitled to the benefit of Cenvat Credit had they followed the necessary procedures under Cenvat Credit Rules, 2004.

9. We have considered the arguments on both sides and perused the records. The first issue to be decided is whether the appellant was manufacturing goods or not. Clearly, the inputs were GI Strips while the final products were GI Ducts of non-circular cross section. Thus, they fall under different Tariff headings, the final products being under 7306 69 00. It is also evident that a distinct marketable commodity as known in the market and as is sold in the market under a different name comes into existence. It is immaterial for levy of excise duty that the appellant themselves were not marketing these products. The second question is whether they get exempted by virtue of the fact that they were manufacturing these products at site. Clearly, we find that the show cause notice was restricted only to the extent where goods were manufactured by them in their factory and transported under the cover of delivery challans. Therefore, the question of any onsite manufacture in the demand raised does not arise. The third issue to be decided is whether the goods in question need to be welded for them to fall under 7306 69 00. A plain reading of the Tariff heading does not say so. It is true that there are other

Tariff headings such as 7306 40 00 and 7306 50 00 which covered only welded products. However, the main four digit heading 7306 includes non-welded products or open seam products. Therefore, the product in question gets squarely covered by 7306 69 00. The next question to be decided is whether this heading existed during the entire period of limitation. We find from the Tariff that during the period 2006-07, Chapter heading 7306 69 00 did not exist at all but it was introduced subsequently. Since the demand is under this heading, the demand to the extent it pertains to prior to 2007-08 has to fail. The amount has to be accordingly re-quantified. The next point to be decided is whether the prayer portion of the appeal by the department before the first appellate authority being incomplete adversely affects the demand. We find that although the prayer part of the appeal by the department does not cover the issue of manufacture of excisability, these issues were clearly covered in Para 12 of their appeal before the first appellate authority. Therefore, we find no force in this argument by the appellant. On the question of benefit of Cenvat Credit, we find that it is beyond the scope of show cause notice and if the appellant is entitled to the benefit of Cenvat Credit, they may take so after following due process as applicable during the relevant period.

10. On the question of extended period of limitation being invoked, we find that there is nothing on record to show that the appellant had declared their activity before the Central Excise department or taken registration or filed returns or has disclosed their activities in any other manner before the authorities. Therefore, suppression of facts is evident in this case. Sec.11A of the Central Excise Act provides for invocation of extended period where duty has not been paid or has been short paid or has not been levied or short levied by reason of (a) fraud or (b) collusion or (c) any wilful misstatement or (d) suppression or facts or (e) contravention of any provisions of this Act or of the Rules made there under with an intent to evade the payment of duty. The suppression of facts is evident in this case and therefore, extended period of limitation can be invoked. However, considering the demand in respect of 2006-07 which is already set aside, we find that this becomes a non issue since the show cause notice was issued on 03.07.2008. We also find that consequent upon the confirmation of demand, interest to the extent of demand and penalties also need to be sustained.

11. However, we find that the entire demand needs to be re-quantified since the demand for the period 2006-07 is not sustainable. Therefore, the demand, interest and consequently penalty for the period 2006-07 need to be set aside.

12. The appeal is allowed by way of remand to the original authority for the limited purpose of calculating the demand for the period 2007-08, interest and penalties as applicable and setting aside the demand, interest and penalties for the period prior to 2007-08.

(Order pronounced in the open court on 29.04.2019)

(SULEKHA BEEVI C.S)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Veda