IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Cus.Appeal No.76765/17

(Arising out of Order-in-Appeal No.125/SLG/CUS/2017 dated 19.06.2017 passed by the Commissioner (Appeals) of Central Excise, Kolkata)

M/s R. B. Agarwalla & Company

Applicant (s)/Appellant (s)

Vs.

Commissioner of C.Ex. & Service Tax, Siliguri

Respondent (s)

Appearance:

Shri Nirupam Kar, Consultant for the Appellant (s)
Shri S. N. Mitra, Asstt. Commr. (A.R.) for the Respondent (s)

CORAM:

SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

Date of Hearing /Date of Pronouncement : 26.02.2018

ORDER NO.F/O/75790/2018

Per Shri P. K. Choudhary :

This is an appeal filed by the Appellant against the Order-in-Appeal No.125/SLG/CUS/2017 dated 19.06.2017 passed by the Commissioner (Appeals) of Central Excise, Kolkata.

2. Briefly stated the facts of the case are that the appellant had claimed duty drawback in terms of Notification No.68/2011-Cus (NT) dt. 22.09.2011 for Mild Steel Stranded wire classifiable under tariff item No.7312 04. A show cause notice dt. 23.05.2014 was issued proposing to reject the payment of duty drawback amounting to Rs. 3,36,814/-. The adj. auth. confirmed the demand of Rs. 3,36,814/- along with interest. By the impugned order, the Comm(A) upheld the adjudication order. Hence the present appeal.

3. Heard both sides and perused the appeal records.

4. The ld. Counsel for the appellant submitted that the show cause notice was issued in respect of Bills of Export No. 20/EXP/FB/DBK/11-12 dt. 01.02.2012, 17/EXP/FB/DBK/12-13 dt. 13.09.2012 and 18/EXP/FB/DBK/12-13 dt. 19.09.2012. The adjudicating authority proceeded on the basis of different Bills of Entry.

5. The appellant contended that no test was conducted on the samples drawn from the exported goods. The goods were finally assessed as Mild Steel Stranded wire as declared by the exporter. It is noted that the assessment orders were not challenged by the dept. The Tribunal in the case of TVS Motor Co. Ltd. v. CCE & ST, Mysore [2017 (5) GSTL 85 (Tri.-Bang.)] allowed the refund in an identical situation. The relevant portion of the decision is reproduced below:

> ***"3.*** *Heard both the parties and perused the records. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed by misconstruing the provision of the Notification as well as by ignoring the binding judicial precedents on the same issue. He further submitted that the orders-in-original sanctioning the two refund claims of the appellant have attained finality and same being an appealable order, new proceedings cannot be initiated without challenging the said orders. He further submitted that in the absence of any challenge to these final orders sanctioning refund, the present proceedings initiated for recovery of refund stands infructuous and cannot be sustained. In support of this submission, he relied upon the following decisions:*

(1) CC v. Millat Fibres [2011 (271) E.L.T. 512(Guj.)

(2) Doothat Tea Estate Kanoi Plantation (P) Ltd. v. CCE, Shillong [2001 (135) E.L.T. 386 (Tri.-Kol.)]

(3) Commissioner of C. Ex. Shillong v. Jellalpore Tea Estate [2011 (268) E.L.T. 15 (Gau.)

(4) M/s. Eveready Industries India Ltd. v. CESTAT, Chennai [2016-TIOL-676-HC-MAD-CX = 2016 (337) E.L.T. 189 (Mad.)

(5) CCE, Tirupathi v. Panyam Cements & Minerals Industries Ltd. [2016 (331) E.L.T. 206 (A.P.).

He further submitted that the appellants have fulfilled all the substantial requirements and are eligible for refund under Notification No. 17/2009-S.T., dated 7-7-2009. He further submitted that the condition of realization of sale proceeds as stated under para 4 of the said Notification has to be read in consonance with the provisions under FEMA, 1999. He further submitted that as per Section 8 of the FEMA, 1999 which provides for such realization, when any amount of foreign exchange is due or has accrued. The phrase "foreign exchange due" is defined under clause 2(iii) of the Foreign Exchange Management (Realization Repatriation and Surrender) Regulations, 2000, as an amount which a person has a right to receive or claim any foreign exchange. He also submitted that in the present case, the appellants have exported the components of vehicles by way of free warranty replacement therefore the recovery of export proceeds does not arise under FEMA as the same is not due. He also submitted that the condition in paragraph 4 of the Notification should be considered as fulfilled when the amount due to be realized is nil. He further submitted that in para 4(j) of the Foreign Exchange

Management (Export of Goods and Services) Regulations, 2000 and paragraph 4(h) of Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 read with clause 2.37 under Chapter-2 of the Indian Foreign Trade Policy 2004-2009 make it abundantly clear that no amount is receivable for the export goods and there is no requirement of realization of export proceeds in case of warranted replacement of goods. In support of his submission, he relied upon the decision in the case of CCE, Raipur v. Simplex Engg & Foundary Works Pvt. Ltd. [2016 (333) E.L.T. 112 (Tri.-Del.)]. The assessee therein filed rebate of duty paid on export of goods which was ultimately exported as replacement of the earlier defective goods. In the context of the requirement of realization of export proceeds, the Tribunal held that the question of foreign exchange realization does not arise as the exported goods are free replacement of defective goods. He also submitted that the appellants are eligible for availing CENVAT credit of service tax paid on the courier agency services received and the entire exercise is revenue neutral. In support of this submission, he relied upon the following decisions:

(1) CCE, Ahmedabad v. Sucheta Metals Ltd. [2009 (246) E.L.T. 326 (Tri.-Ahd.)

(2)Zenith Spinners v. UOI [2015 (326) E.L.T. 97 (Guj.)].

On the other hand learned AR defended the impugned order and submitted that the Assistant Commissioner, Mysore has erroneously sanctioned the refund vide order-in-original dated 10-8-2009 and 15-2-2010 as the appellants have not fulfilled the conditions of Notification No. 17/2009, dated 7-7-2009 and in terms of para 4 of the Notification No. 17/2009-S.T., dated 7-7-2009, the sale *proceeds in respect of the goods exported have to be realized by the exporter to become eligible for the refund and in the absence of the same, as in the present case, the refund of service tax granted to the appellant is recoverable as erroneous refund. He further submitted that the appellant is eligible for refund only when they produce the foreign exchange realization certificate issued by the banks.*

4. *After considering the submissions of both the parties and perusal of the records, I am of the view that the orders-in-original sanctioning the refund have already attained finality and the Revenue has not filed any appeal against the sanctioning of the refund order and the Revenue wants to recover the erroneously sanctioned refund by parallel proceedings by issue of show cause notice which is not permitted under law as held in the decision relied upon by the learned counsel for the appellant. Further I find that the appellants have exported the spare parts to their dealers abroad by way of free warranty replacement as per their contract which is placed on record and for exporting the said components they have availed the services of courier agency for which they have paid the service tax. I also find that the findings of the Commissioner (Appeals) that the appellants have not produced any evidence to prove that the goods are exported within the warranty period of replacement free of cost is wrong because the appellant has produced invoices on record which clearly shows that it is free warranty replacement and the invoices have been produced on record before the Tribunal also. The appellant has also produced a copy of the agreement between his dealers by which the appellants are under obligations to supply parts under free warranty replacement then in that case, no*

> *monetary consideration flow from the buyer and therefore the department's view that bank realization certificate has not been produced is not justified ground for denial of refund. The export proceeds have already been received when the main product was exported. Therefore keeping in view the submission of both the parties, I am of the view that the impugned order is not sustainable in law and the same is set aside by allowing all the appeals of the appellant with consequential relief if any".*

6. In view of the above, the impugned order cannot be sustained. Accordingly, the impugned order is set aside and the appeal filed by the appellant is allowed.

(Operative part of the order was pronounced in the open Court)

Sd/

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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Briefly stated the facts of the case are that M/s Kailashpati Cement Pvt. Ltd. (Appellant company) is engaged in the manufacture of cement classifiable under chapter 25 of CETA. The officers of anti-evasion unit, Central Excise and Service Tax, Guwahati conducted scrutiny of the records and found that the appellant company cleared their finished goods on various occasions without issuance of invoices and under-invoicing the value of the goods. Sri. Kartik Sharma, Managing Director of the Appellant company (Appellant No. 2 herein), in his statement stated that they have disbursed cement and have later on issued invoices so as to defer the CE duty liability as they are facing acute financial crisis sue to non-receipt of refund from the department. A show cause notice dt. 19.04.2013 was issued proposing demand of duty along with interest and penalty for the period from 01.04.2010 to 23.08.2011. The adj. auth. confirmed the demand of duty of Rs. 32,34,321/- along with interest and imposed penalty of equal amount of duty. The adj. auth. appropriated the amount of Rs. 17,20,400/- and interest of Rs. 8,56,433/- as deposited by the appellant. A penalty of Rs. 32,34,321/- has also been imposed on Appellant No. 2 under Rule 26 of the Central Excise Rules, 2002. By the impugned order, the Comm(A) rejected the appeals filed by the Appellants. Hence, the present appeals.

Heard both sides and perused the appeal records.

The ld. Counsel for the appellant submitted that the appellant cleared the goods without invoice. Subsequently, they issued the invoices and paid duty. He submitted that they had cleared some consignments without payment of duty as there was a delay in refund of duty as they were entitled as per area based notfn no. 20/2007-CE dt. 25.04.2007. It is submitted that they raised the invoices subsequently after the consignments were finally accepted and paid by the buyers. He further submitted that the Appellant No. 2 had no knowledge of the alleged offense and therefore, no penalty should be imposed on him.

The ld. AR for the Revenue reiterated the findings of the lower auth. He relied upon the decisions as under:

- BEAS Scientific Dyers v. CCE, Ludhiana [2014 (307) ELT 596 (Tri.-Del)]
- Somani Iron and Steel Ltd. v. CESTAT [2011 (270) ELT 189 All]

I find that Rule 8 of CE Rules, 2002 provides for manner of payment of duty. Rule 8(1) provides that the duty on the goods removed from the factory or warehouse during a month shall be paid by the sixth day of the following month. Rule 4 of the Rules provides for duty payable on excisable goods at the time of removal from factory in the manner provided in Rule 8 of the Rules. In the present case, admittedly, the excisable goods were cleared without payment of duty and without invoice. Appellant No. 2, in his statement dated 30.08.2013, stated that in some cases invoices are issued for clearances as and when the order is received from the customer but due to problem in arranging trucks/labourers, etc. the actual clearance do not take place on that date and the clearance is affected. In such case, they used to keep the invoices and hand over the customer copy at the time of actual clearance. It is further stated that in some cases their customers asked them not to hand over the invoice copy to the truck drivers. The appellant contended that the investigating officers had not verified the transporters/ buyers. I find that the appellant had made the averments without any reconciliation statement. In such situations, the findings of the lower auth. would be accepted. It is seen from the orders of the lower auth. that the adj. auth. had examined the issues at length. In any event, the plea of the appellant that there was a delay in refund of duty in terms of the exemption notfn. And therefore they cleared the goods without payment of duty cannot be accepted. Hence, the demand of duty along with interest and penalty against the appellant company is sustainable.

Regarding imposition of penalty on Appellant No. 2, I find that the Appellant No. 2 is the Managing Director of the Appellant Company. He has stated in his statements that he had no knowledge of the alleged irregularity. In any event, the appellant No. 2 had deposited the duty partly during the investigation. Taking into account the overall facts and circumstances of the case, the imposition of penalty on Appellant No. 2 is not justified.

In view of the above discussion, the appeal filed by M/s Kailashpati Cement Ltd. is rejected and the appeal filed by Shri. Kartik Sharma is allowed.