IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. E/77119/2017, CO-75258/2018

(Arising out of Order-in-Appeal No.120/HWH/CE/2017-18 dated 21.09.2017 passed by the Commissioner of CGST & Central Excise, Appeals-II, Kolkata)

Commissioner of CGST & C.Ex, Howrah

Applicant (s)/Appellant (s)

Vs.

M/s. Jupiter Alloys & Steel (India) Ltd.

Respondent (s)

Appearance:

Shri D.Halder, AC(AR) for the Appellant (s)
Shri Anjan Dasgupta, Advocate for the Respondent (s)

CORAM:
Hon'ble Shri P.K.Choudhary, Member (Judicial)

Date of Hearing/Decision: 10.05.2018

ORDER NO.FO/76566/2018

Per Shri P.K.Choudhary

1. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of M.S. Round, CMS Crossing, Bogie, Coupler Body/Set, Back Stop, Draft Gear etc. classifiable under Chapter 72,73 & 86 of the First Schedule to the Central Excise Tariff Act, 1985. Show Cause Notice dated 16.11.2016 was issued alleging removal of finished products from the factory without payment of central excise duty. The Adjudicating Authority confirmed the demand of Rs.16,59,067/- alongwith interest and also imposed equal penalty. On appeal, the first appellate authority upheld the adjudication order. However, he set aside the penalty imposed. Being aggrieved, the Revenue is in appeal before the Tribunal. Respondent assessee has filed cross objection.

2. Ld. DR reiterates the grounds of appeal and submits that the Commissioner (Appeals) cannot set aside the penalty imposed under Section 11AC of the Central Excise Act, 1944.

3. Ld. Advocate appearing on behalf of the respondent assessee submits that owing to the price escalation the assessee during the period 2011-2012 paid the differential duty of Rs.16,59,067/- before issuance of the show cause notice. It is his submission that they have consistently paid the differential duty with interest on their own and also reiterated the fact in the relevant ER-I Returns. In fact there was no occasion to issue show cause notice.

4. Heard both sides and perused the appeal records.

5. I find that the assessee had paid the entire amount of differential duty alongwith interest on their own before intervention of the department. I observe that the first appellate authority has discussed the issue in details. The relevant portions of the impugned order are reproduced for the sake of appreciation of the facts and law on the point:

> *"14. In view of the above, I am of the considerate opinion that the Chartered Accountant's Certificate should have been given due cognizance to display the application of judicious nature of mind by the lower authority during the course of appreciating the factual matrix of the instant case.*
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> *15. It obviously follows from the above discussions that in absence of any of the excluding elements as specified in sub-section (1) of Section 11A of the Central Excise Act, 1944, the appellant would definitely qualify for being given the benefit of sub-section (2) of Section 11A provided they have abided by the provisions of sub-section (1)(b) and sub-section (2) of Section 11A of the said Act in such a way that it does not attract the provisions of sub-section (3) of Section 11A supra.*
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> *16. I find that the appellant had duly paid the Central Excise duty totaling to Rs.19,86,082/- [Rs.19,28,235/- (Cenvat) + Rs.38,564/- (Ed.Cess) + Rs.19,283/- (S & H Ed. Cess)] pertaining to price escalation for F.Y. 2010-11 in the month of May, 2011 vide issuance of Invoice Nos. 64-66 all dated*

07.05.2011 and 128-132 all dated 31.05.2011 in addition to Rs.39,74,470/- [Rs.38,58,709/- (Cenvat) + Rs.77,174/- (Ed.Cess) + Rs.38,587/- (S & H Ed. Cess)] pertaining to price escalation for F.Y. 2011-2012 in the months of June, 2012 and July, 2012 vide issuance of Invoice Nos. 122 dated 30.06.2012, 162 and 163 dated 25.07.2012 and 164 & 165 dated 26.07.2012, based on their own ascertainment, before issuance of the impugned Show Cause Notice dated 16.11.2016 was served on them. The details of such payment of duty by way of raising supplementary invoices has also been furnished by them in their relevant ER-I Returns pertaining to the months of May'11, June'12 which had been submitted by them to the Department on 09.06.2011, 10.07.2012 and 10.08.2012 respectively. All such payments of duty had been done before issuance of the impugned Show Cause Notice dated 16.11.2016. In addition, they have also paid the interest involved in this case and totaling to Rs.9,93,447/- vide e-Challan Nos. 00274 dated 26.12.2014, 00069 dated 23.08.2014 and 00211 dated 30.08.2013, which too had been paid before issuance of the impugned Show Cause Notice dated 16.11.2016 was served on them. Such reversal of credit on the basis of their own ascertainment and payment of interest involved thereon, before the issuance of relevant Show Cause Notice, is in agreement with the provisions of sub-section (1)(b)(i) of Section 11A of the Central Excise Act, 1944.

17. *I also find that the appellant had duly informed about such payment of duty and interest to the Department vide their letter dated 06.01.2015, which again is in agreement with the provisions of sub-section (2) of Section 11A supra. No evidence of disagreement on the quantum of Central Excise duty and interest payment by the appellant has been furnished before me by Revenue. This proves that the provisions of sub-section (3) of Section 11A of the said Act are not attracted in the instant case.*
18. *As such, I am of the considered opinion that the appellant is eligible for being extended the benefit of sub-section (2) of Section 11A ibid which categorically provides that the impugned Show Cause Notice should not have been issued to the appellant in the instant case and also that no penalty is required to be imposed on them.*
19. *Regarding imposition of penalty on the appellant in terms of Section 11AC of the Central Excise Act, 1944, I find that the statute explicitly bars the imposition of penalty in cases where the assessee concerned is eligible for availment of benefit of sub-section (2) of Section 11A of the said Act. Accordingly, I am of the considerate opinion that the penalty*

imposed by the impugned OIO deserves to be set aside being not maintainable on merit.

20. In view of the discussions above, I uphold the impugned OIO only to the extent of demand for recovery of duty along with appropriate interest. Penalty imposed is set aside and appeal is allowed on the above terms with consequential relief."

6. In view of the above discussions I do not find any infirmity in the impugned order and the same is hereby sustained.

7. The appeal filed by the revenue is dismissed. Cross objection is disposed of.

(Operative portion of the order have already been pronounced in the open court)

S/d.
(P.K.Choudhary)
MEMBER (JUDICIAL)

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