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

Ex.Appeal No.211/08

(Arising out of Order-in-Appeal No.44/CE(A)/GHY/2007 dated 10.09.2007 passed by the Commissioner of Central Excise & Customs, Guwahati)

M/s Madanlal (Aluminium) Ltd.

Applicant (s)/Appellant (s)

Vs.

CCEx., Shillong

Respondent (s)

Appearance:

Shri S. Bagaria & Shri I.Banerjee, both Advocates for the Appellants(s)
Shri S. Mukhopadhyay, Supdt. (AR) for the Revenue

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing : 09.10.2018
Date of Decision : 09.10.2018

ORDER NO…FO/A/76846/2018

Per Bench :

The present appeal challenges the Order-in-Appeal No.44/CE(A)/GHY/2007 dated 10.09.2007.

2. The appellant is engaged in the manufacture of various products of aluminium falling under Chapter 26 of the Central Excise Tariff Act, 1985. In the process of manufacture of aluminium products, aluminium dross is generated. The appellants cleared the goods manufactured by them including aluminium dross on payment of Central Excise duty. The dispute covers the period February, 2005 to

January, 2006. During the said period, the appellant was availing the benefit of area based exemption Notification No.32/99-CE dated 08.07.1999, inasmuch as the appellant's factory was situated in an area covered by the said Notification. As per the Scheme of the said Notification, the appellants cleared the goods on payment of duty and subsequently, the duty paid was paid back to them subject to the conditions in the area based exemption notification. During the period under dispute as above, the appellant claimed the refund of the duty paid on aluminium products including aluminium dross. Through various refund orders under Section 11B of the Central Excise Act, 1944, the Assistant Commissioner sanctioned and paid such refunds. Subsequently, show-cause notices were issued proposing to recover such amounts totally amounting to Rs.4,95,473/- under the provisions of Section 11A as erroneous refund. The ground cited in the notices was that Aluminium dross has been held to be in the nature of waste and rubbish and could not be said to be a product of manufacture exigible to excise duty. It was viewed by Revenue that since no duty was payable at the time of clearance of aluminium dross, no refund will also be payable in terms of area based exemption notification. The original authority vide his order dated 13.02.2006, ordered for recovery of the refunded amount. In the impugned order, the Commissioner (Appeals) upheld the same. Aggrieved by the decision, the present appeal has been filed before the Tribunal.

3. Heard Shri S.Bagaria ld.Advocate assisted by Shri I.Banerjee, Advocate for the Appellant and Shri S. Mukhopadhyay, ld.D.R. for the Revenue.

4. The grounds of appeal were argued by the ld.Advocate and these are summarized below :

(i) The refund amounts were paid to the appellant by issue of appealable orders passed by the Assistant Commissioner. Without review of such adjudication orders under Section 35E of the Central Excise Act, 1944, the Department is not entitled to recover such refund through a notice under Section 11A ibid ;

(ii) The refund has been sanctioned after the appellant fulfilled all conditions laid down in the relevant Notification No.32/99-CE (supra). The Notification has covered Chapter 26, which includes aluminium dross. This was duly considered by the Refunding Authority at the time of passing of the refund claim. Such refund orders have attained finality and there was no scope to re-open the same on the ground of erroneous refund under Section 11A ibid. In this regard, he has relied on the following case laws :

(i) Eveready Indus. India Ltd. Vs. CESTAT, Chennai : 2016 (337) ELT 189 (Mad.) ;

(ii) TFL Quinn India Pvt. Ltd. Vs. CC & CE : 2016 (339) ELT 129 (Tri.-Hyd.) ;

(iii) Voltas Limited Vs. CCEx. & CC : 2006 (202) ELT 355 (Tri.-Bang.).

5. The ld.D.R. for the Revenue justified the impugned order. He rebutted the arguments on behalf of the appellant that the notice under Section 11A cannot be issued for recovery of erroneous refund without reviewing of the refund order under Section 35E. To this effect, he relied on the decisions of the Hon'ble Supreme Court in the

cases of (i) Asian Paints (India) Ltd. Vs. Collector of Central Excise, Bombay : 2002 (142) ELT 522 (S.C.) & (ii) Grasim Industries Ltd. Vs. Commr. of Central Excise, Bhopal : 2011 (271) ELT 164 (S.C.).

6. Heard both sides and perused the records.

7. The appellant's unit is situated in the State of Meghalaya, which is covered within the area based exemption Notification No.32/99-CE (supra). For the goods which are manufactured in the unit situated in such area, excise duty is required to be paid and the duty amount in excess of that paid by using cenvat credit was eligible as refund. The Scheme was formulated to promote industrialization of the areas to which such notification has been made applicable. It is noted that Chapter 26 of the Central Excise Tariff Act, 1985, is one of the Chapters specified in the Notification.

8. The appellant manufactured many aluminium products and aluminium dross emerged in the processes carried out in the factory. The appellants paid duty on the various aluminium products and refund was granted of the duty so paid including that aluminium dross, subject to the conditions specified in the Notification. Later on, the Revenue realized that the Hon'ble Supreme Court, in the case of Commissioner of Central Excise Vs. Indian Aluminium Co.Ltd. reported in 2006 (203) ELT 3 (SC), has held that aluminium dross is not excisable even if there is a tariff entry in the Central Excise Tariff covering it. In view of the above decision, Revenue was of the view that the appellant was not required to pay duty on aluminium dross and if paid, will not be entitled to the refund thereon in terms of Notification No.32/99-CE (Supra).

9. In the present proceedings before the lower authority as well as in the grounds of appeal, it has been agitated that the Revenue was not entitled to recover the refund already paid by issuance of a Notice under Section 11A by considering the refund as erroneous without reviewing the refund sanction order under Section 35E ibid.

10. After perusal of various case laws cited by both sides, it is noticed that the decisions are cited for against such proposition. However, we note that the dispute in the present case can be decided by considering the basic Notification No.32/99-CE (supra) in its proper prespective.

11. The intention of the Government in coming out with the area based exemption notification is to promote industrialization of the area. The Notification grants exemption to the specified goods manufactured within the designated area ; but such exemption has been operational through the refund mechanism. The CBEC Circular No.682/73/2002-CX dated 19.12.2002 has clarified that the refund paid under the area based exemption notification, is not the result of any excess payment of duty attracting Section 11B of the Act, but is a way of operation of the benefit of area based exemption.

12. Notification covers Chapter 26 and is applicable to all goods falling under the said Chapter. Aluminium dross is specifically mentioned under CETH No.262040.10, but still the Hon'ble Supreme Court has held in the case of Indian Aluminium Co.Ltd. (supra) that even if there is a tariff entry, no duty liability is there on aluminium dross. Under the circumstances, the appellant cannot be defaulted for making payment of duty on aluminium dross, especially since the

appellant has been availing benefit of the same Notification for a long time and has been receiving periodical refunds. We are of the considered opinion that the appellant was not required to pay duty on aluminium dross in the light of the pronouncement of law by the Apex Court. But keeping in view the purpose of Notification, we are of the view that once duty is paid, the refund cannot be denied to them.

13. In the result, in view the above discussions, we set aside the impugned order and allow the appeal with consequential relief.

(Dictated and pronounced in the open court)

Sd/
(P.K.Choudhary)
Member (Judicial)

Sd/
(V.Padmanabhan)
Member (Technical)

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