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

Ex.Appeal No.184/09

(Arising out of Order-in-Original No.40/Commissioner/CE/Kol.IV/2008 dated 31.12.2008 passed by the Commissioner of Central Excise, Kol.IV)

CCEx., Kol.IV

Applicant (s)/Appellant (s)

Vs.

M/s Bharat Roll Industries

Respondent (s)

Appearance:

Shri S. Mukhopadhyay, Supdt. (AR) for the Revenue
Dr.Samir Chakraborty, Sr.Advocate & Shri R.K.Singha, Sr.Executive for the Respondent (s)

CORAM:

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

Date of Hearing : 16.11.2018
Date of Decision : 16.11.2018

ORDER NO…FO/A/76999/2018

Per Bench :

The present appeal is filed by the Revenue against the Order-in-Original No.40/Commissioner/CE/Kol.IV/2008 dated 31.12.2008.

2. The respondent has a unit for the manufacture of various excisable goods falling under Chapter 73 & 84 of the first schedule to the Central Excise Tariff Act, 1985. During the period from 2003-04 to 2007-08 (Upto September 2007), the respondent's factory was covered by the West Bengal Incentive Scheme, 1999, for industrial projects of large, medium and small scale unit to be set up in the State

of West Bengal. This scheme was floated by the Govt. of West Bengal Commerce and Industries Department. In terms of the Scheme, the respondent was allowed to recover the sales tax at the appropriate rate and retain the same, without depositing to the State Government. The Department was of the view that such amount of sales tax retained by the respondent was to be considered as a component of value and is required to be added to the assessable value for levy of excisable duty in terms of Section 4 (3)(d) of the Central Excise Act, 1944. Accordingly, show-cause notice dated 14.03.2008 was issued. The Adjudicating authority dropped the demand for differential Central Excise duty worked out by adding sales tax incentives to the assessable value. Revenue has challenged the impugned order in the present appeal.

3. The ld.D.R., Shri S.Mukhopadhyay, for the Revenue, submitted that subsequent to passing of the impugned order, the issue has been decided by the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Jaipur II Vs. Super Synotex India Ltd. : 2014 (301) ELT 273 (SC). Similar view has been taken by the Apex Court in the case of Commr. of Central Excise, Delhi III Vs. Maruti Suzuki India Ltd. reported in 2014 (307) ELT 625 (SC). He submitted that the Apex Court has taken the view that unless the sales tax is actually paid to the Sales Tax Department of the State Government, no benefit towards Excise duty can be given under the concept of the transaction value under Section 4(4)(d) of the Central Excise Act, 1944. He

submitted that in view of the decision of the Apex Court, the differential duty demanded is liable to be upheld.

4. The respondent is represented by Dr.Samir Chakraborty, ld.Sr.Advocate. He fairly conceded that the issue stands decided by the Hon'ble Apex Court in favour of the Revenue on merit. However, he brought to notice the Circular issued by CBEC vide Circular No.1063/2/2018-CX dated 16.02.2018, in which among others, the issue regarding inclusion of sales tax incentive amount in the value has been clarified. CBEC has referred to the decisions of the Hon'ble Supreme Court in the cases of Super Synotex India Ltd. & Maruti Suzuki India Ltd. (supra). However, the CBEC has also referred to the decision of the Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Central Excise, Delhi III Vs. Microtek Forgings reported in 2016 (341) ELT 218 (P & H) and has clarified that the demand in such case is to be restricted to normal period. He further submitted that similar view has been taken by the Hon'ble Gauhati High Court vide decision dated 22.05.2018 in the case of North East Roofing Pvt. Ltd. Vs. Commr. of Central Excise & Service Tax in Central Excise Appeal No.6/2018. In view of the above, he prays for waiver of penalty.

5. Heard both sides and perused the appeal records and various case laws cited. The issue whether sales tax incentive amount is required to be included in the assessable value has been decided by the Hon'ble Supreme Court in the decisions as discussed above. As per Scheme of the West Bengal Incentive Scheme, 1999, the

assessees subscribing to such Scheme are allowed retention of the sales tax collected by them on the goods sold without depositing the same to the Sales Tax Department. The decision of the Hon'ble Supreme Court has made it clear that under such circumstances, the benefit of deduction of the sales tax amount under Section 4(4)(d) will not be available. As such, we are of the view that the demand for differential duty proposing in the show-cause notice is required to be upheld on merit.

6. We have also perused the Circular of the CBEC dated 16.02.2018 as also the more recent decisions of the Hon'ble High Courts of Punjab & Haryana as well as Gauhati. The Hon'ble High Courts have taken the view that since there was no clarity on the issue, untill the issue is settled by the Apex Court the assessee is not said to be at fault. Hence, extended period would not be available to raise the demand. By following these decisions, we are of the view that the demand is required to be restricted to the normal time limit. In these circumstances, we also find no justification for imposition of any penalty on the respondent.

7. The Adjudicating authority is directed to re-quantify the demand within the normal time limit, which is required to be paid along with interest.

8. In the result, the appeal is partly allowed.

(Dictated and pronounced in the open court)

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

Sd/
(V.Padmanabhan)
Member (Technical)

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