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

Appeal No.E/68/2008

(Arising out of Order-in-Appeal No.56/CE(A)/GHY/SH/2007 dated 11.09.2007 passed by the passed by the Commissioner of Customs & Central Excise (Appeals), Guwahati)

M/s. Dharampal Satyapal Ltd. …APPELLANT(S)

VERSUS

Commissioner of Central Excise & Customs, Shillong …RESPONDENT (S)

APPEARANCE
Shri T.R.Rustogri, Advocate for the Appellant.
Shri R.K.Choudhary, Spl. Counsel and Shri B.N.Pal, Spl. Counsel for the Respondent.

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing : 27.11.2018

Date of Pronouncement: 06.12.2018

ORDER NO.FO/77039/2018

Per Shri V.Padmanabhan :

The appeal is against the Order-in-Appeal No.56/CE(A)/GHY/SH/2007 dated 11.09.2007. The appellant is a manufacturer of branded and unbranded Pan Masala classifiable under Chapter 21 of the Central Excise Tariff Act, 1985. The dispute, which covers the period June, 2001 to March, 2004, covering Unit-I (Shed No.39) and Unit-II (Shed No.5) of the appellants situated in Guwahati. In these two units the appellant manufactured unbranded Pan Masala in bulk packing. These were cleared availing the Area Based Exemption Notification No.32/99-CE dated 08.07.1999. This exemption is granted in respect of that portion of the

Excise Duty which is paid in cash, over and above the portion of duty discharged by utilizing cenvat credit.

2. Clearances were made from Unit –I and Unit-II to appellan's three other Units situated in Guwahati, Baddi (Himachal Pradesh) and Noida (Uttar Pradesh). Since these clearances were made to sister concerns, the valuation to be adopted for payment of excise duty was done in terms of Rule-8 of the Central Excise Valuation Rules which provides that the assessable value is to be determined @115%/110% of the cost of production. The duty so paid is availed as cenvat credit by the receiving units.

3. The appellant adopted the cost of production as Rs.389.99 per Kg. (resulting in assessable value of Rs.448.5 per Kg.). It is pertinent to record that the cost sheet/pricing as above, was intimated to the jurisdictional Central Excise Authorities vide letter of the appellant dated 01.03.2002, which was also acknowledged by the Central Excise Authorities on 04.03.2002. The departmental authorities, after investigation, came to the conclusion that the cost of production should be Rs.386.11 per Kg. (resulting in assessable value of Rs.443.03 per Kg.) and that the appellant had indulged in over-valuation of unbranded Pan Masala with a view to claim undue benefit of refund in terms of Notification No.32/99 ibid. On these lines show cause notice was issued on 12.04.2005 to the appellant. The due process of adjudication resulted in the Order-in-Original dated 06.01.2007 ordering recovery of excess refund from Unit-I and Unit-II. This order is under challenge in the present proceedings.

4. With this background we heard Shri T.R.Rustogri, Advocate for the Appellant and Shri R.K.Choudhary and Shri B.N.Pal, Spl. Counsels for the Respondent.

5. The main arguments advanced on behalf of the appellant are summarized below:

i) The demands have been made in terms of Section 11A of the Central Excise Act. Ld. Advocate submitted that Section 11A ibid has no application for demand of duty in the circumstances of refund granted under Area Based Exemption Notification. To support this view he relied on the following decisions.

a) Shree Nath Industries vs. CCE, Jammu [2018(5) TMI 195-CESTAST Chandigarh.
b) M/s Bharat Box Factory Ltd. etc vs. CCE, Jammu [2018 (5) TM 1346-CESTAT, Chandigarh.
c) Crystal Corp Protection Pvt. Ltd. vs. CCE Jammu [Final Order No.A/631197/2018-EX(DB) dt. 27.08.2018]
d) Nirlon Ltd. vs. CCE, Mumbai [2015(320) ELT 22 (SC)]
e) M/s. Mahindra & Mahindra Ltd. vs. CCE Mumbai-IV [2017(5) TMI 43-CESTAT Mumbai]

ii) The appellant has been claiming refunds periodically as entitled under Area Based Exemption Notification. These refunds have been sanctioned by way of Quasi Judicial Order passed by the Jurisdictional AC/DC. None of these refund orders have been reviewed and hence have achieved finality. Without reviewing the refund orders no proceedings can be initiated under Section 11A for recovery of refunded amounts. In this connection he specifically relied on the decision of the Hon'ble High Court of Gauhati in the case of Commr. Of C.Ex, Shillong vs. Jellapore Tea Estate [2011(268) ELT 14(Gau.)]

iii) Since the clearances have been made to sister units, any differential duty paid by the appellant will be availed as cenvat credit to the downstream units. Since this leads to Revenue neutral situation, there can be no demand for Central Excise duty by taking recourse to the suppression clause under Section 11A.

iv) There is no justification for imposition of penalty under Section 11AC.

v) He also strongly raised the ground of time bar. Referring to the intimation filed by the appellant before the Jurisdictional Superintendent; and Assistant Commissioner of Central Excise vide appellant's letter dated 01.03.2002, he argued that the basis for determination of cost of production was duly intimated to the department and as such there can be no allegation of suppression against the appellant. Hence, the demand may be set aside on the ground of time-bar.

6. Ld. Special Counsel for the Revenue justified the impugned order with the following arguments.

i) The argument raised by the appellant with reference to Section 11A has never been raised before the lower authorities and as such cannot be allowed to be raised at this stage.

ii) Ld. Special Counsel asserted that the provisions of Section 11A will be available to Revenue to raise the demand. He argued that all clearances made from units covered by Area Based Exemption are to be accompanied by invoices based on which the downstream unit availed cenvat credit. The provisions of Section 11A can be invoked for demand of any amount paid as duty.

iii) He refuted the submission made on behalf of the appellant that the situation is Revenue neutral.

iv) He also refuted the ground of limitation with the argument that the appellant has suppressed material facts by not giving sufficient information voluntarily to the Departmental Authorities. In the declarations filed by the appellant under Rule 173C on 28.06.2001, they had only declared the assessable value of unbranded Pan Masala. Since they have failed to give all the details specified in CBEC Circular No.29/29/94-CX, dated 21.03.1994, the allegation of suppression is to be sustained.

v) They also relied on the following case laws:

a) Chemfab Alkalis Ltd. vs. Comm. Of C.Ex., Pondicherry [2010(251) ELT 264(Tri.-Chennai)]

7. Heard both sides and perused the appeal records.

8. The dispute pertains to the two units of the appellant situated in Guwahati which were availing Area Based Exemption under Notification No.32/99 (supra) and made clearances of unbranded Pan Masala to three separate units of the appellant situated elsewhere. Admittedly clearances made to sister units are required to be valued on the basis of Rule 8 of the Central Excise Valuation Rules, 2000. The dispute revolves around the computation of the assessable value on the basis of the estimated cost of production. The basis for arriving at the cost of production has been prescribed in CAS-4 Standards formulates by the Institute of Cost Accountants. Perusal of the record indicates that the estimate of cost of production by the appellant is not supported by any Certificate from Cost Accountant. The department has proceeded to redetermine the cost of production under their own methodology, but it is seen that cost of production arrived at by the department is also not as per CAS-4

Standard. Under the circumstances we are inclined to conclude that neither of the assessments is made as per the prescribed standard.

9. The allegation of the department is that the appellant has inflated the assessable value, paid more duty than required and availed extra amount by way of refund available to them under Notification No.32/99 (supra). The demands in this regard have also been made under the extended period of limitation under proviso to Section 11A, by alleging suppression of facts. Appellant has pointed out that they have been periodically filing declarations before the departmental authorities indicating the prices of unbranded Pan Masala proposed to be adopted for payment of duty. There is a record of price list having been filed under the then Rule 173C of the Central Excise Rule, 1994 on 28th June, 2001. Further, it is on record that the cost of production has also been intimated to the Jurisdictional Superintendent on 01.03.2002 alongwith cost sheet. In view of the above, the departmental authorities were very much aware of the fact that unbranded Pan Masala was being cleared to sister concerns. Further they could have undertaken investigation promptly to determine whether the valuation adopted was proper. Having failed to do so, we find no justification on the part of Revenue Authorities to invoke the suppression clause against the appellant on the basis of estimate of cost of production not supported by necessary certificate from an independent Cost Accountant. Hence, we conclude with invoking the extended time limit under Section 11A has no justifiable basis. For the period June, 2001 to March, 2004, the show cause notice has been issued only on 12.04.2005. This leads us to the conclusion that the entire demand is not sustainable as time barred.

9. In view of the above we set aside the impugned order and allow the appeal.

(Dictated and Pronounced in the Open Court on 06.12.2018)

S/d. S/d.

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(V.Padmanabhan)
MEMBER (TECHNICAL)

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