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

Appeal No. E/122/2009

(Arising out of Order-in-Original No. 108/MP/Denovo/Commr./2008 dated 08/12/2008 passed by the Commissioner Central Excise and Service Tax, Ranchi.)

M/s. Bihar National Engineering Works Applicant (s)/Appellant (s)
Vs.
CCE, Ranchi
Respondent (s)

Appearance:
Shri G. K. Mundra, CA for the Appellant (s)
Shri D. Haldar A. C. (A.R.) for the Revenue
CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: -12.07.2018
Date of Pronouncement:-02/01/2019
ORDER NO. FO/75015/2019

PER BENCH

This is the third round of Litigation before the Tribunal.

2. The facts of the case in brief are that the appellant is a partnership firm. The erstwhile partners of the erstwhile firm were (i) Shri Nemi Chand Jain, and (ii) Smt. Pushpa Devi Jain. The appellant firm was engaged in the manufacture of Ferrous Castings (Castings of iron or steel) and non-ferrous Castings (Castings of Brass). The appellant's factory was registered as a Small Scale Industry unit with the Director of Industries Bihar.

3. Prior to the Central Excise Tariff Act, 1985, the ferrous castings manufactured by the appellant were classifiable under Tariff Item No. 25 of the First Schedule to the Central Excise Act, 1944. After the Central Excise Tariff Act, 1985, came into force, the aforesaid goods were classifiable under Chapter 73 as per Notification No. 208/83-CE dated 1/8/1983, as amended. It is the case of the appellant that Castings of iron

or steel, when made from the inputs specified in the said Notification, were exempt from the whole of the duty of Excise leviable thereon subject to the following conditions:-

(i) Appropriate Excise Duty/additional duty of Customs under section 3 of the Customs Tariff Act, 1975 had already been paid on such inputs, and

(ii) No credit of the duty paid on the inputs was taken under Rule 56A or Rule 57A of the Central Excise Rules, 1944.

The Explanation to the said Notification specifically provided "For the purpose of this notification, all stocks of inputs in the country, except such stocks as are clearly recognizable as being non-duty paid, shall be deemed to be inputs on which duty has already been paid."

4. Thus, complying with the conditions of the Notifications, Modvat Credit on the inputs have not been availed and the L-4 license was surrendered to the Excise Authorities which was duly accepted. Show Cause Notice dated 04/06/1990 was issued demanding duty for the period 1986-87 to 1989-90. A search of the appellants was conducted on 22/02/1991 and further Show Cause Notice dated 29/07/1991 was issued invoking the larger period of limitation.

5. The Adjudicating Authority passed the impugned order and confirmed the demand of duty amounting to Rs.2,72,406/- along with interest and imposed penalty of Rs. 1,50,000/-. Hence, the present appeal before the Tribunal.

6. The dispute in the instant case is that the Commissioner has erred is not considering the claim of the Appellant that the C.I. Castings manufactured by it were classifiable under Chapter heading No. 73.07 upto 28.2.1988 and heading No. 73.25 with effect from 1.03.1988. It has

been submitted that the said goods were entitled to the benefit of exemption Notifications No. 208/83-C.E. dated 1.08.1983, No. 90/88-C.E. dated 1.3.1988, No. 202/88-C.E. dated 20.5.1988 and No. 275/88-C.E. dated 4.11.1988.

7. Ld. Consultant appearing on behalf of the appellant firm filed a synopsis of written submissions along with a compilation of relied upon decisions, circulars and notifications.

8. Ld. DR reiterates the findings of the impugned order.

9. Heard both sides and perused the appeal records.

10. We find that the appellant did not manufacture precision castings. The Castings manufactured by the Appellant were subjected to operations only upto the stage of Proof-machining. After coming into force of the Central Excise Tariff Act, 1985, the Iron Castings were classifiable under heading No. 73.07. The Board vide its Circular No. 01/87. dated 18.2.1987 clarified that the Castings, which have undergone the process of removal of runners and risers, surface cleaning, grinding to remove excess material, annealing & stress relieving, proof-machining, surface coating, etc., would continue to be classified under heading 73.07 and do not merit classification as parts of Machinery under chapter 84/85. With effect from 1.3.1988, changes were made in the Tariff headings of Chapter 73 and the Castings and cast articles of iron or steel were classified under heading No. 73.25.

11. The Board issued a Circular No. 32/89 dated 30.06.1989 clarifying that in view of the alignment of Chapter 73 with the HSN with effect from 1.3.1988, the Castings should be regarded as semi-finished articles having essential character of Machine parts, and as such by application of

Rule 2(a) of the Interpretation Rules, the same would be classified under Chapters 84, 85, 86 and 87.

The Tribunal in the case of Shivaji Works Ltd. Vs. C.C.E.-1994 (69) E.L.T. 674 (Tribunal), had held that Rule 2(a) of the Interpretation Rules cannot be applied for classification of the Castings. The Tribunal held that the Iron Castings upto the proof-machining stage would be classified under heading 73.25.

The said decision of the Tribunal in Shivaji Works Ltd. Vs. C.C.E. (Supra) was accepted by the Department and vide Circular No. 225/59/96-CX dated 1.7.1996, the Board clarified that the Castings, other than precision Castings, would be classified under heading No. 73.25. The Board also withdrew the earlier Circular dated 28.7.1989 and directed that all pending assessments may be finalized as per the new Circular. The goods manufactured by the Appellant were entitled to the benefit of Notification No. 208/83-C.E. dated 01.08.1983 upto 28.2.1988, Notification No. 90/88-C.E. dated 1.3.1988 upto 20.5.1988; Notification No. 202/88-C.E. dated 20.5.1988 upto 4.11.1988 and Notification No. 275/88-C.E. dated 4.11.1988 from this date onwards.

In so far as the Cast articles of Brass falling under Tariff heading No. 7410.00 are concerned, the Appellant manufactured the said goods from copper/brass scrap purchased from the open market and the same were exempt under Notification No. 149/86-C.E. dated 1.3.1986.

As regards the Mould Pattern falling under heading No.8480.00, the same were used by the Appellant within its factory and were eligible for exemption under Notification No. 220/86-C.E. dated 2.4.1986

It is trite law that, if the Department intends to classify the goods under a particular heading or sub-heading, the Department has to adduce proper evidence and discharge the burden of proof. In the present case, the Department has not produced any evidence that Castings manufactured by the Appellant have undergone any process beyond proof-machining. There seems to have been no misdeclaration or suppression of facts or contravention of any of the provisions of law with intent to evade payment of duty on the part of the appellant.

The Appellant was holding L-4 License and the details of the goods manufactured and the process of manufacture undertaken by it were fully known to the excise authorities. By its letter dated 26.12.1986, the Appellant made a bonafide claim for exemption under Notification No. 208/83 dated 1.08.1983 and surrendered the L-4 License. The surrender of the L-4 License was duly accepted by the Excise authorities without any objection. There was correspondence from time to time for filing of declarations under Rule 174. It is well settled that if the duty is not paid or an exemption is claimed under a bonafide belief or when the facts are known to the department, the proviso to Section 11A(1) cannot be invoked.

Even otherwise, during the relevant period, there was considerable doubt regarding the tariff classification of the Iron Castings particularly as to whether such Castings would be classified under Chapter 73 or as semi-finished parts of the machinery under Chapter 84, which was settled only by the Tribunal decision in the case of Shivaji Works Ltd. Vs. C.C.E. (Supra).

The Board, which had earlier issued Circular dated 30.06.1989 clarifying that Castings should be regarded as semi-finished Machine Parts also withdrew the said Circular and accepted the Tribunal decision in the aforesaid case. The Assistant Director, DGAE, Patna required the

Appellant to submit all the relevant records for the period from March, 1986 to February, 1990, which were duly produced by the Appellant on 4.5.1990. However, after necessary examination of the records and enquiries, the Assistant Director, DGAE, returned the documents by his letter dated 17.9.1990 and no proceeding was initiated against the Appellant. Thus, it seems that the Assistant Director, DGAE, was also satisfied that no duty was payable by the Appellant during the relevant period.

The Excise Department considered the issue relating to the chargeability of the duty on the products manufactured by the Appellant on various occasions in the past i.e. when the Appellant surrendered the L-4 license on 26.12.1986 and also when the Appellant filed declarations on 16.4.1990. The issue of chargeability of the duty on the products manufactured by the Appellant was also examined by the Assistant Director, DGAE, Patna. The department also issued letters/Show Cause Notices (s) on the same subject matter.

It is well settled by various decisions of the Hon'ble Supreme Court that when the department has earlier considered the issue, or has issued show cause notice on the same matter earlier, it cannot issue a subsequent show cause notice alleging suppression of facts.

12. In view of above discussion, the impugned order is set aside and the appeal filed by the appellant is allowed.

(Pronounced in the court on 02/01/2019.)

Sd/-	Sd/-
(BIJAY KUMAR)	**(P. K. CHOUDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Pooja