IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Ex. Appeal No.79274 of 2018

Arising out of Order-in-Appeal No.348/RAN/2018 dt. 23/08/2018 passed by the Commissioner (Appeals) of Central Goods & Service Tax & C. Ex., Ranchi.

M/s. Bharat Coking Coal Ltd.
Coal Washery, Area Finance Manager, Sudamdih,
Dhanbad-828125

Appellant (s)

VERSUS

Commissioner of CGST & C. Ex, Ranchi
5A, Main Road, Ranchi, Jharkhand

Respondent (s)

APPERANCE :

Shri Rajeev Agarwal, CA for the Appellant
Shri H. S. Abedin, D. R. (A. R.) for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing : 03.06.2019
Date of Pronouncement:-17/06/2019
ORDER NO. FO/75596/2019

PER P. K. CHOUDHARY :

In the instant case, the issue that arises for consideration is whether demand is sustainable when the excess amount of central excise duty paid by appellant is suo-moto adjusted during the period March 2011 to March 2013 and whether there is a short payment of central excise duty as per ER-1 return filed by appellant for the month of February 2012.

2. Briefly stated the facts of the case are that the appellant is a coal washery plant of Bharat Coking Coal Ltd. (BCCL) which is engaged in washing of the duty paid raw coal received from other coal producing areas/units of the company. Central Excise duty on coal was introduced for the first time w.e.f. 1st March, 2011. Prior to the said date, coal was subjected to 'NIL' rate of Central Excise duty. Even though the activity of washing of coal did not amount to manufacture, the appellant due to lack of knowledge started paying duty on washed coal w.e.f. 01.03.2011. In respect of supply of washed coal in some cases, the final price got reduced

after determination of ash content as per the supply contracts with the buyers. Although the appellant did not resort to Provisional Assessment under Rule 7 of the Central Excise Rules, 2002, for payment of duty, the prices agreed with the coal buyer is always provisional which is finalised after the closure of the respective financial year and subject to adjustment of ash content in the washed coal.

3. The appellant made suo-moto adjustment of excess duty of Rs.29,80,320/- for the period of 2011-12 to 2012-13 for which a Show Cause Notice (SCN) dated 5th August, 2016 came to be issued. In the said SCN, a short payment of duty of Rs.5,39,617/- for the period February 2012 was also alleged. The Ld. Assistant Commissioner, Central Excise and Service Tax, confirmed the demand along with equivalent penalty and applicable interest. The appeal filed against the said adjudication order was upheld vide the impugned order wherein the Ld. Commissioner (Appeals) relied on the Larger Bench decision of the Tribunal in the case of BDH Industries Ltd. v. Commissioner of C. Ex (Appeals), Mumbai-I, 2008 (229) ELT 364 (Tri-LB) to hold that the assessee could not make suo motu adjustment without seeking department’s consent. Hence, the present appeal before the Tribunal.

4. Sri Rajeev Kr. Agarwal, CA, appeared on behalf of the appellant and Sri H. S. Abdedin Ld. AR, Departmental Representative appeared on behalf of the Revenue.

5. The Ld. CA appearing on behalf of the appellant submitted that the issue regarding the adjustment of excess duty was well in the knowledge of the department. He pointed out to the Audit Report no. 64/ST/BOK/RAN/2013-14 (issued under C. no. III (10-G) 19/EA-2000/CEX/BOK/RAN-13-14/2794 duly signed by Asst. Comm. Audit, Ranchi HQRS), wherein the objection raised by Audit team with respect to self adjustment of duty against the excess deposits of Rs. 25,66,839/- for the period 2012-13 was specifically dropped in the Monitoring Committee Meeting (MCM) of the audit department. The aforesaid letter dated 4th March, 2014 along with the Audit Report is annexed at Page no. 57 to 62 of the Appeal Paper Book. He also pointed out to the deposition made by the appellant in summon proceedings in para 9 wherein the fact of aforesaid audit para having been dropped was duly submitted. (also reproduced in the impugned SCN in page no. 4). It is his submission that the audit objection was well-settled and no action was proposed to be

taken against the appellant for the self adjustment of duty issue. No attempt was made in the entire SCN or the impugned OIO to justify how the audit objection of self adjustment got revived, though it was dropped in 2014 and duly communicated to the appellant. He also referred to Circular no. 985/9/2014-CX dated 22.9.2014, issued under F. No. 206/03/2014-CX.6, para no. 5.1, wherein it is mentioned that "Monitoring Committee Meeting (MCM) should be convened by Audit Commissionerate, for which the Executive Commissioner or his representative will be invited to attend. The decision with regard to settlement of an audit objection after recovery of all dues or dropping of the unsustainable audit objections shall vest with the Audit Commissioner." Accordingly, he submitted that once the decision has been taken in the MCM to drop the audit para, no SCN could be issued.

The Ld. CA further submitted that the decision of the Ld. Commissioner (Appeals) is based on the larger bench decision of CESTAT, Mumbai in the case of BDH Industries Ltd. wherein the Hon'ble Tribunal while denying suo moto adjustment of excess duty, had not taken into consideration the decision by the Hon'ble Karnataka High Court as reported in [2006 (206) E.L.T. 90 (Kar.), confirming the decision of the Tribunal in the case of Motorola India Pvt. Ltd. [2007 (7) S.T.R. 613 (Tri-Bang.), wherein it is observed that the amount paid in excess, cannot be treated as duty and it was held that the assessee can avail suo-moto credit of such excess duty paid. He submitted that the decision of Hon'ble Larger Bench cannot be relied upon and the very basis of the impugned OIA is incorrect and thus liable to be set aside. In support of his contention, he relied on the decisions of this Tribunal in Sopariwala Exports Pvt. Ltd. v. Commissioner of C.Ex.,Vadodara-I [2017 (49) S.T.R. 195 (Tri-Ahmd.) and Pushp Enterprises v. Commissioner of Central Excise, Jaipur-I [2015 (322) E.L.T. 728 (Tri. - Del.)], wherein it has been held that the decision in the case of BDH Industries Ltd [Supra] cannot be relied upon in view of the fact that the judgment of the Hon'ble Karnataka High Court was not brought to the notice of the Larger Bench when they heard the Larger Bench reference.

The Ld. CA also submitted that claiming of refund of excess duty payment instead of suo-moto adjustment will not have any financial implication either on the appellant or revenue department. There is no loss of revenue to the government. He stated that the situation would be completely revenue neutral, in which case the extended period of limitations cannot be invoked as has been held by the Apex Court in Nirlon Ltd. v. CCE, Mumbai 2015 (320) E.L.T. 22 (SC).

On the second issue with regard to alleged short payment of duty of Rs. 5,39,617/-, the Ld. Counsel vehemently submitted that the said demand is based on examination of ER-1 return filed for February 2012. The said demand has been wrongly issued by considering the differences made in the Original and Revised Returns for February 2012 whereas it is the submission of the appellant that the final duty, payable was Rs. 1,04,54,696/- and not Rs 1,09,94,313. He submitted that details of duty computation as appearing in page 96 of Appeal Paper Book was duly submitted with the revised return. He also submitted that the entire case has been built on the basis of examination of ER-1 returns filed by the appellant, as also recorded in para 4 of the SCN, and therefore the allegation of fraud or suppression cannot be levelled to invoke extended period of limitation. He further submitted that the original ER-1 return was filed stating the duty payment of Rs. 1,09,94,313/- which was revised showing the payment of Rs. 1,04,54,696/- being the correct net duty liability. The SCN has not stated any concrete basis to allege short duty payment whereas, the appellant has duly filed the returns (original and revised) and the relevant details were always available with the department and therefore, the extended period of limitation cannot be invoked. He further stated that the Ld. Commissioner (Appeals) erred in observing that that there was no legal provision allowing the appellant to file revised return. The Ld. Commissioner (Appeals) failed to appreciate that even if there is no specific provision to file the revised return, the assessee cannot be left rudderless and there was no error in submitting the correct facts and figures by way of filing revised return. The assessee has submitted the actual amount of duty of Rs. 1,04,54,696/- instead of Rs. 1,09,94,313/- wrongly shown in the original return.

He further contested the demand on time bar and submitted that the appellant being a PSU cannot have intent to evade payment of duty. He relied on the Apex Court's decision in the case of CCE, Chennai vs. Chennai Petroleum Corporation Ltd. 2007 (211) ELT 193 (SC), as well as this Tribunal's decision in the case of CCE Indore vs. Nepa Ltd. 2013 (298) ELT 225 (Tri-Del) and Burn Standard Co. Ltd. vs. CCE, Kolkata 2011 (267) ELT 193 (Tri).

As an alternate plea, the Ld. CA submitted that the demand in the instant case is on the appellant which is merely a Coal Washery plant of BCCL and not the coal producing area/mine. The activities undertaken by appellant is merely limited to washing of coal which itself does not amount to manufacture of an excisable goods inasmuch as no new product emerges in the coal washing process. He relied on the decision of the Hon'ble Supreme Court in the case of CCE Bhubaneswar vs. Tata Iron and Steel Co. Ltd. 2003 (154) ELT 343 (SC) wherein it has been held by the Apex Court that activities undertaken for washing of coal to reduce the ash content from the raw coal do not amount to 'manufacture'. He submitted that merely because the appellant chose to register itself with central excise for payment of duty, newly introduced w.e.f. March 2011, which was legally not payable, the demand per se is not sustainable.

6. The Ld. DR submitted that the appellant is not legally entitled to suo-motu adjust the excess amount of duty in view of the Larger Bench decision of BDH Industries (Supra) as has been correctly relied by the Ld. Commissioner (Appeals) in the impugned order. He stated that the proper course of action would have been to apply for refund inasmuch as the appellant did not seek permission for provisional assessment under Rule 7 of the Central Excise Rules. Moreover, he submitted that once the ER-1 return has been filed by stating the duty amount of Rs. 1,09,94,313 for the month of February 2012, the assessee could not subsequently reduce the duty amount to Rs. 1,04,54,696/- by taking shelter of filing revised return inasmuch as there was no legal provision to file the revise return and in that case the proper course would have been to file a refund claim.

7. Heard both sides and perused the appeal records.

8. On perusal of the entire case, I am of the view that the case of the appellant can be decided on the ground of limitation inasmuch as the period in dispute is March 2011 to March 2013 for which the SCN has been issued in August 2016 by invoking extended period of limitation. The fact regarding the adjustment of excess duty was always in the knowledge of the department as it appears from the audit proceedings when the audit Para was dropped. The SCN has been issued on the basis of change in opinion without taking into cognizance of the practice already followed by assessee in which case there cannot be said to be any suppression on the part of the assessee. Further, on perusal of the entire SCN, except the allegation of suppression to invoke extended period of limitation, I do not

find any specific instance to show that the assessee deliberately suppressed any information from the Department. Moreover, I find that the whole issue has arisen due to lack of knowledge in complying with the central excise procedure since the levy of central excise duty was introduced for the first time with effect from March 2011 and the assessee was new to the subject. In the instant case, the appellant is a PSU and will not have any reason to evade payment of duty as has been held by the Apex Court in Chennai Petroleum Corporation Ltd. (Supra) and followed by this Tribunal in Nepa Ltd. (Supra) and Burn Standard Co. Ltd. (Supra). In view of the above findings, instead of going into the merits of the case, I allow the appeal on the ground of limitation.

8. The impugned demand is therefore set aside and the appeal is allowed with consequential relief as per law.

(Pronounced in the court on 17/06/2019.)

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

Pooja