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

Ex. Miscellaneous Application No. 76513 of 2019
And
Appeal No. E/159 of 2012, CO-32/2012

Arising out of Order-in-Appeal No. 09/ADJ/CE/COMMR/DIB/11 dated 22.11.2011 passed by the Commissioner of Central Excise, Dibrugarh.

Commissioner of Central Excise, Dibrugah.
Milan Nagar "F" Lane,
P. O. C. R. Building
Dibrugarh-786003, Assam.

....Appellant (s)

Vs.
M/s JSVM Plywood Industries Ltd.
(Formerly Arunachal Saw & Veneer Mills Ltd.)
17th Milw, jairampur,
Arunachal Pradesh.

....Respondent (s)

<u>Appearance:</u>
Shri S. Mukhopadhyay, A. R. for the Appellant (s)
Dr. Samir Chakraborty & Shri K. K. Biswas, Advocates for the Respondent(s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: - 06.08.2019

Date of Decision:- 06.08.2019

Order No…MO/76871/2019 & FO/A/76434/2019

PER SHRI P.K.CHOUDHARY:

The instant appeal is preferred against the adjudication Order No. 09/ADJ/CE/COMMR/DIB/11 Dated 12/11/2011 passed by the Commissioner, Central Excise, Dibrugarh, in terms of the Review Order No. 02/Review/CCO/SH/2012 dated 19/03/2012 by the Committee of Chief Commissioner.

The Respondent filed a Misc. Application for change of name of the Company from **ARUNACHAL SAW & VENEER MILLS PVT LTD** to **_JSVM PLYWOOD INDUSTRIES LTD**., Prayer for change of Cause Title is allowed.

2. The facts of the case in brief are that the Respondent is engaged in the manufacture of Plywood and Block Boards classifiable under Chapter 44 of the erstwhile Central excise Tariff Act. On September 24, 2007 an application for availing of the benefit of exemption in terms of Clause -

5(b) of Notification No. 20/2007 – CE dated April 25, 2007 (in short, "the said Notification"), along with required documents was submitted.

3. On November 6, 2007 the Assistant Commissioner, Central Excise, Digboi Division, the jurisdictional Assistant Commissioner, forwarded to the Range Superintendent, the application of the respondent for onsite verification of the plant and machinery newly installed, in addition to the existing plant and machinery and to submit a detailed report on the genuineness of the claim.

4. Range Superintendent of the Division submitted a report and stated therein that the respondent had taken up expansion of the installed capacity by way of setting up of the machineries set out in the said report dated October 17, 2007. It was further reported that the respondent had duly intimated the Range Superintendent, by a letter dated March 2, 2007 about the Company's proposal for increasing the installed capacity, by way of adding / setting up new plant and machineries and that such installation was started on March 5, 2007 and completed on April 27, 2007, whereupon the commercial production was commenced with the new machineries on May 2, 2007.

The Assistant Commissioner of the Division visited the factory along with Superintendent, Anti Evasion, Central Excise, Digboi and physically verified the plant and machineries during pre-expansion and post-expansion. The Respondent also submitted Chartered Accountant's Certificate dated 30-09-2006 certifying the written-down value of the plant and machinery as on March 31, 2006 and certified that fresh investments in plant and machinery and value installed during 05-03-2007 to 31-03-2007 and 01-04-2007 to 30-04-2007. After verification of those certificate and inspection, the Assistant Commissioner, Digboi Division passed an order dated 06-11-2007 after being satisfied with the correctness and genuineness of the capital investment in plant and machinery made by the respondent and came to the conclusion that the respondent has made expansion of the plant and machinery for more than required 25%, the Assistant Commissioner allowed the respondent to avail the benefit of the said Notification No. 20/2007 – CE dated 25-04-2007.

Thereafter, The Commissioner, Central Excise, Dibrugarh, by an Order dated 30-11-2007 accepted the order passed by the Assistant Commissioner, Digboi Division dated 06-11-2007. The Assistant Commissioner in his order dated 11-01-2008 allowed the respondent to take credit of the amounts by way of 'Self-Credit' of basic excise duty paid for the months of May 2007 to December 2007 as provided in the said Notification in the respondent accounts current.

5. However, thereafter, pursuant to an investigation undertaken by the Head Quarters, Anti Evasion Unit of Central Excise, Dibrugarh, a Show Cause Notice dated November 11, 2010 was issued alleging that the respondent had availed the benefit of the said Notification by way of 'Self Credit' and refund of duty paid, during period May 2007 to July 2010 (hereinafter referred to as the said period on misstatement of fact of eligibility under the said Notification and by allegedly furnishing fictitious documents of plant and machineries, in contravention of the provisions of the said Notification. The Show Cause Notice proposed demand and recovery of the duty amount of Rs.85,83,753/- under Section – 11A(1) of the Central Excise Act, 1944 along with interest thereon under Section – 11AB of the Act. The Show Cause Notice further proposed imposition of penalty upon the appellant under Section – 11AC of the Act read with Rule – 25 of the Central Excise Rules, 2002.
6. The Commissioner, Central Excise, Dibrugarh, on consideration of reply to the Show Cause Notice and submissions made during the personal hearing by the Respondent, passed the impugned order under appeal and dropped the charges against the respondent and concluded that the investments made by the respondent was more than 25% of the value of fixed capital investment in plant and machinery as stipulated in the said Notification.

The Committee of the Chief Commissioner reviewed the order passed by the Commissioner, Dibrugarh and directed the Commissioner to file an appeal to determine as to whether the order was proper and legal in dropping the charge against the assessee holding that there was substantial expansion done by the assessee by taking into consideration the depreciated value in plant and machinery as a base value for the purpose of expansion by way of increase in the value of fixed capital investment in plant and machinery so as to make the respondent eligible for availment of benefit of Notification No. 20/2007 – CE dated 25-04-2007.

The Ld. A.R. appearing for the Department reiterated the grounds of appeal and submitted that investment was made in plant and machinery as on 31-03-2006 on the basis of written-down value of plant and machinery so installed on or before 31-03-2006 was not correct and proper in terms of Notification No. 20/2007 – C.Ex dated 25-04-2007 and the Commissioner, erred in holding that Noticee No.1 has fulfilled the condition / terms of the Notification. The Order passed by the Commissioner is, therefore, erroneous and liable to be set-a-side.

LD. Senior Advocate DR. Samir Chakraborty argued that there was no infirmity in the impugned order and submitted that the Commissioner was right in his interpretation of Clause – 5 (b) of the Notification and to take the depreciated value of the plant and machinery in determining the percentage of increase in the fixed capital investment in plant and machinery effected by the respondent as required under the said Notification.

DR. Chakraborty argued that the Commissioner in the impugned order had rightly held that in the said Notification there is no mention of "Original Book Value" or "Depreciated Value" of fixed capital investment in plant and machinery. It is only "value", which is stated therein. The said value represents and also has to represent, "the present value", i.e. the value as on March 31, 2006, since the said Notification required commencement of commercial production from the expanded capacity only on or after April 1, 2007, the increase had to be determined based on the value of the existing plant and machinery prior thereto.

He further stated that – if one compares with Section – 80IE of the Income Tax Act, 1961, relied upon in the Show Cause Notice itself by the Revenue. Sub-Section (7) (iii) thereof defines "substantial expansion" as "increase in the investment in the plant and machinery by at least 25% of the Book Value of plant and machinery (before taking depreciation in any year) as on the first day of the previous year in which the substantial expansion is undertaken". Therefore, whereas under the Income Tax Act, 1961, Section – 80IE thereof required computation of 25% or more increase on the book value of the plant and machinery without taking depreciation, there being no such specification contained in Clause – 5(b) of the said Notification or in any other Clause thereof, the legislative intent is clear and unambiguous that the "present" value, i.e. the value as on March 31, 2006 in the instant case, as reflected in the Balance Sheets and the certificates issued by the Chartered Accountant certifying the same has to be taken into account. Contrary to the misconceived contentions of the Revenue, the related Balance Sheets of the respondent clearly disclosed that the value of the fixed capital investment as on March 31, 2006 was that as declared by the respondent (duly certified by the Chartered Accountants). The said figure was therefore correctly considered and accepted by the Commissioner.

He further argued that the Show Cause Notice and the demand pertaining to the period May 2007 to November 2009 is barred by limitation, as the same was issued beyond the prescribed period of One Year as provided in Section – 11A (1) of the Act in absence of any mis-declaration or suppression of any fact.

Ld. Sr. Advocate, further contended that the Appeal preferred by the Revenue is, on the face of it, unsustainable ab initio. No challenge was made by the Revenue to the order dated November 6, 2007 of the Assistant Commissioner allowing the benefit of the said Notification and sanctioning self-credit / refund pursuant thereto, though the said order was challengeable under Section – 35E of the Act. On the contrary, the said order dated November 6, 2007 of the Assistant Commissioner was accepted and confirmed by the Commissioner of Central excise, Dibrugarh, by his order dated November 30, 2007, which order was also not challenged by the Revenue. He cited the decision of Hon'ble Gauhati High Court in the case of Commissioner of Central Excise – Vs – Jellalpore Tea Estate, 2011 (268) ELT 14 (Gau).

7. Heard both sides and perused the appeal records.

8. We find that the claim of the respondent was allowed only after complete scrutiny of all the concerned authorities of the appellant, including physical verification in the course of which all relevant materials and documents were duly scrutinized and we find that the Commissioner was right in his interpretation of Clause – 5(b) of the Notification and to take the depreciated value of plant and machinery as on 31-03-2006 in determining the percentage of increase in the fixed capital investment in plant and machinery in absence of any mention of Original Book Value in the said Notification.
9. We also find that in view of the decision of the jurisdictional High Court of Gauhati in the case of The Commissioner of Central Excise – Vs – Jellalpore Tea Estate, 2011 (268) ELT 14 (Gau), the instant proceedings against the respondent by taking recourse to Section – 11A of the Central Excise Act for recovery of alleged erroneous refund tantamount to circumventing the prescribed law, is clearly impermissible. Following the said binding decision of the Hon'ble Gauhati High Court, which has also attained finality, the instant appeal is liable to be rejected on this ground alone. Also we rely on the decision of the Apex Court in Commissioner – Vs – Green Ply Industries – 2018 (360) ELT A171 (SC).
10. The Appeal filed by the Department, is therefore, rejected. Cross Objection filed is also disposed-off accordingly.

(Operative portion of the order already pronounced in the Open Court)

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

Sd/-
(Bijay Kumar)
Member (Technical)

T.K.