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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76978 of 2017

(Arising out of Order-in-Appeal No.83/GHY/CE(A)/GHY/2017 dated 06.09.2017 passed by Commissioner(Appeals), CGST & Central Excise, Guwahati.)

M/s. Abdos Lamitubes Private Limited
(N.H.-37, Pub Boragaon, Garchuk, Guwahati-781035.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Guwahati
.....Respondent
(5th Floor, Custom House, Nilmani Phukan Path, Christian Basti, Guwahati-781005.)

APPEARANCE

Shri Arijit Chakraborty, Advocate for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75628/2021

DATE OF HEARING : 29 July 2021
DATE OF DECISION : 29 July 2021

P.K. CHOUDHARY :

The present appeal has been filed by M/s. Abdos Lamitubes Pvt. Ltd. (hereinafter referred to as the Appellant) against demand of Central Excise duty of Rs.56,78,807/- along with applicable interest and equivalent penalty confirmed by the Order-in-Original dated 23.03.2017 for the period May 2009 to November 2011 which has been further upheld by the Order-in-Appeal dated 06.09.2017 which are impugned herein.

2. Briefly stated, the facts of the case are that the Appellant is engaged in the manufacture of Lamitubes on which applicable Central Excise duty is being paid. The Appellant is enjoying Sales Tax remission under the Assam Value Added Tax Act whereby, 99% of the

Sales Tax / VAT collected from the buyers are retained and only 1% is deposited with the State Government treasury in compliance with the applicable State VAT laws and Rules made thereunder.

Taking note of the Hon'ble Supreme Court's decision dated 28.02.2014 in the case of CCE, Jaipur vs. Super Synotex (India) Ltd [2014 (301) ELT 273 (SC)], wherein it has been held that VAT amount retained by the assessee would be includible in assessable value, Show Cause Notice dated 04.06.2014 was issued to the appellant herein by invoking extended period of limitation for raising demand for the period in dispute as stated above to include the VAT amount retained as aforesaid in the assessable value for the purpose of payment of Central Excise duty.

3. Heard Shri Arijit Chakraborty, learned Advocate for the appellant and Shri A. Roy, learned Authorized Representative for the Revenue through video conferencing. The arguments advanced by the learned Counsel and the learned Authorized Representative have been duly considered.

4. We find that the issue has been decided in favour of the Revenue on merits as the same has been settled by the Hon'ble Supreme Court in Super Synotex (Supra) and the issue is no longer *res integra*. The only issue that has to be decided is whether the extended period of limitation is available to the Department as has been pointed out by the learned Counsel for the Appellant. He has relied on the following decisions to buttress his argument:-

- Jayaswal Neco Industries Ltd vs. CCE, Raipur 2016 (344) ELT 578 (Tri-Del)
- CCE vs. Microtex Forgings 2016 (341) ELT 218 (P&H)
- Pr. CCE vs. NHK Spring India Ltd 2016 (342) ELT 498 (P&H)
- Shree Vamika Industries vs. CCE Guwahati (Order dated 25.04.2019 passed by CESTAT, Kolkata Bench)

5. The learned Counsel has also relied on the CBEC Circular No.1063/2/2018-CX dated 16.2.2018 wherein it has been stated that the Board has accepted that extended period of limitation shall not be available to the Department in such cases.

6. We have carefully perused the appeal records and the decisions relied upon by the Appellant wherein the applicability of extended period of limitation has been decided subsequent to the outcome of the decision in the case of Super Synotex (Supra). We find that the issue has been decided in detail by the Tribunal in the case of **Jayaswal Neco Industries (Supra)** as relied upon by the Appellant, the relevant portion of the decision is reproduced below:-

> ***"6.*** *We have considered the submissions from both the sides and perused the records. On merits, the question as to whether the VAT which was exempt and which the appellant have collected from the customers and retained in terms of a Scheme of the State Government, is to be included in the assessable value or not, stands decided against the appellant by the Apex Court's judgment in the case of Super Synotex (India) Ltd. (supra). Therefore, we hold that the appellant during the period of dispute were liable to pay duty on the assessable value including amount of VAT collected by them from their customers and retained by them and since the VAT amount was not included in the assessable value, there has been short payment of duty. However, the duty demand for the 2006-07 period has been issued only on 28-4-2011 by invoking extended period of five years under proviso to Section 11A(1) and this demand would survive only if it can be proved that the appellant had not acted under bona fide belief or that they had committed fraud or wilful misstatement or suppression of facts with intent to evade payment of duty. However, we find that during the period of dispute, the Board's Circular No. 378/11/98-CX, dated 12-3-98 and No. 671/62/2002-CX, dated 9-10-2002 were in favour of the appellant, as these circulars clarified that sales tax/VAT collected by an assessee but retained and not paid to the Government is not includible in the assessable value. Not only this, there were several judgments of the Tribunal on this issue which were*

in favour of the appellant company, the last other judgment being in the case of Super Synotex (India) Ltd. (supra), which was subsequently reversed by the Apex Court vide judgment reported in 2014 (301) E.L.T. 273 (S.C.). In view of the Board's Circular and the judgments of the Tribunal, which were in favour of the appellant, it can be said that the appellant had acted under bona fide belief that VAT amount collected by them from the customers and retained was not includible in the assessable value and hence, in these circumstances, in view of the Apex Court judgment in the case of CCE v. Continental Foundation Joint Venture (supra), the longer limitation period would not be available and as such, the duty demand would have to be held as time barred.

7. *When as discussed above, the appellant have been held to be acted under bona fide belief and for this reason, the longer limitation period under proviso to Section 11A(1) has been held to be not available to the department, there would be no question of imposition of penalty on the appellant under Section 11AC."*

Further, the Hon'ble Punjab & Haryana High Court in the Appeal filed by the Department against the CESTAT order passed in the case of **Microtex Forgings (Supra)** has observed as below:-

"3. After hearing learned counsel for the appellant, we do not find any merit in the present appeal. The Tribunal has dealt with the issue of limitation in Para No. 5 of the order, which is extracted below :-

> *"The respondents also contested the issue on limitation. We find that during the relevant period there was CBEC Circular dated 30-6-2000 which provides that any amount of concession on sales tax retained by the respondent is not required to be added in the assessable value and there are certain judicial pronouncements of this Tribunal holding the same view in the case of Kinetic Engineering Ltd. (supra) and Life Long India Pvt. Ltd. v. CCE, Delhi,2013 (292) E.L.T. 88 (Tri.-Del.).* ***As there were view taken by the CBEC Circular and this Tribunal in favour of the respondent which has been negated by the***

> ***Hon'ble Apex Court in the decision cited before us today. In these circumstances, we hold that extended period of limitation is not invocable. Consequently demand pertaining to the extended period of limitation which is sought to be demanded from the respondent are set aside. Consequently, the penalties on the respondents are not imposable."***

> *4. In the aforesaid para, Circular dated 30-6-2000 issued by Central Board of Excise and Customs (to be called as 'the Board') providing that any amount of concession on sales tax retained by the assessee is not required to be added in the assessable value and an earlier order passed by the Tribunal in favour of the assessee has also been referred to.*

> *5. Keeping in view the aforesaid facts, the assessee cannot be said to be at fault. Hence, extended period of limitation was not available. No substantial question of law arises."*

Identical decision has been passed by the Hon'ble Punjab & Haryana High Court in the case of NHP Spring India Ltd (Supra).

Since the issue is no longer *res integra*, there is no reason to take a contrary view. Moreover, we find that taking note of the outcome of decision of Hon'ble Supreme Court on 28.02.2014 which decided the valuation issue against the assessee, the SCN dated 04.06.2014 was issued soon thereafter to raise the impugned demand. Since there were Board Circulars wherein it was clarified that VAT amount retained by the assessee would not be liable to be included in the assessable value, which fact has also been noted by the Hon'ble High Court and the co-ordinate Benches of the Tribunal, the assessee cannot be faulted.

Thus, in view of the factual matrix of the case and the legal position stated above, the impugned demand cannot be sustained on the point of limitation and thus, set aside. The Appeal is thus allowed with consequential relief as per law.

(Operative part of the order was pronounced in the open Court.)

SD/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(RAJU)
MEMBER (TECHNICAL)

sm