IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.2

Excise Appeal No.182 of 2011

(Arising out of Order-in-AppealNo.59/Kol-VII/10 dated24.12.2010 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

M/s.Budge Budge Refineries Limited
(23B, A.M. Ghosh Road, Budge Budge, 24 Parganas (South), Pin-700137.)
...Appellant

VERSUS

Commssioner of Central Excise, Kolkata-VII
.....Respondent
(C.R. Building, 5th Floor, 169, A.J.C. Bose Road, Kolkata-700014.)

APPEARANCE

Shri N.K.Chowdhury, Advocate for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Respondent

CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)
FINAL ORDER NO. 75237/2023

DATE OF HEARING : 17 April 2023
DATE OF DECISION : 17 April 2023

Per : K. ANPAZHAKAN :

The facts of the case in brief are that the appellants are engaged in the manufacture of Refined Palm Oil in their factory. Refined Palm Oil is exempted from payment of duty. In the manufacture of refined palm oil Fatty Acid emerges as waste/bye-product, which was cleared by the appellant without payment of duty in terms of Notification No.89/95-CE dated 18/05/1995, in view of the Order passed by the Assistant Commissioner vide Order-in-Original No.30/AC/DDN/DRPL/2006-07 dated 30/3/2007, during the period from August 2007 to January 2008, classifying the product as "others (Residues)" under Chapter sub-heading No.1522 0090. Subsequently, Department observed that the said Fatty Acid should be classified under sub-heading no.3823 1900 attracting Central Excise duty. The Appellant accepted the contention of the Department and paid duty, taking the clearance value as the cum-duty price. The Department questioned the adoption of cum-duty price and demanded differential duty by denying it. The demand was confirmed by the Adjudicating Authority and later by the Appellate Authority. The Appellant is before us against the impugned Order passed by the Commissioner Appeals.

2. Thus, we find that the issue involved in this case is valuation of waste/bye-product and the applicability of cum-duty price for the goods cleared. There is no dispute regarding liability of Central Excise duty. The Appellant has initially cleared the goods without payment of duty by availing the benefit of Notification No.89/1995 dated 18.05.1995. Subsequently on the advice of the Department, they agreed and paid the duty by treating the value as cum-duty price. The Department has contested the adoption of cum-duty price and demanded differential duty.

3. The Appellant stated that the issue has already been settled when Section 4 was amended and an Explanation to Section 4 was inserted w.e.f. 14.05.2003 . The Explanation inserted is reproduced below :

> [***Explanation***. — For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]

4. As per the explanation cited above, when duty is not collected separately ,the price actually realized is deemed to be cum-duty price. In the present case also, initially the appellant cleared the goods without payment of duty by availing the Exemption under Notification 89/95 dated 18/05/95. Hence, as per the Explanation cited above, the price actually realized is deemed to be inclusive of duty.

5. In support of their argument, The Appellant referred the Circular No.749/65/2003-CX dated 26.09.2003 issued by the Board clarifying

the above issue. The said Circular is also reproduced for ready reference:-

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Valuation of Goods for Central Excise Purposes - Cum duty price.

Kind attention is invited to the judgment dated 26-02-2002 of the Hon'ble Supreme Court in the case of *CCE, Madurai* v. *T.V.S. Srichakra Ltd.* [2002 (142) E.L.T. A279 (S.C.)]and the judgment dated 27-2-2002 in the case of *CCE, Delhi* v. *Maruti Udyog Ltd.* [2002 (141) E.L.T. 3 (S.C.)]. Vide the said judgment, appeals filed by the Department were dismissed by the Hon'ble Supreme Court, upholding that the sale price realised by the assessee is to be regarded as inclusive of excise duty and therefore, in arriving at the excisable value of the goods, the element of duty which is payable is to be excluded.

In this regard, it is to be informed that against the above said judgments of the Hon'ble Supreme Court, Review Petitions have been filed by the Department and the Hon'ble Supreme Court has ordered for issue of notice. It is therefore, requested that the cases pending for adjudication and remanded on this issue may be kept pending in the Call Book till the decision of the Hon'ble Supreme Court on the Review Petition filed by the Department. Accordingly, if any, adverse decision of any appellate authority on this issue comes in the meanwhile, the same will need to be appealed against.

Though vide section 136 of the Finance Act, 2003, Section 4 of the Central Excise Act has been amended by insertion of an Explanation to Section 4(1) to the effect that the price-cum-duty shall be deemed to include the duty payable on the goods, Board has taken a view that the amended provision will apply only prospectively and the old cases will have to be pursued as per the provisions of law prevailing at the relevant time.

It is requested that the contents of this Circular may be brought to the notice of all the Commissioners under your charge for necessary action at their end.

6. From the Circular and the Explanation to Section 4 cited above, it is clear that when the duty is not charged separately, the price collected

is deemed to be cum-duty price. We find that the Appellant has already adopted the value realized as cum-duty price and paid the duty accordingly. Thus, we find that the duty paid by the Appellant is in order.

7. The Appellant cited the decision of the Tribunal in the case of Triveni Udyog v. Commissioner of Central Excise, Jaipur-I [2017 (358) ELT 950 (Tri.-Del.)], wherein the Tribunal has held as under:-

> ***"12. Claim for cum-duty benefit :****The appellants have referred to Board Circular No. 749/65/2003-CX, dated 26-9-2003 claiming cum-duty benefit. For the goods already sold to the customer, it is an accepted principle that the assessee would be entitled to cum-duty benefit as the duty component now cannot be recovered separately from the customers. In other words, the sale price of the goods is to be treated as inclusive of duty component. The Explanation to Section 4(1) of Central Excise Act makes it clear. We, therefore, hold that the appellants are entitled to cum-duty benefit for the subject goods already sold."*

7. We find that the above decision cited by the Appellant is squarely applicable in this case. Accordingly, we hold that the demand raised on the Appellant is not sustainable and the impugned order confirming the demand is liable to be set aside. In view of the above discussion, we set aside the Impugned Order and allow the Appeal filed by the Appellant.

(Dictated and pronounced in the open Court.)

Sd/

(P.K.CHOUDHARY)

MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)

MEMBER (TECHNICAL)

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