

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

REGIONAL BENCH – COURT NO.1

Excise Appeal No. 79130 of 2018

(Arising out of Order-in-Appeal No.99-100/Kol-V/2018 dated 13.07.2018 passed by Commissioner (Appeals-I), Central Goods & Services Tax & Central Excise, Kolkata.)

M/s. Neptune & Co.,

I/V, Saggachi 1st Lane,
Kolkata-700 039.

Appellant

VERSUS

Commissioner of Central Goods & Service Tax &

Central Excise,

GST Bhawan, 8th Floor,
180 Shantipally,
Kolkata-700 107.

Respondent

APPEARANCE :

Mr. R.N. Bandopadhyay, Advocate for the Appellant

Mr. S.S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHURY, MEMBER (JUDICIAL)

FINAL ORDER NO.76107/2023

Date of Hearing : 09.06.2023

Date of Decision:12-07-2023

PER ANIL CHOUDHARY

The issue in this appeal is whether the demand of duty of ₹2,77,012/- has been rightly demanded along with equal amount of penalty under Section 11 D of the Central Excise Act, relating to the period April, 2008 to October, 2009.

2. The brief facts are that the appellant was a registered assessee with the Department and was engaged in manufacture of footwears on behalf of Bata India Ltd (Contractor). The contractor supplies raw materials to the appellant, who processes the same and manufactures footwears, which

were cleared from their factory directly to the buyers/distributors, as instructed by Bata India, on payment of appropriate central excise duty. As per the agreement, the appellant was entitled to job charges plus the amount of central excise duty paid by them. Revenue observed that at the time of initial agreement of the appellant with the contractor – Bata, the applicable duty was 8% ADV, which was reduced to 4% ADV from 12th December, 2008. It was further observed that although the appellant discharged duty at the correct rate of 4% on clearance of footwear, they continued to collect central excise duty (by way of reimbursement) from Bata India Ltd @ 8%. It appeared to revenue that appellant have suppressed the reduced rate of duty from Bata India Ltd., and also failed to inform the Department about the fact of extra amount realised towards duty from Bata India Ltd. It further appeared that during the period April, 2008 to March, 2009, the appellant have short paid or not paid amount of duty totalling ₹.9,75,503/- including cess. It further appeared that appellant have willfully suppressed such facts from the Department, and further such amount is liable to be collected under the provisions of Section 11 D of the Act.

3. Accordingly show cause notice dated 20th January, 2011 was issued invoking the extended period of limitation, proposing to demand the said amount of ₹.9,75,503 including cess under Section 11 D (2) along with interest.

4. The show cause notice was adjudicated on contest vide order-in-original dated 29th August, 2011 confirming a reduced amount of ₹. 2,77,012, observing as follows: –

“The quantum of demand, as raised in the show cause notice

was re-examined against copies of excise invoices, bills and purchase order indicating as to how much duty per pair is payable for reimbursement by the contractor – Bata, after adjusting the total duty liability per pair against Cenvat credit per pair and has been ascertained at ₹ 2,77,012 instead of ₹ 9,75,503, which is tallied with the quantum of demand admitted by the assessee.”

5. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), *inter alia*, on the ground that the Adjudicating authority have failed to appreciate that the appellant had admitted to their inadvertent mistake and had prayed for allowing them to raise debit/credit note to their contractor – Bata. It is further admitted fact that the appellant have rightly raised the excise invoice and have deposited the correct amount of duty. Whatever error have occurred has occurred in the commercial invoice relating to job work. The excess amount collected by the appellant due to inadvertent error in the commercial invoice, is always reconcilable between the parties and does not attract the rigor of Section 11 D (2). It is a clear-cut case of clerical error and adjustable between the parties, being an accounting error. The said error occurred due to lack of coordination between the excise clerk and the other clerk, who was raising the commercial invoice. Such accounting errors are curable by way of rectification entry upon reconciliation of accounts between the parties. Further, the Adjudicating Authority have erred in denying the opportunity to correct the accounting error, by issue of debit/credit note to the contractor.
6. Admittedly, it is not the case that the appellant have charged some

extra amount towards duty in the excise invoice, and thereafter not deposited the same. Section 11 D clearly specifies that any excess duty collected from the buyer is to be deposited to the credit of the Central Government. In the instant case, no excess duty was charged from the buyers and hence, Section 11 D is not attracted. Thus, there is no question of payment of the excess amount collected due to error in the commercial invoice, and further, no interest on the same is attracted under Section 11 DD of the Act. The amount of excess reimbursement received by the appellant from its principal/contractor cannot be demanded by the Department as tax, as the appellant is duty-bound to return the same upon reconciliation to the contractor. It is further urged that the show cause notice is speculative, upon proper reconciliation during the adjudication proceedings, it was found that only an amount of ₹ 2,77,102/- has been claimed in excess vide commercial invoice. It was found in the adjudication proceedings that no excess realisation was made against particular invoices as mentioned in serial nos.15, 45 to 74 of the Annexure to the show cause notice. Further, urged that there being no case of mis-representation, fraud, concealment etc., the extended period of limitation is not attracted.

7. Revenue had also filed appeal before the Commissioner (Appeals) on the ground that the Adjudicating Authority has erred in quantifying the exact duty liability to be deposited, which should be ₹ 6,78,175/- instead of ₹.2,77,102/-. Revenue, *inter alia*, contended that in reply to the show cause notice, the assessee had stated that extra realisation was only in respect of invoices at Sl. Nos. 1 to 14 and Sl. Nos.16 to 44 of the Annexure to the show cause notice. That no excess realisation was made against

particulars mentioned at Sl.Nos. 15 & 45 to 74 of the said Annexure, although bill number and date, under which the amount was realised from the contractor with these invoices, was mentioned. Moreover the total of the amount mentioned against serial number 1 to 14 and 16 to 44, accepted by the appellant, comes to ₹ 6,78,175.31.

8. The learned Commissioner (Appeals) was pleased to allow the appeal of Revenue and ordered the assessee to deposit ₹ 6,78,175/- along with interest under Section 11 DD of the act. The appeal of the assessee was rejected.

9. Being aggrieved, the appellant - assessee is in appeal before this Tribunal, *inter alia*, on the ground that the order of enhancement of demand has been passed unilaterally and arbitrarily, without disclosing the facts (there being no service of copy of the appeal by Revenue). Thus, the appellant was not afforded proper opportunity to defend their case, in the matter of Revenue's appeal. It is further urged that the Commissioner (Appeals) have erred in holding that the provisions of Section 11 D are attracted in the facts of the case.

10. Learned Counsel appearing for the appellant, *inter alia*, urges and reiterated the grounds taken in the appeal memo and those pleaded before the Court Below. He further urges that by any stretch of imagination, there being no case of any suppression, fraud or mis-representation, and admittedly, appellant paid the proper tax as per the excise invoice, extended period is not invocable. Accordingly prays for allowing the appeal with consequential benefits. Learned Counsel also relied on the ruling of a Coordinate bench of this Tribunal in **CCE, Bhopal Vs. S. S. Crop Care Ltd.**

- **2010 (255) ELT 149 (Tribunal-Delhi)**, wherein under the fact that inputs were transferred or removed to another unit and to job workers, duty was paid adopting value at 110% of cost, as per the Rules. The demand was raised under Section 11 D of the Act alleging requirement of payment of only amount of credit earlier taken. Excess payment of duty was definitely made, however, inputs cleared not to any buyers. It was held that Section 11 D of the Act is applicable, only where excess amount is collected from the buyer. There being no excess amount collected than what was paid to the Central Government, Section 11 D was not attracted. Further as regards limitation, it was held that there is no suppression of facts with intent to evade and whatever duty paid is available to the other unit as credit, allegation that assessee enabled the other unit to take excess credit intentionally, is not corroborated. Demand was also held to be time-barred.

11. Ld. Authorised Representative for Revenue relies on the impugned order.

12. Having considered the rival contentions, I find that, admittedly, the appellant have raised the excise invoice properly, charging the correct amount of central excise duty. Further, admittedly, there is clerical error in raising the commercial invoice, wherein some excess amount towards duty have been mentioned for reimbursement. I hold that such excess amount collected or charged in the commercial invoice is wholly reconcilable with the contractor, under the terms of the contract and appellant cannot be illegally or unjustly benefited, as they have a running account with the principal. It is not the case of one-time transaction, but the appellant, being job worker of M/s. Bata India Ltd., continues to manufacture and supply

goods on behalf of Bata India. I further find that appellant had bonafidely offered to adjust their account for the excess amount charged in the commercial invoice, by issue of appropriate debit/credit note. Thus, I find that there is no *mala fide or* mis-representation of facts or suppression of facts. Accordingly, I hold that extended period of limitation is not attracted in the facts of the case. I further find that in the facts and circumstances, the provisions of Section 11 D are not attracted. Accordingly, I allow this appeal and set aside the impugned order.

13. Appellant is entitled to consequential benefit in accordance with law.

(Order pronounced on 12-07-2023)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.