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

REGIONAL BENCH - COURT NO.1

Excise Appeal No.447 of 2010

(Arising out of Order-in-Original No.3-15/Commr./Denovo/Bol/10 dated 08.03.2010 passed by Commissioner of Central Excise, Bolpur.)

M/s. Megatherm Electronics Private Limited
(Plot No.L1, Block-GP, Sector-V, Electronics Complex, Salt Lake City, Kolkata-700091.)

...Appellant

VERSUS

Commissioner of Central Excise, Bolpur

.....Respondent

(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

APPEARANCE

Shri Balram Pandey, Chartered Accountant for the Appellant (s)
Shri K.Chowdhury, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 76278/2023

DATE OF HEARING : 31 July 2023
DATE OF DECISION : 31 July 2023

Per : K. ANPAZHAKAN :

The Appellant received an Order-in-Original dated 08.03.2010 passed by Commissioner of Central Excise, Bolpur, wherein the Ld.Commissioner, inter alia, imposed a penalty of Rs.20,00,000/- on the Appellant. Being aggrieved against the impugned order, the Appellant has filed the present appeal before this Tribunal.

2. The Appellant submits that they supplied one Induction Furnace of 4 M.T to M/s SPS Metal Cast and Alloys (P) Ltd., Durgapur, vide challan no.72 dated 20.11.1997 . This Furnace was actually having a capacity of 6 M.T, by oversight they paid duty of a 4 M.T induction Furnace and cleared the same on payment of appropriate duty. The Appellant contended that they have detected the mistake on

21.01.2018 and paid the differential duty along with interest and intimated the Range superintendent on 05.03.1998, before issuance of the SCN. The department has alleged that the Appellant had abetted the evasion of central excise duty by M/s. SPS Metal Cast and Alloys (P) Ltd and demanded penalty on them under Rule 209A of the Central Excise Rules, 1944, in the Notice. While adjudicating the case, the adjudicating authority has imposed a penalty of Rs. 20,00,000/- on the Appellant. The Appellant has filed the present appeal against this penalty.

3. The contention of the Appellant is that the provisions of Rule 209A of the Central Excise Rules, 1944 are not applicable in this case as the department has failed to prove as to how the Appellant has contravened the provisions of the said Rule, 209A. They have detected the mistake and paid the differential duty voluntarily before issue of the SCN. Accordingly they prayed for setting aside the penalty imposed on them in the impugned order.

4. The Ld. A. R. submitted that the Appellant has mis-declared the capacity of the Induction Furnace in the Invoice which facilitated the client for fixation of their Annual Capacity of production at a lower level. Accordingly, he contended that penalty has been rightly imposed on the Appellant and prayed for dismissing the appeal.

5. Heard both sided and perused the Appeal records.

6. We observe that the Appellant has supplied one induction furnace of 4 M.T to M/s SPS Metal Cast and Alloys (P) Ltd., Durgapur, vide challan no.72 dated 20.11.1997, which is actually a 6 M.T. Furnace. When they realized that they have short paid duty by mistake, they paid the differential duty along with interest on 21.01.2018 and intimated the Range superintendent on 05.03.1998, before issuance of the SCN. The allegation of the department is that the appellant has mis-declared the induction furnace of higher capacity as lower capacity and sold the same to M/s. SPS Metal Cast and Alloys (P) Ltd. in order to enable them to pay lesser amount of duty under the compound levy system. The appellants submits that since the matter was regularized

by them by payment of differential duty and it was sheer case of inadvertence that instead of sending induction furnace of 4 M.T. capacity, 6 M.T. capacity of induction furnaces supplied first and then 4 M.T. capacity furnace was supplied instead of 6 M.T. furnace supplied later. It has to be accepted as a case of sheer inadvertence. Regarding the allegation that the capacity of induction furnace was 7 M.T. instead of 6 M.T, they stated that it has not been mentioned as to how the capacity has been determined. A gap always remained at the top so that the metal does not over flow. So extra space is always kept in a furnace for safety and security and economic purpose so that the metal is not wasted. Hence, 6 M.T. capacity furnace supplied by the appellants cannot be treated as of 7 M.T. capacity.

7. We observe that in the present case penalty has been imposed on the Appellants under the provisions of Rule, 209A of the Central Excise Rules, 1944. The provisions of Rule 209A ibid specifically postulates that any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these Rules, shall be liable to a penalty not exceeding three times of the value of such goods or Rs.5,000/-, whichever is greater.

8. The Appellants submits that the provisions of Rule 209A of the said Rules, which is parimateria to Rule 26 of the Central Excise Rules, 2002 are clearly not applicable in respect of a corporate body. Firstly, a corporate body is not associated with the activities mentioned in Rule 209A of the said Rules. The A,ppellants submits that no penalty under Rule 209A of the Central Excise Rules, 1944 is imposable upon them as they are body corporate and out of the purview of Rule 209A ibid as held by the Tribunal in the following decisions:-

a. 1996 (84) ELT 229
b. 2004 (164) ELT 339
c. 2007 (214) ELT 386

9. We observe that there is merit in the contention of the Appellant. Penalty under Rule 209A, which is akin to Rule 26 of the Central Excise Rules, 2002 is imposable only on an individual and not on a Firm, as held by the Tribunal, Kolkata in the case of Woodmen Industries Vs Commissioner of Central Excise, Patna, reported in 2004 (164) ELT 339, the relevant portion of the order is reproduced below:

> ***"9.*** *Coming to the appeal of the other appellants viz. the buyer of the goods (M/s. Kitply Industries Ltd.) when the allegations against the main appellants have not been brought home, the penalty imposed on this appellant for abetment is not sustainable. Further, penalty on this appellant has been imposed under Rule 26 of the C.E. Rules (erstwhile Rule 209A). The said rule permits imposition of penalty on a person and not on the firm as held in the case of Aditya Steel Industries v. CCE, Hyderabad reported in 1996 (84) E.L.T. 229. There was no confiscation of the goods either. On this score also the penalty on this appellant cannot sustain. We also observe that the Commissioner has referred to the provisions of Income-tax Act regarding issue of cheque for payment in excess of Rs. 25,000/-. If there was any violations of the provisions of the I.T. Act, it was for the Income-tax authorities to have taken objection in that regard. The Central Excise Law does not permit the Commissioner of Central Excise to assume power under the Income-tax Act. There was therefore, no need for the Commissioner to have recorded such a finding when he is discharging the functions of Commissioner of Central Excise. With this observation, we set aside the impugned order and allow the appeal with consequential relief if any."*

10. In the case of Aditya Steel Industries Vs Commissioner of Central Excise, Hyderabad, also it has been held that Penalty under Rule 209A not imposable on a partnership concern and only person concerned can be penalized under this section. The relevant portion of the decision is reproduced below:

> ***"10.*** *So far as imposition of penalty is concerned, I find that the statements of Raghuvir Singh of Pioneer Steel Re-rolling Mills and Driver Mohd. Ikram have to be taken to be voluntary and there have been no retraction of their statements. They have not probabilised that there was any coercion or threat. In view of this, I hold that they are liable to penalty and penalty of Rs. 1,000/- cannot be considered as excessive in the facts and circumstances of the case. So far as redemption fine of [Rs.] 8,000 on the truck is concerned, the truck was admittedly used for clandestine removal of the goods and therefore, truck is liable to confiscation. However, the redemption fine on the truck is reduced to Rs. 5,000/- (Rupees Five thousand). In the facts and circumstances of the case, the redemption fine on the goods which are confiscable as held by the lower authority and which I agree with for the reasons set out in his order cannot be considered excessive and the same is confirmed in entirely. So far as imposition of penalty on Lakhi Prasad is concerned, he was the Manager of Aditya and he was responsible for the affairs in the factory and he is therefore liable to penalty under Rule 209A and I uphold the penalty of Rs. 1000/- imposed on him. Penalty under Rule 209A cannot be imposed on partnership concern and only the person concerned could have been penalised. Therefore, penalty levied on Pioneer Re-rolling Mills is not maintainable and is set aside and their appeal allowed. M/s. Aditya are liable to penalty under Rules 9(2), 52A and 173Q and 226 of the Central Excise Rules, and I hold that penalty of Rs. 2500/- imposed on them cannot be considered as excessive and I uphold there same."*

11. We observe that the Appellant has short paid the duty inadvertently, which has been rectified by them by paying the differential duty along with interest before issue of the Notice. Also, the impugned order has not brought any evidence on record to substantiate the allegation of abetment of the offence by the Appellant. By relying on the decisions cited above, we hold that the penalty under Rule 209A of the Central Excise Rules, 1994 imposed on the Appellant is not sustainable. Accordingly, we set aside the same.

12. In view of the above discussion, we allow the appeal filed by the Appellant.

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

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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