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

Excise Appeal No. 629 of 2012

(Arising out of the Order-in-Appeal No. 41-42/Kol-VII/2012 dated 20.06.2012 passed by Commissioner of Central Excise (Appeals), Appeal-I, Kolkata.)

M/s Paharpur Cooling Towers Pvt. Ltd,
Vill.-Bhasa, P.O.-Bishnupur, Dist.-24 PGS(S), WB.

...Appellant (s)

VERSUS

Commissioner of Central Excise, Kolkata-VII.
169, AJC Bose Road, Bamboo Villa, 5th Floor, Kolkata-700014.

. ...**Respondent(s)**

APPERANCE :
Shri Satyanarayan Gupta & Ms. Pritha Sarkar, both Chartered Accountants for the Appellant
Shri K. Chowdhury, Authorized Representative for the Respondent

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

FINAL ORDER No...76776/2023

DATE OF HEARING : 18.09.2023
DATE OF DECISION : 18.09.2023

PER K. ANPAZHAKAN :

Briefly stated facts of the case are that M/s. Paharpur Cooling Towers (The Appellant) have manufactured and cleared various types of cooling towers and parts thereof, by availing exemption under Notification 10/97-CE dated 01.03.1997, during the period May 2001 to March 2005.The conditions of the Notification requires that the Appellant must produce certificate from the Head of the Institution, at the time of clearance of the goods, to the effect that these goods would be used exclusively for research purposes. As the Appellant could not produce the Certificate from the proper authority, before clearance of the goods, they were liable to pay central excise duty of Rs.90,722/- including Cess. The Appellant also cleared excisable goods without payment of duty under Notification 03/2001-CE dated 01.03.2001 superseded by Notification 6/2001-CE dated 01.03.2002. Sl. No 237 of the said Notification exempts Non-Conventional Energy Devices/Systems specified in Serial No 21 of List 9 (Sl No. 16 of List 5 of Notification 03/2001) which are manufactured and consumed within the factory of manufacture of Non-Conventional Energy Devices. As the parts of Non- conventional Energy devices manufactured and cleared without payment of duty by the Appellant were not consumed within the factory of production, the Appellant was liable to pay central excise duty of Rs. 24.03,847/-. The Appellant also removed excisable goods under Notification 29/2003-CE dated 01.03.2003 . This Notification provided exemption to excisable goods manufactured and supplied to Delhi Metro Rail Corporation (DMRC) subject to the condition that The Chairman or Managing Director or Director (Finance) of DMRC issues a certificate to the effect that the goods were procured by or on behalf of DMRC for its use in the MRTS Project. As the Appellant could not produce the Certificate from the designated authority before clearance of the goods, the department contended that they have violated the conditions of the Notification and consequently, they were liable to pay central excise duty of Rs.2,82,015/-.

2. A Show Cause Notice dated 29.5.2006 was issued to the Appellant demanding Central Excise duty of Rs.27,81,233/- including Education Cess, along with interest and penalty. The Notice was adjudicated by the Additional Commissioner, Kolkata VI - Commissionerate vide Order-in-Original dated 29.10 2017, wherein he has confirmed Central Excise duty of Rs.27,69,041/- along with interest and penalty. On appeal, the Commissioner (Appeals) upheld the demands confirmed in the Order-in-Original, vide impugned order dated 20.06.2012. Aggrieved against the impugned order, the Appellant has filed the present appeal.

3. In their submissions, the Appellant stated that they have already submitted the Certificates from the designated authorities as required under the respective Notifications. They could not produce the certificates before clearance of the goods. The delay in submission of the certificates is only a procedural lapse for which substantial benefit of the notification cannot be denied. In this regard, the Appellant placed their reliance on the decisions of the Tribunal in the cases of CCE Chennai Vs Dynaspede Integrated Systems Ltd. [2002 (147) ELT 541 (Tri-Chennai)] and CCE Vs OEN India Ltd.[2006(202) ELT 836]. In view of the decisions cited above, they contended that the demand confirmed in the impugned order is not sustainable.

4. Regarding eligibility of Notification 03/2001, the Appellant stated that the goods produced have become part of Municipal and Urban Waste Conversion Devices producing energy falling under Sl. No 16 of List 5 of Notification 03/2001. The intention of the Notification is that the goods should be used in-Conventional Energy Devices. The goods cleared in this case has become part of Municipal and Urban Waste Conversion Devices and hence it satisfies the conditions of the Notification. Accordingly, they claimed that they are eligible for the benefit of the notification.

5. The Appellant stated that they are availing Cenvat credit of the duty paid on the inputs used in dutiable and non dutiable goods manufactured and cleared by them. They have debited an amount equivalent to 8 or 10% of the total price of the impugned goods, in accordance with the Rule 6(3)(b) of the CCR 2004, on the face of invoices vide which the impugned goods were cleared without payment of duty, which would be tantamount to debiting it from RG Register/Account Current. Thus, they contended that when Cenvat credit was availed and utilized in the manufacture of dutiable and exempted goods, without maintaining separate accounts, payment of an amount equal to

8% /10% of the value of the exempted goods would sufficient , as per Rule 6(3)(b) of the Cenvat Credit Rules, 2004. Since they have already paid 8%/10% of the value of the exempted goods, the demands confirmed in the impugned order is not sustainable.

6. The Ld. A.R. reiterated the findings in the impugned order.

7. Heard both sides and perused the appeal records.

8. We observe that the Appellant has manufactured and cleared some of their finished goods without payment of duty by availing the benefit exemption notifications 10/97, 3/2001 and 29/2003. To avail the exemption the Appellant has to fulfill certain conditions. The department alleged that the Appellant has not fulfilled those conditions accordingly they are liable to pay central excise duty involved in those clearances.

9. We observe that in respect of the goods cleared by availing the exemption under Notification 10/97-CE dated 01.03.1997, the Appellant has produced necessary Certificate from the Head of the Institution after clearance of the goods. The notification envisages production of the certificate at the time of clearance of the goods. We observe that the delay in submission of the certificates is only a procedural lapse for which substantial benefit of the notification cannot be denied. In this regard, the Appellant placed their reliance on the decision of the Tribunal in the case of CCE Chennai Vs Dynaspede Integrated Systems Ltd. [2002 (147)ELT 541 (Tri-Chennai)]. The relevant paras of the decision is reproduced below:

> ***"6.*** *On a careful consideration of the submissions, we notice that the appellant had claimed the benefit of Notification No. 108/95, dated 20-11-1995 without producing the requisite certificate in advance to the Department at the time of clearance of the goods and for that reason the Asstt. Commissioner did not accept the late production on 5-1-2000 after clearance of the goods but before the adjudication of the order.*
> ***7.****The ld. Commissioner (Appeals) has noticed from the extracted findings and has referred to the case law which is cited before us to upheld the parties contention. The assessee's contention is that production of certificate is one of the conditions required in the notification to know the*

genuineness of the transaction and requirement of goods by the project. They have produced the certificate received from Govt. of India which was issued belatedly. However, that does not take away their right to claim the benefit. We have perused the grounds of appeal in which we notice the total duty confirmed is Rs. 2,93,619/- solely on the ground that the certificate has not been produced before the clearance of the goods. Although this is the condition laid down in the notification but the said condition has to be held as procedural one. In the light of the ratio of the Apex Court judgment rendered in the case of Mangalore Fertilizers & Chemicals v. Deputy Commissioner as reported in 1991 (55) E.L.T. 437 (S.C.). The Apex Court has clearly laid down that so long as there is substantive compliance of the notification, the benefit cannot be denied. The Tribunal in the case of Birla Institute of Technology v. CC (supra) (a three member Bench) clearly states that the delay in submission of certificate will not affect grant of the exemption. The findings recorded in Paras 5 to 7 are produced herein :

"We have heard both the sides and gone through the records of the case. We find that the Tribunal in the case of Vaz Forwarding Pvt. Ltd. v. CC, Bombay reported in 1983 (14) E.L.T. 2019 had examined the question whether exemption under Notification No. 211-Cus., dated 2-8-1976 was admissible in respect of certain scientific equipment when the N.M.I. Certificate was not available at the time of importation of the goods and even the application for the certificate was filed after the shipment of the goods. The relevant extract from the Tribunal's decision is reproduced below :

"The only ground on which the appellants' claim for refund had been rejected is that they had not applied for N.M.I, certificate before the shipment of the goods, otherwise there is no dispute that the appellants and the goods are entitled to benefit of notification in question. Considering the entire facts and circumstances of the case, the Bench feels that a highly technical view in the matter should not be taken as the appellants though later have fulfilled all the conditions of the notification. In this view of the matter, the appellant's appeal deserves to be allowed"

Since the facts in this case are similar, relying upon the view taken by the Tribunal in the decision quoted above, we hold that the NMI certificate issued to the appellants after the clearance of the goods was acceptable for the purpose of exemption under Notification No. 70-Cus., dated 26-3-1981.

Accordingly, the appeal is allowed. The orders of the lower authorities are set aside with consequential relief to the appellants."

8.*In view of the laid down proposition of the Apex Court in the case of Mangalore Chemicals & Fertilizers (supra) and also in the Tribunal's judgment rendered in the case of Birla Institute of Technology (supra) we do not find any infirmity in the order passed by the Commissioner. He has rightly followed the judgment and Revenue has not made out any other*

> *grounds as to why the said judgments does not apply to the facts of the case. Therefore, while rejecting the stay application, we take up the appeal and respectfully following the judgment noted above we do not find any merits in the revenue's appeal and dismiss the same."*

10. In view of the decisions cited above, we hold that the benefit of the exemption notification cannot be denied to the Appellant for the delayed submission of the Certificates. Accordingly, we hold that the demand confirmed in the impugned order on this count is not sustainable.

11. Regarding the goods cleared without payment of duty under Notification 03/2001-CE dated 01.03.2001 superseded by Notification 6/2001-CE dated 01.03.2002., we observe that Sl. No 237 of the said Notification exempts Non-Conventional Energy Devices/Systems specified in Serial No 21 of List 9(Sl No. 16 of List 5 of Notification 03/2001) which are manufactured and consumed within the factory of production of Non-Conventional Energy Devices. . The Appellant stated that the goods manufactured and cleared by them have become part of the Municipal and Urban Waste Conversion Devices producing energy falling under Sl. No 16 of List 5 of Notification 03/2001. We observe that the goods cleared have been used in the manufacture of Non-Conventional Energy Devices. Accordingly, we hold that the Appellant are eligible for the benefit of the notification 03/2001-CE dated 01.03.2001 superseded by Notification 6/2001-CE dated 01.03.2002. Hence, the demand confirmed in the impugned order on this count is not sustainable.

12. Regarding the excisable goods cleared without payment of duty under Notification 29/2003-CE dated 01.03.2003, we observe this Notification provides exemption to excisable goods manufactured and supplied to Delhi Metro Rail Corporation (DMRC) subject to the condition that The Chairman or Managing Director or Director (Finance) of DMRC issues a certificate to the effect that the goods were procures by or on behalf of DMRC for its use in the MRTS Project. In this case, the Appellant has produced necessary Certificate

from the designated authority after clearance of the goods. The notification envisages production of the certificate at the time of clearance of the goods. We observe that the delay in submission of the certificates is only a procedural lapse for which substantial benefit of the notification cannot be denied. In this regard, the Appellant placed their reliance on the decision of the Tribunal in the case of CCE Chennai Vs Dynaspede Integrated Systems Ltd. [2002 (147)ELT 541 (Tri-Chennai)] and CCE Vs OEN India Ltd.[2006(202) ELT 836]. We observe that the decisions cited by the Appellant are squarely applicable to them in this case. In view of the decisions cited above, we hold that the benefit of the exemption notification cannot be denied to the Appellant for the delayed submission of the Certificates. Accordingly, we hold that the demand confirmed in the impugned order on this count is not sustainable.

13. Regarding the availment of Cenvat credit, we observe that the Appellant has manufactured both dutiable and exempted goods and not maintained separate accounts for the Cenvat credit availed on the inputs used in the exempted goods. Under such circumstances, they have to pay 8%/10% of the value of the exempted goods, as provided in Rule 6(3)(b) of the Cenvat Credit Rules 2004. In their submissions, the Appellant stated that they have already paid the 8%/10% at the time of clearance of the goods and it is reflected in the respective invoices .

14. The Summary of such payment made by the Appellant is tabulated below:-

Particulars	Assessable	Excise duty	Reversal (8%/10%)
Notification No. 03/2001	1,49,98,257	24,03,847	8,11,598
Notification No. 29/2003	17,28,037	2,82,015	2,49,793
Notification No. 10/1997	5,62,905	90,722	39,595
Total	1,72,89,199	27,76,584	11,00,986

15. We observe that Rule 6(3) gives two options to a manufacturer of dutiable and exempted goods, who are not maintaining separated accounts for the inputs used in dutiable goods and exempted goods. They have to pay either 8%/10% of the value of exempted goods or they have to pay an amount as per the formula prescribed in Rule 6(3A). The Appellant in this case has adopted the payment of 8%/10% of the value of exempted goods. Thus, we hold that the Appellant has complied with requirement as prescribed in Rule 6(3)(b) of CCR, 2004. But the correctness of the amount paid needs to be verified. The matter needs to be remanded for verification purpose.

15. In view of the above discussions, we hold that the demand confirmed in the impugned order is not sustainable. Since, the demand itself is not sustainable, the question of demanding interest and imposing penalty does not arise. Accordingly, we set aside the impugned order and remand the matter back to the adjudicating authority for verification

of the correctness o the reversal as per Rule 6(3)(b) of Cenvat Credit Rules, 2004.

(Dictated and pronounced in the open Court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

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