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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 248 of 2011

(Arising out of Order-in-Appeal No. 07/DIB/CE(A)/GHY/11 dated 09.02.2011 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati)

M/s. Behali Tea Estate
(Dr. Dutta Chaudhuri, Advocate,
15, P. K. Guha Lane, Modern Park, Kolkata-700028)

Appellant

VERSUS

Commr. of Central Excise, Dibrugarh
(F-Lane, Milan Nagar, Dibrugarh-786003)

Respondent

APPEARANCE :
None for the Appellant
Mr. S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77623/2023

Date of Hearing : 01 December 2023
Date of Decision: 01 December 2023

PER R. MURALIDHAR:

No one appeared on behalf of the Appellant, inspite of notice. It is seen from the records that even in the past, on several occasions, the Appellant has not appeared and adjournments have been granted regularly.

2. Since the Appeal pertains to the year 2011, in the interest of justice, we have taken up the Appeal for disposal with the help of the Leaned AR.

3. The Appellant had sought exemption for payment of Excise Duty under Notification No. 33/99 dated 08/07/1999, on the ground that the installed capacity of their factory has been enhanced substantially by more than 25% after 24/12/1997. After initial round of litigation up to High Court, the matter was remanded for Denovo Adjudication

to the Commissioner (Appeals). The Commissioner (Appeals) has upheld the Order of the Lower Authority and rejected the Appeal filed by the Appellant. Being aggrieved, the Appellant is before the Tribunal.

4. We have perused the Grounds of Appeal and the Impugned OIA. The issue involved is to decide as to whether the Appellant has undertaken substantial expansion of their installed capacity which would amount to enhancement of the capacity by more than 25% or not.

5. The Appellant has heavily relied on the Certificate issued by the Chartered Engineer vide their Report dated 25/06/2004. We find that the Commissioner (Appeals) has considered the Chartered Engineer Certificate and all the factual details in a detailed manner and has given the following findings:-

> *7. Whereas the Appellant have contended forcefully that their original installed-capacity has been increased in excess of the stipulated Twenty five percent, (25%), as evidenced by the Chartered Engineer's report, effected by means of replacing the ECP and VFBD Dryers by set of two new VFPD-EE3 Dryers together with the inclusion of the ECP Dryer (capacity: 140 kg./hr), which was earlier used for gapping purpose, with effect from 21.04.2000, and hence are eligible for exemption under the said notification, <u>the Department had contended that the post-increase stage of twenty seven point eight seven (27.87%) which has been claimed is not real nor factually correct, (is) arrived at by resorting to manipulation and jugglery-reckoning and including the capacity of the pre-existing ECP Dryer for this purpose, particularly when the ECP Dryer was not accounted for purpose of determining the pre-existing (original) capacity.</u>*
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> *<u>8. I find that the Lower Authority has claimed that the Chartered Engineer in his report claimed that the expansion was effected from 01.04.2000 (the date of installation of the 2nd VFBD-EE3Dryer). But when the Range Superintendent has raised objection pointing out that the said dryer was installed on 20.04.2000 and as such the production capacity was increased w.e.f. 21.04.2000 and not from 01.04.2000, the Appellant vide their letter dated 09.12.2004 has agreed and accepted that the date of installation as indicated by the Range Superintendent w.e.f. 21.04.2000 and not from 01.04.2000, Clearly, the Appellant has also accepted the amendment readily, in the face of the said</u>*

Report. Therefore, it is evident that the report of the Chartered Engineer cannot and ought not to be accepted blindly without any further scrutiny.

9. As per the terms of the said notification, the installed capacity is required to be increased by not less than the stipulated Twenty Five percent (25%). It is evident that since the said ECP Dryer (of installed capacity-140 kg./hr) had already been installed during the pre-increase stage (i.e., 21-04-2000), the capacity of the same should necessarily have been considered and included for assessing the pre-increase installed capacity, and it cannot be included for the post-increase determination, as has been done by the Appellant. Hence, the Appellant's claim of due increase in the installed capacity is not borne out by the material and evidence on record.

10. The Appellant have forcefully urged that the Chartered Engineer's report is sacrosanct as he is a professional expert. There can be no dispute that a Chartered Engineer is competent to determine interalia the assessment of capacity of various machines. The context and circumstances in which the said Report is required to be evaluated and considered would depend upon the facts obtaining in each case, which may vary, widely at times. The Appellant in the present case had claimed the increase based on the function of the ECP Dryer under question in the pre-increase and post-increase stages (periods). The various case laws cited by the Appellant in their defence are not relevant, as the Department has never questioned the technical aspect of the certificated given by the Chartered Engineer. Moreover, I also find that the Appellant themselves have impliedly contradicted and thus challenged the veracity of the report of the Chartered Engineer, and in fact, voluntarily accepted the report of the Range Officer regarding the effective date of increase in installed capacity. Therefore, here, the question is not of purported non-acceptance of the report of the Chartered Engineer and the Range Officer, it has been found that there were four number of dryers already installed at the factory, in fact. Obviously, one (number) ECP dryer of capacity of 140 kg./hr. had not been considered for assessing the installed capacity for the pre-increase stage, on the specious and untenable plea that the same was used for 'gapping' purpose. It is also evident that the Chartered Engineer's Report has itself admitted and qualified the methodology employed therein particularly for the determination of the capacity of the said ECP Dryer, as it was being used as a 'gipping' dryer. This, in effect, would go to vindicate the finding arrived at by the Lower Authority.

11. Further, another material and substantive issue that has to be duly considered is that the Appellant in their first claim (for exemption benefit) dated 16.02.2004 had themselves shown in their assessment report that the said ECP

Dryer with the capacity of 140 kg./hr. was used for manufacturing purpose. But surprisingly, the Appellant in their second claim thereafter dated 5.8.2004 have shown in the assessment report that the same ECP dryer was used for 'gapping' purpose, in similar circumstances-without recording proper justification. Hence, the Lower authority has rightly held that the claim of the Appellant is self-contradictory, not tenable and hence also not accepted.

12. It is also evident that the claim of the Appellant that the ECP Dryer was used for 'gapping' purpose during the pre-increase stage would not negate/denigrate the claim of the Department that the said Dryer was actually installed in their factory during pre-increase stage, whether or not it was used for 'gapping' purpose or for other manufacturing purpose. No exception was permissible. The said Dryer ought therefore to have been necessarily shown (included) in the pre-increase ground plan dated 10.12.1997, relied upon by the Appellant, and reckoned also for such determination, which has not been done. Therefore, it appears that the Appellant has intentionally excluded this capacity from being considered for inclusion in the installed capacity of the factory in the pre-increase stage, and concealed material information from the Department. Consequently, considering this factor, the resultant increase in installed capacity after the expansion ('increase') was found to be mere Four percent (4%), which is not sufficient.

13. Further, the plea of the Appellant that their eligibility for exemption under the said notification has attained its finality once the Order-in-Appeal No. 40/CE(A) Ghy/04 dated 08.04.2004 was accepted by the Commissioner, is not found to be proper. This argument is not applicable here, as it is on record that the Appellant had voluntarily refunded the said amount along with interest on 29.06.2004 and also thereby withdrawn their first claim, dated 16.02.2004. The Appellant cannot therefore resort to and press for revival of this claim at this belated stage; and in relation to which the aforesaid Order-in-Appeal dated 08.04.2004 has been passed. Their earlier claim has lapsed and is a closed chapter. It cannot be revived now in such apparent devious manner. The present issue is arising out of their fresh claim filed vide their letter dated 05.08.2004 and has to be accordingly dealt with distinctly. It has been confirmed that the installed capacity of the Appellant's factory has not been increased by less than Twenty five percentage (25%); the increase in installed capacity after expansion being inadequate-mere Four percentage (4%). Hence, the Appellant would not be considered eligible for the exemption contained in the said notification. [Emphasis supplied]

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6. We do not find any necessity to interfere with the detailed findings and the Order passed by the Commissioner (Appeals), wherein he has considered all the factual details and Chartered Engineer's Certificate and the statutory provisions. Therefore, we dismiss the present Appeal filed by the Appellant.

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

Sd/-
(R. Muralidhar)
Member (Judicial)

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

Pooja