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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.445 of 2010

(Arising out of Order-in-Original No.13/COMMR/CE/KOL-V/ADJN/10 dated 12.03.2010 passed by Commissioner of Central Excise, Kolkata-V.)

M/s. ARCL Organics Private Limited
(Budge Budge Truck Road, 24 Parganas (South), Kolkata-700141.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-V

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

WITH

Excise Appeal No.446 of 2010

(Arising out of Order-in-Original No.13/COMMR/CE/KOL-V/ADJN/10 dated 12.03.2010 passed by Commissioner of Central Excise, Kolkata-V.)

Shri R.K.Vijay
(C/o Aarem Chemicals Pvt.Ltd.
45/2, Rafi Ahmed Kidwai Road, Kolkata-700016.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-V

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Dr. Samir Chakraborty, Sr. Advocate AND Shri Indranil Banerjee & Shri Sanjay Bhowmik, both Advocates for the Appellant (s)

Shri P.K.Ghosh, Authorized Representative for the Revenue

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

FINAL ORDER NO. 77702-77703/2023

DATE OF HEARING : 11 December 2023
DATE OF DECISION : 11 December 2023

Per : K. ANPAZHAKAN :

The instant appeals are filed against the Order-in-Original No. 13/COMMR/CE/KOL-V/ADJN/10 dated March 12, 2010 passed by the Commissioner, Central Excise, Kolkata–V Commissionerate, wherein the Ld. Commissioner has confirmed central excise duty demand of Rs. 22,99,672/-, Rs. 61,24,002/- and Rs. 1,50,540/- against the Appellant No. 1 (hereinafter referred to as "the Appellant"). He also imposed a penalty of Rs. 85,74,214/- upon the Appellant No. 1 under Section 11AC of the Central Excise Act, 1944 and a penalty of Rs. 1,00,000/- upon the Appellant No. 2 under Rules 26 of the Central Excise Rules, 2002. Aggrieved against the impugned order, both the Appellants filed appeal before this tribunal.

2. The Appellant is engaged in the business of manufacture of various grades of free flowing dried urea formaldehyde resin powder such as, Strong Bond P-101G, Strong Bond P-102P, Strong Bond P-105E and Strong Bond P-202G falling under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985 at its factory at Rampur, West Bengal. The Appellant set up its manufacturing facilities in June, 2007 adjoining the factory of its sister concern, Allied Resins and Chemicals Limited (hereinafter referred to as "Allied Resins"), which manufactured the liquid resin used by the Appellant to manufacture the resin powder. The liquid resin required by the Appellant for the manufacture of resin powder was purchased by it from Allied Resins. Allied Resins supplied the liquid resin through pipeline directly from its factory to the Appellant's factory. The Appellant obtained central excise registration on November 5, 2007 and started production from December 2007. Prior to the Appellant obtaining central excise registration and also thereafter, Allied Resins used the Appellant's manufacturing facilities to manufacture resin powder from liquid resin manufactured by it in its adjoining factory. Allied Resins duly accounted for the resin powder so manufactured in its central excise records and paid duty thereon.

3. On May 5, 2008, central excise officers conducted stock verification at the Appellant’s factory. In course of such verification, the officers found 30,525 kgs of resin 101 G in bags bearing the marks of the Appellant and 155050 kgs packed in bags, which bore the marks of Allied Resins. As per the registers, the Daily Stock Account balance was 1,28,475 kgs. Accordingly, the quantity of 1,55,050 kgs packed bags bearing the marks of Allied Resins was treated as excess stock and the same was seized and was subject matter of a separate show cause notice dated November 4, 2008, which has since been adjudicated.

4. On May 4, 2009, a show cause-cum-demand notice was issued to the Appellant alleging as follows :-

(a) The Appellant was liable to pay central excise duty and cess, aggregating Rs. 61,24,002/-, on 12,78,655 kgs of resin powder reflected in the monthly returns of Allied Resins during the period June 2007 to April 2008. It was alleged that Allied Resins had no facility to manufacture resin powder and that the appellant had manufactured the said quantity and supplied the same to Allied Resins clandestinely, without payment of duty and without complying with any central excise formality.

(b) The appellant was liable to pay duty and cess of Rs. 22,99,672/- on 3,49,023 kgs of resin powder clandestinely cleared by it.

(c) The show cause notice proceeded on the basis that the Appellant obtained as its finished product, namely, resin powder, 55% of the liquid resin received from Allied Resins. The quantity of liquid resin received by the Appellant from Allied Resins was sought to be converted into estimated production of resin powder by multiplication with 55%. From the estimated production so arrived at, the clearance quantity as per monthly returns Daily Stock Account and the quantity physically found (ignoring the aforesaid quantity of 1,55,050 kgs) was deducted and the difference was sought to be treated as unaccounted production, cleared clandestinely.

(d) The Appellant was liable for differential duty of Rs. 1,50,540/- in respect of finished goods transferred to the Delhi depot during the period April 2008 to February 2009 since it had not followed the provisions of The Central Excise (Determination of Value of Excisable Goods) Rules, 2000 (hereinafter referred to as "the Valuation Rules")

5. The Notice was adjudicated by the Commissioner vide the impugned Order-in-Original No. 13/COMMR/CE/KOL-V/ADJN/10 dated March 12, 2010, wherein he has passed the following orders:

(i) Confirmed the duty demand of Rs.61,24,002/- including Education Cess and SHE Cess, relating to unaccounted manufacture and clearance of U F Resin Powder, to Rampur Unit of Allied Resins.

(ii) confirmed the duty demand of Rs.22,99,672/- including Education Cess and SHE Cess, relating to clandestinely cleared goods not accounted for in physical stock verification.

(iii) Confirmed duty demand of Rs. 1,50,540/- relating to under valuation of stock transferred goods.

(iv) Imposed penalty of Rs.85,74,214/- on the Appellant under Section 11AC, of the Central Excise Act, 1944.

(v) Imposed penalty of Rs.1,00,000/- on Shri. R K Vijay, CEO under rule 26 Of Central Excise Rules, 2002 read with Section 9(1) of the Central Excise Act, 1944.

6. In their grounds of appeal, the Appellant made the following submissions:

(i) **Issue No. (i) : Demand of Rs. 61,24,002/-**

The Appellant submits that the Commissioner erred in confirming the demand of duty of Rs. 61,24,002/- in respect of resin powder manufactured by Allied Resins by using the Appellant's manufacturing facilities and its own facilities and duly accounted for by Allied Resins in its central excise records and returns. Allied Resins have already paid duty in respect of the 1278655 kgs of resin powder and hence there is no question of the Appellant required to pay duty on the said quantity again. The Commissioner erred in rejecting the contention of the Appellant that Allied Resins also had its own facilities for drying the liquid resin into powder. Even if it is assumed that the said 1278655 kgs of resin powder were manufactured by the Appellant, the same had to be taken as manufactured by way of job work and Allied Resins having duly accounted for the manufacture and clearance thereof in its excise records and returns, there is no question of the Appellant being required to pay any duty in respect of the said quantity.

(ii) **Issue No. (ii) : Demand of Rs. 22,32,691/-**

It has been held that the Appellant has clandestinely removed 349023 kg of various grades of UF resin powder and central excise duty of Rs. 22,32,691/- has been confirmed in the impugned order based solely on the basis of the statements of A. K. Bhora and Asim Kumar Das, of the Appellant no. 1. On the said basis their statements, it has been held that the total value of unaccounted goods was Rs. 1,59,47,795/- and the Appellant had evaded duty of Rs. 22,32,691/-. The Contention of the Appellant was that UF resin powder produced was 45% of the liquid resin consumed. However, relying on the said statements, it has been alleged that UF resin powder produced was 55% of the weight of liquid resin. Accordingly, it has been held that excess production of 349023 kg of UF resin powder was manufactured and cleared clandestinely. The Appellant submits that even if it is accepted that UF Resin Powder produced was 55% of the weight of liquid resin consumed, then also, the variation was of a very small percentage, which is ignorable. The Appellant submitted a reconciliation statement to this effect, the gist of which is reproduced below:

Total liquid at the Rampur Facility	= 3967.515 MT
Total powder ought to be produced (A)	= 3967.515 * 55%
	= 2182.13 MT
Total Powder Produced (B)	= 2146 MT
Shortage of powder production (B) – (A)	= 36.13 MT

Total Duty Payable for shortage of power

Value of 36.13 MT on the basis of rate of goods	
taken by the Department at Rs. 58000/MT	= 20,95,540
Cenvat Duty @14%	=2,93,375
Education Cess@2%	=5,867
H E Cess @1	= 2,933
Total Duty Payable	=3,02,176

Accordingly, the Appellant submits that they are ready to pay the Duty amounting to Rs. 3,02,176 along with interest for the shortage of 36.13 MT.

(iii) Regarding the confirmed demand of duty Rs. 1,50,540/- relating to under valuation of stock transferred goods, the Appellant has not disputed this liability.

(iv) The Appellant further submits that under the facts and circumstances of the instant case, the extended period of limitation cannot be invoked in this case. When there is no liability of duty, no interest is chargeable under the Act. Also, the question of imposition of penalty under section 11AC does not arise.

(v) In the impugned order, a personal penalty of Rs. 1,00,000/- has been imposed upon the Appellant No. 2 under Rule 26 of the said Rules read with Section 9(1) of the Act. In the show cause notice proposal was made for imposition of personal penalty on R. K. Vijay, CEO of the Appellant, under section 9(1) of the Act for his alleged involvement in abetting the commission of alleged evasion by the Appellant. As the alleged offence has not been substantiated with evidence, the question of imposing penalty does not arise. However, the Ld. Commissioner has imposed penalty of Rs. 1,00,000/- under rule 26 of the said Rules upon the Appellant no. 2, which is liable to be set aside.

7. The Ld.D.R. reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal records.

9. Regarding the demand of duty of Rs. 61,24,002/-, we observe that duty has been demanded on the 1278655 Kgs of resin powder manufactured by Allied Resins by using the Appellant's manufacturing facilities. We observe that Allied Resins have already paid duty in respect of the 1278655 kgs of resin powder. The department has not disputed the duty payment on this quantity by M/s. Allied Resin. We observe that even if it is assumed that the said 1278655 kgs of resin powder were manufactured by the Appellant, the same has to be taken as manufactured by way of job work and Allied Resins having duly accounted for the manufacture and clearance thereof in its excise records and returns. Thus, there is no evidence to substantiate the allegation of clandestine clearance and there is no question of the Appellant being required to pay any duty in respect of the said quantity. Thus, we hold that the demand of duty from the Appellant on the said quantity again is not sustainable. Accordingly, we hold that the demand confirmed in the impugned order on this count is liable to be set asie.

10. Regarding the central excise duty of Rs. 22,32,691/- confirmed in the impugned order, we observe that it has been alleged in the impugned order that 349023 kg of various grades of UF resin powder has been manufactured and clandestinely removed. We observe that this allegation is based solely on the basis of the statements of A. K. Bhora and Asim Kumar Das, of the appellant no. 1. There is no other evidence brought on record to substantiate the allegation of clandestine clearance. The Contention of the Appellant is that UF resin powder produced was 45% of the liquid resin consumed. However, relying on the said statements, it has been alleged that UF resin powder produced was 55% of the weight of liquid resin. Accordingly, it has been held that excess production of 349023 kg of UF resin powder was manufactured and cleared clandestinely. The Appellant submits that even if it is accepted that UF Resin Powder produced was 55% of

the weight of liquid resin consumed, then also, the variation was of a very small of percentage, which is ignorable. As per the reconciliation statement submitted by the Appellant the actual short, which is reproduced below, the shoratge was only 36.13 MT.

Working Notes			
	M1	**M2**	**Total Liquid produced**
Liquid produced during 01.06.2007-05.05-2008	10970.315	2658.435	13628.75*
*** Out of the total liquid a part is used for captive consumption by Allied Resins in Rampur, a part is transferred to Aarem facility in Rampur and a part is transferred to Hide Road facility**			

Transfer of liquid	**Aarem facility at Rampur (As per Excise Dept)**	**Allied facility (Captive Consumption) [As per books]**	**Total Liquid transferred to Rampur**
	2106.315	**1862.2**	**3967.515**

Total Powder should have been produced	**3967.515 * 55%**	**2182.13 MT**

Sale of goods of Allied Resins (01.06.07-05.05.08)	**1134**	<u>But 298 MT should have been shown under Aarem Sale and not on Allied, which is wrongly filled.</u>
Sale of goods of Aarem Chemicals	**674**	This should be 674 + 298=972
Physical stock as on 05.05.08 (as per Dept)	**124**	
Stock seized found in Allied Bags	**155**	
Captive production for UF as per working sheet	**59**	
Total Powder produced		**2146**

Net Shortage : 2182.13 – 2146: 36.13 MT

11. We have gone through the reconciliation statement submitted by the Appellant and satisfied with the net shortage of 36.13 MT arrived at by the Appellant. Accordingly, we hold that the Appellant is liable to pay duty of Rs. 3,02,176/- along with interest on the shortage of 36.13 MT, as worked out by them and reproduced in Para 6(ii) supra.

12. Regarding the confirmed demand of duty Rs. 1,50,540/- relating to under valuation of stock transferred goods, the Appellant has not disputed this liability. Accordingly, we uphold the confirmation of this demand.

13. Regarding the penalty imposed on the Appellant, we observe that As per the discussions above, the duty of Rs. 3,02,176/- along with interest has been confirmed on the shortage of 36.13 MT, which the Appellant agrees to pay. We observe that this shortage has been arrived at by taking the yield of UF Resin Powder produced as 55% of the weight of liquid resin consumed. As there is no evidence available on record to establish clandestine clearance of this quantity of U F Resin Powder, we hold that penalty under Section 11AC not imposable on this demand. Also, the demand of duty Rs. 1,50,540/- is related to under valuation of stock transferred goods. The Appellant has not disputed this liability. However, the issue being technical in nature, the intention to evade payment of duty cannot be attributed to this demand. Accordingly, we hold that no penalty imposable on this demand.

14. Regarding the personal penalty of Rs. 1,00,000/- imposed on the Appellant No. 2 under Rule 26 of the said Rules read with Section 9(1) of the Act, we observe that allegation of suppression with intent to evade payment of duty has not been substantiated in this case. Also, the department has not brought in any evidence to highlight the role of Appellant No.2 in the commission of the alleged offence. Accordingly, we hold that the penalty imposed on him under rule 26 read with section 9(1) of the Central excise act, is not sustainable.

15. In view of the above discussion, we pass the following order:

(i) The demand of duty Rs.61,24,002/-confirmed in the impugned order is set aside.

(ii) The demand of duty of Rs. 22,32,691/- confirmed in the impugned order is reduced to Rs. of Rs. 3,02,176 for the shortage of 36.13 MT. The Appellant is liable to pay this duty along with interest.

(iii) With respect to the demand of duty Rs. 1,50,540/- relating to under valuation of stock transferred goods, the Appellant has not disputed this liability. Accordingly, we uphold the confirmation of this demand.

(iv) The penalty imposed on the Appellant 1 and Appellant 2 are set aside.

(v) The impugned order is modified as above and the appeals are disposed on the above terms.

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

Sd/-
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Pooja