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

REGIONAL BENCH - COURT NO.1

Excise Appeal No.75942 of 2015
And
Excise Cross Objection No.75799 of 2015

(Arising out of Order-in-Appeal No.06/KOL-III/2015 dated 30.06.2015 passed by Commissioner of Central Excise, Appeal-II, Kolkata.)

Commissioner of Central Excise, Kolkata-III
(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

...Appellant

VERSUS

M/s. NTC Industries Limited

.....Respondent

(149, B.T. Road, Kolkata-700058.)

APPEARANCE

Shri S.Mukhopadhyay, Authorized Representative for the Revenue
Shri Shovendu Banerjee, Advocate for the Respondent (s)

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 75705/2024

DATE OF HEARING : 04.04.2024
DATE OF DECISION : 04.04.2024

Per : ASHOK JINDAL :

The Revenue is in appeal.

2. The facts of the case are that the respondent was engaged in the manufacture of Cut tobacco, Smoking Mixture and Cigerettes. It was alleged that the respondents manufactured and issued 10,33,255 Kgs. of cut-tobacco for captive consumption in the production of cigarettes, out of which 58,364 Kgs. and 31,194 Kgs. i.e. 89,558 Kgs. of cut-tobacco were converted into winnows/spills and tobacco dust during processing. Accordingly, the said proportionate cut-tobacco was not captively used for manufacture of cigarettes but disposed of otherwise without payment of duty and liable to pay Central Excise duty. It was also observed that the respondents are not entitled to the benefit of Notification 121/94-CE dated 11.08.1994, as amended on proportionate

Cut Tobacco not captively consumed in the manufacture of cigarettes. In this set of facts, a show cause notice was issued to the respondent to demand Central Excise duty on clearance of winnows/spills and tobacco dust for the period April 1997 to February 2002. The matter was initially adjudicated by the adjudicating authority, demand of duty was confirmed. The matter has travelled up to this Tribunal and this Tribunal remanded the matter back to the Ld.Commissioner(Appeals) to decide the issue again. In remand proceedings, the Ld.Commissioner(Appeals) dropped the demand against the respondent. Aggrieved from the said order, the Revenue is before us.

3. The Ld.AR appearing on behalf of the Revenue reiterated the grounds of appeal taken by the Revenue while filing the appeal before this Tribunal stating that the respondent is liable to pay duty on this tobacco dust and winnows.

4. On the other hand, the Ld.Counsel appearing on behalf of the Respondent submitted that the issue has been decided by this Tribunal in the case of VST Industries Ltd. v. Commr. of C.Ex., Cus. & S.T., Hyderabad-II [2015 (318) E.L.T. 671 (Tri.-Bang.)], therefore, the issue is no more *res integra*. In that circumstances, the appeal filed by the Revenue may be dismissed.

5. Heard the parties and considered the submissions.

6. We find that the Ld.Commissioner(Appeals) has examined the issue in detail and observed as under:-

> *"11. ………………. The issue involved in all these cases is whether cut tobacco which has gone into the manufacture or forms part of tobacco refuse or tobacco dust can be levied to excise duty just because the appellants removed tobacco refuse or tobacco dust at nil rate of duty. I find that Tobacco refuses being neither a new product nor a final product but coming in the existence by way of emerging as ramnants of the inputs [cut tobacco] and such unwanted material cannot be construed by any stretch of imagination to be a 'final product'. The SCN has alleged 'that cut tobacco were converted into winnows/spills and dust'. A common prudence cannot expect that a manufacturer would convert their input [cut tobacco] into manufacturing of refuses*

[winnows/spills] or dust. In fact these are collaterally results which cannot be avoided. A notification should be interpreted on its own terms. Notification 121/94, dated 11.8.1994 has specifically used the term 'final product'. Cut tobacco 'refuses' do not have a separate commercial name in market but it is commonly known as 'waste' or 'refuses' of tobacco manufacturing process. Similar views were held by Hon'ble CESTAT in case decision BHAVANI Cigarettes Vs CCE that "We are of the view that the tobacco dust/tobacco refuse cannot be treated as final product for the purpose of Notification No.214/86. The final products are the cigarettes. Therefore the assessee is entitled to the benefit of exemption on cut tobacco under seizure under notification. We therefore, set aside the impugned order by which the demand has been confirmed and penalty of Rs.50,000/- imposed, and allow the appeal" [2005 (189) E.L.T. 182 (Tri.-Mumbai)]."

7. We also take note of the fact that the similar issue came up before this Tribunal in the case of VST Industries Ltd. (supra), wherein this Tribunal observed as under :-

"7. *We have already reproduced the manufacturing process, the reasons/grounds for commencement of proceedings against the appellant and the basis for confirming the demand by the Commissioner while discussing the statement of facts and therefore we would not like to repeat the same. Quite clearly the issue involved is whether the Cut Tobacco which forms part of tobacco refuse cleared without payment of duty as per Notification No. 3/2005-C.E., dated 24-2-2005 as amended. Exemption Notification No. 52/2002-C.E., dated 17-10-2002 is the notification, the benefit of which has been denied resulting in confirmation of demand and imposition of penalty. It would be appropriate to reproduce the relevant Notification for better appreciation.*

Tobacco - Goods manufactured and captively consumed - Notification No. 121/94-C.E. superseded

In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) (hereinafter referred to as *the said Special Importance Act) and sub-section (3) of Section 136 of the Finance Act, 2001 (14 of 2001) (hereinafter referred to as the said Finance Act) and in supersession of the notification of the Government of India in the erstwhile Ministry of Finance (Department of Revenue), No. 121/94-Central Excise, dated 11th August, 1994, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said Tariff Act) manufactured in a factory and used within the factory of production in or in relation to the manufacture of final products all goods falling under Chapter 24 of the First Schedule to the said Tariff Act, from the whole of the duty of excise and additional duty of excise and national calamity contingent duty leviable thereon, which is specified in the respective Schedules to the said Tariff Act and the said Special Importance Act and the said Finance Act :*

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products (other than those cleared either to a unit in a Free Trade Zone or to a 100% Export Oriented Undertaking or to a unit in an Electronic Hardware Technology Park or Software Technology Parks), which are exempt from the whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty.

8. *It can be seen that the question that arises is whether we can consider the tobacco refuse as final product. Benefit has been denied on the ground that tobacco refuse is also excisable goods, marketable, can be considered to have been manufactured and can be sold for consideration. There can be two views about all these issues. But question arises whether it can be considered as a final product of the assessee. Para 3 of the decision in the case of Golden Tobacco Ltd. [2010 (259) E.L.T. 269 (Tri.-Ahmd.)] is relevant and is reproduced below :*

"3. After hearing both sides, we find no merits in the above distinctions drawn by the appellate authority between facts of the present case and facts as available before Mumbai High Court. In the present case, the reading of the show cause notice clearly shows that the Revenue is treating the "Tobacco refuse" as a by-product. The

> *original adjudicating authority also confirmed the demand by considering the "Tobacco refuse" as a by-product. Appellants are not manufacturer of "Tobacco refuse" and the same emerges as a by-product during the course of manufacture of their final product i.e. Cigarettes and Cut Tobacco. The fact that such "Tobacco refuse" is a specified item against a particular entry in Central Excise Tariff and has been exempted by virtue of the notification, will not change the character of "Tobacco refuse" from by-product to final product. The same were the facts before Mumbai High Court; inasmuch as Mother Liquor was a specified item and was exempted by way of issuance of particular notification. However, Hon'ble High Court held that inasmuch as Mother Liquor was a by-product which comes into existence during the course of manufacture of final product the assessee is not liable to pay amount of 8%/10% in terms of Rule 6."*

9. *In the above case it has been clearly observed that tobacco refuse cannot be considered as final product but has to be treated as a by-product. By-product or waste may be liable to excise duty but we are not considering the liability of the tobacco refuse to excise duty. What we are considering is whether tobacco refuse cleared by the assessee is a 'final product' of the assessee. In this case as rightly submitted by the learned counsel, the assessee is engaged in the manufacture of Cigarette. During the course of manufacture of Cigarette, and for the process of manufacture of Cigarette, they have to manufacture Cut Tobacco also. Therefore it can be clearly said that the appellant is a manufacturer of Cut Tobacco and Cigarette. Can anyone say that appellant is a manufacturer of tobacco refuse is the moot question to which the obvious answer in the light of the decision of the Tribunal in the case of Golden Tobacco Ltd. is "tobacco refuse is not a final product". The Tribunal also while rendering the decision in the case of Golden Tobacco Ltd. had relied upon the decision of the Hon'ble High Court of Bombay in the case of Rallis India Ltd. v. Union of India [2009 (233) E.L.T. 301 (Bom.)] where a similar view was taken. Thereafter several decisions have been rendered following the same view and the issue is no longer res integra.*

10. *When this observation was made, the learned AR had sought time and no contrary decision has been placed before us at this stage.*

Under these circumstances the decision of the Tribunal taking a view that tobacco refuse cannot be considered as a final product of the assessee has to be considered and followed. Once we do that the provisions that nothing contained in the notification shall apply to inputs used in or in relation to manufacture of final products which are exempted, would not be applicable to the present case. Therefore just because appellant cleared tobacco refuse without payment of duty, cut tobacco which forms part of such refuse cannot be levied to Central Excise duty as proposed by the Revenue in these cases. In view of the above discussion, the demands against the appellants, interest thereon and penalties imposed cannot be sustained. In the result all the impugned orders are set aside and the appeals filed by the appellants are allowed with consequential relief if any to the appellants."

8. The input namely cut tobacco used in the manufacture of dutiable cigarettes and tobacco refuse is a by-product which emerges during manufacturing, the tobacco refuse is not liable to duty.

9. In view of the above observation we hold that the respondent is not liable to pay duty on this tobacco refuse/dust, therefore, we do not find any infirmity in the impugned order. The same is upheld and the appeal filed by the Revenue is dismissed. Cross Objection also gets disposed of.

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

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)

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