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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 76118 of 2015

(Arising out of Order-in-Appeal No. 93/Pat/CEx./Appeal/2015 dated 17/09/2015 passed by Commissioner (Appeals) Customs, Central Excise and Service Tax, Patna)

M/s. Daya Engineering Works Pvt. Ltd.
(6-3-1239/B/111, 4th Floor, Renuka Enclave,
Raj Bhavan Road, Somajiguda, Hyderabad-82 (A.P))

Appellant

VERSUS

Commr. of Central Excise, Patna
(2nd Floor, Central Revenue Building, Bir Chand Patel Path, Patna-800001)

Respondent

With

Excise Appeal No. 76119 of 2015

(Arising out of Order-in-Appeal No. 92/Pat/CEx./Appeal/2015 dated 17/09/2015 passed by Commissioner (Appeals) Customs, Central Excise and Service Tax, Patna)

M/s. Daya Engineering Works Pvt. Ltd.
(6-3-1239/B/111, 4th Floor, Renuka Enclave,
Raj Bhavan Road, Somajiguda, Hyderabad-82 (A.P))

Appellant

VERSUS

Commr. of Central Excise, Patna
(2nd Floor, Central Revenue Building, Bir Chand Patel Path, Patna-800001)

Respondent

APPEARANCE :
Mr. Aditya Dutta, Advocate for the Appellant
Mr. P. K. Ghosh, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.76652-76653/2024

Date of Hearing : 12 August 2024
Date of Decision: 12 August 2024

PER R. MURALIDHAR:

The Appellant is manufacturer of Pre-stressed Concrete (PSC) Sleepers for Railways since 1963. Within the same premises, one more manufacturer, M/s Daya Technical Services (P) Ltd., (DTS) was also manufacturing after obtaining the Central Excise Registration in the year 1992. They were manufacturing PSC poles and supplying to the Electricity Boards. Both these units were individually claiming SSI exemption under Notification No. 8/2003-CE dated 02/03/2003. Earlier to this, they were covered by similar Notification for the relevant period towards SSI exemption. On the allegation that both the units have two common directors and common staff monitoring the accounting, marketing and supervision activities, Show Cause Notice was issued on 24/07/2013 on the Appellant demanding the Excise Duty for the period April 2008 to March 2012 by invoking the extended period provisions. Subsequently, one more Show Cause Notice was issued on 24/12/2013 for the period April 2012 to January 2013 once again invoking the extended period provisions. After due process, the demands were confirmed. On appeal, the Commissioner (Appeals) dismissed their appeals. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Counsel submits that admittedly both the units are manufacturing two different products supplying the same to two different buyers. They have separate Central Excise Registration and separate PAN Numbers for Income Tax and VAT Registration for Sales Tax purposes. He submits that the Department has not come out with any evidence towards flow back of fund and mutuality of interest. He submits that this issue was before the Hon'ble Supreme Court in the case of **CCE, Jaipur Vs. Electro Mechanical Engg. Corporation [2008 (229) ELT 321 (SC)]**. One more decision was given by the Apex Court in the case of **Central Excise, New Delhi Vs. Superior Products-2008 (230) E.L.T. 3 (S.C.)** In these cases, it has been held that in the absence of any evidence in respect of mutuality of interest, even when there are common directors, common employees and common facilities are being used, still the turnovers cannot be clubbed together to deny the SSI Exemption benefit. Further, he submits that the Show Cause Notices were issued to the present appellant (DEW) only and not to the other unit (DTS) whose turnover is being proposed to be added to the appellant's turnover to deny the SSI benefit. On this issue, he relies on the case law of **CCE, Kolkata-II, Vs. Diamond Scaffolding Co.[2011 (274) E.L.T. 10**

(Cal)]. In view of these submissions, he prays that the appeals may be allowed on merits.

3. He further submits that though the Appellant Company and other unit were co-existing right from 1992 and they were under the supervision of the same Central Excise Authority, no query was ever raised about their turnover being liable to be clubbed together to deny the SSI benefit, till the first Show Cause Notice was issued on 24/07/2013. Hence the entire confirmed demand in respect of the first SCN is time barred. He further submits that even the second Show Cause Notice is time barred since it was issued on 24/12/2013. He relies on the case law of **CCE, Jaipur Vs. Electro Mechanical Engineering Corporation [2008 (229) E.L.T. 321 (SC)] and Nizam Sugars Factory Vs. CCE, AP-2006 (197) ELT 465 (SC).** In view of these submissions, he prays that the appeals may be allowed on account of limitation also.

4. The Learned AR reiterates the findings of the lower authorities. He submits that admittedly, both the units were operating with common staff and even two directors were common which would show mutuality of interest. Therefore, he justifies the confirmed demand.

5. Heard both sides and perused the Appeal Papers and documents placed before us.

6. We find that the Revenue has erred by not issuing any Show Cause Notice to DTS whose turnover is being sought to be clubbed with that of the appellant. This goes against the judicial principles since the other party is not even given notice to make their submissions. The Calcutta High Court in the case of **CCE, Kolkata-II, Vs. Diamond Scaffolding Co.[2011 (274) E.L.T. 10 (Cal)] has held as under:-**

> ***8.*** *In respect of the second point, i.e., <u>clubbing of clearance, the Tribunal further came to the conclusion that clearances of two other units were clubbed with the clearance made by the importer without issuing any</u>*

> *show cause notice to the other units and there was no notice to the two units for clubbing clearance with the clearance of the importer. In such circumstances, in our opinion, the Tribunal was quite justified in holding that demand by clubbing the clearance of other units without issuing any show cause notice was not sustainable.*

[Emphasis supplied]

7. We also find that the Revenue has not brought in any specific evidence towards mutuality of interest and flow back of funds between these units. On the other hand, the Appellant submits that the very products dealt by them are being sold to two different sets of buyers, we find that the issue has been dealt by Hon'ble Supreme Court in the case of **CCE, Jaipur Vs. Electro Mechanical Engg. Corporation**, Cited supra. The Hon'ble Supreme Court has held as under:-

> ***7.*** *Respondents carried the matter in appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, ('the Tribunal'). The Tribunal, after hearing the parties, held that the respondents (appellants before the Tribunal) had disclosed all the material facts, as regards their constitution and functioning, at the time of their respective registration and it could not be said that they had suppressed any material facts from the Department and that there was no tangible evidence to show that there was any financial flow back from one unit to another which is most essential for clubbing the clearances of the units. The Tribunal, relying upon a judgment of the Rajasthan High Court in the case of Renu Tandon v. Union of India - 1993 (66) E.L.T. 375 held that because there were some common employees, the value of the clearances of two units cannot be clubbed unless there is evidence to prove that there was mutuality of business interest and the units were having financial flow back. Insofar as the invocation of extended period of limitation is concerned, the Tribunal held that once it is held that no material facts were suppressed from the Department, the extended period of limitation could not be invoked.*

[Emphasis supplied]

8. This judgment has also dealt with the issue of time bar which is as under:-

> ***10*** *The case of the Department is that these firms have been clubbed together as certain employees of the three firms were common or that*

> *<u>their premises were adjoining each other.</u> The Tribunal, while setting aside the order of the Commissioner, has held that there is no evidence on record to prove that there was mutuality of business interest or there was flow back of funds from one unit to another. <u>The finding recorded by the Tribunal, being a finding of fact, does not call for any interference.</u>*
>
> ***11.*** *As noted earlier, on the question of invocation of extended period of limitation, <u>the Tribunal has held that the demand of duty was for the period from 1-5-1995 to 31-3-2000 whereas show cause notice was served only on 1-6-2000. The Tribunal has held that since there was no wilful or deliberate suppression of any material facts, extended period of limitation could not be invoked.</u>*
>
> ***12.*** *<u>We agree with the finding recorded by the Tribunal that there was no deliberate or wilful suppression of any material facts by the respondents from the Department. Hence, the extended period of limitation could not be invoked</u>. But, since the show cause notice was served on 1-6-2000, the period from 1-5-1995 to 31-5-1999 being beyond the period of limitation of one year from the date of service of notice, as prescribed by the Statute. Insofar as the period from 1-6-1999 to 31-3-2000 is concerned, issuance of show cause notice was within limitation. However, the Tribunal has excluded the entire period. <u>In our view, the period from 1-6-1999 to 31-3-2000 was within limitation, but, since we have upheld the order of the Tribunal on merits, this issue becomes academic in nature.</u>*

[Emphasis supplied]

9. In respect of the second Show Cause Notice, we find that the Hon'ble Supreme Court in the case of **Nizam Sugars Factory Vs. CCE, AP**, cited supra has held as under:-

> ***9.*** *Allegation of suppression of facts against the appellant cannot be sustained. <u>When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.</u>*

[Emphasis supplied]

10. We find that the ratio laid down in the above decisions of the Supreme Court and High Court both on merits and on limitation are squarely applicable to the facts of the present case. Accordingly, we set aside the impugned orders and allow the appeals on merits as well as on account of limitation.

11. The Appellant would be eligible for consequential relief, if any, as per law.

(Dictated and pronounced in the open court.)

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

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja