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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75349 of 2015

(Arising out of Order-in-Original No.87/Commissioner/CE/Kol-IV/2014 dated 23.12.2014 passed by Commissioner of Central Excise, Kolkata-IV.)

M/s. B.D. Castings Pvt.Ltd.
(NH-2, Delhi Road, P.O. Par Dankuni, Dist-Hooghly, West Bengal, Pin-712232.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-IV

.....Respondent

(15/1, Strand Road, Custom House, M.S. Building, Kolkata-700001.)

APPEARANCE

Shri N.K.Chowdhury, Advocate for the Appellant (s)
Shri B.K.Singh, Authorized Representative for the Revenue

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

FINAL ORDER NO. 76988/2024

DATE OF HEARING : 05.09.2024
DATE OF DECISION : 05.09.2024

Per : R. MURALIDHAR :

The Revenue has raised a demand on the Appellant on the ground that VAT collected from the customers is required to be added to the assessable value. After due process, the demand was confirmed. Being aggrieved, the Appellant is before the Tribunal.

2. The Ld.Advocate appearing for the Appellant submits that the issue is in a short compass. This matter was under litigation and the period involved in the present dispute is for the period October 2004 to September 2007. This issue as to whether VAT is includible in the Assessable Value or not had finally reached the Apex Court and only after that it has been clearly held by the Hon'ble Supreme Court that the VAT portion is required to be added in the assessable value. Therefore as on date on merits the decision is in favour of Revneue.

3. However, in several cases it has been held that the non-inclusion of VAT in the assessable value has emanated mainly due to

interpretational difficulties. Therefore the Tribunals and High Courts have been consistently holding that extended period of limitation cannot be invoked in such cases. He relies on the identical case law of **Jayaswal Neco Industries Ltd. v. Commissioner of C.Ex. & S.T., Raipur [2016 (344) E.L.T. 578 (Tri.-Del.)]** and **Commissioner of Central Excise, Delhi-III v. Microtek Forgings [2016 (341) E.L.T. 218 (P & H)**. Accordingly, he prays that the Appeal may be allowed on account of time bar itself.

4. The Ld.AR for the Department reiterates the findings of the lower authorities.

5. Heard both sides and perused the appeal papers and the documents placed before us.

6. Admittedly the Show Cause Notice for the period October 2004 to September 2007 has been issued on 08.09.2009. At that time there was interpretational difficulty about the inclusion or otherwise of the VAT portion in the Assessable Value. Finally the same was resolved by the Hon'ble Supreme Court in the case of **CCE, jaipur v. Super Synotex (India) Ltd. [2014 (301) E.L.T. 273 (S.C.)]**, wherein the Apex Court has held that the value of the VAT is required to be added to arrive at the Assessable Value.

7. After considering the fact that there were interpretational issues, the Tribunal in the case of **Jayaswal Neco Industries Ltd.**, cited supra, has held as under:-

> ***"6.*** *We have considered the submissions from both the sides and perused the records. On merits, the question as to whether the VAT which was exempt and which the appellant have collected from the customers and retained in terms of a Scheme of the State Government, is to be included in the assessable value or not, stands decided against the appellant by the Apex Court's judgment in the case of Super Synotex (India) Ltd. (supra). Therefore, we hold that the appellant during the period of dispute were liable to pay duty on the assessable value including amount of VAT collected by them from their customers and retained by them and since the VAT amount was*

not included in the assessable value, there has been short payment of duty. However, the duty demand for the 2006-07 period has been issued only on 28-4-2011 by invoking extended period of five years under proviso to Section 11A(1) and this demand would survive only if it can be proved that the appellant had not acted under bona fide belief or that they had committed fraud or wilful misstatement or suppression of facts with intent to evade payment of duty. However, we find that during the period of dispute, the Board's Circular No. 378/11/98-CX, dated 12-3-98 and No. 671/62/2002-CX, dated 9-10-2002 were in favour of the appellant, as these circulars clarified that sales tax/VAT collected by an assessee but retained and not paid to the Government is not includible in the assessable value. Not only this, there were several judgments of the Tribunal on this issue which were in favour of the appellant company, the last other judgment being in the case of Super Synotex (India) Ltd. (supra), which was subsequently reversed by the Apex Court vide judgment reported in 2014 (301) E.L.T. 273 (S.C.). In view of the Board's Circular and the judgments of the Tribunal, which were in favour of the appellant, it can be said that the appellant had acted under bona fide belief that VAT amount collected by them from the customers and retained was not includible in the assessable value and hence, in these circumstances, in view of the Apex Court judgment in the case of CCE v. Continental Foundation Joint Venture (supra), the longer limitation period would not be available and as such, the duty demand would have to be held as time barred."

[Emphasis supplied]

8. In the case of **Commissioner of Central Excise, Delhi-III v. Microtek Forgings,** cited supra, the Hon'ble Punjab & Haryana High Court has held as under:-

"3. *After hearing learned counsel for the appellant, we do not find any merit in the present appeal. The Tribunal has dealt with the issue of limitation in Para No. 5 of the order, which is extracted below :-*

"The respondents also contested the issue on limitation. We find that during the relevant period there was CBEC Circular dated 30-6-2000 which provides that any amount of concession on sales tax retained by the respondent is not required to be added in the assessable value and there are certain judicial pronouncements of this Tribunal holding the same view in the case of Kinetic Engineering Ltd. (supra) and Life Long India Pvt. Ltd. v. CCE, Delhi, 2013 (292) E.L.T. 88 (Tri.-Del.). As there were view taken by the CBEC Circular and this Tribunal in favour of the respondent which has been negated by the Hon'ble Apex Court in the decision cited before us today. In these circumstances, we hold that extended period of limitation is not invocable. Consequently demand pertaining to the extended period of limitation which is sought to be demanded from the respondent are set aside. Consequently, the penalties on the respondents are not imposable."

[Emphasis supplied]

9. From the above decisions, we find that the issue as to whether extended period can be invoked in respect of the issue before us, is no more *res integra*. Accordingly, we set aside the confirmed demand on account of time bar and allow the Appeal.

10. 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)

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