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

REGIONAL BENCH – COURT NO.2

ExciseAppeal No. 76627of 2014

(Arising out of Order-In-Original No.25/Commissioner/CE/Haldia/Adjn/2014 dated 29/09/2014 passed by the Commissioner of Central Excise, Haldia)

M/s.Skipper Ltd, (Unit-I)
(N. H.-6, Jangalpur, Andul, Mouri, Howrah-711302)

Appellant

VERSUS

Commr.ofCGST & Central Excise, Haldia
(25, Princep Street, 3rd Floor, Kolkata-700072)

Respondent

APPEARANCE :
ShriAdityaDutta, Advocate for the Appellant
Shri S. K. Mukim, Authorized Representative for the Respondent

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

FINAL ORDER NO. 77025/2024

Date of Hearing :04 September 2024
Date of Decision: September 24, 2024

PER RAJEEV TANDON:

The appellant M/s. Skipper Ltd. (Unit-I) had filed the present appeal assailing the Order-In-Original No. 25/Commissioner/CE/Haldia/Adjn/2014 dated 29/09/2014 passed by the Learned Commissioner, HaldiaCommissionerate whereby the Commissioner apart from confirming and appropriating duty paid on the supplementary invoices has also demanded interest of Rs.8,55,102/- under Section 11B and Section 11AA of Central Excise, 1944 besides imposing penalty of Rs. 51,70,284 on the appellant under Section 11AC of the Act ibid read with Rule 25 of the Central Excise Rules, 2002.

2. The facts of the case are that the appellant entered into contracts with various parties for manufacture, testing, inspection and supply of transmission line towers. Such contracts contained a price variation clause depending on the cost of the input, labour and other costs thatare not determinable at the time of initial clearance of goods

under cover of Central Excise Invoices. Central Excise duty was thus paid on the basis of the assessable value as shown in the invoice for the purpose at the time of initial clearance of the goods. Subsequently, the price escalation is calculated based on the basis of All India Industrial Price Indices determined by the Reserve Bank of India and communicated by All India Electrical Manufacturers Association, Ministry of Labour and Employment, Government of India. At times, it also happens that instead of price escalation, there is a reduction of price. The appellant submits that it is not possible at the time of original clearance to foresee any price escalation at the time of clearance of goods and therefore, supplementary invoices for differential amount are raised consequent to determination of the price escalation and differential duty on the said differential assessable value paid by way of the said supplementary invoices. A show cause notice dated 19.09.2013 was issued to the appellant in respect of the goods cleared during the period 2009-10, 2011-12 demanding central excise duty on such price escalation along with interest.

3. The appellant submits that the differential duty of Rs. 51,10,284/- was voluntarily paid by them even prior to the issuance of the said notice. They however dispute the payment of interest of Rs. 8,55,102/- demanded on the said differential amount of duty.

4. The impugned Show Cause Notice was issued invoking the extended period of limitation inter alia alleging that the assessee were having knowledge about possibility of price escalation in respect of supplies of their final product yet theyotherwise neither disclosed the facts to the Department nor opted for provisional assessment of such goods. The notice thus goes onto allege that they had willfully violated the provisions of the Central Excise Rules, with intent to evade payment of duty.

5. Learned AR for the Revenue however supports the impugned order & reiterates the findings.

6. We have heard the two sides and perused the case records.

7. At the outset, we would like to unhesitatingly state that we are not convinced with the Department's contention that the appellant had resorted to suppression, mis-statement and willfully defaulted payment of appropriate leviable duty in the matter by choosing not to opt for provisional assessment in terms of Rule 7 of the Central Excise Rules, 2002.

8. From the chronological history of the case, it is evident that the Show Cause Notice for interest on differential duty on the escalated value was raised on 09/09/2013 i.e. well beyond normal period of limitation of one year from (31 March 2012) the date of payment of differential duty under the last of the aforesaid invoices. We also note that the contention of the department with regard to mis-declaration, suppression etc. is clearly not attracted in the present matter as complete facts of the case and the scheme of assesse's transactions, work methodology and clearance of finished goods was well within the knowledge of the Department. We cannot read any fraud or collusion or suppression for that matter under the aforesaid scheme of operation to suggest any intention to evade payment of duty, more so since it has been a regular practice of the assessee's working.

9. We note that the learned Commissioner vide the impugned order in original has confirmed the demand of interest of Rs. 8,55,102/- besides appropriating the differential duty amount paid by the appellant. The said Show Cause Notice has been issued invoking the extended of period of limitation. For a Show Cause Notice invoking the larger period of time in terms of the provisions of Section 11A(1) ingredients thereto like fraud, collusion, willful misstatement, suppression of fact etc. are required to be evidently established. However, we find that no such ingredient actually exists in the matter and merely holding non-availment of provisional assessment procedure as a valid ground to invoke longer limitation to our

understating belies reasonability and logic.For a show cause notice invoking normal period of limitation, it is required to be served on the noticee within one year of the relevant date and the period of one year would be required to be counted from the date of the return for the month concerned with short payment of duty. In the present case the notice is issued on 19.09.2013, which is well beyond normal period of limitation. Also none of the ingredients as contained in proviso to Section 11 A(1) being validly made out in the present case, the larger period of limitation, cannot be invoked. Moreover, the fact that the payment of duty, on the strength of supplementary invoice was paid by the assessee, of their own accord immediately when the revised rates/value of the goods cleared were known and this fact was well within the knowledge of the department at the time of filing of the relevant ER-1 return by the assessee, no case of suppression actually stands out against the appellant. We are convinced that extended period of limitation is not invokable in the facts and circumstances of the case. The demand for payment of interest being beyond normal period of limitation is therefore unsustainable and liable to be set aside.

10. We also note that the issue viz. whether the appellant is liable to pay the interest on supplementary invoices by invoking extended period of limitation or not ? The said issue has been dealt by this Tribunal in the case of **Commissioner Vs. T.V.S.Whirpool Limited [1996 (86) E.L.T. 144 (T)** and as maintained by the Hon'ble Apex Court reported in **2000 (119) ELT A177 (S.C.)** wherein it has been held by the Apex Court that *"it is only a reasonable time that the period of limitation that applies to a claim for the principal amount should also apply to the claim for interest thereon."* The Revenue's appeal in the matter was dismissed by the apex court with costs. Further in the case of **Hindustan Insecticides Limited Vs. Commissioner of Central Excise, LTU** reported in **2013 (297) ELT 332 (Del)**, the said issue was examined by the Hon'ble Delhi High Court wherein the Hon'ble High Court has held as under :

> *"14. A reading of the aforesaid paragraph would show that in the said case notice of payment for interest was issued after four years and it was held that it was beyond a reasonable period and the department could recover the amount from the Assessing Officer, who had not taken steps for four years and not from the respondent-assessee therein. The finding of the Supreme Court on interpreting the applicable Act was that no limitation period was prescribed, therefore, proceedings for recovery could be initiated within a reasonable time. The ratio in the said case is distinguishable for the reason that payment of interest is to be made under Section 11A and, therefore, the period of limitation prescribed therein would equally apply as has been held by the Delhi High Court in the case of Kwality Ice Cream Company (supra), Punjab and Haryana High Court in the case of M/s. VAE VKN Industries Private Limited (supra) and Gujarat High Court in Gujarat Narmada Fertilizers Company Limited (supra). These judgments have relied upon the decision of the Supreme Court approving the view of the Tribunal in TVS Whirlpool Limited (supra) wherein parimateria provisions of the Customs Act were considered. This being a distinguishing feature, we feel that the appellant is entitled to succeed in the present appeals. The question of law is accordingly answered in affirmative, i.e., in favour of the appellant and against the respondent-Revenue."*

11. We thus hold that the extended period of limitation is not invokable for the facts and circumstances of the case as the appellant has paid the duty on the supplementary invoices for the material period prior to issuance of Show Cause Notice and the same appropriated vide the impugned order. In that circumstances, the extended period of limitation for demand of interest, is not invokable. Consequently, the demand of interest on supplementary invoices is barred by limitation.

12. The Learned AR for the Department however, places reliance on the Apex Court's Orders in the case of Commissioner of **Central Excise, Pune, Vs. SKF India Ltd.-2009 (239) E.L.T. 385 (S.C).** We would add here that indeed we do not dispute the contention that the initial payment of duty was in effect short paid duty warranting issuance of supplementary invoice and payment of duty leviable, along

with interest as applicable under sec. 11AB/11AA. The fact to be noted here however is, that any show cause notice for the said purpose, if issued, was required to be issued within normal period of limitation particularly when we find the impugned show cause notice to be bereft of sustainable grounds to invoke longer period of limitation. Had the department taken care to promptly issue the notice within normal limitation, once apprised of the fact of short paid duty, the stance of the revenue would have been legally sustainable. However invoking longer period of limitation without existence of any corresponding criteria to do so, we are afraid the said judgement of the apex court does not come to the aid of the revenue. We also note that Rule 7 of the Central Excise Rules supra do not make it mandatory for an assessee to opt for Provisional Assessment and bind him thereto, where the assessee is unable to determine the final price of the excisable goods at the time of its clearance. The availment of the said facility of provisional assessment is purely optional and at the discretion of the assessee. The law does not provide that the assessee need to necessarily resort to and follow the prescriptions of Rule 7 of the Rules *ibid,* in circumstances so warranting. However, any failure to so do would be with attendant consequences as befall in law. Hence on this ground as well we are afraid that the assessee cannot be fastened with harsher norms for invoking the longer period of limitation.

13. In view of our discussion above, we set aside the impugned order qua demanding interest on the duty paid on supplementary invoices. Under the circumstances, no penalty is imposable on the appellant and the same is also set aside.

14. The appeal is thus disposed in the aforesaid terms.

(Pronounced in the open court on September 24, 2024.)

Sd/

(R.Muralidhar)
Member (Judicial)

Sd/
(Rajeev Tandon)
Member (Technical)

Pooja