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

REGIONAL BENCH – COURT NO.2

Ex.Appeal No.161 of 2009

(Arising out of Order-in-Original No.05/Commissioner/CE/Haldia/Adjn./2008 dated 31.12.2008 passed by Commr. of Central Excise, Haldia)

M/s MCC PTA India Corpn. Pvt. Ltd.
22, Camac Street,
Block C, 4th Floor,
Kolkata-700016.

Applicant (s)

VERSUS

Commr. of C.Ex., Haldia
25, Princep Street (3rd Floor),
Kolkata-700072

Respondent (s)

WITH

Ex.Appeal No.162 of 2009

(Arising out of Order-in-Original No.04/Commissioner/CE/Haldia/Adjn./2008 dated 31.12.2008 passed by Commr. of Central Excise, Haldia)

M/s MCC PTA India Corpn. Pvt. Ltd.
Vill. & P.O.- Bhuniaraichak, Haldia,
Dist.-East Midnapore,
Pin - 721635

Applicant (s)

VERSUS

Commr. of C.Ex., Haldia
25, Princep Street (3rd Floor),
Kolkata-700072

Respondent (s)

APPERANCE :

Shri Arvind Baheti, C.A. for the Appellant
Shri D. K. Achariaya, Spl.Counsel for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75440-75441/2019

DATE OF HEARING : 28.03.2019
DATE OF DECISION : 28.03.2019

PER V. PADMANABHAN :

The appellant engaged, *inter alia*, in the manufacture of Purified Terephthalic Acid (PTA) in its factory situated at Haldia in the State of West Bengal. While PTA was sold to domestic customers, in addition, they also supplied PTA to holders of Advance Authorization/license, which qualifies as a "deemed export" under the provisions of Foreign Trade Policy issued from time to time. The transaction value adopted for such supply of PTA to buyers under the category of "deemed export" was lesser than the transaction value for other domestic supplies around the same time. The Department was of the view that the appellant had undervalued clearances of PTA made to such deemed export category buyers. For the clearance made to deemed export, during the period April, 2000 to November, 2006, the Department proposed to demand differential duty by adopting the transaction value for other domestic suppliers. 11 show-cause notices were issued for demanding differential duty for the above period. 9 show-cause notices were decided by issue of Order-in-Original No.05/Commissioner/CE/Haldia/Adjn./2008 dated 31.12.2008 and the balance two show-cause notices were decided by issue of Order-in-Original No.04/Commissioner/CE/Haldia/Adjn./2008 dated 31.12.2008. These orders have been challenged by the appellant by filing Ex.Appeal Nos.161/2009 and 162/2009 respectively. Both the appeals are taken up for disposal by issue of this common order.

2. Heard Shri Arvind Baheti, ld.C.A. for the appellant and Shri D.K.Achariya, ld.Spl.Counsel on behalf of Revenue.

3. The ld.C.A. on behalf of the appellant submits that the issue involved in the present appeals is decided against the appellant by the Hon'ble Supreme Court in the case of CCEx., Bhubaneswar II Vs. IFGL Refractories Ltd. reported in 2005 (186) ELT 529 (S.C.). However, he

submitted that the appellant will be entitled to the benefit of bonafide belief. In this connection, he relied on the decision of the Kolkata Bench of the Tribunal in the case of Haldia Petrochemicals Vs. CCEx., Haldia vide Final Order No.FO/77096/2018 dated 14.12.2018. The Tribunal, in this case, restricted the demand for differential duty to the normal time limit. The ld. C.A. further submitted that even for the demand falling within the normal time limit, the appellant will not be liable to pay it and will be entitled to the benefit of revenue neutrality as has been held by the Majority decision of the Three Member Bench of the Tribunal in the case of Reliance Industries Ltd. Vs. Commr. of Central Excise & Cus., Rajkot reported in 2009 (244) ELT 254 (Tri.-Ahmd.). The Majority decision held that the demand even within the normal time limit, will not be payable on the ground of revenue neutrality.

4. The Spl.Counsel on behalf of Revenue, emphasized the fact that the issue on merit is decided in favour of Revenue. He opposed the claim of the appellant that they will be entitled to the benefit of bonafide belief. He emphasizes the fact that the adjudicating authority has observed that the appellant had suppressed the facts and as such, he submitted that the demand for the entire period in dispute may be upheld.

5. We have heard both sides at length and perused the records.

6. The crux of the dispute in the present case is whether the transfer of advance licenses are to be considered as a consideration for sale of the goods by the appellant to the buyers. The transferred advance license, can be beneficial for the appellant for duty free inputs of the raw materials required for manufacture in the appellant’s factory. Hence, certain benefit accrued to the appellant through the receipt of transferred advance licenses.

7. The Hon’ble Supreme Court in the case of IFGL Refractories Ltd. (supra) has decided the issue in favour of the Revenue and the observations of the Apex Court are reproduced below for ready reference :

*"**9.** Ultimately it was agreed that M/s. Visakhapatnam will surrender its Advance Licences and in lieu thereof the Respondents get the Advance Intermediate Licences. Thus, without the Advance Licences of M/s. Visakhapatnam Steel Plant, being made available to the Respondents, the prices would have been as were quoted earlier. It is only because of the Advance Licences being surrendered by M/s. Visakhapatnam Steel Plant and in lieu thereof Advance Intermediate Licences being made available to the Respondents that the Respondents could offer lower prices. The surrendering of Licences by M/s. Visakhapatnam Steel Plant and as a result thereof the Respondents getting the Licences had nothing to do with any Import and Export Policy. It was directly a matter of contract between the two parties. This resulted in additional consideration by way of "Advance Intermediate Licence" flowing from M/s. Visakhapatnam Steel Plant to the Respondents. The value received therefrom is includable in the price. The Tribunal was wrong in stating that such an arrangement can never be placed upon the platform of additional consideration. In so stating the Tribunal has ignored and/or lost sight of the fact that it was in pursuance of the contract of sale between Respondents and M/s. Visakhapatnam Steel Plant that the Licences were made available to Respondents. The Export and Import Policy had nothing to do with the arrangement/contract under which the Licences flowed from the buyer to the seller. At the costs of repetition it must be mentioned that had the Respondents had Advance Intermediate Licence on their own i.e. without M/s. Visakhapatnam Steel Plant having to surrender its Licences for the purposes of the contract, then the reasoning of the Tribunal may have been correct. But here, in pursuance of the Contract of Sale, there is directly a flow of additional consideration from the buyer to seller. The value thereof has to be added to the price. We are thus unable to accept the broad submission that where parties take advantage of policies of the Government and the benefits flowing therefrom,*

then such benefit cannot be said to be an "additional consideration.""

The Apex Court's decision was further followed by this Tribunal in the case of Haldia Petrochemicals (supra). Further, in the Haldia Petrochemicals case, the Tribunal held that the appellant will be entitled to the benefit of time bar. The observations of the Tribunal in the Haldia Petrochemicals case are reproduced below :

"*10. The appellant has also submitted arguments on the grounds of time bar. The show cause notice dated 24.10.2007 has raised the demand for the period November, 2002 to June, 2007; clearly the demand involves extended period of limitation. The Supreme Court decision in the case of IFGL Refractories Ltd. (supra) reversed the earlier decision of the Tribunal reported in [2001(134) ELT 230(Tri.)]. Hence, it is to be noted that the issue was in favour of the appellant till the decision of the Supreme Court. Consequently, we are of the view that the appellant is entitled to a bonafide belief that such additional consideration is not required to be added. Hence, we are of the view that the Revenue is not justified in invoking the extended period of limitation by alleging suppression of facts. Consequently, the demand is to be restricted to normal time limit. Further in the facts and circumstances of the present case, we set aside the penalty."*

8. On behalf of the appellant, it has also been argued that the demand even within the normal time limit, is not payable on the ground of revenue neutrality. In support, they relied upon the decision of the Ahmedabad Bench of the Tribunal in the case of Reliance Industries Ltd. (supra). After going through the said decision, we find that the said case is distinguishable to the facts of the present case. We note that in the case of Liebherr Machine Tools India Pvt. Ltd. Vs. CCEx. (Appeals), Bangalore reported in 2017 (357) ELT 971 (Tri.-Bang.), the Tribunal has distinguished the claims as asked for by the appellant and has observed as under :

"***6.2*** *The learned advocate has sought to set aside the demand on the ground of revenue neutrality by placing reliance on the Three-Member decision of Ahmedabad Tribunal in the case of Reliance Industries Ltd. (supra). We are of the view that the plea of revenue neutrality comes into play when differential duty paid by one unit is available immediately as Cenvat credit to the same unit or to another unit of the same manufacturer or its sister unit. In the present case that is not so. We find that the machines have been supplied to another customer M/s. Bajaj Auto. It may well be that the differential duty, when paid, is also available to the customer. However, on such a plea the demand itself cannot be set aside."*

9. By taking note of the observations to the Tribunal in the above case, we are of the view that the appellant will not be entitled to the benefit of revenue neutrality.

10. In view of the above discussions, we uphold the demand for differential duty on merit. However, we set aside the demand for duty beyond the normal time limit. Under the circumstances, penalties are set aside.

11. Both the appeals are disposed of in the above terms.

(Dictated and pronounced in the open court.)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(V.Padmanabhan)
Member (Technical)

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