IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL Nos. E/87202,87293/2016,87096/2017

(Arising out of Order-in-Appeal No. SK/261/Th-II/2016 dated 6.6.2016, No. 05/PS/COMMR/TH-II/2017 dated 20.4.2017 passed by Commissioner of Central Excise (Appeals), Thane-II)

Commissioner of Central Excise, Thane-II **Appellant**

Vs.

Omega Colours Pvt. Ltd. **Respondent**

AND

Omega Colours Pvt. Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Thane-II **Respondent**

Appearance:

Shri M.R. Melvin, Superintendent (AR), for Revenue
Shri J.N. Tiwari, Advocate, for assessee

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)

Date of Hearing: 3.5.2018
Date of Decision: 3.5.2018

ORDER NO. **A/86267-86269/2018**

Two appeals are filed by the assessee, one is against the order of the Commissioner (Appeals) whereby the demand of duty confirmed on the loss of material due to flood in the factory and another appeal is filed against rejection of remission claim ordered by the Commissioner (Appeals). Revenue also filed appeal seeking upholding of the penalty imposed by the adjudicating authority under Section 11AC of the Central Excise Act, 1044.

2. The facts of the case are that due to flood in the factory of the assessee, the finished goods, goods in process and raw material got destroyed. They claimed insurance from the insurance company, which was allowed. For the loss of the goods in the flood, the assessee did not file any remission application. Accordingly, the demand was confirmed and the Commissioner (Appeals) upheld the same, against which appeal No. E/87293/2016 is filed. In the order of the Commissioner (Appeals), liberty was granted to file an application for remission. Therefore, a remission application was filed before the Commissioner who rejected the application on the ground that the assessee did not file necessary documents such as insurance claim papers, survey report etc., against which appeal No. E/87096/2017 is filed by the assessee.

3. Shri J.N. Tiwari, learned counsel appearing on behalf of the assessee, submits that there is no dispute that the goods were destroyed in the flood which is evident from the insurance claim received by them, which is based on record and also appearing in the books of account. Therefore, the loss of the goods in the

flood is not in dispute. Accordingly, the demand cannot be confirmed. Regarding the appeal on rejection of remission claim, he submits that it is evident from the insurance claim received by the assessee that the goods were destroyed in flood. Therefore, no further evidence is required and the remission should have been granted only on the basis of insurance claim received by the assessee. He placed reliance on the following judgments:-

(i) *Mira Chemicals vs. CCE, Surat-II – 2009 (234) ELT 328 (Tri.-Ahmd.)*;

(ii) *Voltamp Transformers Ltd. vs. CCE, Vadodara – 2010 (262) ELT 909 (Tri.-Ahmd.)*.

3.1 As regards the Revenue’s appeal, he submits that this is not a case of clandestine removal which is admitted by the Revenue. Therefore, it is only a matter of remission and, therefore, no penalty under Section 11AC can be imposed. He placed reliance on the judgment of this Tribunal in the case of *CCE, Mumbai-V vs. Mahindra & Mahindra Ltd. 2015 (330) ELT 737 (Tri.-Mumbai)*.

4. Shri M.R. Melvin, learned Superintendent (AR) reiterates the finding of both the orders inasmuch as the orders rejected the remission claim and confirmed

the duty. As regards the Revenue's appeal, he submits that once the demand under Section 11A has been confirmed, penalty under Section 11AC is inevitable. Therefore, the same was rightly imposed by the original authority, and the Commissioner (Appeals) has erred in setting aside such penalty. He submits that as regards the remission, the assessee did not provide all the documents and the remission was rightly rejected and consequently the demand is sustainable. He placed reliance on the judgment of this Tribunal in the case of *Hanil Era Textiles Ltd. vs. CCE, Raigad - 2012 (279) ELT 252 (Tri.-Mumbai)*.

5. I have carefully considered the submissions made by the sides. I find that the demand was confirmed in respect of the goods lost in flood. Subsequently, on appeal before the Commissioner (Appeals), liberty was granted to the assessee for filing a remission application. The remission application was rejected on the ground that documents such as survey report, insurance claim papers etc. were not submitted by the assessee. I observe from the order of the Commissioner dated 20.4.2017 that she has listed out various documents which were supposed to be submitted along with the remission application. In this regard, I am of the view that once the insurance claim was filed and the

same was processed, all the proceeding of insurance claim itself is sufficient to establish that the goods were destroyed in flood. Therefore, no further document is required. However, as per the finding of the Commissioner, insurance related documents were not submitted by the assessee. In these circumstances, the remission matter needs to be reconsidered. The assessee is directed to produce all the records related to insurance claim and also the documents which bear the recording of this insurance claim. Thereafter, the learned Commissioner should pass a fresh order on the remission application. In case of demand, since it is consequential to the outcome of the remission application, the same should also be decided afresh after passing order on the remission matter.

6. As regards the Revenue's appeal, I find that this is admitted case of loss of goods in flood. In this fact, the ingredient to invoke the penalty under Section 11AC does not exist, as it is beyond the control of the assessee that the goods were lost in flood. Therefore, Section 11AC in any case is invokable in the facts of the present case. Therefore, irrespective of any outcome of the remission application and the demand, penalty is not imposable and I agree with the learned Commissioner (Appeals) in dropping the penalty.

Accordingly, setting aside of the penalty under Section 11AC is upheld.

7. The Revenue's appeal No. E/87202/2016 is dismissed. The assessee's appeal Nos. E/87293/2016 and E/87096/2017 are allowed by way of remand to the adjudicating authority.

(Pronounced in court)

(Ramesh Nair)
Member (Judicial)

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