

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

APPEAL No. E/1073/2008

(Arising out of Order-in-Original No. 11-12/PD/Th-II/2008 dated 30.6.2008 passed by Commissioner of Central Excise, Thane-II)

Punmiya Metal Industries

Appellant

Vs.

Commissioner of Central Excise, Thane-II

Respondent

Appearance:

Shri Gajendra Jain, Advocate, for appellant

Shri N.N. Prabhudesai, Superintendent (AR), for respondent

CORAM:

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

Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 19.3.2018

Date of Decision: 22.5.2018

ORDER NO. **A / 86500 / 2018**

Per: Raju

This appeal has been filed by M/s. Punmiya Metal Industries against confirmation of demand and imposition of penalties. They are also in appeal against confiscation and imposition of redemption fine. From the records, it is seen that the appellant was engaged in activity of redrawing of duty paid SS wire rods (CETH 72.12) and copper/brass tubes/pipes (CETH 74.11) since December 2003. Revenue officers visited the

premises of the appellant on 14.9.2006 and investigations started. Revenue alleged that the process of drawing or redrawing amounts to manufacture in terms of Section note 10 to Section XV and Section note 2 to Chapter 74. The said section notes read as under:-

“10. In relation to the products of this Section, the process of drawing or redrawing a rod, wire or any other similar article, into wire shall amount to ‘manufacture’”.

“2. In relation to the products of heading No.74.11, the process of drawing or redrawing shall amount to ‘manufacture’.”

The department also alleged that the appellants have underdeclared the cost of raw material and also suppressed production to remain within the full exemption limit of Rs.1 crore. Accordingly, show cause notice was issued demanding duty on the processes done by the appellant and denying the small scale exemption claimed by the appellant. The small scale exemption was also denied on the ground that the appellant had failed to file declaration as required in terms of Notification No.361/2001-CE(NT) dated 26.6.2001.

2. Learned counsel for the appellant argued that the process allegedly undertaken by them would amount to manufacture only if the final product made by them is a

“wire”. He relied on the definition of wire as specified in Note 1(o) of the Chapter 72 which is reproduced as below:-

“Cold-formed products in coils, of any uniform solid cross-section along their whole length, which do not conform to the definition of the flat-rolled products.”

He argued that the Revenue has not produced any evidence that the product manufactured by them was wire, as only the products in coil forms can be considered wire. He argued that in the panchnama dated 14.9.2006 drawn in the premises of the appellant, no machinery for winding of drawn/redrawn product into coil form (coiling machinery) has been found installed in the factory. He relied on the statement dated 11.10.2006 of Shri Navin Agarwal, partner of M/s. Bahubali Metals and the statement dated 15.9.2006 of Shri Tejraj Jain, partner of M/s. Vimal Metal Corporation, to assert that wire rods after redrawing got into required sizes and cleared to customer. He argued that on the basis of above evidence, it is apparent that no wire comes into existence. He argued that the burden of proving that the activity amounts to manufacture is on Revenue and the said burden has not been discharged insofar as the Revenue has failed to establish that the product manufactured by the appellant was in coil form to

qualify as wire. He relied on the decisions of Apex Court in the case of *Garware Nylons vs. UOI* – 1996 (87) ELT 12 (SC) and in the case of *Ponds India vs. CTT, Lucknow* – 2008 (227) ELT 497 (SC). He further argued that in the challans issued by the appellant to the respective raw material suppliers, the description of the end product is shown as “labour job SS wire rods for redrawing only”.

3. Learned counsel further argued that the small scale exemption has been denied on the ground that the appellant had failed to file declaration as required under Notification No.36/2001-CE(NT) dated 26.6.2001 placing reliance on the decision of Apex Court in the case of *Eagle Flask Industries vs. CCE* – 2004 (171) ELT 296 (SC). He argued that the facts in the *Eagle Flask Industries* (supra) were significantly different insofar as in the said case, filing of declaration was a pre-requisite for claiming the benefit of Notification No.53/1988 dated 1.3.1988 and Notification No.11/1988-CE(NT) dated 14.4.1988. He argued that in the instant case, Notification No. 8/2003 does not have any such condition and therefore the facts in the instant case are different from those in the case of *Eagle Flask Industries* (supra) and therefore the said decision has no relevance in the instant case. He argued that filing of declaration

in case of Notification No.8/2003 dated 1.3.2003 is a procedural requirement and non-observation of such procedural requirement should not come in way of grant of the benefit of notification. He relied on the following decisions to support his argument:-

- (i) *HMM Ltd. vs. CCE – 1996 (87) ELT 593 (SC)*;
- (ii) *Mangalore Chemicals & Fertilizers vs. DC – 1991 (55) ELT 437 (SC)*.

4. He argued that the allegations of clandestine removal are based on the statements of transporters and LR copies recovered from the transporters. The said documents have not been corroborated by any statement of the appellant or on the records of the appellant. He argued that such evidence is a third party evidence and cannot be used to support the allegations of clandestine removal without any corroboration from the appellant or their records. He relied on the following decisions to support his assertion:-

- (i) *CCE vs. Rajaguru Spinning Mills – 2009 (243) ELT 280 (T)*;
- (ii) *Senthil Kumar Soaps Works vs. CCE – 1997 (89) ELT 77 (T)*;

(iii) *Sharma Chemicals vs. CCE – 2001 (130) ELT 271 (T)*.

He argued that the charge of clandestine removal should be supported by tangible evidence and the evidence in the present circumstances is unverifiable and unreliable, especially because non-verification was done by the department from the particulars of dispatch available on the LRs from the buyers. He further argued that the transporter had categorically stated that they never accepted the goods unless they were accompanied by delivery challans. However, no delivery challans were found with the said LRs. In these circumstances, the authenticity of LRs is under question and it does not become reliable evidence. He further argued that there is no evidence of the alleged quantity of material processed in the factory or that the raw material figuring in the LR was actually received in the appellant's factory. The appellant also challenged the quantification of the demand. He argued that if the value of clearance of wire rods, then the total demand would be substantially reduced after grant of small scale exemption. In support of the said claim, the appellant has argued that no duty was payable on SS wire rods. He argued that drawing/redrawing of SS wire rods into rods/wires does not amount to

manufacture. He relied on the decision of Apex Court in the case of *CCE vs. Technoweld Industries – 2003 (155) ELT 209 (SC)*. He further argued that the CBEC vide circular No.720/36/2003-CX dated 29.5.2003 has accepted the said decision of Apex Court. He argued that vide Note 4 under Chapter 72, introduced in the tariff with effect from 1.3.2006, the process of drawing or redrawing a bar, rod, wire rod, round bar or any other similar article into a bright bar shall amount to 'manufacture'. It is submitted that the appellants are not manufacturing the bright bars, nor has such a finding been recorded in the impugned order to claim that the appellants are producing the bright bars and therefore, the process of drawing or redrawing of duty paid stainless steel wire rods amounts to manufacture.

5. Learned counsel further argued that the extended period of limitation cannot be invoked in the instant case as appellant had a *bona fide* belief that the process undertaken by them does not amount to manufacture. He relied on the following decisions to support his claim:-

(i) *Cosmic Dye Chemical vs. CCE – 1995 (75) ELT 721 (SC)*;

(ii) *CCE vs. Damnet Chemicals – 2007 (216) ELT 3 (SC)*;

(iii) *Anand Nishikawa Co. Ltd. vs. CCE – 2005 (188) ELT 149 (SC)*;

(iv) *Pushpam Pharmaceuticals Co. vs. CCE – 1995 (78) ELT 401 (SC)*;

(v) *Tata Iron and Steel Co. Ltd. vs. UOI – 1988 (35) ELT 605 (SC)*.

He further argued that under these circumstances, no penalty or redemption fine can be imposed.

6. Learned departmental representative relied on the impugned order. He argued that the value of goods was grossly misdeclared in the delivery challans seized under panchnama dated 14.9.2006 for the years 2003-04 to 2006-07. He argued that the gross turnover was grossly underdeclared. It was alleged that one of the raw material supplier M/s. Vimal Metal Corporation had purchased SS wire rods from M/s. D.H. Exports, Navi Mumbai @ Rs.125/- to 110/- per kg. depending on the quality whereas the value shown on delivery challan was Rs.36/- per kg. He pointed out that job work charges varied from Rs.8/- per kg. to Rs.20/- per kg. depending on the quality. He pointed out that in the

statement of Shri Bhawarlal S. Jain, partner of M/s. Sandeep Metal India, has admitted that he was giving material for job work for redrawing of SS wire from SS wire rods and the normal charges were from Rs.5/- per kg. to Rs.8/- per kg. He also admitted that the arrangement for the delivery of the goods is made by private tempo or lorry for which transportation charges were borne by the appellant and the job charges were being paid through cheque. He pointed out that the value of goods dispatched by the appellant was verified on the basis of purchase documents of M/s. Sanjay Steel Centre. He further relied on the statement of Shri Sanjay V. Jain of M/s. Sanjay Steel Centre, Shri Navin Agarwal of M/s. Bahubali Metals, to assert that various persons were sending SS rods and SS wire rods to the appellant for cutting, polishing and redrawing purpose. He pointed out that verification of all the names appearing in the LRs could not take place as out of 28 traders, 18 addresses were found fictitious/non-existent. Moreover, during verification of one such address of M/s. Dhiraj Metal Corporation, it was found that the proprietor of the said Corporation, Shri Narendra Chunilal Shah denied having done any transaction with the appellant. He refused to own the delivery challans containing name of the said Dhiraj Metal Corporation. He further pointed out that in the

declaration claimed to have been filed by the appellant was a fraud as at the material time, the division where the said declaration was allegedly received was not in existence.

7. We have gone through the rival submissions. We find that the points for determination are:-

(a) Whether the process undertaken by the appellant amounts to manufacture insofar as the final product manufactured by them is wire in coil or otherwise;

(b) Whether the appellant is entitled to the benefit of small scale exemption in absence of a formal declaration under Notification No.8/2003;

(c) If the quantum allegedly received by the appellant on the strength of the LRs recovered from the transporters and other third parties is correct or otherwise.

(d) If the value of goods declared by the appellant is correct or otherwise.

8. Learned counsel for the appellant has argued that to become manufactured goods with a different name, character and use need to come into existence. He pointed out that Hon'ble Apex Court in the case of *Technoweld Industries* (supra) has clearly held that

drawing of wire from wire rods does not amount to manufacture. In view of that fact, the tariff was amended and following Section note and Chapter note were introduced:-

“10. In relation to the products of this Section, the process of drawing or redrawing a rod, wire or any other similar article, into wire shall amount to ‘manufacture’”.

“2. In relation to the products of heading No.74.11, the process of drawing or redrawing shall amount to ‘manufacture’.”

It is seen that to qualify as manufacturer in terms of section note, the final product in the shape of wire has to come into existence. In respect of goods of Chapter 74 and in terms of Chapter Note 2 to Chapter 74, the process of drawing or redrawing itself amount to manufacture. The appellant has asserted that the Revenue has failed to produce any evidence that the product manufactured by them was wires in so much as evidence of clearance of the goods in coil form has been produced. They relied on the definition of wire as follows:

“Cold-formed products in coils, of any uniform solid cross-section along their whole length, which do not conform to the definition of the flat-rolled products.”

It is seen from the impugned order that the appellant had five redrawing machine, one weighing machine of small capacity, grinding machines, one lathe machine, small cutting machine and three drums for pickling. The appellant has claimed that they had no coiling machine and thus question of making coils does not arise.

9. The second issue which needs determination as if the benefit of Notification 8/2003 can be denied on account of failure to file declaration. The Revenue has relied on the decision of Apex Court in the case of *Eagle Flask Industries* (supra) to deny the benefit on account of appellant's failure to file the declaration. It is seen that Notification No.53/1988-CE mandated filing of the said declaration as is apparent from para 6 of the decision of the Apex Court, which is reproduced below:-

“6.We find that Notification 11/88 deals with exemption from operation of Rule 174 to exempted goods. The Notification has been issued in exercise of powers conferred by Rule 174A of the Rules. Inter alia it is stated therein that, where the goods are chargeable to nil rate of duty or exempted from the whole of duty of excise leviable thereon, the goods are exempted from the operation of Rule 174 of the Rules. The goods are specified in the Schedule to the Central Excise Tariff Act, 1985 (in short ‘the Tariff Act’). The proviso makes it clear that where goods are chargeable to nil rate of duty or where the exemption from the

whole of the duty of excise leviable is granted on any of the six categories enumerated, the manufacturer is required to make a declaration and give an undertaking, as specified in the Form annexed while claiming exemption for the first time under this Notification and thereafter before the 15th day of April of each financial year. As found by the forums below, including CEGAT, factually, the declaration and the undertaking were not submitted by the appellants. This is not an empty formality. It is the foundation for availing the benefits under the Notification. It cannot be said that they are mere procedural requirements, with no consequences attached for non-observance. The consequences are denial of benefits under the Notification. For availing benefits under an exemption Notification, the conditions have to be strictly complied with. Therefore, CEGAT endorsed the view that the exemption from operation of Rule 174, was not available to the appellants. On the facts found, the view is on terra firma. We find no merit in this appeal, which is, accordingly, dismissed."

It is seen that in case of Notification No.8/2003, the filing of declaration is not a mandatory pre-requisite and is more of a procedural nature. Thus it is held that the benefit of small scale notification cannot be denied merely for the failure of the appellant to file the said declaration.

10. The next issue relates to the validity of the LRs recovered from various transporters as evidence against the appellant. It is seen that the addresses appearing in LR could not be verified as some of the addresses were

non-existent or bogus. It is seen that the LRs were recovered from the premises of the transporter. The transporter had stated that the goods were transported from the premises of the appellant to their godown at Masjid Bunder. The consignees would approach their godown with one copy of LR and take possession of the goods from the godown. The transportation charges for such goods were also paid by the consignees receiving the goods on the strength of LRs. In case of transportation of goods to Bhivandi, the transportation charges were paid by the appellant. The details of LR, party's name, quantity of material dispatched and transportation charges were maintained by the transporter M/s. Palghar Golden Transport Service. As per the statement of Shri Sabir Kadir Khan, manager of the said Services, the said Shri Sabir Kadir Khan also deposed that the said goods were cleared by the appellant without accounting for or making any supporting delivery challan.

(Pronounced in court on 22.5.2018)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)