CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Excise Appeal No. E/2024 of 2010.

(Arising out of Order-in-Appeal No. PKS/321/Bel/2010. dated 24-9-2010 passed by the Commissioner of Central Excise (Appeals), Mumbai-III.

Exide Industries Ltd, ...Appellant
Kanjurmarg (East),
Mumbai – 400 042.

VERSUS

Commissioner of Central Excise ....Respondent
Mumbai-III,
3rd & 4th Flr., Vardaan Centre,
Thane (West), Mumbai 400604.

APPERANCE:

Shri Rajesh Ostwal, Advocate for the Appellant
Shri Sanjay Hasija, Supdt., Authorised Representative for the Respondent

CORAM: HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86037/2019

Date of Hearing: 31-01-2019
Date of Decision: 31-01-2019

PER: DR. SUVENDU KUMAR PATI

1. Denial of duty exemption under notification no. 64/95 C.E. DATED 16-3-1995 to the appellant for supply of underwater electric

storage batteries including cells to the Indian Navy is assailed in this appeal.

2. Brief fact of the appellant case, as reveals from the appeal memo, is that appellant was engaged in manufacture of battery and cells of the above description and had supplied the same to Indian Navy by availing nil rate of duty in terms of Sr. no. 12 of notification no. 64/95 C.E. dated 16-3-1995 as in the said notification duty exemption for goods manufactured for use by the Indian Navy was permissible upon furnishing of certificate issued by competent Naval authority to the effect that **goods were to be used for the fittings to Submarine vessel including a Torpedo and Chariot of Indian Navy and shall be so used**. For Submarine, each set of battery purchased by Navy comprised of 460 cells, out of which 8 cells are retained in the factory in similar manner, while the remaining 452 cells were despatched to the Navy. Those 8 cells were kept in the possession of Quality Assurance Officer, stationed in factory premises of the appellant which were required as test cells. Likewise battery set with 248 cells were also manufactured and supplied by the appellant to the Indian navy from which 8 cells were kept separately and supplied to the warehouse of Navel stores. Respondent Department disputed the test cells cleared to the Indian Navy for the period 1-9-2001 to 31-5-2006 on the ground that those test cells were not used for fitment in the Submarine. Appellant was asked to show cause, matter was adjudicated upon, duty demand along with interest and penalty under section 11-A CE read with Rule section 25 were

imposed on the appellant who appealed, to the Commissioner (Appeals) Central Excise, Mumbai-III, who in terns set aside the penalty but confirmed duty demand. Both Appellant and Respondent were before us challenging duty demand and penalty respectively but in view of no-litigation policy on duty/penalty below ₹ 10,000/- introduced by the Government of India, Revenue Department has withdrawn this appeal that resulted in dismissal of appeal filed by the Department, while challenge against duty demand by the Appellant continued.

3. In the memo appeal and during the course of hearing of appeal, Learned Counsel for the Appellant Shri Rajesh Oswal submitted that Appellant had met two conditions stipulated in notification no. 64/95 as the cells were supplied to the Indian Navy and necessary certificate was obtained from its competent authority regarding the purpose of use but the manner in which Indian navy would use the cells was of no relevance to the present case since it was not the responsibility of Appellant to find out that the goods were used in compliance to the content of the certificate issued. He further submitted that test cells were also used as replacement against defective cells and "used as a replacement" should be treated as actual use or intent to use for which he placed his reliance on the decision report 1988(14) ECR 292(SC) of the Hon'ble Supreme Court in the case of State of Haryana vs. Dalmia Cement Ltd, Dadri. He thrust upon the purpose of testing as the first and foremost stage of use not only for the purpose of determination of its efficiency but also to determine life cycle through repeated

testing and pointed out that in the case of Commissioner of Central Excise, Mumbai-II v. Standared Batteries Ltd of the report in 2005 (184E.L.T.42) of the Tribunal, CESTAT had given its findings that test cells are eligible for exemption under recent notification no. 70/77 CE and standard battery has been taken over by Exide Industries Ltd, i.e., present Appellant with effect from 16-2-1998, while operational procedure and supply terms with Indian Navy remains unchanged and non application of the ratio of this judgment by the Commissioner (Appeals) had resulted in confirmation of duty liability that is required to be set aside. Alternatively Learned Counsel for the Appellant pleaded that since test cells were kept in the factory premises and not cleared, duty is also not levyable for which Commissioner finding is also referred to be set aside.

4. In response to such submissions, Learned Authorised Representative Shri Sanjay Hasija, Supdt. for Respondent Department, supported the reasoning and rationality of the Order passed by the Commissioner (Appeals) and sought no interference by the Tribunal. We have heard the issue at length from both the sides and also perused the case record as well as relevant portion of the exemption notification no. 64/95 C.E, which is reproduced below:

" The above exemption is available subject to the conditions mentioned below:-
(a) The goods in question are manufactured for use by the Indian Nay; and
(b) The concerned officer of Navy, or the Director of production and inspection (Naval), not below the rank of Commander, furnishes a certificate, before removal, that the said goods are required for the

fitment to submarine vessel including a Torpedo and Chariot of the Indian Navy and shall be so used."

5. Admittedly supply of cells were made to Indian Navy and certificate to that effect was issued by competent Naval Officer that neither party had disputed. The dispute remain confined non use of 4 piece of cells in both batteries having 452 cells and 240 cells, which is admittedly kept in factory premises or in the warehouse of Navel store for test and replacement purpose. Going by the test of exemption notification, as reproduced above, furnishing certificate before removal was the mandatory requirement and rest of description given in the said para is supposed to be the content of the said certificate. Nonfulfillment of those conditionalities available in the content of certificate issued by the competent Naval Officer cannot be stated to be within scrutinising range of the Appellant. As has been argued alternatively, whatever cells are kept for testing purpose with Quality Assurance Officer of the Navy, stationed in the factory premises can never be stated to be under the control and authority of manufacturing unit i.e., Appellant.

6. It is worth mentioning that the adjudicating authority i.e., Additional Commissioner of Central Excise, Mumbai-III had confirmed the duty demand on the said ground that on the previous occasion, pertaining to earlier period, duty demand was confirmed by the Jt. Commissioner in a detail order and he did not intent to deviate from the well reason finding of the Joint Commissioner. No other ground is cited in the Order-In-Original and apparently thereafter, the

Commissioner (Appeals), instead of going through the legality of the Order-In-Original, had himself adjudicated the matter and supplied reasoning to it. The primary grounds of rejection are mainly two: First, he emphasised the words "shall be so used" mentioned in the notification as actual use in the Submarine vessel itself and discarded test cell meant for life cycle determination of the cells; Second, handing over of possession would amount to removal and duty was required tobe paid. Therefore, it was immaterial if goods were removed from the factory or not. However, he lost sight of the fact that the condition stipulated in the said notification is confined to the certificate issued by the competent Naval Officer which should contain the requirement in which it shall be put to use or actually used. Therefore, following the judicial precedent set by this Tribunal in the case of CCE v. Standard battery passed in the Appellant's own case, the following order is passed.

7. The appeal is allowed and order passed by Commissioner (Appeals) in order No. PKS/321/Bel/2010 dated 24-9-2010 is hereby set aside.

(Dictated & pronounced in open Court)

(DR. SUVENDU KUMAR PATI)
MEMBER (JUDICIAL)

(C J MATHEW)
MEMBER (TECHNICAL)

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