IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO.E/1016/2011

(Arising out of Order-in-Original Appeal No.SB-41-42-MV/2011 dated 28.03.2011 passed by the Commissioner (Appeals) of Central Excise, Mumbai Zone – 1)

M/s. Emmes Metals Pvt. Ltd : **Appellant**
147, Government Industrial Estate, Charkop,
Kandivali (W), Mumbai 400 067

VS

CCE MUMBAI - V : **Respondent**
5TH Floor, Utpad Shulk Bhavan,
Plot No.C-24, Block 'E', Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051

Appearance

Shri T.C. Nair, Advocate for Appellant

Shri Sanjay Hasija, Supdtt. (A.R) for Respondent

WITH

APPEAL NO. E/1017/2011

(Arising out of Order-in-Original /Appeal No.SB-41-42-MV/2011 dated 28.03.2011 passed by the Commissioner (Appeals) of Central Excise, Mumbai Zone – 1)

Shri Lalit M. Pande : **Appellant**
Joint Managing Director
Emmes Metals Pvt. Ltd.
147, Govt. Industrial Estate
Charkop, Kandivali (W),
Mumbai 400 067

VS

CCE MUMBAI - V : **Respondent**
5TH Floor, Utpad Shulk Bhavan,
Plot No.C-24, Block 'E', Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051

Appearance

Shri T.C. Nair, Advocate for Appellant

Shri Sanjay Hasija, Supdtt. (A.R) for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 18.03.2019
Date of decision : 18.03.2019

ORDER NO. A/86153-86154/2019

Per : **P Anjani Kumar, Member (Technical)**

The brief facts of the case are that the Appellants are manufacturers of die castings. The department contended that amortized cost of Moulds/Dies was to be included in the assessable / transaction value of Die-castings manufactured and cleared by the Appellants. A Show cause Notice dated 07.06.2010, covering the period May 2005 to March 2010, was issued to the appellants and was confirmed by the lower authority vide OIO dated 22.11.2010. On an appeal filed by the appellants, Commissioner (Appeals) upheld the order and confirmed duty of Rs 20,846 and penalty of Rs 70,846 on the Company and a penalty of Rs.50, 000 on the Joint M.D. Hence, these appeals.

2. Shri T.C. Nair, Learned Counsel for the appellants, fairly submits that Tribunal Larger Bench in the case of Mutual Industries Ltd., reported in 2000 (117) ELT 578 (T-LB) settled the issue, of inclusion cost of Moulds and Dies in the assessable/transaction value of the goods manufactured, in favour of Revenue; demand is barred by limitation in the absence of any conscious and deliberate suppression of facts, misstatement, etc; Appellants were filing monthly Returns regularly, disclosing all the requisite information; the records were audited, from time to time, i.e. in 2000, Jan, 2008, Dec. 2007 & April 2009, during which time, no objection was raised by the Audit Parties for non-inclusion of the amortized cost of Moulds/Dies into the transaction value of the Die-casting manufactured; the objection, for the first time, was raised by the EA 2000 Audit Party in the audit conducted in March, 2010; immediately on being pointed out by the Audit Party, the Appellants have paid the differential duty thereon, along with interest, and informed the Audit Party accordingly.

2.1. Learned Counsel for the appellants submits that once the differential duty, along with interest, has been paid, although on being pointed out by the Audit Party, there was no need to issue SCN, in terms of Section 11A (2A) of CEA; although SCN was issued, the Lower Authorities ought to have dropped the proceedings, under Section 11A (2A) of CEA, in view of the payment of duty, along with interest, and intimation to the Department; in any case, there was inordinate delay in issuing the SCN, as way back in 2000 and/or 2006, the department was aware of non-inclusion of amortized cost and Moulds and Dies in the assessable/ transaction value of Die-castings manufactured and cleared and, hence, the demand is not sustainable, based on settled position of law on the issue; he relies upon Pragathi Concrete Products – 2015 (322) ELT 819 (SC). He submits that as since the records were audited, from time to time, there was not suppression and, hence, demand is barred by limitation; demand invoking extended period, based on audit objection is not sustainable; without prejudice, the Adjudicating Authority ought to have given the option to pay 25% penalty under Section 11AC within 30 days from the receipt of the Order.

2.2. Learned Counsel for the appellants submits that in the absence of any mala fide intention and mens-rea penalty is not sustainable; composite penalty under Section 11AC and Rule 25 is not sustainable; there is no specific finding on the involvement of the Joint Managing Director in the alleged undervaluation and / or non-inclusion of amortized cost of Dies and Moulds and, hence, penalty imposed upon him is not sustainable; in any case, imposing separate penalties on the Company as well as its Director is against the very spirit of Central Excise law, based on the settled position of law on the issue.

3. Shri Sanjay Hasija, Learned Authorised Representative, reiterates the findings of OIO and OIA.

4. Heard both sides and perused the records of the case. The counsel for the Appellants submits fairly that on merits the issue is settled in favour of the Revenue in the case of Mutual Industries Ltd. (supra); he however, submits that the Show Cause Notice is barred by limitation in view of the fact that the Appellants have been submitting ER1 returns regularly from time to time. Audit parties have been visiting the Appellants from time to time. He relies upon the following cases :

a) 1987 (27) ELT 334(T) – Agarwal Brothers
b) 1993 (65) ELT 552 (T) – International Steel Foundry
c) 1999 (110) ELT 874 (T) – Richardson & Cruddas

d) Ram Steel Rolling – 2006 (204) ELT 87 (T)
f) Rajkumar Forge Limited – 2010 (262) ELT 155 (Bom.)
g) Aditya College of Competitive Exam – 2009 (16) STR 154(T)
h) Punjab Chem & Pharma Ltd – 2001 (135) ELT 227 (T)
i) Ram Steel Rolling & Forging Mills – 2008 (204) ELT 87 (T)
j) Kirloskar Pneumatic Co. Ltd. – 2010 (254) ELT 328 (T))
k) Kushal Fertilisers (P) Ltd. – 2009 (238) ELT 21 (SC)
l) Orissa Bridge & Construction – 2011 (264) ELT 14 (SC)H

He further submitted that the instant case none of the condition enumerated under proviso of Section 11A, penalty under Section 11AC cannot be imposed; composite penalty under Section 11AC and Rule 25 is not permissible in view of the following :

a) Rajasthan Spinning & Weaving Mills – 2009 (238) ELT 3 (SC)
b) Singhal Strips Ltd – 2010 (256) ELT 15 (P&H)
c) J.R. Fabrics – 2009 (238) ELT 209 (P&H)
d) Thirumala Alloys Castings – 2009 (238) ELT 226 (Mad.)
e) K.P. Pouches – 2008 (228) ELT 31 (Del.)
f) 2002 (146) ELT 190 (T) – Agarwal Pharmaceuticals
g) 2002 (53) RLT 324 (T) – Alagappa Cements
h) 2002 (150) ELT 404 (T) – Themotech
(Upheld by Supreme Court – 2003 (152) ELT A-97)
i) 2004 (171) ELT 201 (TR) – Avdel (Indel) Pvt. Ltd.

We find that Tribunal in the case of Lanxess ABS Ltd 2010 (259) ELT 551(T) held that *as per the settled law on the issue longer period of limitation can only be invoked when there is positive suppression of the statement on the part of the assessee.* We find that in the instant case none of the ingredients are absent so as to necessitate invocation of extended period. The Learned Counsel has conceded the case fairly on merits. Therefore, we do not go into the merit of the case. However, in view of the above we find that there is a force in the submissions of the Appellant, as far as limitation and imposition of penalties are concerned. We find that department has not made any case for imposition of penalty under Section 11AC and Rule 25. Similarly, no case is made about imposition of penalty on the joint Managing Director. Therefore, we find that penalties imposed therein are not sustainable and are liable to be set aside.

5. In view of the above Appeal No.E/1016/2011 is partly allowed to the extent of setting aside the penalties. Appeal No.E/1017/2011 is allowed in toto.

(Operative parts pronounced in open court)

(D.M. Misra)	***(P Anjani Kumar)***
Member (Judicial)	***Member (Technical)***

HM