

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, WEST ZONAL BENCH AT MUMBAI**

REGIONAL BENCH - COURT NO. 02

Excise Appeal No. 1085 of 2008

(Arising out of Order-in-Original No. 14/MS-14/2008/Thane-I dated 11.07.2008 passed by Commissioner of Central Excise, Thane-I)

M/s Spacetech Equipments & Structural Pvt. Ltd. **.....Appellant**

Plot No. A/17, Additional Ambernath, Anand Nagar, Dist: Thane

VERSUS

Commissioner of Central Excise Thane-I **.....Respondent**

4th Floor, Navprabhat Chambers, Ranade Road, Dadar, Mumbai-400038.

WITH

Excise Appeal No. 1086 of 2008

(Arising out of Order-in-Original No. 14/MS-14/2008/Thane-I dated 11.07.2008 passed by Commissioner of Central Excise, Thane-I)

Gautam Ghosh **.....Appellant**

Plot No. A/17, Additional Ambernath, Anand Nagar, Dist: Thane

VERSUS

Commissioner of Central Excise Thane-I **.....Respondent**

4th Floor, Navprabhat Chambers, Ranade Road, Dadar, Mumbai-400038.

AND

Excise Appeal No. 1087 of 2008

(Arising out of Order-in-Original No. 14/MS-14/2008/Thane-I dated 11.07.2008 passed by Commissioner of Central Excise, Thane-I)

Ganesh Chandra Ghosh **.....Appellant**

Plot No. A/17, Additional Ambernath, Anand Nagar, Dist: Thane

VERSUS

Commissioner of Central Excise Thane-I **.....Respondent**

4th Floor, Navprabhat Chambers, Ranade Road, Dadar, Mumbai-400038.

Appearance:

Shri Mayur Shroff, Advocate for the Appellant

Shri N.N. Prabhudesai, Authorized Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. P. Anjani Kumar, Member (Technical)

FINAL ORDER NO. A/86323-86325/2019

Date of Hearing: 29.01.2019

Date of Decision: 29.07.2019

Per: S.K. MOHANTY

Brief facts of the case, leading to these appeals are as under:-

1.1 The appellant M/s. Spacotech Equipments and Structurals Pvt. Ltd. (SESPL) is engaged in the manufacture of LPG Road Tankers, Pressure Vessels, M.S. Storage Tanks, Mounting of LPG on Rigid and Trailer Chassis, falling under Chapter 73, 84 and 87 of the Central Excise Tariff Act, 1985 in its factory situated at Ambernath.

1.2 The main issue involved in these appeals pertains to clubbing of clearance of the appellant's unit with the clearances of two proprietorship concerns namely, Industrial Engineering Company (IEC) and Rashmi Shellcast & Foundry (RSF). On the basis of investigation, the Central Excise department contended that both IEC and RSF belonged to the appellant M/s SESPL and as such, the benefit of Notification Nos. 175/86 dated 01.03.1986 and 1/93 dated 01.03.1993 should not be available inasmuch as the combined turnover of all the three units during the disputed period had exceeded the eligibility criteria of Rs.200/300 Lacs. Accordingly, show cause proceedings were initiated vide notice dated 03.10.1994 against the appellant's unit, Shri Ganesh C. Ghosh, Managing Director and Shri Gautam

Ghosh, Director of the appellant company, seeking for confirmation of the duty demand and for imposition of penalties.

1.3 The show cause notices were adjudicated vide order dated 15.06.1998, wherein the proposed demands were confirmed, holding that the three units of the same company were not independent entities separately, but were manufacturing the goods only for the appellant's company. The order dated 15.06.1998 was appealed against before the Tribunal, which was disposed of vide order dated 12.05.2005 by way of remand to the original authority for a fresh fact finding on the issue of clubbing of clearances in light with the judgment of Hon'ble Supreme Court in the case of Supreme Washers (P) Ltd. - 2003 (151) ELT 14 (S.C.), Area Controls Pvt. Ltd. - 2003 (158) ELT 212 (S.C.) and Modi Alkalies & Chemicals - 2004 (171) ELT 155 (S.C.). On de novo adjudication, the learned Commissioner of Central Excise, Thane-I, Mumbai vide the impugned order dated 11.07.2008 has clubbed the clearance value of excisable goods of the proprietorship firms with the clearance value of the appellant's unit and confirmed central excise duty demand of Rs.33,24,892/- along with interest and also imposed equal amount of penalty on the appellant company. Besides, the impugned order also imposed penalties of Rs.10,00,000/- and Rs.5,00,000/- respectively on Shri Ganesh C. Ghosh and Shri Gautam Ghosh.

1.4 Feeling aggrieved with the impugned order, all the three appellants have preferred these appeals before the Tribunal.

2. In support of confirmation of the adjudged demands, the learned Commissioner of Central Excise has recorded the following findings in the impugned order:

(a) During the material period, the appellant company had three manufacturing units, one at Ambarnath, another at

Rabale and third one at Pawane and upon lifting of the corporate veil, it transpired that the said three units were not in existence independently. Accordingly, the clearance value of three different units is required to be clubbed together inasmuch as the three factories are belonging to one manufacturer i.e. the appellant's unit.

- (b) The benefit claimed by the appellant company under Notification Nos. 241/86 dated 03.04.1986 and 279/86 dated 24.04.1986 was denied on the ground that the appellant did not produce any evidence regarding payment of duty on chassis and non-availment of credit of central excise duty paid of chassis and other inputs.
- (c) The impugned order also recorded other findings in support of confirmation of the adjudged demands on the appellants.

3.1 Shri Mayur Shroff, the learned Advocate appearing for the appellants submitted that the appellant company M/s SESPL and the proprietorship firms namely, M/s IEC & RSF are separate entities and are situated at different places, having their own plant and machinery, independent workers and power connections for carrying out the manufacturing activity. Thus, he submitted that since all the three units have their own distinct identity, it cannot be said that the proprietorship firms are the units belonged to the appellant company. Further, the learned Advocate also submitted that the appellant being a private limited company, its clearances cannot be clubbed with the clearances of the proprietorship concerns. In this context, he has relied upon the Circular No. 6/92 dated 29.05.1992 issued by the CBEC. He has also relied upon the following judgments, to state that clearance value of the proprietorship firm cannot be clubbed with the clearance value of a private

limited company for denying the duty exemption provided under the notification dated 01.03.1986:

(i) Parle Bisleri Pvt. Ltd. Vs. CCE-2011 (263) ELT 15 (S.C.)

(ii) CCE Vs. Limca Flavours & Fragrances Ltd.-2006 (198) ELT 106 (Tri.-Mumbai)

(iii) L.D. Industries Vs. CCE-2003 (157) ELT 459 (Tri.-Del.)

(iv) Supreme Washers (P) Ltd. Vs. CCE-2003 (161) ELT 14 (S.C.)

(v) CCE Vs. Modi Alkalies & Chemicals Ltd.-2004 (171) ELT 155 (S.C.)

3.2 The learned Advocate further submitted that the SSI limits for the relevant period have been wrongly arrived at by including the value of the chassis in respect of LPG tanks manufactured by the appellant inasmuch as value of chassis is to be excluded in terms of Notification No. 241/86-C.E. dated 03.04.1986 and the circular dated 04.09.1986 issued by CBEC.

3.3 Learned Advocate also contended that the interest liability cannot be fastened on the appellant inasmuch as Section 11 AB of the Central Excise Act, 1944 was inserted in the statute book w.e.f. 28.09.1996, which is much after the period of dispute involved in the present case. He has relied upon the judgment of Hon'ble Bombay High Court in the case of CCE, Mimbai-I vs. Dev Ashish - 2015 (317) ELT 405 (Bom.) to strengthen such stand.

3.4 The learned Advocate also stated that the provisions of erstwhile Rule 173Q of the Central Excise Rules, 1994 read with Section 11AC of the Central Excise Act, 1944 cannot be invoked for imposition of penalty inasmuch as the period involved in the

appeal is prior to the date of insertion of Section 11AC in the Act. With regard to confiscation of land, building, plant & machinery etc., he submitted that at time of passing of the impugned adjudication order, the erstwhile Rule 173Q (2) and Rule 211 of the Rules of 1994 were omitted and as such, such repealed provisions cannot be invoked for confiscation of immovable property. In this context, the learned Advocate has relied upon the judgment of Hon'ble Gujarat High Court in the case of Kotak Mahindra Bank Ltd. Vs. District Magistrate - 2011 (267) ELT 614 (Guj.) and also on the decision of this Tribunal, in the case of Choice Ceramics Tiles P. Ltd. Vs. CCE, Bhavnagar - 2010 (258) ELT 283 (Tri.-Ahmd.).

4. On the other hand, Shri N.N. Prabhudesai, the learned AR for Revenue has reiterated the findings recorded in the impugned order and supported confirmation of the adjudged demands on the appellants.

5. Heard both sides and examined the case records.

6. In the present case, the adjudged demands confirmed against the appellants pertain to the period from 1989-90 to 1992-93 and thus, the relevant statutory provision for consideration of the issue is Notification No. 175/86 dated 01.03.1986. The said notification grants exemption from payment of Central Excise duty on the excisable goods cleared from the factory of the manufacturer up to certain aggregate value prescribed therein. The issue of clubbing of clearances of various firms for the purpose of determination of the aggregate value has also been discussed in the said notification. For ensuring uniformity of levy of duties of excise in terms of the notification dated 01.03.1986, the Central Board of Excise and Customs has prescribed the general principles, which were communicated vide Circular No. 6/92 dated 25.09.1992. With

regard to clubbing of clearances of various firms, the principle laid down by the Board is as under:

“Different firms will be treated as different manufacturers for the purpose of exemption limit. But if a firm consisting of certain partners say A, B & C, has got more than one factory, all these factories should of course be combined. Limited companies whether public or private are separate entities distinct from the shareholders composing it. Hence each limited company is a manufacturer by itself and will be entitled to a separate exemption limit.”

6.1 In the case in hand, it is an admitted fact on record that the appellant is a private limited company, incorporated under the Companies Act, 1956 and the other two firms namely, M/s IEC and RSF are proprietorship concerns, belonging to Shri Sandeep Ghosh and Shri Sudeep Ghosh respectively. Since, the appellant is a private limited company; its clearances cannot be clubbed with the clearances of the proprietorship concerns, as per the above principles laid down by the CBEC in terms of Section 37B of the Act *ibid*.

6.2 In the case of Supreme Washers (P) Ltd. (supra), the Hon'ble Apex Court have noted and also appreciated with the contents of the Circular dated 29.05.1992 and since, the appellant therein had not pleaded for the benefit of the notification dated 01.03.1986 (supra) read with the clarification furnished in the said circular, were pleased to remand the matter to the Tribunal for the limited purpose of deciding the applicability of the Circular dated 01.03.1956 and subsequent circular dated 29.05.1992 for a decision, whether a limited company's production can be clubbed with other units. Pursuant to the remand direction, the Tribunal in the case of L.D. Industries (supra) has held that for the purpose of Notification No. 175/86 dated 01.03.1986, the clearances of M/s Supreme Washers Pvt. Ltd. could not be clubbed with the other two units

viz. L.D. Industries and L.R. Industries. The Tribunal has referred to the circular dated 29.05.1992 of CBEC to hold that public/private limited company is a separate entity, distinct from the shareholders composing it and hence, each limited company is a manufacturer by itself. Further, in the case of Limca Flavours & Fragrances Ltd. (supra), this Tribunal has also held that for the period prior to 01.04.1993, the clearances of three companies in question cannot be clubbed in spite of evidence on record, suggesting interdependence and interrelationship of the said companies. For the said conclusion, the Tribunal has referred to the judgment of Hon'ble Apex Court in the case of Modi Alkalies & Chemicals Ltd. (supra), which is to the effect that the clearances of the limited companies can be clubbed for the period subsequent to 01.04.1993, as per Notification No. 1/1993 and not for the period prior to such date. The said order of the Tribunal was upheld by the Hon'ble Apex Court (supra). In view of the settled position of law as discussed above, we are of the considered opinion that the appellant should be entitled to the benefit of Notification No. 175/86 for the clearances effected by it prior to 01.04.1993.

6.3 The genesis of the present impugned notice dated 03.10.1994 is the interception of two LPG Road Tankers on 08.07.1993 in the course of transit checks by the department. The investigation subsequently culminated in a separate show cause notice dated 16.12.1993 issued to M/s IEC, treating it as a manufacturer. Since, the department has considered M/s IEC as a manufacturer of excisable goods and accordingly, proceeded for confirmation of the duty demand, such stand cannot be altered subsequently, to hold that the said unit was physically not in existence and therefore, the clearances made by it should be clubbed with the value of clearances of the appellant.

6.4 The value of clearances for the purpose of availing SSI benefit, for the relevant period, has been wrongly arrived at by

the department in including the value of the chassis for the LPG tanks manufactured by the appellant. As per Notification No. 241/86-C.E. dated 03.04.1986 read with circular dated 04.09.1986 issued by CBEC, the value of chassis is required to be excluded for the value of the final product. We find that while computing the proposed demand for the earlier show cause notice dated 16.12.1993, the value of chassis was excluded by the department, which is evident from the annexure to such show cause notice. Thus, in this case since, there is no change in the method of valuation adopted by the appellant and without proper substantiation of the allegation, it cannot be asserted that the appellant should not be entitled for the benefit provided under the said notification. Hence, we do not find any merit in the impugned order, so far as it relates to denial of the benefit of such notification to the appellant.

6.5 The impugned order in this case, has invoked the provisions of erstwhile Rule 173Q *ibid* read with Section 11AC *ibid* for imposition of penalty equal to the adjudged amount of central excise duty confirmed on the appellant. Section 11AC *ibid* was inserted in the statute book w.e.f. 28.09.1996 by Section 76 of the Finance (No.2) Act, 1996 (33 of 1996). The period in dispute involved in the present case is prior to the date of such statutory enactment and thus, the provisions of Section 11AC *ibid* are inapplicable to the facts and circumstances of the case inasmuch as such enactment will have prospective effect and cannot be applied retrospectively.

6.6 The learned adjudicating authority has invoked the provisions of Section 11AB *ibid* for payment of interest in respect of the central excise duty demand confirmed in the adjudication order. The said section was inserted in the central excise statute w.e.f. 28.09.1996. The interest liability provided therein is penal in character and would only apply in those cases, where clearances are effected after September 1996, irrespective of the

date of passing of the adjudication order, for the reason that interest is compensatory in character and is linked to delayed payment of the duty amount, when it was due for payment. In this context, the Hon'ble Bombay High Court upon interpretation of the statutory provisions, have held in the case of Dev Ashish (supra) that the provisions of Section 11AB *ibid* inserted w.e.f 28.09.1996 are in nature of penal interest and thus, the rigor would apply only to those cases, where clearances were affected after such effective date. Thus, the impugned order confirming the interest demand is not sustainable.

6.7 The impugned order dated 11.07.2008 has confiscated land, building, plant, machinery etc. under Rule 173Q (2) of the erstwhile rules *ibid*. The said rule was omitted by notification dated 12.05.2000. The effect of such omission is that order passed subsequent to such effective date should not be guided by the provisions of such non-existence rule. Admittedly, in this case, the present impugned order was passed after omission of such rule from the statute book. Thus, as per the judgment of Hon'ble Gujarat High Court in the case of Kotak Mahindra Bank Ltd. (supra) and the decision of this Tribunal in the case of Choice Ceramics Tiles Pvt. Ltd. (supra) cited by the learned Advocate for the appellant, the subject goods cannot be ordered for confiscation and accordingly, no redemption fine can be imposed on the appellant.

6.8 We find that the other aspects considered in the impugned order for sustaining the duty demand have not been substantiated with any tangible documentary evidence, supported with the provisions of the statute. On the contrary, we find support from the submissions made by the appellant that the charges cannot be levelled against it, in support of confirmation of the adjudged demand.

7. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order passed by the learned adjudicating authority. Therefore, by setting aside the same, we allow the appeals in favour of the appellants.

(Order pronounced in the open court on 29.07.2019)

(S.K.Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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