CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 2031 OF 2010

[Arising out of Order-in-Original No: 207/09/V/2010/COMMR/KS dated 31st August, 2010 passed by the Commissioner of Central Excise, Mumbai – V.]

Rozey Plastics
105, Vinay Industrial Estate, Chincholi Bunder,
Link Road, Malad (W), Mumbai 400064 … ***Appellant***

versus

Commissioner of Central Excise
Mumbai – V
5th Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector – E
Bandra – Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

WITH

(i) Excise Appeal No: 2032 of 2010 (Altop Industries); (ii) Excise Appeal No: 2034 of 2010 (Zain Plastics); (iii) Excise Appeal No: 2035 of 2010 (Guru Plastic Works); (iv) Excise Appeal No: 2036 of 2010 (Liba Enterprises); (v) Excise Appeal No: 2037 of 2010 (Allied Instruments Pvt Ltd); and (vi) Excise Appeal No: 2038 of 2010 (Jayesh Plastics).

[Arising out of Order-in-Original No: 207/09/V/2010/COMMR/KS dated 31st August, 2010 passed by the Commissioner of Central Excise, Mumbai – V.]

APPEARANCE:

Shri M H Patil, Advocate with Shri Nitin Mehta, Chartered Accountant for the appellants

Shri S Hasija, Superintendent (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A/87542-87548 / 2019

DATE OF HEARING: 11/01/2019
DATE OF DECISION: 11/01/2019

PER: C J MATHEW

All these appeals, against order-in-original no, 207/09/V/2010/ COMMR/KS dated 3rd September 2010 of Commissioner of Central Excise, Mumbai -V proceeding from the same show cause notice and on identical set of facts, are disposed off by common order. Proceedings were commenced with issue of show cause notice dated 11th January 1999 for recovery of duty of ₹ 8,39,661, ₹1,46,875, ₹2,47,997, ₹82,240 , ₹ 12, 671, ₹ 1,29,241 , ₹ 1,45,378 and ₹ 63,015 for the period between April 1995 and July 1998 from M/s Jayesh Plastics, M/s Guru Plastics Works, M/s Allied Instruments Pvt Ltd, M/s Liba Industries, M/s Altop Industries, M/s Rozey Plastics, M/s Zain Plastics and M/s Krishna Plastics respectively.

2. It would appear that M/s Barish Plast (Private) Ltd, who market 'plastic half round rain water systems' which comprise of several components were procuring 'half round pipe' from the market and getting the other components manufactured by several job-workers who were supplied with raw materials and moulds/dies. It was alleged that the components bore the brand name 'BARISH' which, being that of a trader ineligible for availment of benefit of exemption afforded by

notification no. 1/93-CE dated 28th February (as also successor notification no. 7/97-CE dated 1st March 1997 and notification no. 8/98-CE dated 2nd June 1998), precluded the claim of eligibility for exemption, under the same notifications, for the job-workers and, hence, the demand of duty. The valuation, thereupon, could not, in the absence of independent transaction, be computed in accordance with section 4(1)(a) of Central Excise Act, 1944,owing to which recourse was had to rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 1975 read with section 4(1)(b) of Central Excise Act, 1944 and for which the noticees were called upon to furnish certificate issued by Chartered Accountant to make adjustments for overheads and profit margin.

3. The dispute had been carried to the Tribunal on a former occasion and it had been considered appropriate, *vide* order no. C-I/1976-89/WZB/2001 dated 30th July 2001, that the matter should be remanded back to the adjudicating authority for reconsideration of the classification in view of the alternative proposed by the noticees under heading no. 3925 of the Schedule to Central Excise Tariff Act, 1985 and for valuation to be determined in terms of the decision of the Hon'ble Supreme Court in *Ujagar Prints v. Union of India [1989 (34) ELT 493]*. Upon re-adjudication, the further appeal before the Tribunal was disposed of, *vide* order no. A/316-324/WZB/2005 dated 8th April 2005, by setting aside the penalty but remanding the matter back for re-

determination on the basis of certificate of Chartered Accountant dated 22nd June 2002, to allow credit of MODVAT to the extent of documentation made available and for interest to be determined in accordance with instruction no. 655/46/2002-CX dated 26th June 2002. The direction on setting aside of penalty, challenged before the Hon'ble High Court of Bombay, was disposed of by judgements rendered on 29th September 2009 confirming the decision of the Tribunal on the imposition of penalty on M/s Guru Plastics Works, M/s Liba Enterprises, M/s Altop Industries, M/s Rozey Plastics and M/s Barish Plast Pvt Ltd. On similar grounds, the appeal of Revenue pertaining to dispute with M/s Krishna Plastics was dismissed on 6th October 2009. The decision of the Hon'ble High Court dated 21st September 2007 in the appeal of Revenue with M/s Jayesh Plastics as respondent held that question of law did not arise. Likewise, the decision in the appeal of Revenue pertaining to M/s Allied Instruments Pvt Ltd held that there was no infirmity in the order of the Tribunal.

4. In the fresh order of adjudication now impugned before us, the duty liability proposed in the show cause notice was once again confirmed with appropriate interest under section 11AB of Central Excise Act, 1944. Penalties of ₹ 8,04,984 and ₹ 1,45,378 were imposed on M/s Jayesh Plastics and M/s Zain Plastics under section 11AC of Central Excise Act, 1944. In view of the several, and succeeding, directions issued by the Tribunal in remand orders, the first obligation

is the ascertainment of conformity with those directions.

5. We have heard Learned Counsel for the appellants and Learned Authorised Representative at length. We have also perused the findings of the adjudicating authority on the three directions contained in the remand order of the Tribunal. It is of interest to note that, in considering the certification of the Chartered Accountant dated 14th March 2002, the adjudicating authority appears to be plagued by several doubts that were expressed thus

> *'81. The questions, which need convincing answers, is whether the records of the eight job work noticees were produced before the chartered accountant for his satisfaction and to determine the assessable value per upwards Ujagar Prints formulae? Did the noticee number 9 had access to and possession of the records and documentation of these eight job work noticees, who may have independent business dealing or so called 'principal to principal relationship (?!) with the noticee number 9, for being submitted to the examining chartered accountant? Whether these eight job work noticees had acquiesced with the valuation statement furnished by the noticee number 9? Why these annexures had not been produced by the eight job work noticees in their individual shown causes to the notice and needed the noticee number 9 to produce for and on behalf of them? As each of the eight job work noticees were independent juridical entities; was it not essential for independent examination of the records, by the examining chartered accountant, qua each of the eight job work noticees Since, fresh certification was being issued by the chartered accountant on 14.03.2002 to the valuation statements, enclosed by the noticee number 9 to their shown*

cause of 23.04.1999 was it not pertinent for him to have perused the finding of the learned original adjudicating authority of 14.06.2000, and to issue clarifications, which he finally did on 22.06.2002, i.e., much after the completion of re-determinative process by the learned first remand adjudicating authority on 28.03.2002? Was the clarificatory certification dated 22.p6.2002 of the chartered accountant was restricted only qua manufacture and clearances of the noticee number 8, i.e., M/s Krishna Plastics? Did the examining chartered accountant peruse the findings and discrepancies noted by the learned first remand adjudicating authority in his order dated 28.03.2002, prior to issuing the clarificatory certification dated 22.06.2002 qua M/s Krishna Plastics? Had the original valuation statements at annexure A-1 to A-8, of the shown cause of the noticee number 9 had been solely certified by the examining chartered accountant qua the accounts of M/s Krishna Plastics? Did he peruse and examine the evident vast difference, as tabulated above, in the assessable values computed in the notice and that submitted by the noticee number 9? Was it not necessary and essential? Was it not essential and necessary for him to give an observation in the fallacy of the computation made in the notice or of the observation to the similar effect by the learned original adjudicating authority, in her order dated 16.04.2000 or prior to issuing re-certification on 14.03.2002 or further clarificatory certification on 22.06.2002? Did the examining chartered accountant examine and certify that the valuation statements, so certified by him, were in conformity and in accordance with the Ujagar Prints formulae? Why did he not certify that the values given in the certified valuation statements were inclusive of the costs of the raw material plus the manufacturing cost plus the profit of the manufacturing job worker? Did he examine the relationship of the eight job work noticees qua the noticee number 9 before re-certifying the *values in the certified valuation statements to the effect that they were the assessable values as per Section 4of the Central Excise Act, 1994? Why did his original endorsement, in the annexures 'A-1' to 'A-8'; re-certification dated 14.03.2002 or the clarificatory certification dated 22.06.2002 did not speak that the determined assessable values in these valuation statements had been in accordance with Section 4 of the Central Excise Act, 1944 or in accordance with the Ujagar Prints formulae, especially so, when the Honourable CESTAT, in its order dated 30.07.2001 has directed for determination of the assessable value in accordance with the Ujagar Prints formulae, as urged by the noticees? Did the examining chartered accountant had been made aware of and had examined the perspectives of the issue to this certification had been made? Had he been made aware and did he examine that the goods manufactured, by the eight job work noticees were 'BARISH' plastic half round rain water systems, bearing brand name BARISH belonging to the noticee number 9?'*

6. It is also seen that the adjudicating authority has not only considered, but also extracted, several findings from the previous orders of his predecessors that, in terms of the remand order, had ceased to exist and should not have influenced the present adjudicator. In the context of the specific direction of the Tribunal to undertake the exercise of valuation on the basis of a particular judgement and the upon certification of Chartered Accountant, it was not necessary for the adjudicating authority to render the finding that

'97. As stated above by the foregoing judicial speeches, what is to be ascertained in such situations would be the intrinsic value of the manufactured goods. The Empire Industries stated

> *so. It was affirmed in the Ujagar Prints I and II. Ujagar Prints III, was the conclusions thereof; but it can never be read shorn of the reasoning provided in Ujagar Prints II. To read otherwise would be to inflict perversity in the order of the Honourable Supreme Court. The reasoning to uphold intrinsic value principle, stated in Empire Industries, as provided in Ujagar Prints II was -*
>
> > *"The method of determination of the assessable value suggested by the processors would lead as to the untenable position that while in one class of grey fabric, processed by the same processor on bailment, the assessable value would have to be determined differently dependent upon the consideration that the processing house had carried out the processing operations on job-work basis; in the other class of cases, as it not unoften happens, the goods would have to be valued differently only for the reason the same processing house has itself purchased the grey fabric and carried out the processing operations on its own."'*

7. It would appear that the adjudicating authority has misread the scope of the original remand order of the Tribunal. It was not intended that the Chartered Accountant should step into the role of adjudicator for determination of the value in accordance with the decision indicated in the remand order as the adjudicating authority appears to have construed. It was also improper for the adjudicating authority to have concluded that

> *'105. There have also been no explanations to the observations made by the two learned adjudicating authorities in the delayed but unclear certifications of the examining chartered accountant.'*

Consequently, the finding thereon that

> *'106. Having perused the workings provided in the annexure B and C to the notice, having examined the valuation statements, submitted by the noticee number 9, as certified by the examining chartered accountants, M/s Mamania & Associates, after reading the juridical disposition on the subject, as above; I find that the demands have been validly made in the notice, in true determination of the intrinsic values of the manufactured and cleared excisable goods by the each of the eight job work noticees, for the relevant period.*
>
> *107. Consequently, the amounts of the unpaid duty of excise, demanded in the notice, i.e. Rs.8,39,661/-, Rs. 1,46,875/-, Rs.2,47,997/-, Rs.82,240/-, Rs.12,671/-, Rs.1,29,241/- Rs. 1,45,378/- and Rs. 63,015/-, from the noticees number 1 to 8 would be determinate under Section 11A(2) of the Central Excise Act, 1944.'*

is not in accord with the remand directions. Accordingly, the demand is set aside as bad in law.

8. The finding of the adjudicating authority, in accordance with circular dated 26th June 2002, for interest under section 11AB to be liable only with effect from 28th September 1996, on interest liability is also not in accordance with the directions in the remand order. It is on record that the show cause notice had been issued even as the provision for charging interest was yet to be incorporated in Central Excise Act, 1944. It was the responsibility of the adjudicating authority to consider the applicability of the circular cited and which, while confirming the applicability to clearances with effect from 28th September 1996, did not indicate its applicability to notices that had already been issued

before the retrospective amendment was enacted. A plain reading of the provisions was not the intent of the remand order.

9. On the issue of eligibility for MODVAT credit, it is observed by the adjudicating authority that

> *‘115. The annexure 'C' and its enclosure invoices, were documents, which gave details of the duty paid by the noticee number 9, upon receipt of 'PP Grey' from M/s Mehul Colour Chem; 'MS Roofing BrC 1/4 x 1½ and 'MS Roofing Sem ¼ x 1½' from M/s Shree Ganesh Rivets & Fasteners; and 'PP Powder', grade - 'FPTC 30N in HG SP A, code # 410103303/ 410103301' and '30N in HG' from M/s Tipco Industries, during the year 1995-96, 1996-97 and 1997-98.*
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> *116. Do the above pleadings suffice to the specificity of the order, passed by the Honourable CESTAT on 14.03.2002? Do they satisfy the test of use of the above inputs by the eight job work noticees in their factories in the manufacture of the subject excisable goods? The answer would have to be plainly in negative. There is complete absence of linkage between the probable receipt of these inputs by the noticee number 9 and subsequent receipts thereof, partly or in full consignments by each of the eight job work noticees and subsequent use thereof by these eight job work noticees in the manufacture of the finished excisable goods therefrom. The annexure 'C' does not even speak of the quantum of the benefits, which would be receivable or due to each of the eight job work noticees, for being offsetted against their individual payable duty liability. It does not even speak as to whether these available benefits had been duly passed by the noticee number 9 only to each of the eight job work noticees and not to any other person(s) in any other manner.’*

which is an incorrect disposal of the documentation and is not in accord with the directions of remand. The disallowance of claimed MODVAT credit is improper.

10. Learned Authorised Representative relies upon the decision of the Tribunal in *Goa Antibiotics & Pharmaceuticals Ltd v. Commissioner of Central Excise, Goa [2014 (314) ELT 546 (Tri-Mumbai)]* which has held that

> *'4. We have considered the submissions of both sides. As per various case laws cited by the ld. Advocate for the appellant this Tribunal has been consistently taking the view that in respect of physician's sample being manufactured by job worker and sold to the principal manufacturer, valuation is to be done as per Ujagar Print's judgment of Apex Court. However, we find in this case appellant's themselves are not assessing duty as envisaged in Ujagar Print's case, which requires specifying cost of all the raw materials, packing material supplied by the principal manufacturer, job charges and profit element. In fact, principal manufacturer on his own dictating the assessable value to be declared. This has come out clearly in the statement mentioned by the ld. AR Ld. Advocate for the appellant has not rebutted the same. Even ld. Advocate is claiming that they are declaring value as per CAS-4. CAS-4 valuation scheme is applicable for goods meant for captive consumption, which is not the case here. Thus the transaction between appellant and principal manufacturer cannot be considered as on principal to principal basis. Under the peculiar circumstances, the only way left is to assess the value based upon M.R.P. of similar goods after giving*

> *abatement as prescribed and on proportionate basis. This is what has been ordered by Commissioner (Appeals).'*

11. The issue before us is the compliance with the terms of remand. The Tribunal had remanded the matter for consideration of three specific matters: valuation, interest liability, set off of liability by adjustment of MODVAT credit. The need for compliance thereon has been reiterated by the decisions of the Tribunal in *Banco Aluminium Ltd v. Commissioner of Central Excise, Vadodara [2005 (181) ELT 110 (Tri-Mumbai)]* holding that

> *'3. Since the Tribunal has found that -*
>
> > *"..... This is because we find sub..... in the plea that in respect of the appellants M/s Banco Aluminium Ltd. an effective hearing and the facility of cross-examination of....... which thereafter was extended to them had not in fact take place. Such................. we find, is essential for establishing cases against this appellant and their employees beyond doubt...."*
>
> *Therefore, the findings of the Commissioner to the effect -*
>
> > *"....Since it was considered that Cross-examination of Shri A.J. Shimpi, Excise Officer of M/s. Banco Aluminium Ltd., and two officers who investigated the case viz. Shri N.M. Brahmbhatt and Shri K.N. Jadav, will not jeopardise in any manner the defence of the notice, they were not called for cross-examination..."*
>
> *is a finding, which smacks of non-compliance with the order of Remand. An order not conforming to an order in Remand, as in this case, when the Bench of this Tribunal is concluding the need of cross-examination by use of the term. ".....Such cross-examination we find is essential for establishing case against the appellant and their employees beyond doubt...." then the*

non-compliance thereof by not offering the officers for cross-examination before the adjudicator cannot lead to any other conclusion than a "failure to establish the case against the appellants". We conclude the same.

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5. Perusal of the order, extracted herein in extensio also indicates that the adjudicator has not applied his own mind but appears to be led by the decision arrived at by the earlier adjudicators. There is an underlying current to somehow confirm the liabilities. Such approach cannot be upheld.

6. Since Tribunal orders in Remand are not been complied with and there appears to be no desire to do so, no purpose will be served, now, once again in remanding the matter back to the adjudicator. We would, reluctantly have to conclude that the cases have not been established against the appellants. The orders against them has to be set aside and the appeal allowed.'

12. In disposing of appeal of Revenue against that order, Hon'ble High Court of Gujarat was constrained to observe that

'5. It is in this context that the Tribunal has come to the conclusion that order in remand has not been complied with and there appears to be no desire to do so. In fact, the Tribunal found that "there is an underlying current to somehow confirm the liabilities. Such approach cannot be upheld."

6. As against the aforesaid findings recorded by the Tribunal, the learned Advocate for the appellant has not been able to point out as to how the said findings are incorrect or against the record. In fact, in the memorandum of appeal, an

> *irresponsible sweeping statement is made to the effect. "Thus conclusion drawn by the learned Tribunal is in isolation and as per their own whims and fancy to go through the abstract of the OIO best suitable to them without following the principle of justice."*
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> *7. There are other observations also against the Tribunal in the memorandum of appeal which do not reflect maturity, to say the least.*
>
> *8. However, in light of what is stated herein before as regards the findings of the Tribunal, not being against the evidence on record, no substantial question of law arises from the impugned order of Tribunal. The appeal is accordingly dismissed.'*

in *Commissioner of Central Excise & Customs v. Banco Aluminium Ltd [2007 (218) ELT 184 (Guj)]* and the appeal filed thereafter before the Hon'ble Supreme Court was dismissed on ground of delay as well as on merits.

13. In view of the manner in which the adjudicating authority has dealt with the order of the Tribunal, we, in accordance with the position set out in *re Banco Aluminium Ltd,* set aside the impugned order and allowed the appeals.

(Pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*