CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Excise Appeal No. 760 of 2012

(Arising out of Order-in-Original No. Belapur/65/Bel-I/R-V/SLM/Commr/11-12/Bel dated 15.02.2012 passed by Commissioner of Central Excise, Belapur)

Turbhe Chemical Pvt. Ltd. **.....Appellant**
D-89/4 TTC Industrial Area MIDC Turbhe,
Navi Mumbai 400 613.

VERSUS

Commissioner of Central Excise Belapur **.....Respondent**
1st Floor C.G.O. Complex CBD Belapur,
Navi Mumbai 400614.

WITH

Excise Appeal No. 780 of 2012

(Arising out of Order-in-Original No. Belapur/69/Bel-III/R-IV/SLM/Commr/11-12/Bel dated 27.02.2012 passed by Commissioner of Central Excise, Belapur

Total Oil India Pvt. Ltd. **.....Appellant**
TTC Industrial Area Plot No.26 Mahape, MIDC
Kopar Khairane
Navi Mumbai – 400709.

VERSUS

Commissioner of Central Excise, Belapur. **.....Respondent**
1st Floor C.G.O. Complex CBD Belapur,
Navi Mumbai 400614.

Appearance:

Shri Muhul Jivani, Advocate for the Appellant
Shri Sydney D'Silva, Addl. Commr., A.R. for the Respondent

CORAM:

HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87121-87122/2021

Date of Hearing : 09.11.2021
Date of Decision : 12.11.2021

PER : RAMESH NAIR

The brief facts of the case are that the appellant M/s. Turbhe Chemical Pvt. Ltd. is engaged in the manufacture of excisable goods namely viscosity improver on job-work basis for M/s. Total Oil India Ltd. (hereinafter referred as "TOIL"). The said excisable goods are manufactured out of raw material and packing materials provided by their principal manufacturer M/s. TOIL. The appellant had received the base oil, base mineral oil and other items from TOIL along with the excise invoice. They have availed the credit of excise duty paid on the base oil, base mineral oil etc. and used the same in the manufacture of final product which was cleared on payment of duty to M/s. TOIL The said viscosity improver manufactured by the appellant was used by M/s. TOIL in further manufacturing process. Thus, the viscosity improver is an intermediate product for M/s. TOIL. The duty was paid by the appellant at the time of clearance of goods and the same has been availed as a credit by M/s. TOIL. The appellant has paid the duty on the assessable value of Rs.44.67 per kg. as per declaration submitted by the appellant in 2006. The said declaration was not revised since then. The department conducted the EA-2000 audit for the period April 2006 to March 2010 and requested the appellant to revise the same and get the assessable value determined in terms of Rule 10A(iii) read with Rule 8 and as per the principles laid down in CAS-4 and get the same certified from cost accountant. The appellant submitted the certificate from the cost accountant. On the basis of the above, the appellant paid the differential duty of Rs.1,23,00,460/- alongwith interest of Rs. 32,81,195/- prior to issue of show cause notice. The appellant has also submitted the application for waiver of Show Cause Notice under Section 11A(2B) on 13.08.2010. However, Show Cause Notice dated 18.04.2011 was issued and it was alleged that the appellant has willfully suppressed the facts from the Central Excise Department by not determining the value of excisable goods as per the provisions contained in Rule 8 read with Rule 10A (iii) of the Central Excise (Valuation) Rules, 2000 and thereby demanded the differential duty of Rs.1,23,00,460/- along with interest and also proposed penalty under Section11AC. The Commissioner vide Order-in-Original No. Belapur/65/Bel-I/R-V/SLM/COMMR/11-12/Bel dated 15.02.2012 has confirmed the demand, demanded the interest and imposed the penalty. Therefore, the present appeal No. E/760/2012 filed by the appellant M/s. Turbhe Chemical Pvt. Ltd.

2. Consequent to the above case, Show Cause Notice No. V/Adj(SCN)15-70/Commr/11-12/Bel/392 dt. 09.09.2011 was issued to the principal manufacturer of job worker M/s. Total Oil India Pvt. Ltd. proposing disallowance of credit taken by TOIL on supplementary invoices of M/s. Turbhe Chemical Pvt. Ltd. in terms of Rule 9(1) (b) of the Cenvat Credit Rules, 2004, on the ground that TCPL has paid the duty on the detection by the department and there is willful suppression of fact for non-payment of duty on the part of TCPL. The Commissioner vide Order-in-Original No. Belapur/69/Bel-III/R-IV/SLM/COMMR/11-12/Bel dated 27.02.2012 confirmed the demand of Cenvat Credit amounting to Rs.1,24,02,477/- as per Rule 9(1)(b) of Cenvat Credit Rules, 2004 and imposed the equal amount of penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section11AC of the Central Excise Act, 1944 against M/s. Total

Oil India Pvt. Ltd. Therefore, M/s. Total Oil India Pvt. Ltd. the appellant filed appeal No. E/780/2012.

3. Shri Mehul Jivani, learned Counsel appearing on behalf of the appellant M/s. Turbhe Chemical Pvt. Ltd. submits that the adjudicating authority determined the valuation of the above goods invoking Rule 8 read with Rule 10A (iii) of the Central Excise (Valuation) Rules, 2000. He submits that the very issue has been settled by this Tribunal in the case of *Rolastar Pvt. Ltd. 2012 (276) E.L.T. 87 (Tri.-Ahmd.)* and *Advance Surfactants India Ltd. 2011 (274) E.L.T. 261 (Tribunal)* these decisions of the Tribunal has been upheld by the Hon'ble by the Hon'ble Supreme Court reported at *Commissioner Vs. Rolastar Pvt. Ltd. – 2013 (298) E.L.T.A186 (S.C.).* He also placed reliance on the following judgements:

(i) Palco Metals Ltd. 2011 - (23) S.T.R. 389 (Tribunal)
(ii) Indian Extrusions – 2012 (283) E.L.T. 209 (Tri.-Mumbai)
(iii) Reclamation Welding Ltd. – 2014 (308) E..T. 542 (Tri.-Ahmd.)

He submits that in view of the above settled position valuation adopted by the appellant i.e. cost of manufacture plus job charges is the correct value and the value proposed by the department under Rule 8 of the Central Excise (Valuation) Rules, 2000 is not correct and legal. He alternatively submits that the appellant TCPL manufactured intermediate products which is otherwise not liable to duty under Rule 4(5)(a), if the same would have been followed by the appellant. He placed reliance on the decision of Tribunal in the case of *Lawkim Ltd. 2007 (218) E.L.T. 142 (Tri.-Mumbai).*

Without prejudice he further submits that it has been decided in various judgments that even the value of material supplied free of cost to the job-worker is not includible in the assessable value since it would form part of the assessable value of the final product cleared by the principal manufacturer on payment of duty. He placed reliance on the following judgment:

(i) *Dymos Lear Automotive India Pvt. Ltd. 2019 (366) ELT 898 (Tri.-Chennai)*

The said judgment has been approved by the Supreme Court in *Commissioner Vs. Dymos Lear Automotive India Pvt. Ltd. -2019 (366) E.L.T. A186 (SC).* On this issue he also placed reliance on the following judgments:

(i) *International Auto Ltd. Vs. Commissioner 2005 (183) E.L.T. 239 (S.C.)*

(ii) *SRF Ltd. 2007 (220) E.L.T. 201 (Tri.-Chennai)*

(iii) *SRF Ltd. V. Commissioner- 2016 (331) E.L.T. A138 (S.C.)*

He further submits that since the appellant has manufactured goods on job work basis, the duty paid on such intermediate product is available as cenvat credit to the principal manufacturer of M/s. Total Oil India Pvt. Ltd. Therefore even if some short payment of duty is there, it is revenue neutral exercise therefore on this ground also neither suppression of facts can be attributed nor the demand is sustainable. He placed reliance in the following judgements:

(i) *SRF Ltd. 2007 (220) ELT 201 (Tri.-Chennai)*

(ii) *Coca Cola 2007(213) ELT 490 (SC)*

(iii) *International Auto Ltd. Vs. Commissioner 2005 (183) ELT 239 (S.C.).*

(iv) *United Phosphorus Ltd. Vs. Commissioner of Central Excise, Surat – 2007 (210) ELT 45 (Tri.-Ahmd.)*

(v) *Commissioner Vs. Super Forgings & Steels Ltd. – 2007 (212) ELT A151 (S.C).*

Without prejudice to the above submission, he further submits that Rule 10A of the Central Excise (Valuation) Rules, 2000 came into force w.e.f. 01.04.2007 vide Notification No. 9/2007-C.E.(N.T.), dated 01.03.2007 and this rule has not been given retrospective effect. Therefore, demand for the period 2006-07 i.e. Rs.32,57,503/- should be set aside. He further submits that in the present case there is no intention to evade payment of duty for the reason that this is a clear case of revenue neutral situation. The fact that the assessable value has not been revised after 2006 was known to the department. The declaration at a price of Rs.44.67 per kg was submitted in 2006 and the fact that it was not revised was known to the department and therefore there is no suppression with *malafide* intention. The department never enquired about the revision of the value for such a long time. He submits that when the facts are known to both the parties, omission by one party to do when he might have done would not render it suppression. Mere omission to give correct information is not suppression of fact. He further submits that since the principal manufacturer eligible for the credit, revenue will not be at loss as the assessable value of the final product cleared by the principal manufacturer does not result into undervaluation of final product as the same does not depend on the cost of intermediate product cleared by the appellant and therefore principal manufacturer will not gain anything. The intermediate product manufactured by job worker otherwise would not liable to duty under Rule 4(5) (a), if same would have been chosen to be followed. He further submits that the Tribunal has consistently held that undervaluation in case of job worker does not lead to *malafide* intention on the part of job worker as ultimately credit is available to the principal manufacturer or otherwise also value of the goods will be added in the final product of the principal manufacturer. In support of his above submission on time bar he placed reliance on the following judgements:

(i) Nirlong Ltd. – 2015 (320) ELT 22 (SC)

(ii) M/s. Continental Foundation Jt. Venture – 2008 (216) ELT 177 (S.C.)

(iii) Deccan Enterprises Pvt. Ltd.–2005 (190) ELT 241 (Tri.-Bang.)

(iv) LG Electronics Pvt. Ltd. 2010 (255) ELT 135 (Tri.-Mumbai) as upheld by the Hon'ble Supreme Court in Commissioner V. L.G. Electronics Pvt. Ltd. – 2014 (308) ELT A118 (Bom.) and upheld by the Hon'ble Supreme Court in Commissioner Vs. L.G. Electronics Pvt. Ltd. – 2016 (341) E.L.T. A223 (S.C.)

(v) P.R. Rolling Mills Pvt. Ltd. 2010 (249) ELT 232 (Tri. – Bang.)

(vi) Commissioner Vs. P.R. Rolling Mills Pvt. Ltd. 2010 (260) ELT A84 (S.C.)

(vii) Vishnu Dyeing & Printing Works - 2008 (221) ELT 369 (Tri.-Mumbai)

(viii) Commissioner Vs. Vishnu Dyeing & Printing Works – 2009 (238) ELT A84 (Bom.).

Without prejudice he further submits that since the duty and interest has been paid prior to issuance of show cause notice, the show cause notice would not have been issued or it should be deemed to have been concluded, as per the provisions of Section 11A (2B) of

Central Excise Act,1944. He placed reliance on the following judgments:

(i) Tirupathi Fuels Pvt. Ltd.- 2017 (7) GSTL 142 (A.P.)

(ii) Commissioner V. Tirupathi Fuels Pvt. Ltd. -2018 (12) G.S.T.L. J179 (S.C.)

(iii) Adecco Flexione Workforce Solutions Ltd. – 2012 (26) S.T.R. 3 (Kar.)

He submits that the appellant had submitted an application for waiver of show cause notice on 13.08.2010 which is prior to the date of issue of show cause notice. As submitted above, since there was no intention to evade duty or willful suppression of facts. Therefore show cause notice should not have been issued to the appellant. With this submission he prays for setting aside the demand, interest and penalty.

4. As regard, the appeal No. E/780/2012 of Total Oil India Pvt.Ltd. he submits that in this case the cenvat credit was disallowed on the duty paid by M/s. Turbhe Chemical Pvt. Ltd. on the ground that M/s. Turbhe Chemical Pvt. Ltd. has short paid duty under suppression of fact as alleged in the show cause notice issued to M/s. Turbhe Chemical Pvt. Ltd. He submits that since as per the submission made on behalf of M/s. Turbhe Chemical Pvt. Ltd., demand, interest and penalty are not sustainable on the ground that there is no suppression of fact. The Cenvat Credit of the duty paid by M/s. Turbhe Chemical Pvt. Ltd. is legally admissible to M/s. Total Oil India Pvt. Ltd. and the same is not hit by the provisions of Rule 9(1)(b) of Central Excise Valuation Rules, 2004. He, without prejudice to his above submission further submits that bar of availment of credit under Rule 9(1) (b) in case of suppression by

supplier applicable only when there is a sale involved. In the present case, the job worker M/s. Turbhe Chemical Pvt. Ltd. has not sold the goods to M/s. Total Oil India Pvt. Ltd. and the transaction is of stock transfer. For this reason also Rule 9(1) (b) cannot be invoked. He placed reliance on the following judgments:

(i) *Karnataka Soaps & Detergents Ltd. - 2010 (258) ELT 62 (Kar.)*

(ii) *Essar Oil Ltd. - 2014 (303) ELT 255 (Tri. Ahmd.)*

(iii) *Jai Raj Ispat Ltd. - 2007 (217) ELT 272 (Tri. Bang)*

(iv) *Jairaj Ispat Ltd. 2009 (245) ELT 118 (A.P.)*

(v) *United Phosphorus Ltd. 2014 (313) ELT 418 (Tri.-Ahmd.)*

He further submits that since the show cause notice has been issued on the scrutiny of ER.1 return and the show cause notice itself stated that the appellant has availed the credit in the month of August 2010. There is no suppression of fact and no *malafide* intention on the part of the appellant. Therefore, in respect of the credit taken in August, 2010 show cause notice was issued on 09.09.2011 is clearly time barred.

5. Shri Sydney D'Silva, learned Additional Commissioner A.R. appearing on behalf of the Revenue reiterates the finding of the impugned order. He placed reliance on Tribunal's Larger Bench order reported at Eicher Motors Ltd. Vs. Commissioner of C. Ex., Indore 2008 (228) ELT 43 (Tri.LB).

6. We have carefully considered the submissions made by both the sides and perused the records.

First we take the Appeal No. E/760/2012, in this case the issue to be decided are as under:

(i) Whether valuation of job work goods is governed by Rule 8 of Central Excise (Valuation) Rules, 2000 or on cost construction method i.e. cost of raw material plus job charges.

(ii) Whether there is suppression of fact or *malafide* intention in non-payment/short-payment of duty on the job work goods on the part of the appellant.

In the impugned order, the adjudicating authority has invoked Rule 8 of the Central Excise (Valuation) Rules,2000 according to which the demand was raised calculating the assessable value i.e. cost of manufacture plus 10% notional profits. We find that in the present case the job-worked goods which was manufactured by the appellant, after manufacture the same was returned to the principal manufacturer i.e. M/s. Total Oil India Pvt. Ltd. Rule 8 provides as under:

> *"Rule 8. Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten percent of the cost of production or manufacture of such goods".*

From the careful readings of the above rule, it is abandoned clear that the value of the goods shall be done under Rule 8 only in case if the said goods is either used by the assessee himself or on his behalf in the manufacture of other articles. In the present case, job-worked goods manufactured by M/s. Turbhe Chemical Pvt. Ltd. was neither used by themselves nor on their behalf in the manufacture of any other articles. Admittedly, the job-worked goods after manufacture was returned back to principal manufacturer M/s. Total Oil India Pvt. Ltd. and it is M/s. Total Oil India Pvt. Ltd., who have used the job-worked goods in the manufacture of their final products and such manufactured goods cleared on payment of duty. Therefore, the ingredients of Rule 8 are not satisfied on the part of the appellant, therefore, valuation of job work goods cannot be done under Rule 8. The very same issue has been considered by this Tribunal in the case of *Rolastar Pvt. Ltd. (supra)* and *Advance Surfactants India Ltd. (supra)*, which have been upheld by the Hon'ble Supreme Court. As regard the judgment relied upon by the Revenue in the case of *Eicher Motors Ltd. Vs. Commissioner of C. Ex., Indore – 2008 (228) ELT 43 (Tri.-LB).* On careful reading of the said Larger Bench judgement, we find that in the said case the dispute is that in the hands of the job-worker while computing the assessable value whether the 10% notional profit of raw material should be included in the assessable value of final product manufactured by the job worker or otherwise. In the present case, the fact is completely different that whether the valuation in the hands of job-worker should be under Rule 8 or on cost construction method i.e. cost of raw material plus job charges. Therefore, the Larger Bench decision in the case of *Eicher Motors Ltd. (supra)* has no application in the present case. In view of the above settled position of law, we are of the view that the valuation of job-worked goods in the present case, adopted by the appellant i.e. cost of raw material plus job charged s correct and legal in view of the law laid down by the Hon'ble Supreme Court judgements in the case of *Ujagar Prints Vs. Union of India 1988 (38) ELT 535 (S.C.)* and *Pawan Biscuits Co. Ltd. Vs. Collector – 2000 (120) ET 24 (S.C.).* As regards the submissions made by the appellant whether there is suppression of fact with *malafide* intention for non-payment/short-payment of duty, we find that the appellant have been paying the excise duty. The only lapse is that the appellant have not revised the price after 2006, however on pointing out by the audit they have paid the duty along with interest. We also find that the duty so paid/payable by the appellant is undisputedly available as Cenvat Credit to the principal manufacturer M/s. Total Oil India Pvt. Ltd. Therefore, it is a clear case of revenue neutral. In catena of case law including the case laws cited by the learned Counsel, it was held that where there is situation of revenue neutrality the *malafide* intention cannot be attributed to the assessee. For this reason also, we find that there is no suppression of fact or *malafide* intention on the part of the appellant. However, the appellant have admittedly paid the duty however the duty paid is not disputed by the appellant. We are of the view that excise duty payable on the value i.e. cost of manufacture plus job-work charges is correctly payable by the appellant. The adjudicating authority should re-determine the value accordingly. Consequently, the correct excise duty payable and interest thereon should be re-computed. As we discussed above, that there is no *malafide* intention on the part of the appellant, hence the penalty is set aside.

7. As regard the Appeal No. E/780/2012 filed by M/s. Total Oil India Pvt. Ltd., we find that in this case the demand of Cenvat Credit was confirmed only on the ground that the duty for which the Cenvat Credit was availed, was paid by M/s. Turbhe Chemical Pvt. Ltd. under suppression of fact. As we have already held that suppression of fact cannot be attributed on short payment of duty against M/s. Turbhe Chemical Pvt. Ltd., Appellant M/s. Total Oil India Pvt. Ltd. is entitled

for the Cenvat Credit. Since the excise duty payable needs to be re-computed in the case of M/s. Turbhe Chemical Pvt. Ltd. Consequential entitlement of Cenvat Credit to M/s. Total Oil India Pvt. Ltd. may also vary. However, since the appellants are entitled for Cenvat Credit the demand of Cenvat Credit is not sustainable. Consequently, penalty and interest corresponding to such Cenvat demands are also set aside. The amount of Cenvat Credit may also be re-computed in accordance with, re-computation of excise duty in the case of M/s. Turbhe Chemical Pvt. Ltd.

8. With our above observation, both the matters are disposed of by way of remand to the adjudicating authority for passing a fresh order.

(Order Pronounced in the open court on 12/11/21)

(C.J. Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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