CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 817 of 2011

(Arising out of Order-in-Appeal No. SB/72/TH-I/2011 dated 15.02.2011 passed by the Commissioner of Central Excise (Appeals), Thane)

M/s Indian Agro-Chem Industries Pvt. Ltd. … Appellant
Plot No.B-23, M.I.D.C., Badlapur (East),
Dist. Thane-421 503.

Versus

Commissioner of Central Excise Thane-I … Respondent
4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai-400028.

WITH

Excise Appeal No. 1705 of 2011

(Arising out of Order-in-Appeal No. OIA 40/BR-40/TH-I/2011dated 24.08.2011 passed by the Commissioner of Central Excise (Appeals), Thane)

M/s Indian Agro-Chem Industries Pvt. Ltd. … Appellant
Plot No.B-23, M.I.D.C., Badlapur (East),
Dist. Thane-421 503.

Versus

Commissioner of Central Excise Thane-I … Respondent
4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai-400028.

Appearance:

Shri M .H. Patil, Advocate for the Appellant
Ms.A. S. Parab, 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/85183-85184/2022

Date of Hearing: 09.09.2021
Date of Decision: 08.03.2022

Per: S.K. MOHANTY

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

1.1 The appellants herein are engaged in the manufacture of Fungicides/Pesticides namely, Sulphur 85% DP, Sulphur 80% WP and Sulphur 80% WDG. The said products have been classified under Tariff Item 3808 92 90, itemized in the Schedule appended to the Central Excise Tariff Act, 1985. Since inception of the company in 1999, the appellants have been availing the benefits of SSI exemption on the said products. The appellants are also engaged in conversion of indigenous/imported Sulphur lumps/granules into Sulphur powder, by the process of pulverization. Sulphur is a by-product, emerges during refining of Crude Oil by Refineries and the same is classifiable under Tariff Item 2503 00 10.

1.2 During the disputed period, the appellants have entertained the belief that such conversion activity undertaken by them does not amount to manufacture in terms of Section 2(f) of the erstwhile Central Excise Act, 1944 and accordingly, did not obtain the registration certificate and the goods were removed from the factory under commercial invoice/challan. The *modus oprandi* adopted by the appellants was disputed by the department through exchange of various communications. Finally, the jurisdictional Range superintendent vide letter dated 03.06.2010 had informed the appellant that the process of conversion of sulphur powder from crude sulphur in the form of granules, chips, lumps amounts to manufacture in terms of Section 2(f) read with Section 2(k) and Section 6(b) ibid and as such, is classifiable under Chapter sub-heading No. 25030010 of the Central Excise Tariff Act, 1985, liable to payment of Central Excise Duty. Feeling aggrieved with the above letter of the Range Superintendent, the appellants have preferred appeal before the learned Commissioner (Appeals), which was disposed of vide Order-in-Appeal No. SB/72/TH-I/2011 dated 15.02.2011, in upholding the views expressed in the impugned communication addressed by the jurisdictional Range Superintendent. In the meantime, the Commissioner of Central Excise, Thane-I Commissionerate had issued the show cause notice dated 13.04.2011, which was adjudicated vide Order-in-Original No. 40/BR-40/Th-I/2011 dated 24.08.2011.

1.3 Feeling aggrieved with both the orders dated 15.02.2011 passed by the learned Commissioner (Appeals) and dated 24.08.2011 passed by the Commissioner of Central Excise, Thane-I (hereinafter, for short referred to as "the impugned orders”), the appellants have preferred these appeals before the Tribunal, which were registered as Appeal Nos. E/817/2011 and E/1705/2011 respectively.

2. Shri M.H. Patil, learned Advocate appearing for the appellants submitted that the activity of conversion of crude Sulphur lumps/Granules into Sulphur powder would not amount to manufacture, as per the definition contained in Section 2(f) *ibid*. In support of such submission, the learned Advocate has relied upon the following judgments delivered by the Hon’ble Supreme Court:

(i) Osnar Chemicals Pvt Ltd. – 2012 (276) ELT 162 (SC)
(ii) Tarpaulin International – 2010 (256) ELT481 (SC)
(iii) S.R. Tissues Pvt. Ltd. – 2005 (186) ELT 385 (SC)
(iv) A.R. Thermosets (PVT) Ltd. – 2016 (339) ELT 500 (SC)
(v) Grasim Industries Ltd. – 2011 (273) ELT 10 (SC)
(vi) Rajasthan State Chemical Works – 1991 (55) ELT 444 (SC)

2.1. Learned Advocate further submitted that even if such process of conversion is held to be amounting to manufacture, then also the disputed product would fall under Tariff Item 2503 00 90 *ibid* and would be chargeable to ‘nil’ rate of duty inasmuch as Sulphur recovered as by-product in refining of crude oil would be classifiable under Tariff Item 2503 00 10.

2.2 Learned Advocate has relied upon various adjudication orders passed by the department in the case of M/s. Sulphur Mills Ltd. and M/s. Standard Chemical Co. Pvt. Ltd., to state and submit that in respect of the similar activities under taken by those manufactures, the department had held that process of conversion of Crude Sulphur into Sulphur Powder would not amount to manufacture. Thus, he submitted that similarly placed assesses cannot be given different treatment for consideration of the same activity as manufacture, in order to be categorized under the definition provided in Section 2(f) *ibid*.

2.3 Learned Advocate further submitted that the show cause proceedings initiated by the department in invoking the extended period of limitation is not sustainable inasmuch as there was no element of suppuration of facts, wilfullmisstatement or fraud on the part of appellants in defrauding the Government revenue. He further submitted that the entire fact of manufacture of the excisable goods, conversion of Crude Sulphur to powder form was known to the department through exchange of various letters between the appellants and the department. Hence, he submitted that the proviso clause appended to Section 11AC *ibid* has no applications to the facts and circumstance of the present case for invoking the extended period of limitation.

3. On the other hand, the learned A.R. appearing for Revenue reiterated the findings recorded in the impugned order and further submitted that the issue of manufacture of the disputed goods was not intimated by the appellants to the department and that since such information was gathered by the department through proper enquiry/investigation and thereafter, the show cause proceedings were initiated against the appellants, it cannot be said that the action on the part of the lower authorities are not proper and justified in invoking the extended period of limitation.

4. We have examined the case records and considered the arguments placed by both sides.

5. The main issue involved in the instant case for consideration by the Tribunal is, whether conversion of Crude Sulphur Lumps/Granules into Sulphur Powder, would amount to 'manufacture', as per the definition of said phrase contained in Section 2(f) *ibid*.

5.1 In respect of the Appeal No. E/1705/2011 (arising out of the impugned order dated 24.08.2011), the department had issued the SCN dated 13.04.2011, proposing for confirmation of the duty demand along with interest and for imposition of penalty on the appellant. The period of dispute involved therein is from 01.04.2006 to 31.12.2010. The *proviso* clause appended to Section 11A *ibid* was invoked by the department for confirmation of the adjudged demands on the appellants.

5.2 Section 11A *ibid* deals with the situation for recovery of duties not levied or not paid or short-levied or short-paid or the circumstances, where the refund has erroneously been made to the person concerned. Sub-section (1) of Section 11A *ibid* mandates that in such eventuality, a Central Excise Officer may within '*one year*' from the relevant date, serve notice on the person chargeable with the duty amount, requiring him to show cause why he should not pay the amount specified in the notice. However, in case of non-levy, short-levy etc., owing to the reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Central Excise Act, 1944 or of the rules made there under with intent to evade payment of duty, then in place of normal period of '*one year*', the show cause notice has to be issued within '*five years*' from the relevant date.

5.3 We find that the learned Commissioner of Central Excise, Belapur vide Original Orders dated 14.11.2011 and 13.12.2011, while adjudicating the SCNs issued to M/s. Sulphur Mills Ltd. and M/s. Standard Chemical Co. Pvt. Ltd. respectively, had held that "*the process of pulverization of Crude Sulphur to Sulphur falling under Chapter Heading No. 2503 of CETA, 1985 does not amount to manufacturing activity under Section 2(f) of the Central Excise Act, 1944*". In arriving at such conclusion, the learned adjudicating authority had elaborately discussed the facts involved in those respective cases and also various judicial pronouncements, including the judgments delivered by the Hon'ble Supreme Court on the similar set of facts. Though, The principles of *res-judicata* do not apply in taxation law, inasmuch as, the adjudicator is free to adjudicate in judicious manner on a issue before him, by distinguishing the relied upon binding precedents, but in such an eventuality, the SCN cannot be invoked under the extended period of limitation and the time limit should be confined only to the normal period. The reason being that the terminology used in the *proviso* clause in the statute namely, fraud, collusion, etc…, etc…, with the intent to defraud the Government Revenue, is entirely lacking in such circumstances. The issue involved in a particular case vis-àvis in the cases decided by the quasi judicial or appellate forum, may at best give rise to the interpretational issue, but cannot be considered or equated with the phrases applied in the *proviso* to Section 11A *ibid*, justifying the department officers to automatically invoke the extended period of limitation for issuance of the SCNs. In other words, invocation of the *proviso* clause appended to Section 11A *ibid* is not the rule, but an exception, which can only be acted upon sparingly, considering the circumstances that really there are glaring evidences to book a case against the assessee by taking recourse to the *proviso clause*. In such a possible occurrence, the burden of proof entirely lies with the department to prove that the ingredients contained in the *proviso* to Section 11A are truly justified for invocation of such provision and not otherwise. Thus, considering the overall facts and circumstances of the case, we are of the firm opinion that since there were divergent views expressed between the equal ranking adjudicating authorities in both the cases, the charges of fraud, collusion, willful mis-statement etc. cannot be leveled against the present appellants, justifying invocation of the longer period of limitation, without proper substantiation.

5.4 Further, on careful examination of the documents/records available in the case file, we find that the appellants have amply demonstrated that the conversion activities undertaken by them do not fall within the scope and ambit of the definition of 'manufacture', provided in Section 2(f) *ibid*. In this context, it is noticed that the appellants have filed various declarations from time to time and also different correspondences were exchanged between them and the department, conveying the fact of manufacture of Pesticides, Fungicides & Sulphur Powder; that the letter dated 04.01.2007 was addressed to the department, explaining that the process of pulverizing of Crude Sulphur into powder form etc. would not amount to manufacture, as there is no change in characteristic, properties, quality, grade, etc.; that on 20.10.2008 again, the process of manufacture of Sulphur Powder was explained to the Preventive Officers, during their visit to the factory; that the appellants filed further declaration before the department on 08.04.2009, explaining *inter alia*, with the help of drawings & designs that the process undertaken for conversion of Crude Sulphur into Sulphur Powder by pulverization process will not amount to manufacture. We find that over and above the said correspondences, the appellants have also approached the department through their several other representations, notably dated 09.11.2009, 26.12.2009 etc. on the subject issue, but yielding no results. Thus, on factual analysis of the case, it can safely be concluded that the ingredients itemized in the proviso clause appended to Section 11A *ibid* have no application in the case of the present appellants for invocation of the extended period of limitation for confirmation of the adjudged demands.

5.5 Therefore, the impugned order dated 24.08.2011, to the extent it has confirmed the duty demand along with interest beyond the prescribed normal period of 'one year' is barred by limitation of time and accordingly, the impugned order is liable to be set aside and thus, we set aside the same and allow the appeal in favour of the appellant. It is made clear that the department may proceed to confirm the duty demand along with interest, if any, within the normal period, but no penalty shall be imposed on the re-adjudication process inasmuch as, the charges envisioned in Section 11AC *ibid* are completely absent in the present case.

6. With regard to the issue, as to whether the activity of conversion of crude sulphur/lumps/granules into sulphur powder amount to manufacture, we find that the authorities below in both the cases have not dealt with such issue properly, especially in the light of various judgments (supra) relied upon by the appellants and more particularly in the adjudication orders dated 14.11.2011 and 13.12.2011, passed by the learned Commissioner of Central Excise, Belapur. Therefore, we are of the considered view that the issue regarding manufacture of the disputed goods should be looked into afresh by the learned adjudicating authority.

7. In view of the above discussions and analysis, the present appeals are allowed by way of remand to the learned Commissioner of Central Excise, having jurisdiction over the factory of the appellants to decide and adjudicate on the subject issue, whether the disputed goods emerge as a result of manufacturing activity and confirm to the definition of 'manufacture' contained in the definition clause provided under Section 2(f) *ibid*. Needless to say, that opportunity of personal hearing should be granted to the appellants, before passing of the de-novo adjudication order.

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(Pronounced in court on 08.03.2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Sinha