CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Excise Appeal No. 86039 of 2020

(Arising out of Order-in-Appeal No. NSK/CGST-CX/COM/02/2020-21 dated 29.09.2020 passed by the Commissioner of CGST & Central Excise (Appeals), Nashik)

Shri B.V. Kshatriya **Appellant**
703/704, Padmanabh Heights,
Datta Mandir Road,
Nashik Road, Nashik 422 101.

Vs.

Commissioner of GST & CE, Nashik **Respondent**
Plot No.155, Sector P34, NH
Jaishtha Vaishakh, CIDCO, Nashik 422 008.

Appearance:

None for the Appellant
Shri P.K. Acharya, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 11.01.2023
Date of Decision: 11.01.2023

FINAL ORDER NO. A/85324/2023

This appeal is directed against Order-in-Appeal No. NSK/CGST-CX/COM/02/2020-21 dated 29.09.2020 passed by the Commissioner of CGST & Central Excise (Appeals), Nashik. By the impugned order, Commissioner has observed as follows:-

"5. I have gone through the records of the case. I find that this case was remanded back by Hon'ble CESTAT vide its order no. A/85191- 85192/2018 dated 30.01.2018 with certain directions for fresh adjudication. However, when the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (SVLDRS) was launched by the Government, the main noticee M/s Bhikusa Paper (P) Ltd. and six co-noticees filed applications under the scheme. Subsequently, their applications were accepted and after fulfilling the conditions of the scheme, the penalties imposed on them were waived. However, three co-noticees namely Shri B.V. Kshatriya, Director, M/s Raj Sales Corporation

and M/s Vishal Pakaging Industries failed to file applications under the scheme. Since, there is no provision in the SVLDRS that if main noticee applies for and gets benefit of the SVLDRS, the co-noticees shall also get the same benefit automatically, the case against these three co-noticees did not attain finality and has to go through the adjudication process.

6. On scrutiny of the SCN, OIO and other relevant records in this case, I find that Shri B.V. Kshatriya, Director of M/s Bhikusa Paper (P) Ltd. was found to be responsible for manipulating documents by showing purchases of waste paper in the name of suppliers when both the suppliers and transactions were not genuine. He mislead the department for claiming full exemption under Notification No. 83/94 and therefore, penalty of Rs. 1,00,000/- was imposed upon him under Rule 209A of Central Excise Rules, 1944 read with Rule 26 of Central Excise Rules, 2002. The allegations on him have been proved and he was penalized correctly. However, considering the fact that he has missed the chance to settle the case under SVLDRS due to ignorance when other co-noticees got the benefit, I reduce the penalty to Rs. 20,000/- only."

2.1 None appeared for the appellant. Heard Shri P.K. Acharya, Superintendent, Authorised Representative for the Revenue who reiterates the findings recorded in the impugned order.

3. Appellant has in the appeal stated that:-

- He was not aware that the main noticee, i.e. M/s. Bhikusa Paper Pvt. Ltd., settled under SVLDRS by paying 50% and got waiver of interest and penalty.
- The allegation against him is general in nature without any direct involvement in the alleged commission of the act that would render him liable for penalty, for which the appellant should have been absolved of its liability.
- The appellant contended that when the main noticee has got waiver of penalty under SVLDRS, the penalty imposed on him is not justified. In support, he relies on the following decisions:-
    - V. Abdul Rehman Musalia [2001 (133) ELT 145 (Tri.-Bang.)]

- D.P. Kothari [2001 (135) ELT 669 (Tri.-Del.)].

3.1 I find that the matter was earlier remanded by the Tribunal vide order No. A/85191-85192/18 dated 30.01.2018. Tribunal while remanding has observed as follows:-

"5. WE find that the demand has been made against the Appellant on the ground that they have wrongly claimed the benefit of exemption notification no. 83/94 by showing that they have done jobwork activity of manufacture of kraft paper on raw material supplied by the principal manufacturer. The adjudicating authority has relied upon the statements of such principal manufacturers some of whom have stated that they have purchased finished goods from the Appellant and that the raw material i.e paper scrap was shown to have been purchased on their behalf and they were issued bills for jobwork as well as bill for waste paper. The Appellant had also produced the copy of undertaking given by the principal manufacturer to the jurisdictional Authority of Appellant so that the Appellant can claim exemption from duty under Notification No. 83/94. The Appellant has also contended that even the statement of some of the principal manufacturers have not been considered properly. Their contention is that since the principal manufacturer were nor produced for cross examination, their statement cannot be relied upon and that the case should have been decided on the basis of verification of the accounts which clearly shows that they have undertaken job work activity. The Appellant has also relied upon the report dt. 30.12.2003 of the Superintendent (Preventive) to show that the said report is as not considered whereas it clearly shows the independent nature of job work by them, hence the said clearance cannot be considered as their clearances. Further they have also requested for considering the demand by considering the prices as cum duty. We find that all the above aspects cannot be gone into at this stage including the clearances contended by the Appellant to be not includible for calculation of duty. We also find that it has been settled in various Judgments as cited by the learned Counsel that while determining the duty, the cum duty benefits should be extended to the assessee. We also find that the adjudicating authority

have not examined the fact whether there is a suppression of facts or otherwise. Accordingly, the issue of limitation was also not considered properly.

6. We therefore consider it fit to remand back the case to the adjudicating authority to consider the case afresh after granting the opportunity of cross examining the persons who were not made available for cross examination as well as examining the record and accounts of the Appellant as to how the alleged jobwork activity has been considered in their books. We also hold that the adjudicating authority shall also consider the report dt. 30.12.2003 of the Preventive Superintendent and the intimations filed by the principal manufacturer under the Notification No. 83/94 before deciding the case. The Appellant shall produce all the records and relevant papers whenever called upon to do so before the adjudicating authority. Therefore as the matter needs to be reconsidered on above points, we set-aside the impugned order and remand the matter to the original adjudicating authority to pass a fresh order after verifying the facts and following the settled legal position on all the above issues."

3.2 Thereafter, on introduction of the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019, the main noticee, M/s. Bhikusa Papers Pvt. Ltd. and other co-noticees settled the dispute under SVLDRS, but the present appellant who is a director of the main noticee failed to opt under the scheme. However, without considering the directions given in the remand order and allowing cross examination, Commissioner has imposed penalties on the appellant, just for reason that the appellant did not settle the issue along with others under SVLDRS. Such approach of Commissioner cannot be justified. Even if the appellant has not approached under SVLDRS, Commissioner should have adjudicated as directed by Tribunal. No justification for imposition of penalty on reconsideration as per order of Tribunal is forthcoming.

3.3 I am of the considered view that even after failure on the part of the appellant to avail the benefits of the scheme in its totality in view of Board Circular No. 1071/4/2019-CX.8 dated

27.08.2019 and the consistent decisions of this Tribunal, I and set aside the penalty imposed on the appellant.

4.1 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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