CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 1930 of 2012

(Arising out of Order-in-Original No. 23/AT(23)COMMR/RGD/12-13 dated 17.09.2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Raigad)

Commissioner of CE & ST, Raigad **Appellant**
Utpad Shulk Bhavan,
Plot No.1, Sector 17,
Khandeshwar, Navi Mumbai 410 206.

Vs.

M/s. Zenith Birla (India) Ltd. **Respondent**
Near Khopoli Railway Station,
Khopoli, Dist. Raigad 410 203.

Appearance:

Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorised Representative for the Appellant
Ms. Lalita Phadke, Advocate, for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 16.03.2023
Date of Decision: 16.03.2023

FINAL ORDER NO. 85485/2023

PER: SANJIV SRIVASTAVA

This appeal has been filed by Revenue against Order-in-Original No. 23/AT(23)COMMR/RGD/12-13 dated 17.09.2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Raigad. By the impugned order, following has been held:-

"ORDER

(i) I confirm the demand of central excise duty amounting to Rs.52,98,386.00 (Rupees fifty two lakh ninety eight thousand three hundred eighty six only) from M/s Zenith Birla (India) Ltd., located at near Khopoli Railway Station, Khopoli-410203, Raigad under section 11A(11) of the Central Excise Act, 1944 read with rule 6 of the Central Excise (Removal of Goods at Concessional

Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 and as order appropriation of the amount of Rs.52,98,386.00 (Rupees fifty two lakh ninety eight thousand three hundred eighty six only) paid by them vide e-payment challan No.00127 dated 15.02.2011 during the case investigations;

(ii) I order recovery of interest at the appropriate rates from them under section 11AB/11AA ibid read with rule 6 of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 on the central excise duty not paid by them by the due dates and also I order appropriation of the amount of Rs.1,56,621.00 (Rupees one lakh fifty six thousand six hundred twenty one only) paid by them vide e-payment challan no. 00127 dated 15.02.2011 during the case investigations against this liability;

(iii) I impose penalty of Rs. 15,00,000.00(Rupees fifteen lakhs only) under rule 25(1)(d) of the Central Excise Rules, 2002 for the contraventions as discussed above;

(iv) I do not impose redemption fine under section 34 ibid as proposed and as discussed above.

(v) I impose a penalty of Rs 1,00,000.00(Rupees one lakh only) on Shri Nirmal Kumar Chaudhari, Vice-President-Operations, of the noticee under rule 26 of the Central Excise Rules, 2002 on the grounds discussed above."

2.1 Revenue has in their appeal challenged this order only to the extent of penalty imposed in terms of Rule 25(1)(d) of Central Excise Rules, 2002. According to the Revenue penalty equivalent to the duty should have been imposed on the appellant in terms of Section 11AC of Central Excise Act, 1944. Following has been stated as ground of appeal, as stated in the review order:-

"4.2 Section 11AC of the Central Excise Act, 1944 stipulates that 'Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or

suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:"

4.3 It is observed that in the instant case, in the Monthly Returns (Annexure-II) for the month of December,2010 filed by 'Zenith' in terms of Rule 5 of Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of excisable Goods) Rules, 2001, that they had wrongly declared that the said quantities of H.R.Coils procured by them duty free from M/s LSL were consumed for the intended purpose i.e. the said quantities of H.R.Coils were consumed in the manufacture of Pipes/Tubes, which were cleared for export. It is established during investigations by the officers of DGCEI that the said quantities of H.R.Coils procured by them without payment of Central Excise duty from M/s Lloyds Steel Industries Ltd were used in the manufacture of finished goods, which were ultimately cleared in the local market for home consumption instead of being exported. 'Zenith' were well aware of the fact that the 1629.467 MT of H.R.Coils procured by them from M/s Lloyds Steel Industries Ltd in terms of Notification No. 43/2001-C.E. (N.T.) dated 26.06.2001 were not used by them for the manufacture of finished goods meant for export but were used by them for the manufacture of finished goods cleared in the local market for home consumption. Thus it is a clear cut case of mis- statement/suppression of facts with an intent to evade duty. Further, the Commissioner has given a finding in para 41 of the Order that there is an obvious intent to evade duty on the part of 'Zenith', when they have procured duty free raw materials for manufacture of finished goods meant for export and diverted the finished goods to local market instead of the intended purpose of export

4.4 The ingredients laid down in the proviso of Section 11A(1) of the Central Excise Act, 1944 [Now, Section 11A(4)] for invoking the extended period of limitation and in Section 11AC for imposition of penalty are identical. In this case, the show cause *notice was issued by invoking proviso to Section 11A(1) [Now Section 11A(4)] of the Central Excise Act, 1944 and the Commissioner has confirmed the demand under Section 11A(2) [Now, Section 11A(11)] of the Central Excise Act, 1944. When ingredients are satisfied for invoking the extended period of limitation, penalty envisaged by Section 11AC of the Central Excise Act, 1944 would get attracted automatically and therefore, the Commissioner should have imposed equivalent penalty under Section 11AC of the Central Excise Act, 1944 instead of under Rule 25(1)(d) of the Central Excise Rules, 2002*

4.5 The Commissioner has observed at Para-41 of the impugned order that rule 6 of the Central Excise (Removal of Goods at Concessional Rate of duty for Manufacture of Excisable Goods) Rules, 2001 do not provide for any penal action against the violators, but simply requires recovery of the duty alongwith interest. However, for violation of statutory provisions, the Commissioner has imposed penalty under rule 25(1)(d) of the Central Excise Rules, 2002 by holding that there is an obvious intent to evade duty.

4.6 The show cause notice in the instant case was also issued for contravention of the provisions of Central Excise (Removal of Goods at Concessional Rate of duty for Manufacture of Excisable Goods) Rules, 2001 and Notification No. 43/2001 CE (N.T) dated 26.06.2001 with intent to evade payment of duty.

4.7 The Commissioner has failed to appreciate the fact that Central Excise (Removal of Goods at Concessional Rate of duty for Manufacture of Excisable Goods) Rules, 2001 was framed under Section 37 of the Central Excise Act, 1944 and Notification No. 43/ 2001 CE (N.T) dated 26.06.2001 was issued under Rule 19 of the Central Excise Rules, 2002."

2.2 We have heard Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorised Representative for the Revenue and Ms. Lalita Phadke, Advocate for the respondent.

3.1 In the present case, counsel for the respondent has challenged the appeal on the ground of maintainability stating as follows:-

- The issue involved in the present appeal of the Revenue is for enhancement of penalty contemplating imposition of penalty under Section 11AC as against the penalty imposed under Rule 25(1) of Central Excise Rules by Rs.37,98,386/- which is less than Rs.50,00,000/-.
- Therefore the appeal is not maintainable in terms of litigation policy circular. In support, the respondent has placed reliance on the following decisions:-
  - Techno Economic Services Pvt. Ltd. [2010 (255) ELT 526 (Bom.)]
  - Stovec Industries Ltd. [2014 (33) STR 124 (Guj.)]
  - CESTAT, Chennai [2015 (329) ELT 55 (Mad.)].

3.2 We take note of the above submission, but in our view, after enhancement the total amount of penalty imposed on the respondent would be around Rs.52,98,386/-. Accordingly we do not overrule this preliminary objection.

3.3 We find that the Commissioner has in para 41 of the order recorded the reason for imposing penalty under Rule 25(1)(d), which is reproduced below:

"41. However, I refrain myself from imposing a stringent penalty under the provisions of section 11AC. This is because of the provisions of rule 6 of Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001, which categorically provides that where the subject goods are not used by the manufacturer for the intended purpose, the manufacturer shall be liable to pay the amount equal to the difference between the duty leviable on such goods but for the exemption and that already paid, if any, at the time of removal from the factory of the manufacturer of the subject goods, along with interest and the provisions of section 11A and section 11AB of the Central Excise Act, 1944 (1 of 1944) shall apply mutatis mutandis for effecting such recoveries. These rules

do not provide for any penal action against the violators but simply requires recovery of the duty along with interest. The operative parts of the notice also categorically propose demand for violation of the provisions of Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001. Besides, rule 6 of the said edict also requires the department to ensure that the goods received are used by the manufacturer for the intended purpose. Hence, it is the responsibility of the department too to follow up the full compliance by the assessees. On the other hand, for the violation of statutory provisions the noticee is liable to penal action under rule 25(1Xd) of Central Excise Rules, 2002, this is especially so, as there is an obvious intent to evade duty on their part when they procured duty-free materials and diverted the finished goods to local market instead of the intended purpose of export. However, I do not order confiscation of finished goods as proposed in the notice for obvious reasons. The first is that the impugned goods have not been detained or seized and are not available for confiscation. Second, in real sense the violation is in respect of duty-free raw materials which have not been used in the exported goods and not on the finished goods which have been removed on payment of duty. What is more, the demand is raised in respect of the duty on the raw materials. It is also fact agreed by both the notice and the noticees that the finished goods removed for home clearance have been duty paid at appropriate rates."

3.4 The observations made by the Commissioner are in line with the observations made by this Tribunal in the case of Kapoor Industries [2014 (312) ELT 449 (Tri.-Del.)] holding as follows:-

*"**9.** It is further seen that Commissioner (Appeals) has confirmed the demand of duty of Rs. 2,96,881/- in respect of that quantity of fuel, which the appellant has not been able to show as having been utilized in terms of notification or Rules, 2001. He has also imposed penalty of identical amount on the respondents. The respondents have filed cross-objections, which are required to be taken as cross appeals, challenging imposition*

of penalties of Rs. 2,96,881/-. It stands contended before us that appellants have not disputed the duty demand so as to avoid litigation. However, penalty imposed upon them is not justified inasmuch as the Rule 6 of Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 lays down that where subject goods are not used for intended purposes, the manufacturer shall be liable to pay the amount equal to difference between the duty leviable on such goods but for the exemption and if duty has not already been paid, along with interest, the provisions of Section 11A and Section 11AB of Central Excise Act, 1944 shall apply mutatis mutandis for effecting such recovery. It may be noted that provisions of Section 11AC has not been made applicable under Rule 6 or any other Rule of said Rules, 2001. As such, no penalty can be imposed upon the assessee.

10. *We agree with the above contention of the learned Advocate. After having seen Rule 6 or the other provisions of said Rules, 2001, we find that provisions of Section 11AC has not been made applicable. As such, we set aside the penalty of Rs. 2,96,881/- imposed upon the assessee. Revenue's appeal as also cross-objections are disposed of in the above terms."*

3.5 Even otherwise the respondent had deposited the entire duty along with interest on 15.02.2011 prior to issuance of show cause notice i.e. 05.08.2011. In such a situation respondent could not have been subjected to any penalty under Section 11AC as has been held by the Tribunal in the case of:-

- Rashtriya Ispat Nigam Ltd. [2003 (161) ELT 285 (Tri.-Bang.)] affirmed by Hon'ble Supreme Court as reported at [2004 (163) ELT A53 (SC)].
- Shree Krishna Pipe Industries [2004 (165) ELT 508 (Kar.)]
- Gaurav Mercantiles Ltd. [2005 (190) ELT 11 (Bom.)]
- Matsyodari Steel & Alloys Pvt. Ltd. [2008 (225) ELT 176 (Bom.)]

4.1 In view of the decisions as above, we do not find any merit in the appeal filed by the Revenue for imposition of penalty under Section 11AC of the Central Excise Act, 1944. No other appeal has been filed against this order of the Commissioner. Hence the impugned order is upheld without any modification.

4.2 Appeal filed by the Revenue is dismissed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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