CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 1974 OF 2012

[Arising out of Order-in-Appeal No: P-I/MMD/184/2012 dated 27th September 2012 passed by the Commissioner of Central Excise (Appeals), Pune – I.]

Finolex Cables Ltd
26-27 Mumbai-Pune Road, Pimpri, Pune - 411001 … ***Appellant***

versus

Commissioner of Central Excise
Pune – I
41A ICE House, Sassoon Road, Pune - 411001 ***…Respondent***

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant

Shri Amrendra Kumar Jha, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/ 87174/2023

DATE OF HEARING:	24/08/2023
DATE OF DECISION:	30/11/2023

PER: C J MATHEW

This appeal arises from order[1] of Commissioner of Central

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[1] [order-in-appeal no. P-I/MMD/184/2012 dated 27th September 2012]

Excise (Appeals), Pune – I which upheld the confirmation of demand of ₹43,48,897/-, under section 11A of Central Excise Act, 1944, and imposition of penalty of like amount under section 11AC of Central Excise Act, 1944 by the original authority in relation to clearance of goods from their unit at Pimpri between April 2007 and March 2009 and April 2010 and March 2010 to their own factories at Urse and Goa.

2. The goods that attained ‘semi-finished’ form at their Pimpri factory were cleared to the other two units for utilization in manufacture of ‘cables and wires’ and, by recourse to rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 the appellant had been discharging duty liability under Central Excise Act, 1944 by adopting computation in certificate of cost accountant, based on CAS-4, on which 10%, as required by the relevant rule under which they had claimed coverage, was added.

3. It is the submission of the appellant that they had been furnishing the monthly certificate of cost accountant and that, at a certain stage, central excise authorities required them to re-determine cost of production on the basis of CAS-4 pertaining to the financial year which would then be an anuual exercise instead of monthly determination of assessable value.

4. According to Learned Authorised Representative, recourse by the appellant to monthly CAS-4 data was deliberate attempt to avoid

resort to ‘provisional assessment’ implicit in relying upon CAS-4 for each financial year. Hence, the lower authorities proceeded to re-determine liability as finalization of ‘provisional assessment’ would have been.

5. Learned Counsel for the appellant submits that identical issue had been taken up and disposed off, *vide* order[2] of the Tribunal, while hearing excise appeal[3] arising out of order[4] of Commissioner of Central Excise (Appeals), Pune-I. It was pointed out that the said order of the Tribunal, pertaining to the period from 2005-06 and 2006-07 had held that

> *‘4.3 Undisputedly Appellants submitted the CAS-4 certificates along with their ER-1 returns. The CAS-4 certificate mentions that valuation was done on the basis of previous year's figures and adjustment on account of inflation was done. They had adopted the above method of valuation since July 2000 when Valuation Rules, 2000 were introduced. As per chapter 6.8 of ICWAI guidelines, the cost of production can be determined on the basis of previous quarterly result also. The Appellants have appropriately taken cost figures of the previous month's CAS-4 certificates as a basis to arrive at the cost of production of each month. There was no objection whatsoever by the department at any point of time. For the first time in February 2008, during the course of audit for the period April 2006 to March 2007, this practice was objected and the Appellants were asked to*

[2] [final order no. A/85967/2022 dated 23rd September 2022]
[3] [E/1540/2012]
[4] [order-in-appeal no. P-I/MMD/148/2012 dated 31st July 2012]

redetermine cost of production on the basis of final annual CAS-4 of April 2006 to March 2007.

4.4 If the Appellants are to value their clearance on the basis of annual CAS-4 figures, they have paid excess duty in some instances as is admitted in the show cause notice, order in original and the impugned order. Further the both the authorities have concluded in the order against adjustment of the excess payment of duty against short payment on the ground of unjust enrichment. Both authorities also hold that the assessments were provisional. The stand of the lower authorities is self contradictory and contrary to the observations made by the Hon'ble Apex Court in case of Mafatlal Industries [1997 (89) ELT 247 (SC)] para 95, reproduced below:

> *"95.Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is asssessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under subrule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) reagitating the issues already decided under Rule 9B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."*

4.5 W have no quarrel with case laws relied upon by the revenue to the effect that assessment of the captively consumed goods needs to be done on the basis of CAS-4 certificate. It is also the case of the appellant that they made the assessment of the goods captively consumed in their sister concern on the basis of CAS-4 certificate, duly issued by the Cost Accountant. That being so the assessments made on the basis of the CAS-4 certificates as per these decision has to be treated as final.

4.6 Appellants have while filing the ER-1 return disclosed all the facts and have also submitted the CAS-4 certificate also. The department was aware of the valuation practices adopted by the Appellants. All the material facts relating to the manufacture, clearance and valuation of the cables used in the captive consumption were always within the knowledge of the department. The ER-1 returns also show that there was interplant transfer. Undisputedly appellant had during few months excess paid the duty. This clearly shows that the alleged short payment of duty was not accompanied with intention to evade payment of duty. Therefore, when the Appellants have paid duty in excess of what was payable as per the department, the finding of suppression cannot survive against the Appellants. In our view appellants have not violated any provisions of the Central Excise Act or the rules made thereunder. Thus even if there was any short payment of duty the same was on the basis of the CAS-4 certificate issue by the independent Cost Accountant, was due to bonafide belief of the Appellants regarding determination of assessable value, cannot be on account of suppression, fraud misstatement or contravention of the rule with the intention to evade payment of duty leading to invocation of extended period of limitation as per the proviso to Section 11A (1) of the Central Excise Act,1944.'

6. Accordingly, in the absence of exercise of option by the assessee for ‘provisional assessment’, it is not open to central excise authorities to deem the clearances to have been provisional and to proceed with final assessment for each year. Respectfully following the above decision, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 30/11/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*