**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 89376 OF 2013

[Arising out of Order-in-Appeal No: PUN-EXCUS-001-APP-090-13-14 dated 23rd August 2013 passed by the Commissioner of Central Excise (Appeals), Pune – I.]

Finolex Cables Ltd
26-27 Mumbai-Pune Road, Pimpri, Pune - 411018 … ***Appellant***

versus

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

WITH

EXCISE APPEAL NO: 89673 OF 2013

[Arising out of Order-in-Appeal No: PUN-EXCUS-001-APP-121-13-14 dated 18th October 2013 passed by the Commissioner of Central Excise (Appeals), Pune – I.]

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

versus

Finolex Cables Ltd
26-27 Mumbai-Pune Road, Pimpri, Pune - 411018 ***…Respondent***

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the assesse-appellant

Shri P K Acharya, Superintendent (AR) for Revenue

CORAM:

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

FINAL ORDER NO: 85537-85538/2024

DATE OF HEARING: 05/12/2023
DATE OF DECISION: 03/06/2024

PER: C J MATHEW

M/s Finolex Cables Ltd, aggrieved by the direction of Assistant Commissioner of Central Excise, Pune–III dated 17th January 2013 that assessment of goods cleared from their Pimpri factory to other undertakings of theirs in 2012-13 should be 'provisional' in terms of rule 7 of Central Excise Rules, 2002, is in appeal before us impugning order[1] for 2012- 13 of Commissioner of Central Excise (Appeals), Pune - I for dismissal of their appeal. Appellant-assessee is a manufacturer of 'insulated wires and cables', 'semi-finished cables' and 'copper wire' among other excisable goods and had been clearing 'intermediate products' to their factories at Urse and Goa on payment of duties of central excise and, owing to the nature of relationship as well as intended use of the 'intermediate products', at assessable value computed according to rule 8 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000 before and since. Based on costing of the product at the end of each year, the assessable value was revised for ascertainment of additional duty liability which was being duly discharged for each year, along with interest and that practice was being continued when the jurisdictional authority intervened with order to

[1] [order-in-appeal no. PUN-EXCUS-001-APP-090-13-14 dated 23rd August 2013]

deem the assessment, and unilaterally, as provisional.

2. That order was carried to the first appellate authority for inconsistency with the very provision in law that had been invoked by the Assistant Commissioner of Central Excise and it was held that

> *'7. The facts of the case reveal that the goods are being cleared for captive consumption and the Appellants were unable to determine value under Section 4 of the Central Excise Act, 1944 for the purposes of charging Central Excise duty at the time of clearance. In view of the legal provisions, since the goods are being cleared to related units, the subject goods are to be assessed under the provisions of Section 4(l)(b) of the Central Excise Act, 1944 and the value of the impugned goods should be arrived at as per the provisions of Rule 8 of the Central Excise Valuation Rules, 2000. Appellants have not disputed that the cost of production in this case was not final at the time of clearance of these goods. The Appellants have argued that the Order of Provisional Assessment cannot be suo motu and in absence of a request by them. 1 find that the provisions of Sec. 4 of the Act read with Rule 6 of the Rules mandates that correct assessable value of the goods is to be determined for the purpose of charging of duty. In a situation where it is not possible to comply with the provisions of Rule 6 of the Rules, the available option is resorting to Rule 7 of the Rules. Thus, under the available provisions an assessee has to decide as to "whether duty payable on the goods is to be determined under Rule 6 or Rule 7. It is not the option available to the assessee not to resort to either of the rules. In a situation where the assessee fails to opt for the said option the competent authority can take the decision in the interest of revenue. As such the argument advanced by the Appellants is*

> *not valid. In the instant case the Appellants should have opted for the provisional assessment as per Rule 7 of Rules and submit the cost of subject goods by submitting CAS-4 at the end of financial year, on the basis of audited balance sheet of that particular financial year. However, the Appellants have refrained from doing so in spite of being pointed out by the jurisdictional range superintendent. An officer who is competent to issue an order on the request of an assessee is also competent to issue an order on his own. I do not find any infirmity in the Assistant Commissioner issuing the Provisional Assessment Order on his own when admittedly the Appellants were unable to determine the value of excisable goods. It is not the Appellants' case that they have been asked to pay duty, or some fine or penalty has been imposed under the said order. Therefore, the argument advanced by the Appellants that the Asstt. Commissioner should have issued a Show Cause Notice before issuing the Provisional Assessment Order is not legally correct. Rule 7(3) of the Rules empowers the jurisdictional Asstt. Commissioner to issue the Provisional Assessment Order and it is not warranted to issue a Show Cause Notice for doing so.'*

leading to appeal of M/s Finolex Cables Ltd.

3. However, on a similar order of the jurisdictional Assistant Commissioner of Central Excise pertaining to clearance of 'polyvinyl chloride compound' from their Chinchwad unit to their unit at Urse for the same period of dispute, the first appellate authority *vide* its order[2] took a contrary stand thus

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[2] [order-in-appeal no. PUN-EXCUS-001-APP-121-13-14 dated 18th October 2013]

‘8. In the instant case the Appellants have not requested for the Provisional Assessment under Rule 7 of the Rules and the jurisdictional Asstt, Commissioner has issued Provisional Assessment Order dtd. 18-01-2013. The Appellants have argued that the Order of Provisional Assessment cannot be issued suo moto in the absence of a request by them. I find that the matter has been clarified vide Board's instructions appearing in Part IV of Chapter 3 the CBE &C Central Excise Manual. For ease of reference the relevant portion of the said instructions

> *'3,1 Rule 7 of the said Rules does not provide for the Department, suo moto, issuing directions for resorting to provisional assessment. Therefore, when the Central Excise Officer, during scrutiny or otherwise, find that self-assessment is not in order the assessee may be asked for all necessary document, records or other information for issue of duty demand for differential duty, if any, after conducting inquiry. Where the assessee fails to provide the, records or information and Department is unable to issue demand, the "Best Judgment" method may be used to raise demand based on collateral evidences. The burden will be on the assessee to provide information for appropriate re-determination of duty, if any.'*

From these instructions it is amply clear that if the Appellants/assessee refrain from opting for the Provisional Assessment even when the goods cannot be finally assessed at the time of clearance thereof, the correct action is not ordering provisional assessment suo motu but to call for the records/ information for issuance of the demand of differential duty as clarified by the Board. I thus find that the Adjudicating Authority has erred in Provisional Assessment of his own assertion and the argument advanced by the Appellants is valid to that extent.’

4. Learned Counsel for appellant, M/s Finolex Cables Ltd, contends that the finding *supra* is incorrect as the express provision in law precludes unilateral action by jurisdictional central excise authorities.

He intimated that identical impediment at the instance of jurisdictional authorities for earlier periods had either been overruled at the stage of the first appellate authority and appeal of jurisdictional Commissioner of Central Excise thereafter dismissed by the Tribunal or the upholding thereof in appeal set aside by the Tribunal. We have heard Learned Authorized Representative at length.

5. We find that the impugned order has set out the issue in dispute correctly but has gone on to find that the lack of exercise of option by an assessee in such situations enables the jurisdictional central excise authorities to do so in the interests of revenue. This is not a sustainable proposition as rule 7 of Central Excise Rules, 2002 is unambiguous in vesting the option only in the assessee to decide upon the finality of assessment – which is relevant only for the purposes of filing of monthly returns - in reporting discharge of duty liability for each month. Opting for 'provisional assessment' on the available ground of

> *'Rule 7. Provisional Assessment - (1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him.*

(2) The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

(3) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule (1)

Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reasons to be recorded in writing, be extended by the Principal Commissioner of Central Excise or Commissioner of Central Excise, as the case may be for a further period not exceeding six months and by the Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise, as the case may be for such further period as he may deem fit.

(4) The assessee shall be liable to pay interest on any amount paid or payable to the Central Government, consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under section 11AA of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

(5) Where the assesse is entitled to a refund consequent to order for final assessment under sub-rule (3), subject to sub-rule (6), there shall be paid an interest on such refund at the rate specified by the Central Government by notification issued under section 11BB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of refund.

(6) Any amount of refund determined under sub-rule (3) shall be credited to the Fund :

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

(a) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person; or

(b) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person'

in Central Excise Rules 2002 affords the privilege of such return not being taken up for scrutiny till assessment is taken up for finalization. Non-exercise of the option implies that the assessment is final and any duty not paid or short-paid is liable to be recovered by recourse to section 11A of Central Excise Act, 1944. It is this very foundation that led the Tribunal to hold that

'4. We have perused Rules 7 of the Central Excise Rules, 2002. Sub-rule (1) of such Rules states that "where the assessee is unable to determine the value of the excisable

> *goods or determine of the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him." If such permission is granted, the rule provides Air execution of a Bond by the assessee with such surety or security as the said Assistant Commissioner may specify. The Rule further provides that where the provisional assessment has been sought, the Assistant Commissioner of Central Excise shall pass order for final assessment as soon as may be. The C.B.E. & C. Manual also, in para 3.1 thereof, states that Rule 7 of the Central Excise Rules does not provide for the department, suo motu, issuing directions for resorting to provisional assessment. Therefore, when the Central Excise officers, during the scrutiny or otherwise, find that self-assessment is not in order, the assessee may be asked for all necessary documents, records or other information for issue duty demand for differential duty, if any, after conducting proper inquiry and in case the assessee fails to provide the records/information, 'best judgment' method may be adopted to demand the duty. Thus, both the Rule and instructions issued thereon provides for assessment of duty finally in a case where assessee is unable to determine the correct amount of duty or correct rate of duty and also does not opt for provisional assessment.'*

in *Commissioner of Central Excise, Pune -I v. Finolex Cables Ltd [2014 (308) ELT 578 (Tri-Mumbai)]* in an identical dispute in which the first appellate authority had set aside similar order for another period.

6. Consequently, the only available option was for the jurisdictional

authority to determine short-payment of duty. No such allegation of resort to recovery is on record. In such circumstances, the submission of Learned Authorized Representative of motivated resistance to resort to rule 7 of Central Excise Rules, 2002 on the part of appellant is rendered a non-starter.

7. The Tribunal, in decision[3] disposing off appeal[4] against order[5] of Commissioner of Central Excise (Appeals), Pune–I for the immediately preceding period, has held that

> *'5. Learned Counsel for the appellant submits that identical issue had been taken up and disposed off, vide final order no. A/85967/2022 dated 23rd September 2022 of the Tribunal, while hearing excise appeal E/1540/2012 arising out of order order-in-appeal no. P-I/MMD/148/2012 dated 31st July 2012 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*
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> > *'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*

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[3] [final order no. A/87174/2023 dated 30th November 2023]
[4] [excise appeal no. 1974 of 2012[
[5] [order-in-appeal no. P-I/MMD/184/2012 dated 27th September 2012]

period April 2006 to March 2007, this practice was objected and the Appellants were asked to 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.'

8. The impugned order flies in the face of the law and is set aside to allow the appeal of M/s Finolex Cables Ltd. For the same reason the appeal of Commissioner of Central Excise, Pune–I is dismissed.

(Order pronounced in the open court on 03/06/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*