CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

EXCISE APPEAL No. 85201 of 2017

[Arising out of Order-in-Original No. 18/NVK/COMMR/RGD/2016-17 dated 29.06.2016 passed by the Commissioner of CGST & Central Excise, Raigad.]

Commissioner of CGST & Central Excise, Raigad .... Appellant
Raigad CGST Commissionerate
4th Floor, New Central Excise Building,
Plot No.1, Sector-17, Khandeshwar
New Panvel (West), Maharashtra – 410 206.

VERSUS

PARLE Biscuits Private Limited .... Respondent
131/2, Khopoli Pen Road
Tambati-Khirkindi, Donvat
Taluka Khalapur, District Raigad
Maharashtra.

APPEARANCE:

Shri A.K. Shrivastava, Authorized Representative for the Appellant

Shri Mayur Jain, Advocate for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86973/2025

Date of Hearing: 28.10.2025
Date of Decision: 28.10.2025

PER: M.M. PARTHIBAN

This appeal has been filed by the Commissioner of CGST & Central Excise, Raigad Commissionerate (herein after referred to as 'the appellant' for short) in pursuance of the Order No.R-04/CCO-II/MCX/2017 dated 17.01.2017 passed by the Committee of Chief Commissioners of Central Excise, assailing the Order-in-Original No. 18/NVK/COMMR/RGD/ 2016-17 dated 29.06.2016 (referred to, as 'the impugned order') passed by the Commissioner of CGST & Central Excise, Raigad.

2.1 Briefly stated, the facts of the case are that the respondent assessee M/s PARLE Biscuits Private Limited, Tambati-Khirkindi, Donvat is engaged in manufacture of excisable goods viz., Biscuits, Confectionary etc., falling under Chapters 17, 19, 33, 39 & 48 of the First Schedule to the Central Excise Tariff Act, 1985. For the purpose of payment of appropriate central excise duty and for compliance with the law they are registered their factory with jurisdictional Central Excise authorities and are holding Central Excise Registration No. AAACP0485DXM004. The appellants avail CENVAT credit of duty paid on inputs, capital goods and input services used for manufacture of final products and utilize the said credit for payment of duty on their final products.

2.2 During the course of audit of the books of accounts maintained by the respondent assessee for the financial years 2012-2013 and 2013-2014, the department had found that the respondent had transferred/cleared their finished goods such as Flavours, Wrapper and Corrugated boxes to their related units at the rate determined on the basis of CAS-4 certificate issued for the financial year 2011-2012. In terms of Rule 8 of the Central Excise (Valuation) Rules, 2000 read Section 4(1)(b) of the Central Excise Act, 1944, the clearances should have been based on the CAS-4 certificates for the relevant financial years 2012-13 and 2013-14. Accordingly, the department requested the respondent assessee to pay the differential duty arising on account of the difference in CAS-4 values for the years 2012-13 and 2013-14 vide letter dated 28.04.2014.

2.3 The respondent assessee vide their letters dated 02.06.2014 and 19.07.2014 had informed the department, that they had in accepting the audit objection had paid the differential duty of Rs.42,87,454/- towards Basic Excise Duty (BED), Rs.85,749/- towards Educational Cess and Rs.42,875/- Higher Education Cess for the year 2012-13 along with interest of Rs.12,51,590/-. Similarly, vide letter dated 29.09.2014, the respondent had also informed the department that they had further paid an amount of Rs.91,84,692/- towards BED, Rs.1,83,694 on account of ED. Cess and Rs.91,847/- towards Higher education cess for the year 2013-14 along with interest of Rs.14,59,000/-. However, the department had issued a Show Cause Notice (SCN) dated 16.07.2015 seeking for demand of differential duty along with interest and proposed for imposition of penalties on the respondent under Rule 25 of Central Excise Rules, 2002 read with Section 11AC (1)(c) of the Central Excise Act, 1944 for contravention of Rule 8 of CVR, 2000. In adjudication of the aforesaid SCN, the learned Commissioner of Central Excise had confirmed the differential duty demands and appropriated the amount already paid by the respondent along with interest. However, on the basis of his detailed examination of the case, he had held that there is no ground for imposition of penalty on the respondent. Feeling aggrieved with the said decision in the order passed by the Commissioner, the department had filed this appeal before the Tribunal.

3. Heard both sides and perused the records of the case along with additional paper books filed in the form of written submissions for this case.

4. From the facts of the case, it transpires that the SCN in F. No. V/ Adj (SCN)/15-214/RGD/15-16 dated 16.07.2015 demanding differential duty arising on account of variation in the rates/value adopted on the basis of CAS-4 certificate was issued by the department on the following grounds. The relevant extract of the SCN in this regard is as follows:

> *"4. The assessee are working under Self Removal Procedure and it was their legal duty under Rule 6 of the Central Excise Rules, 2002 to assess the goods properly and pay appropriate central excise duty due thereon. However, the assessee appears to have undervalued the goods deliberately by clearing the same on CAS-4 certificates for the year thousand 2011-12 in spite of the fact that the CAS-4 certificates for the year 2012-13 & 2013-14 were available with them during the relevant time of clearance of goods. This deliberate act of the assessee appears to be with an intention to evade payment of Central Excise duty. The undervaluation of the goods has been detected by the departmental auditors during EA-2000 audit conducted on the records of the assessee and the short payment of duty would have gone unnoticed had it not been detected by the auditors during audit. For this deliberate act of undervaluation the goods with an intention to evade payment of Central Excise duty, the provisions of section 11A(4) of Central Excise Act, 1944 appears to be invokable in the case…."*

5.1 It is further seen that the respondent assessee had paid the entire differential duty along with interest and informed the details to the department vide their letters dated 02.06.2014, 19.07.2014 and 29.09.2014. Further, they had also submitted to the department that upon finalization of their books of accounts after the end of the financial year and upon reconciliation with financial audited accounts, revised CAS-4 rates/ figures are arrived at by their auditors. Accordingly, upon such determination of the rates after finalisation of their books of accounts, they had paid the differential duty. Therefore, they had also accepted the objection raised by the audit team during the verification of their books of accounts. Since all the details were properly captured in their books of accounts, the respondent had claimed that there is no case of suppression for invoking extended period and for imposition of penalty.

5.2 In the order dated 17.01.2017 arising from the review proceedings of the Committee of Chief Commissioners of Central Excise, the following grounds appears to be basis for the department preferring an appeal before this Tribunal, in respect of non-imposition of mandatory penalty for invoking the extended period of time.

> *"4.3…….The assessee accepted & paid the tax liability for the aforesaid periods only after the same was detected in Audit on the records of the assessee. But for the detection by the audit, this would not have come to light. The findings of Audit had in fact the exposed the intent of the assessee evade payment of duty. The mens rea is proved beyond doubt and ingredients of section 11A(4) of the CEA, 1944 stand satisfied for invoking extended period.*
>
> *4.4 Further, the intention to evade duty is also clearly established in view of the fact that there was substantial difference between the actual duty paid by the assessee at the time of clearances and the duty payable by them. The assessee was bound by law to pay the differential duty immediately on finalisation of accounts. These payments were only made subsequently on being pointed out by the audit. As spelt out in the SCN the short payment would have gone remained/unnoticed had it not been detected in Audit. The financial gain by way of availability of the said amount was a clear pointer has to the reason for the intent to evade duty. Thus, there is a suppression of fact with an intention to evade payment of duty and therefore, section 11A(4) of the CEA, 1944 has rightly been invoked in the SCN."*

6. In this regard, we find that the learned Commissioner as original adjudicating authority had examined the details of the case as above, and have held as follows:

> *"15 (iv)…….In case of CAS-4 valuations where the duty is not determinable at the time and place of clearance, the law itself has stretched the boundaries of payment wherein the 'differential duty' arising out of reconciliation of the CAS-4 certificates and finalisation of the financial accounts can be paid at a later stage. Hence I do not think it as a fit case to weigh in the same category of case, where in an assessee who were supposed to pay duty on CAS-4 method and did not do so…..*
>
> *15 (v)………After being pointed out by the department, they paid the duty and incidental interest without protest. The provision for raising demand notice under Section 11A of the Central Excise Act, 1944 and under Section 11A(4) are demarcated based on the conduct of the assessee, mens rea and culpable state.*
>
> *15(vii)…….I do not find any ingredient for invoking extended period in the demand notice is substantiated. The record on the basis of which the allegations are levelled are proper documents which they are supposed to maintain under the law and as such they were not incriminating documents as such. The Central Excise invoices/duty payment particulars/requisite permissions under relevant notifications etc. were the documents submitted to the Department in the course of compliance of Central Excise Law and procedure. This being the position, I do not find that the malafides mentioned in Section 11A(4) of the Central Excise Act, 1944 for invoking extended period are attracted in this case.*
>
> *xxx xxx xxx xxx*

(iii) Since no case is made out for invoking extended period, Hence, I find that penalties under Rule 25 of the Central Excise Rules, 2002 dealing with confiscation and penalties read with section 11AC of the Central Excise Act, 1944 are not attracted in the facts of the case. The law itself has an inbuilt deeming provision in the form of proviso to section 11AC(1)(a) of the Central Excise Act, 1944 which stipulates conclusion of the proceedings if duty and interest payments are made before the issue of demand notice."

7. From the facts of the case as above, it transpires that the grounds for invocation of extended period is that there is substantial difference in the amount of duty payable by the respondent assessee and the duty actually paid by them at the time of clearances; and that CAS-4 certificates figures were different and the same which was available were not adopted. It does not appeal to any logic leading to the ingredients of suppression of facts or mis-statement, for the reasons that, when the entire details are recorded in the financial statements of the Respondent company, and that upon finalisation of annual financial accounts and after due verification by the internal team, they had adopted the revised value as per CAS-4 certificates for the relevant financial years, there is no element of suppression of any fact. Therefore, in our considered opinion there is no ground for invoking extended period of limitation for demand of duty or imposition of penalty on the respondent assessee. It is also important to note that upon pointing out the mistake by the audit officers, the respondent assessee had voluntarily paid the entire differential duty along with applicable interest and also informed the same to the Department. The SCN dated 16.07.2015 has been issued much after payment of such differential duty, and therefore the basis for issue of SCN itself is unfound, particularly in view of the legal provisions contained in proviso to Section 11AC (1) (a) of the Central Excise Act, 1944 read with Explanation 1. The extract of the same is as follows:

"Section 11AC. Penalty for short-levy or non-levy of duty in certain cases.

(1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows:—

(a) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any wilful 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 (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent of the duty so determined or rupees five thousand, whichever is higher:

***Provided** that where such duty and interest payable under section 11AA is paid either before the issue of show cause notice or within thirty days of issue of show cause notice, no penalty shall be payable by the person liable to pay duty or the person who has paid the duty and all* *proceedings in respect of said duty and interest shall be deemed to be concluded;*

....

Explanation 1.— For the removal of doubts, it is hereby declared that—

(i) any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where no show cause notice has been issued before the date on which the Finance Bill, 2015 receives the assent of the President shall be governed by the provisions of section 11AC as amended by the Finance Act, 2015;…"

As the said provisions were effective from 10.05.2015, and the SCN was issued subsequent to this amendment on 16.07.2015, imposition of penalty under section 11AC(1) ibid is contrary to the legal provisions in force. Therefore, we are of the view that the learned adjudicating authority had correctly refrained from imposing penalty under section 11AC(1)(a) of the Central Excise Act, 1944.

8.1 We further find that the Tribunal in a number of cases have decided that extended period of limitation cannot be invoked unless the specific ingredients such as fraud, collusion, wilful mis-statement, suppression of facts, contravention of any of the provisions with an intent to evade is present and there are valid evidences proving such a case. The various case laws relied upon by the respondent assessee is also supporting of this.

8.2 We find that in a number of cases, the Hon'ble Supreme Court had laid down the test for invoking the extended period of limitation. To illustrate in the case of *Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay* - 1995 (78) E.L.T. 401 (S.C.) have held as follows:

"4. *Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

8.3 In the case of case of *Commissioner of Central Excise, Visakhapatnam Vs. Tirupathi Fuels Private Limited* – 2017 (7) G.S.T.L 142 A.P. the Hon'ble High Court for State of Telangana and Andhra Pradesh have held that tax/duty and interest paid by the assessee even before issue of SCN, no penalty is imposable on the appellants. The relevant paragraphs of the judgement dated 13.03.2017 in the above case is extracted and given below:

> ***"15.*** *We have already seen that the liability to pay penalty imposed under Section 78(1) arises only after the service of notice under the proviso to Section 73(1). But, under sub-section (3) of Section 73, the Department cannot even issue a show cause notice, in cases where the Service Tax and interest has been paid, immediately upon the ascertainment of the Service Tax either on own assessment or on the basis of what was ascertained by the Central Excise Officer. Sub-section (3) was intended to confer an extended benefit much more in nature than the varying degrees of penalty imposed under the different provisos of sub-section (1) of Section 78.*
>
> ***16.*** *It is true that sub-section (4) of Section 73 keeps the operation of sub-section (3) out of the purview, in cases where the Service Tax has not been levied, paid, short-levied or short-paid by reason of fraud, collusion, wilful mis-statement, etc. But nevertheless, the law does not treat all cases of fraud, collusion, wilful misstatement, suppression of facts, etc., alike.*
>
> ***17.*** *Keeping this in mind, if we go through the order-in-original, it could be found that the respondent-assessee paid the service tax to the extent of Rs. 40,39,751/- along with interest to the tune of Rs. 12,42,633/-. This amount was paid even before the show cause notice, dated 22-4-2010, was issued. It is only in Paragraph 15(iii) and 15(iv) that the adjudicating authority has recorded a finding that the respondent-assessee wilfully suppressed the true and correct value of the freight incurred. But, the findings recorded in Paragraph 15(iii) and 15(iv), in our considered view, are not sufficient to enable the Department to fall back upon sub-section (4) of Section 73, so as to keep the application of Section 73(3) out of the reach of the respondent-assessee. Hence, we do not think that the Commissioner (Appeals) and the CESTAT were wrong in deleting the penalty. Therefore, the appeal is dismissed."*

The department not satisfied with the above order, had filed an appeal against the order of the Hon'ble High Court before the Hon'ble Supreme Court in Special Leave Petition (Civil) diary No. 31976 of 2017. The said appeal was dismissed by the Hon'ble Supreme Court by upholding the order of the High Court and observing that they *find that the view taken by the High Court is without blemish*, in its judgement delivered on 17.11.2017.

9. On the basis of the above decisions of the Tribunal and the judgement delivered by the Hon'ble High Court, Hon'ble Supreme Court, we do not find any grounds to interfere with the impugned order, insofar as it has dropped the proposal for imposition of penalties on the appellants in terms

of Section 11AC(1)(a) of the Central Excise Act, 1944. Accordingly, we are of the considered view that the impugned order does not require any interference and the appeal filed by the appellant department is liable to be set aside, as the same does not stand the legal scrutiny.

10. In the result, the impugned order is upheld and the appeal filed by the appellant department is dismissed.

(Operative portion of the order pronounced in the open Court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

SM