

2020-TIOL-1459-CESTAT-KOL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. II**

Excise Appeal No.79054 of 2018

Arising out of Order-in-Appeal No.93/HWH/CE/2018-19, Dated: 24.05.2018
Passed by Commissioner of CGST & Central Excise(Appeals-II), Kolkata

Date of Hearing: 23.09.2020

Date of Decision: 23.09.2020

**M/s HINDUSTAN NATIONAL GLASS AND INDUSTRIES LTD
(2, PANCHU GOPAL BHADURIA SARANI, RISHRA, P.O.
-PRABHASNAGAR, HOOGHLY-712249)**

Vs

**COMMISSIONER OF CGST AND CENTRAL EXCISE
HOWRAH COMMISSIONERATE, (M.S.BUILDING, 15/1 STRAND ROAD
KOLKATA, WEST BENGAL-700001)**

Appellant Rep by: Shri Ankit Kanodia, CA

Respondent Rep by: Shri K Choudhury, Superintendent (AR)

CORAM: P K Choudhary, Member (J)

CX - This is the second round of litigation before the Tribunal - The adjudicating authority instead of appreciating the 'modus operandi' of assessee's business and brushing aside all the documentary evidences on record has re-confirmed the demand - On appeal, the Commissioner(A) without going into the merits of case has rejected the appeal for alleged non compliance of mandatory pre-deposit - The Commissioner (A) while rejecting the appeal for non-compliance of pre-deposit under section 35F has also upheld the O-I-O without going into the merits of the case - Further, the Commissioner (A) was of the opinion that the assessee was again required to comply with the provisions of section 35F though it may be the second round of litigation before him - In this regard, the High Court of Delhi in case of *Super Tyres Pvt.Ltd.* [2005-TIOL-228-HC-DEL-CX](#) have held that once the assessee has made compliance of provisions of section 35F of CEA, 1944, it would be appropriate for authorities concerned to hear the appeal without

pre-deposit condition as assessee had already complied with provisions of section 35F and that should be the adequate amount of compliance with provisions of section 35F - Matter is remanded to the lower appellate authority to decide the appeal on merits without insisting on any further pre-deposit: CESTAT

Matter remanded

Case law cited:

Super Tyres Pvt.Ltd. v. Union of India - [2005-TIOL-228-HC-DEL-CX... Para 3](#)

FINAL ORDER NO. 75410/2020

Per: P K Choudhary:

This is second round of litigation before the Tribunal. The Tribunal in the earlier *Order being F/O/75681/2017 dated 31.01.2017* had observed as under:-

"4. I find from the impugned order that the appellant clarified the differential quantity and produced "inter-Office Memo" dated 31.03.2011, and "inter-Office Memo" dated 06.04.2011. The Commissioner(Appeals) observed that the appellant had not produced a cogent proof by which the difference could be certified. In this context, the ld.Counsel drew the attention of the Bench to the Chartered Accountant's Certificate and the various case laws."

2. On going through the de novo Order-in-Original No.25/RDN/Adjn/2017 dated 24.10.2017 I observe that the adjudicating authority in his discussion and findings has stated as under:-

"I find that Rule 16C of Central Excise Rules, 2002 clearly stated that the Commissioner of Central Excise may, by special order and subject to such conditions as may be specified by him, permit a manufacture to remove excisable goods manufactured in his factory, without payment of duty, for carrying out tests or any other process not amounting to manufacture, to any other premises, whether or not registered, and after carrying out such tests or any such others may allow. But in the instant case, the assessee not produced any documents. So, from the above, it is clearly established that the assessee cleared glass bottles without obtaining any permission from the Commissioner. So, the assessee's submission during the time of personal hearing relating to Revised Daily Stock Account and Chartered Accountant's Certificate is not acceptable in the instant case. I find that why a difference in showing the two figures although both the figures in ER-1 & ER-4 should have been prepared on the basis of figure of stock of finished goods in monthly basis for ER-1 and yearly basis for ER-4. Moreover, the assessee has intimated verbally that they are using the SAP system in maintaining the accounts, so it is expected that there should have not been occurred any mistake at the time of preparing both the returns. In the instant case the assessee could not produce any cogent proof by which the difference could be certified."

3. The adjudicating authority instead of appreciating the 'modus operandi' of the assessee's business and brushing aside all the documentary evidences on record has re-confirmed the demand. On appeal the learned Commissioner(Appeals) without going into the merits of the case has rejected the appeal for the alleged non

compliance of the mandatory pre-deposit. Learned Commissioner(Appeals) while rejecting the appeal for non-compliance of pre-deposit under section 35F has also upheld the Order-in-Original without going into the merits of the case. Further the learned Commissioner(Appeals) was of the opinion that the appellant assessee was again required to comply with the provisions of section 35F though it may be the second round of litigation before him. In this regard the Hon'ble High Court of Delhi in the case of *Super Tyres Pvt.Ltd. v. Union of India reported in 2005 (186) E.L.T. 49(Del.) = [2005-TIOL-228-HC-DEL-CX](#)* in a Writ Petition decided on 10.01.2005, have held that once the appellant assessee has made compliance of the provisions of section 35F of the Central Excise Act, 1944, it would be appropriate for the authorities concerned to hear the appeal without pre-deposit condition as the appellant had already complied with the provisions of section 35F and that should be the adequate amount of compliance with the provisions of section 35F.

4. In view of the above discussions, it would be appropriate to remand the matter to the lower appellate authority to decide the appeal on merits without insisting on any further pre-deposit. All issues are kept open. Both sides are at liberty to place evidences in their favour.

The appeal is allowed by way of remand to the learned Commissioner(Appeals).

(Dictated and pronounced in the open Court.)

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