2021-TIOL-546-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, KOLKATA
COURT NO. 2

Excise Appeal No. 75215 of 2020

[Arising out of Order-in-Original No. 03/Commr./CGST & CEx./HWH/Adjn./2020-21 Dated: 15.05.2020
Passed by Commissioner of CGST & Excise, Howrah]

Date of Hearing: 10.08.2021
Date of Decision: 13.08.2021

M/s BENGAL BEVERAGES PVT LTD

Vs

COMMISSIONER OF CGST & EXCISE, HOWRAH

Appellant Rep by: Shri Ankit Kanodia, Adv.
Respondent Rep by: Shri A Roy, Authorized Representative

CORAM: P K Choudhary, Member (J)

CX - The appellant is engaged in manufacture of aerated water and fruit-based beverages - Demand confirmed on the ground that there are differences in quantity of consumption of preform as per ER-6 and form 3CD as filed by appellant by taking into account 100% conversion of preform into PET bottles - It is the case of department that the appellant has manufactured and cleared said excess PET bottles without payment of excise duty on the same and resorting to clandestine removal - Figures in reconciliation provided by appellant between 3CD and ER-6 clearly account for wastage during the manufacturing process which ranges from 0.40% to 1.60% in different years and the same is within the normal industry average of two percent as per the appellant's submission - Lower authority has not at all taken into account the plea of appellant as regards wastage of the preform during manufacturing process whereas the same has been clearly established by appellant in its reconciliation provided at all occasions - Hence, the finding of Adjudicating authority is devoid of any merits - No investigation has been conducted by department to prove the allegation of clandestine manufacture and removal of PET bottles and thus the recovery of excise duty merely based on differences in figures of consumption cannot be made by department - Further, demand has been raised for the period 2012-13 onwards in July 2018 whereas the spot memo was issued by Department in August 2014 itself - No explanation has been furthered by Department in respect of such gross delay in proceeding with the matter - Therefore, invocation of extended period of limitation is not justified - Demand of excise duty only on assumption and presumption without being substantiated by sufficient evidence, cannot be sustained on merits and is accordingly set aside - Since demand of excise duty is set aside, penalty and interest are also not sustainable: CESTAT

Appeal alowed

Case laws cited:

COMMISSIONER OF CENTRAL EXCISE, AURANGABAD Versus COSMOS FILMS LTD. 2013 (292) E.L.T. 116 (Tri. - Mumbai)...Para 8

SRI DURGA CABLES PVT. LTD. Versus COMMR. OF C. EX. & CUS., BHUBANESWAR-I 2020 (374) E.L.T. 459 (Tri. - Kolkata)...Para 10

FINAL ORDER NO.75443/2021

Per: P K Choudhary:

The present appeal has been filed by the Appellant being aggrieved with the Order-in-Original dated 15 November, 2020 passed by the learned Commissioner, whereby the demand of excise duty of Rs.35,68,644/- has been confirmed for the period 2012-13, 2014-15 and 2015-16, along with interest and imposition of penalty.

2. Briefly stated, the facts of the case are that the Appellant is engaged in the manufacture of aerated water and fruit-based beverages classifiable under Chapter 22 of the First schedule of the Central Excise Tariff Act, 1985. During the audit of the records of the appellant by the Central Excise Audit wing of the department, it was noticed that on scrutiny of the return filed by the appellant with the Income Tax department and ER 6 return filed by the appellant for the years 2012-13 and 2014-15 to 2015-16, there was difference in consumption of preform figures as reported in both the above documents and since the Appellant has not accounted for the production of PET bottles from preforms in their daily stock account, it is to be considered that all such preforms taken into use as shown in ER 6 returns were converted into PET bottles and thus the Appellant had manufactured pet bottles in excess of what is shown in ER 1 returns and hence it was stated that the appellant has clandestinely removed such goods without payment of excise duty. Based on the above, on July 27, 2018, the Commissioner of CGST & CX, Audit II Commissionerate (hereinafter referred to as the Commissioner) issued a Show Cause - cum - Demand Notice to the Appellant proposing to demand excise duty on the differential quantity of preform consumption as per ER 6 and form 3CD by considering 100% conversion of preform to PET bottles. The appellant vide reply dated April 25, 2019 duly complied to the said show cause - cum - demand notice pointing out ***inter alia***
that there is no difference in consumption figures as per ER 6 and 3CD for preform and that the department has erred in considering 100% conversion of preform to PET bottles without giving any cognizance to the wastage of the preform as well as PET bottles during the production cycle. The Appellant further contended that demand is based only on the comparison of the figures reported in the annexure of the tax audit report for the years 2012-13 and 2014-15 to 2015-16 and ER 6 without any other substantive allegation in this regard. The Appellant also stated that the demand of duty can be established in the present case if the basic allegation of clandestine removal is proved against the Appellant, which has not at all been discussed or touched upon by the Ld. Adjudicating authority which proves that there is no clandestine removal done by the Appellant and thus the demand also fails in its entirety. The appellant further contended that the said show cause - cum - demand notice was substantially barred by limitation. Hence, the present appeal before the Tribunal.

3. Shri Ankit Kanodia, learned Advocate, appeared on behalf of the Appellant. He contended that the excise duty demand is not sustainable for the following reasons:

(i) demand is based only on the comparison of the figures reported in the annexure of the tax audit report for the years 2012-13 and 2014-15 to 2015-16 and ER 6 for preforms without any other substantive allegation in this regard;

(ii) the department has erred in considering 100% conversion of pre form to PET bottles without considering the percentage of wastage of preforms during the manufacturing process as detailed by the Appellant by way of flow charts also;

(iii) that the Appellant has already provided detailed reconciliation for the same before the Adjudicating authority which has not been considered though there is no difference in consumption figures between the ER 6 and FORM 3CD for all the years under dispute

(iv) the Adjudicating authority has not discussed any reasons for confirmation of demand on account of clandestine removal and the same has not been brought on record;

3.1 He further relied on the following judgments which have held that to prove the allegation of clandestine removal of goods, the evidence must be brought by the department:

a. PENNZOIL QUAKER STATE INDIA LTD. Versus COMMISSIONER OF C. EX., BELAPUR 2016 (344) E.L.T. 401 (Tri. - Mumbai) = 2016-TIOL-572-CESTAT-MUM

b. SHIVALAYA ISPAT & POWER PVT. LTD. Versus COMMISSIONER OF C. EX., RAIPUR 2017 (357) E.L.T. 742 (Tri. - Del.) = 2017-TIOL-601-CESTAT-DEL

c. GOLDEN STEEL CORPORATION LTD. Versus COMMISSIONER OF C. EX., KOLKATA-II 2017 (347) E.L.T. 570 (Tri. - Kolkata) =

2017-TIOL-440-CESTAT-KOL

d. HINDUSTHAN COCA COLA BEVERAGES PVT. LTD. Versus C.C.E. & S.T., PATNA 2012 (284) E.L.T. 254 (Tri. - Kolkata)

e. COMMISSIONER OF CENTRAL EXCISE, AURANGABAD Versus COSMOS FILMS LTD. 2013 (292) E.L.T. 116 (Tri. - Mumbai)

3.2 The learned Advocate has also produced reconciliation copies to show the actual wastage of preform and PET bottles during various stage of manufacturing depicted by the flowchart and thus concluded that there is no difference in figures of consumption of pre form between 3CD and ER 6 for the period under dispute.

3.3. It is his submission that the demand is also barred by limitation as the demand covers the period from 2012-13 and 2014-15 to 2015-16 whereas the SCN was issued on July 27, 2018 much after the expiry of normal period of limitation. He further submits that the spot memo was issued in August 2014 whereas the SCN was issued in July 2018 and thus the question of invoking extended period of limitation does not arise as the department was fully aware of the facts of the case of the Appellant and hence, no penalty is imposable.

4. The learned Authorized Representative appearing on behalf of the respondent department, justified the order of the lower authority.

5. Heard both sides through video conferencing and perused the appeal records.

6. In the instant case, it is seen that the Adjudicating Authority has confirmed the demand of excise duty only on the ground that there are differences in quantity of consumption of preform as per ER-6 and form 3CD as filed by the Appellant by taking into account 100% conversion of preform into PET bottles. It is the case of the department that the said Appellant has manufactured and cleared the said excess PET bottles without payment of excise duty on the same and resorting to clandestine removal. However, it is seen that such allegation is only on the basis of the figure work of the department without production of any other evidence for demand of excise duty for clandestine removal of manufactured goods. The Appellant on the other hand has maintained since its reply to the spot memo in 2014 that the department has erred in taking 100% conversion ratio of Preforms into PET bottles by ignoring the impact of manufacturing wastage of preform as well as PET bottles during different stages of manufacturing as per the detailed flow chart in page 14 of the appeal paper book.

7. I find that the figures in the reconciliation provided by the Appellant between 3CD and ER-6 clearly account for the wastage during the manufacturing process which ranges from 0.40% to 1.60% percentage in different years and the same is within the normal industry average of two percent as per the Appellant's submission. I further find that the lower authority has not at all taken into account the plea of the Appellant as regards wastage of the preform during the manufacturing process whereas the same has been clearly established by the Appellant in its reconciliation provided at all occasions. Hence the order of the adjudicating authority deserves to be set aside to the above extent as the same is based on assumption and without any cogent evidence for 100% conversion of preform in to PET bottles.

8. Further, I find that the Tribunal in the case of
COMMISSIONER OF CENTRAL EXCISE, AURANGABAD Versus COSMOS FILMS LTD. 2013 (292) E.L.T. 116 (Tri. - Mumbai) held that:

"6. Considered the submissions made by both sides and perused the impugned order. On perusal of the impugned order, I find that the Commissioner (Appeals) has considered the issue in detail on the basis of record produced by the respondent and thereafter has recorded the following observations. "…….. I have perused the quantity of shortages shown in form 3 CD yearwise which are appearing in Question No. 8 of statement of J. Gupta dated 12-8-1997. Accordingly, total shortages reflected during 92-93 to 95-96 were 60 MT and particularly in the year 1995-96 they were shown as 11MT as against 67MT for the same year i.e. 1995-96 as were calculated and mentioned in Annexure B of the impugned show-cause notice dated 4-12-1997 issued by the Addl. Commissioner Central Excise Aurangabad. The variations in shortage have not been properly investigated by the Revenue. There is no evidence to substantiate that these raw materials had been cleared clandestinely. On the contrary there appears force in Appellants' contention that there was processing loss during the manufacturing of final product . ……. In any case the percentage loss of raw material consumption has been in the order of 0.415%, 0.223% and 1.05 the year 1993-94, 1994-95 & 1995-96 respectively. The total percentage loss in the three financial years has been only 0.612% i.e. even less than 1% which is quite insignificant. It is also to be observed that the Appellants have been declaring such losses of raw material in the manufacturing process in their annual declarations filed in 3CD Forms to the Income Tax authorities during the years earlier to and after to the subject years. No demand of modvat credit involved on such loss of raw material consumption has since been raised by the department in respect of 3CD Form submitted by the Appellants in the years subsequent to the subject years. This point also goes in the Appellants' favour. …….. In view of the above submissions of the Appellant it is conceded that the Appellants could very well substantiate their claims that the alleged shortage of inputs was on account of process loss . Hence, the demand of credit involved in such inputs found in shortage is not sustainable. As such the imposition of penalty as well as recovery of interest deserves to be quashed and set aside."

7. On going through the above finding of the ld. Commissioner (Appeals), I do not find any infirmity in the same. Therefore, I do agree with the finding of the ld. Commissioner (Appeals) on the basis of argument advanced by both sides before me."

9. In the instant case also, I am of the considered view that the Appellant has been able to produce the relevant reconciliations to show that there is no difference in consumption figures as per ER 6 and form 3CD of pre form and the only difference is on account of wastage which has not been considered by the lower authority. Also, for considering 100% conversion of preform into PET bottles, the Ld. Adjudicating authority has not given any basis for the same and has ignored the submission of the Appellant in this regard. Hence, the finding of the Adjudicating authority is devoid of any merits.

10. Alternatively, it is also on record that the adjudicating authority has not given any cognizance to the submission of the Appellants as regards allegation of clandestine removal and has failed to discharge the burden of proof. This Tribunal in the case of ***SRI DURGA CABLES PVT. LTD. Versus COMMR. OF C. EX. & CUS., BHUBANESWAR-I 2020 (374) E.L.T. 459 (Tri. - Kolkata)*** held that:-

"7. We find that the issue to be decided in this case is whether the appellant has clandestinely removed the goods on which the duty demand has been made. We find that in the entire proceedings, no evidence, much less corroborative evidence, has been adduced to show that input goods have been procured to manufacture goods for clandestine clearance. No evidence for extra production or unaccounted cash or statement of buyers or transporters has been obtained. It is a settled legal position that charge of clandestine clearance is a serious charge and the onus to prove the same is on the Revenue by adducing some evidence. The Tribunal has taken consistent view that in absence of corroborative evidence, the charge of clandestine clearance cannot be levelled against the assessee. Some of the decisions are as below:

- Ghodavat Pan Masala Products Ltd. v. CCE - 2004 (175) E.L.T. 182 (Tri.-Mumbai) = 2003-TIOL-326-CESTAT-MUM

- CCE v. Supreme Fire Works Factory - 2004 (163) E.L.T. 510 (Tri.-Chennai)

- CCE v. Suvidha Limited - 2009 (236) E.L.T. 675 (Tri.-Del.)

9…….. In fact, in the instant case, no shortages of goods were ever found which fact is on record and not in dispute. any case, since we have already noted hereinabove, that the whole basis of allegation of clandestine removal is the production pattern of other assessees, which has no legal or scientific basis, the impugned duty demand cannot be sustained.

10. In view of the above discussions, the impugned order cannot be sustained and accordingly the same is set aside. The appeal is allowed with consequential relief as per law."

11. Thus going by the above decision, I find that no investigation has been conducted by the department to prove the allegation of clandestine manufacture and removal of PET bottles in the case and thus the recovery of excise duty merely based on differences in figures of consumption cannot be made by the department.

12. Further, on perusal of records, I find that the demand has been raised for the period 2012-13 onwards in July 2018 whereas the spot memo was issued by the Department in August 2014 itself. No explanation has been furthered by the Department in respect of such gross delay in proceeding with the matter. Therefore, I find that invocation of extended period of limitation is not justified.

13. In view of the above discussions and the settled legal judicial precedence and provisions contained in statutes referred to above, demand of excise duty only on assumption and presumption without being substantiated by sufficient evidence, cannot be sustained on merits and is accordingly set aside. Since demand of excise duty is set aside, penalty and interest are also not sustainable.

14. The appeal filed by the Appellant is thus allowed with consequential relief, if any.

(Pronounced in the open court on 13.08.2021)