

2021-TIOL-559-CESTAT-KOL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EAST REGIONAL BENCH, KOLKATA**

Excise Appeal No. 75975 of 2018

[Arising out of Order-in-Original No. 21/COMMR/CGST & CE/HWH/Adjn/2017-18 Dated: 30.11.2017
Passed by Commissioner of Central Tax (GST & C.EX), Howrah Commissionerate]

Date of Hearing: 28.07.2021

Date of Decision: 25.08.2021

M/s BENGAL BEVERAGES PVT LTD

Vs

COMMISSIONER OF CGST AND EXCISE, HOWRAH

Appellant Rep by: Shri Ankit Kanodia, Adv.

Respondent Rep by: Shri S S Chattopadhyay, Authorized Representative

CORAM: P K Choudhary, Member (J)

Raju, Member (T)

CX

- Appellant is engaged in manufacture of aerated water and fruit-based beverages - The Adjudicating Authority has confirmed the demand of excise duty only on the ground that there are differences in quantity of clearance of goods as per ER-1 return and form 3CD as filed by appellant, even after accepting that differences are on account of trading of goods which does not form part of clearance as per ER-1 return of appellant in O-I-O - It is the case of Revenue that appellant has manufactured and cleared the goods to the extent of excess reported in form 3CD of Tax Audit Report as filed with Income tax authorities - However it is seen that such allegation is only on the basis of figure work of department without production of any other evidence for alleged clandestine removal of manufactured goods - The appellant has produced their tax auditors certificate certifying the reconciliation which was also produced by appellant before adjudicating authority and the said reconciliation clearly establishes the reconciliation between figures of clearance as per 3CD and ER-1 - The Patna High Court in the case of

UNIVERSAL POLYTHELENE INDUSTRIES

, have held that in case of difference in figures between balance sheet and returns, it is not a rule that balance sheet figures are to be taken as correct - Said judgment was also confirmed by Supreme Court - The appellant has been able to produce the relevant reconciliations to show the reasons of differences in clearance figures as per ER-1 and as per form 3CD which was on account of trading turnover of appellants - Alternatively, it is also on record that the adjudicating authority has not given any cognizance to the submission of appellants as regards allegation of clandestine removal and the burden to prove the same - No investigation has been conducted by department to prove the allegation of clandestine removal in the case and thus the demand of excise duty merely based on differences in figures of consumption cannot be sustained - Demand of excise duty only on assumption and presumptions in quantity of clearance of finished goods figures of tax audit form 3CD and ER-1 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 allowed

Case laws cited:

FINAL ORDER NO. 75550/2021

Per: P K Choudhary:

The present appeal has been filed by the Appellant being aggrieved with the Order-in-Original dated 30th November 2017 passed by the learned Commissioner, whereby the demand of excise duty of Rs. 3,96,21,378/- has been confirmed for the period 2012-13 to 2015-16, along with interest and penalty as proposed in the Show Cause Notice dated 02nd June 2017.

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 to 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 3CD return of the final statement filed by the appellant with the Income Tax department and ER-1 return filed by the appellant for the year 2012-13 to 2015-16, there were excess clearance in respect of Aerated Water and Fruit based beverage over and above the ER-1 return and hence it was stated that the appellant has clandestinely removed such goods without payment of excise duty. Based on the above allegation, on June 2, 2017, the Ld. Commissioner issued a Show Cause-Notice to the Appellant proposing to demand excise duty on the quantities of the finished goods shown as excess clearance in 3CD form on comparison with the same shown in ER-1 return by the Appellant for the period 2012-13 to 2015-16.

The appellant by its letter dated November 6, 2017 duly replied to the said Show Cause Notice pointing out *inter alia* that the ER-1 accommodates only manufacturing details whereas Form 3CD of Income tax includes figures of traded goods also apart from normal loss of quantity due to breakage etc. The Appellant further contended that demand is based only on the figures reported in the annexure of the tax audit report for the years 2012-13 to 2015-16 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 beyond doubt that there is no clandestine removal done by the Appellant and thus the demand also fails in its entirety. The appellant also contended that the said Show Cause 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 figures reported in the annexure of the tax audit report for the years 2012-13 to 2015-16 without any other substantive allegation;
- (ii) the ER-1 form provides details of only manufactured goods whereas the 3CD form is based on entire turnover which includes traded goods also.
- (iii) That the Appellant has already provided detailed reconciliation for the same before the Adjudicating authority which has not been considered at all by the Id. Adjudicating authority
- (iv) That there is no difference in clearance of manufactured products as per ER-1 and form 3CD of Income tax.
- (v) 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;

He 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. COMMISSIONER OF C. EX., PATNA Versus UNIVERSAL POLYTHELENE INDUSTRIES [2011 (270) E.L.T. 168 (Pat.)],

b. Commissioner v. Universal Polythelene Industries - 2016 (342) E.L.T. A226 (S.C.).

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

The learned Advocate has also produced reconciliation copies to show the actual clearance as per ER-1 and as per Form 3CD for manufactured goods. He has also submitted the certificate from the Tax auditor dated 29/07/2021 certifying the figures of Form 3CD and ER-1 and reconciliation thereto.

It is his submission that the demand is also barred by limitation as the demand covers the period from 2012-13 to 2015-16 whereas the SCN was issued on 2nd June, 2017 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 June 2017 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, reiterated the findings in the order passed by 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 clearance of goods as per ER-1 and form 3CD as filed by the Appellant, even after accepting that the differences are on account of trading of goods which does not form part of clearance as per ER-1 return of the Appellant in para 5.6 of the Order-in-Original dated November 30, 2017. It is the case of the Revenue that the said Appellant has manufactured and cleared the goods to the extent of excess reported in form 3CD of Tax Audit Report as filed with Income tax authorities. 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 the alleged clandestine removal of manufactured goods. The Appellant has produced before us their tax auditors certificate certifying the reconciliation which was also produced by the Appellant before adjudicating authority and we find that the said reconciliation clearly establishes the reconciliation between the figures of clearance as per 3CD and ER-1.

Further, we find that the Hon'ble Patna High Court in the case of

COMMISSIONER OF C. EX., PATNA Versus UNIVERSAL POLYTHELENE INDUSTRIES [2011 (270) E.L.T. 168 (Pat.)], have held that in case of difference in figures between balance sheet and returns, it is not a rule that balance sheet figures are to be taken as correct-

"8. We are of the opinion that in case of discrepancy between the balance sheet prepared by the qualified Chartered Accountant and RT-12, as a proposition of law it cannot be said that it is the balance sheet which will prevail. It will depend upon the facts and circumstances of each case. In the facts of a given case, RT-12 may prevail. Similarly in case of conflict, in a particular case the balance sheet may prevail. In case the manufacturer come out with plausible explanation and assigns valid reason for showing higher production in the balance-sheet, the later may be accepted. In our opinion both are pieces of evidence and which deserve acceptance is to be decided on the basis of further material available. There is no material to suggest that the manufacturer had manufactured the quantity as shown in the balance sheet, then what has been shown in RT-12 returns. The Tribunal as also the Commissioner has noted the common feature that manufacturers show inflated figures of its production in the balance-sheet for taking higher loan facilities from the Bank and accepted the plea of the manufacturer.

9. Accordingly, we are of the opinion that the balance sheet prepared by the Chartered Accountant can be ignored on relevant and good grounds. The grounds assigned by the Commissioner as also the Tribunal are good and valid grounds. We are of the opinion that the balance sheet prepared by the qualified Chartered Accountant is not conclusive proof in regard to the production.

10. Accordingly, we answer the reference against the department and in favour of the assessee and it is held that the balance sheet prepared by the Chartered Accountant was not ignored on irrelevant or arbitrary grounds."

We find that the above judgment was also confirmed by the Hon'ble Supreme Court reported in **Commissioner v. Universal Polythelene Industries - 2016 (342) E.L.T. A226 (S.C.)**

. In the instant case also, we are of the view that the Appellant has been able to produce the relevant reconciliations to show the reasons of differences in clearance figures as per ER-1 and as per form 3CD which was on account of trading turnover of the Appellants.

6.1. 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 the burden to prove the same. In this regard we refer to the judgment of this Tribunal in the case of **SRI DURGA CABLES PVT. LTD. Versus COMM. OF C. EX. & CUS., BHUBANESWAR-I 2020 (374) E.L.T. 459 (Tri. - Kolkata)** wherein the CESTAT held:-

"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."

Thus going by the above judgment we find that no investigation has been conducted by the department to prove the allegation of clandestine removal in the case and thus the demand of excise duty merely based on differences in figures of consumption cannot be sustained.

6.2 Thus, by virtue of the findings in the above judgments, we find that the Department has failed to discharge the burden of proof to prove the allegation of clandestine removal in the case and thus, the demand of excise duty merely based on differences in figures of consumption, cannot be sustained.

7. 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 presumptions in quantity of clearance of finished goods figures of tax audit form 3CD and ER-1 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.

8. The appeal filed by the Appellant is thus allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 25 August 2021)

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