2013 (2) ECS (104) (Tri - Del)

CUSTOMS EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM,
NEW DELHI – 110066.

Court No. 2

M/s Sukalp Agencies
Vs.
CCE, Lucknow

Central Excise appeal No. 2497 to 2499/2005

(Arising out of Order – in - Original No. 07/Commr./LKO/2005 dated 30.03.2005 passed by the Commissioner of Central Excise, Lucknow)

Date of Hearing/decision :19.03.2013

M/s Sukalp Agencies,
Shri Neeraj Kumar Aggarwal
Shri Satyavan Singh — Appellant

Vs.

CCE, Lucknow — Respondent

Appearance:

Shri J.P. Kaushik, Advocate for the Appellants
Shri I. Baig, DR for the Respondent

CORAM:

Hon'ble Mr. D N Panda, Judicial Member
Hon'ble Mr. Manmohan Singh, Technical Member

FINAL OREDER NO. 55868/2013

"We find that without intervention of human element, occurrence of such transaction is improbable. Accordingly, we confirm the duty element of Rs. 24,800/- on this count of allegation."[Para 5]

"Therefore, in the absence of material to show separability of clearance of excisable goods from installation and testing charge activity by divisible contracts, it is not possible to agree with the appellant. Therefore, Revenue's allegation that installation and testing charges should form part of assessable value is sustained."[Para 7]

PER: D.N. PANDA

1. Investigation made to the premises of the appellant on 30th July, 2002 resulted with discovery of certain incriminating materials and transaction causing prejudice to Revenue exhibiting questionable modus operandi following by all the three appellants through the mechanism of clandestine removal of goods and non – inclusion of certain elements to the assessable value as well as discrepancies in recorded operating result. On such discovery, learned Adjudicating Authority proceeded to issue notice calling for defence of the appellant. While the appellant defended its case on some counts of allegations there was no defence at all led on other counts as has been observed by learned Adjudicating Authority in different paragraphs of his order dated 30.03.2005.

2. The adjudication resulted in duty demand of Rs. 36,82,921/- against M/s. Sukalp Agencies (appeal case No. 2497/205). Equal amount of penalty of Rs. 36,82,921/-was imposed under Section 11 AC of Central Excise Act (hereinafter referred as "the Act") followed by other consequences of law. That adjudication gave rise to further adjudication consequences against one more firm called Sukalp Engineering Corporation which is in appeal No. E/2498/2005 represented by Shri Neeraj Kumar Aggarwal. Penalty of Rs. 10 Lakhs was imposed on Shri Neeraj Kumar Aggarwal Followed by these consequences, there was another appeal arose by one Shri Satyavan Singh who was authorised signatory of Sukalp Agencies who is in appeal No. 2499/2005. He faced penalty of Rs. 50,000/- under Rule 26 of Central Excise Rules. 2002.

3. Both sides heard and records perused.

1.1. The first count of allegation was that Sukalp Agencies cleared a D.G. Set under invoice No. 854 on 26.7.2002 i.e. 4 days before investigation was conducted issuing such invoice from an invoice book of preceding year to escape scrutiny of Revenue while invoice book for each financial year is separate and every transaction of each such year should be dealt by the invoice book of that year only. No duty thereof was deposited before detection by investigation. Revenue viewed that the excise duty element of Rs. 21,393/- arises against such clandestine clearance. The fact remained undisputed was that invoice was issued from immediately preceded financial year's invoice book which was not acceptable to Revenue since that amounts to breach of Rules. The appellant when found that Revenue is very serious to confirm the demand of Rs. 21,393/- it deposited the said amount on 31.07.2002. Without appropriating the said deposit, Revenue raised demand of duty in the adjudication to the above extent and also penalized the appellant to that extent under Section 11 AC.

1.2. Revenue submits that when invoice is prescribed to be issued under serial number in respect of each distinct financial year, the plea of issuance of invoice No. 85 dated 26.7.2002 from the invoice book of preceding financial year is not sustainable in law because the motive of appeal is a clear demonstrating clandestine removal of one D.G. Set through the invoice in question. Accordingly, adjudication was rightly made to confirm the demand of duty and penalty.

1.3. From the rival contentions one aspect is very clear that invoice in question was issued from invoice book of preceding financial year that remained undisputed. Once such a breach of Rule was noticed by Revenue within 4 days of issuance of invoice and the procedure of issuance of invoice by appellant was well known to the appellant who was engaged in manufacturing activity from many year in past, there is no warranting circumstance to hold that transaction in question was not intending to escape notice of Revenue. Therefore, the duty demand of Rs. 21,393/- is confirmed. It was brought to our notice that the said amount has already been deposited. If deposit has been made, Revenue should verify the same and appropriate that amount against this demand and the short fall, if any, shall be recoverable.

1.4. When the duty element above is confirmed which is to the extent of Rs. 21,393/- we do not find any scope to grant immunity from penalty because of very conduct and questionable modus operandi followed. Therefore, penalty of Rs. 21,393/- on this count shall sustain under section 11 AC of the Central Excise Act, 1944.

5. Second allegation was that on D G set was cleared on 8.7.2002 without that being recorded in the statutory record by the Appellant and also the clearance not followed by excise invoice. Learned Counsel submitted that this was only an inadvertent error for which duty component of Rs. 24,800/- was deposited in two phases. Revenue says that the breach cannot be claimed to be an inadvertent error but a deliberate breach of law. We find that without intervention of human element, occurrence of such transaction is improbable. Accordingly, we confirm the duty element of Rs. 24,800/- on this count of allegation. It was pleaded today by learned Counsel that appropriation of that amount should be made against the demand. There is no quarrel to this proposition. Accordingly, learned Authority shall appropriate the deposit on verification against demand of Rs. 24,800/-. Appropriate interest shall be calculated and that shall be payable by the appellant. So far as penalty equal to the amount of duty on this allegation is concerned, there is absolutely no scope to grant waiver. Accordingly, that is confirmed.

6. Third allegation is that 2 D G sets were cleared in January, 2002 and July, 2002. Learned Counsel says that these two D G sets comprise one of the D G set which was in controversy for the alleged clearance of 8.7.2002 (covered in allegation No. 2 above). Submission of appellant is that there should not be over lapping of demand without appreciation of facts. Revenue says that once there is a clandestine removal there cannot be set off of one clandestine removal to grant subsidy against other to an evader. But we find that there was no evidence brought out by Revenue to show that the contention of learned Counsel is baseless. Total duty demand is of Rs. 59,396/- which comprises of demand Rs. 24,800/- which was the subject matter of second allegation above. The rest of the demand was Rs. 34,596/-. Therefore, when we have already confirmed the duty demand of Rs. 24,800/- we reduce the present duty demand on the above count of allegation to Rs. 34,596/- since we did not find any cogent evidence to hold that two D G sets was found to have been cleared in January, 2002. Therefore, on the third count of allegation duty demand is reduced to Rs. 34,596/-. Learned Counsel Shri Kaushik says that the amount of Rs. 34,596/- has already been debited in RG – 23 A, Part – II record on 5.7.2005. When clandestine removal of one D G set in question related to January, 2002 clearance, giving rise to duty demand of Rs. 34,596/- and reversal by debit entry was done on 5.7.2005, that shall not exonerate the appellant from interest and penal consequence of law. Accordingly, interest become payable from the date of removal of D G set in January, 2002 till 5.7.2005 at the appropriate rate. When the motive of removal is attributable to mala fide, penalty under Section 11 AC to the extent of Rs. 34,596/- is confirmed.

7. Fourth allegation was that installation and testing charges as per balance sheet figures for the year 2000-01 and 2001-02, did not form part of assessable value when goods cleared were installed and tested by appellant. The appellant submits that installation and commissioning is a different activity and shall not form part of assessable value. To appreciate such contention we called for purchase order from the appellant on 20th December, 2012, when the matter was heard. So far no evidence came to record from appellant. Appeal relates to the year 2005. Keeping the appeal pending shall be an abuse of process of law. Therefore, in the absence of material to show separability of clearance of excisable goods from installation and testing charge activity by divisible contracts, it is not possible to agree with the appellant. Therefore, Revenue's allegation that installation and testing charges should form part of assessable value is sustained. We confirm the duty demand of Rs. 19,58,726/- on this count. We are unable to find any way to grant any immunity from the penalty against the duty demand of Rs. 19,58,726/-, as no evidence is available on record to support separability of contract as stated above for no inclusion of alleged charge in the assessable value of the excisable goods supplied. Therefore, penalty of equal amount of Rs. 19,58,726/- sustains. Interest to follow.

8. Fifth count of demand is that the appellant was not entitled to the SSI Exemption benefit. Learned Counsel fairly states that to avoid dispute, an amount of Rs. 2,70,872/- arising on this count has already been deposited. We direct appropriation thereof against such demand. The department did not bring out on record to show that SSI exemption claim was deliberately made to cause prejudice to Revenue. It can be appreciated that interpretation difficulty in exemption notification should not penalize the assessee. We annul the penalty on this count. As a result of which penalty of Rs. 2,70,872/- imposed under Section 11 AC shall not sustain.

1. Sixth allegation is that profit and loss account of the appellant for the year 1999-2000 and 2000-01 shows sale value of finished goods much higher than the assessable value as appearing in excise invoices causing short levy of duty. Learned Counsel submits that differential duty of Rs. 12,85,084/- arose without proper examination of evidence on record. But revenue supports the adjudication. We have examined Para 9 of adjudication order at page 32 of appeal folder. To some extent it shall be appreciated that when the appellant pleads that it carries two different activities i.e. trading and manufacturing, learned adjudicating authority should have extended its examination to find out whether there were actually two activities. Law cannot be applied whimsically or

capriciously which are alien to justice. In all fairness, the duty demand of Rs. 12,85,084/- calls for scrutiny on remand to grant a fair opportunity to the appellant to adduce evidence of profit and loss account of the trading concern for the aforesaid 3 years to prove its stand as to the disclosure of sale figure in respect of trading activity and clearance value of goods manufactured during those years. Revenue is required to ensure that assessable value of excisable invoices relating to manufactured goods appear correctly in profit and loss account. The value of clearance as per excise invoices should be exigible to excise duty levy. If trading activity is independent of manufacturing activity and genuineness of the trading activity is established verifying the sales tax return, sales tax registration and disclosure in income tax return, the sale figure form such activity should be excluded from computation of aggregate value of clearance of above years without clubbing the sale of goods and clearance of manufactured goods. Since we have directed limited remand of this matter we do not come to conclusion of penalty aspect. Learned authority shall pass appropriate order both in respect of duty and penalty, if he finds that there should be proper levy of both or either. Interest, if any, shall follow.

2. Seventh allegation of Revenue is that profit and loss accounts for the period 2000-01 and 2001-02 show payment of duty of Rs. 20,30,980/- and Rs. 20,64,731/- respectively while excise invoices for those two years discloses figure of Rs. 20,58,801/- and Rs. 20,99,560/- respectively. The difference in figures of these years resulted in duty demand of Rs. 62,650/- without reconciliation. Learned Counsel says that if the figures appearing in pages 56 to 59 of the appeal folder are reconciled such demand shall not sustain. Revenue does not agree with such contention submitting that no reconciliation was before the authority below. We find that submission of Revenue has substance since page 56 to 59 of appeal folder is fresh evidence before the Tribunal. We are unable to appreciate at this stage that whether reconciliation exercise shall be of any help to the Appellant. But, to do justice to the appellant, we remit this limited aspect to the learned Adjudicating Authority to grant opportunity to the appellant to reconcile the figures between the profit and loss account and excise invoices. If above pages are genuine and flow from statutory record, depending upon the facts situation and the result of his inquiry, shall pass appropriate order. Interest, if any shall be payable and penalty, if imposable, shall be considered by him along with duty, if any leviable.

3. Last count of argument of the appellant was that the cum – duty benefit should be given. We find no evidence in support of such contention. From the aforesaid paragraph we have noticed that clandestine removal was disturbing feature in

this case. If we allow the plea of the appellant, that shall result in bonus to evader. Therefore, we discard this plea of cum duty benefit.

4. In view of our decision in aforesaid paragraphs duty demand and penalties have under gone modification to the extent indicated against each allegation. That calls for re – computation of duty demand and penalty as well as interest on confirmed part of adjudication which shall be carried out by the learned Adjudicating Authority as soon as he receives this order. He shall only re – do the adjudication in respect of two limited aspects of remands as aforesaid.

5. So far as penalty against Shri Neeraj Kumar Aggarwal is concerned, it was pleaded that there was no mala fide between the deals of Sukalp Agencies and Sukalp Engg. Corporation. Therefore, as against duty demand of Rs. 24,800/-, levy of huge penalty of Rs. 10 lakhs shall be disproportionate. Revenue opposes such contention of the appellant. We are in part agreement with revenue as it is the established fact that the duty demand of Rs. 24,800/- has not resulted invain but on discovery of cogent evidence and Contumacious conduct of the appellant by investigation. Therefore, plea of the appellant of no mala fide does not get approval. As the questionable conduct and oblique motive of appellant is on record in the preceding paragraphs as well as nexus of both the firm is appreciable from the record in view of mass scale evasion noticed on different counts as aforesaid there should be penalty of Rs. 1 Lakh on Shri Neeraj Kumar Aggarwal. His appeal is partly allowed.

6. In so far as penalty imposed on Shri Satyavan Singh is concerned, it is argued by the appellant that this appellant was a mere employee. He should not face penalty of Rs. 50,000/- as he was just carrying out the instructions of his employer. Revenue does not agree to this contention submitting that an authorised signatory was acting on the instruction of the appellant who caused evasion to Revenue. His conscious approach with the repeated evasive method comes out from various allegations in the adjudication. Therefore, he should not get any concession in penalty. We have perused para 11 of adjudication order. From the facts and circumstances, his knowledge is attributable to the evasion. But his pre – meditated mind to cause evasion does not appear to be present in the entire discussion and findings of learned Adjudicating Authority. No doubt, he was authorised signatory. But, there is no scope to annul penalty fully in his appeal. However, in view of aforesaid appreciation of absence of his ill intent penalty imposed on Shri Satyavan Singh, authorised signatory of Sukalp Agencies who is in appeal No. 2499/2005 is reduced to Rs. 10,000/-

7. In the result, all the appeals are partly allowed to the extent aforesaid.

(Dictated & Pronounced in the Open Court)