CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH

Excise Appeal No. 51056 of 2021 [SM]

[Arising out of Order-in-Appeal No.02/CE/DLH/2021 dated 31.05.2021 passed by the Commissioner (Appeals-I), Central Tax/Excise, CGST, New Delhi].

M/s.Bird Audio Electronics **...Appellant**

VERSUS

Commissioner of CGST **...Respondent**
North Delhi CGST Commissionerate

APPEARANCE:

Mr. Parth Mullick, Advocate for the Appellant
Mr.Mahesh Bhardwaj, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: **09/02/2022**
PRONOUNCED ON : **28/02/2022**

FINAL ORDER No. 50172/2022

RACHNA GUPTA

Appellant is engaged in manufacturing of various types of speakers, who after receiving a purchase order from their customer used to sell and supply/deliver those speakers at the site of the respective customers. During an audit conducted by the Department of the appellants record, it was observed that the appellant has wrongly availed Cenvat Credit on account of service tax paid on outward freight as well as on a missing invoice No.175 dated 12.09.2015. However, after agreeing to the said objections

of the audit, the appellant deposited an amount of Rs.4,72,084/- on 09.07.2018 pertaining to the period 2013-14 to 2017-18. The said sum included the credit taken of Rs.2,96,197/-, interest of Rs.1,31,463/- and penalty of Rs.44,424/-. Later the appellant filed the refund claim for the said amount of Rs.472084/- on 13.06.2019. However, vide SCN No.88 dated 27.07.2020, it was observed based on the audit report that on being pointed out by Audit Team, party/appellant agreed with the audit objection and deposited the amount. Hence, no occasion of refund arises. Accordingly, the claim was proposed to be rejected vide the aforesaid SCN. The proposal of rejection as confirmed initially vide order No.21 dated 11.11.2020. The appeal thereof has been rejected vide Order-in Appeal No.02/2021 dated 13.05.2021 dated 13.05.2021. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Parth Mullick, ld. Counsel for the appellant and Shri Mahesh Bhardwaj, ld. Authorised Representative for the Revenue.

3. Learned Counsel has mentioned that the appellant had rightly claimed the Cenvat credit of the service tax paid by him on the transportation charges, the sales by him being on FOR basis. Decision of the Hon'ble Apex Court in the case of **Commissioner of Customs & Central Excise, Aurangabad vs. Roofit Industries Ltd. Reported as 2015 (319) ELT 221 (S.C.)** is

impressed upon. It is further submitted that the missing invoice was also later found. Hence, the appellant was entitled for taking Cenvat Credit thereupon. The amount of duty as was obtained by the Officers at the time of duty, accordingly, was prayed to be refunded. The rejection of refund is, therefore, impressed upon as illegal and against the procedure of the law. Ld. Counsel has laid emphasis upon the decision of Delhi High Court in the case of **M/s. Digipro Import and Export Pvt. Ltd. vs. Union of India reported as 2017 (350) ELT 145 (Del.)**. With these submissions, ld. Counsel has prayed for the order under challenge to be set aside. In addition, he has prayed for the refund to be sanctioned with the interest that too at the rate of at-least 12% thereof. Appeal is accordingly prayed to be allowed.

4. Per contra, ld. D.R. has mentioned that the appellant had voluntarily made the payment of discharging his duty liability. No sooner did it was pointed out by the Audit team. Hence, the payment, the refund whereof has been claimed, was not the payment under protest but was the voluntary payment. The objections pointed out by the Audit Team were otherwise genuine. Ld. D.R. has laid emphasis upon para 8 of the order under challenge. It is also submitted that the Commissioner (Appeals) in para 10 has rightly held that since the appellant did not dispute the issue at the time of the audit, the Department had no opportunity to issue any SCN proposing the demand of duty. The refund whereof has been claimed by the appellant vide the

impugned proceedings. The appeal is accordingly, prayed to be dismissed.

5. After hearing the rival contentions and perusing the record, I am of the opinion as follows:-

It is an admitted fact that the amount for which refund has been claimed by the appellant was got deposited by the Department at the time of conducting audit of appellants record. Hence it is an admitted fact that a SCN as required in law for demand of the duty found at the time of audit/ investigation, to not to have been paid has been issued to the appellant. Though the contention of Revenue in this regard is that since the necessary information required to be given in the SCN was made available to the appellants in the form of various letters and orders and that the appellant agreed to the objections raised by the audit party and thereafter voluntarily paid the observed short amount of duty. But to my opinion this contention of Department is not accedable because the issuance of SCN in a particular format is a mandatory requirement of law. The law requires the said SCNs to be issued under a specific provision of law and not as a correspondence or part of an order. Nor even the communication at the time of conducting audit of the assessees record. A specific notice precisely indicating the amount demanded and calling upon the assessee to show cause if he has any objection for such demand is statutorily to be produced. The

provision relevant for the purpose is Rule 14 of Central Excise Rules, which deals with recovery of Cenvat Credit wrongly taken or erroneously refunded. The sub-rule (1) of this rule mandates that such Cenvat Credit shall be recovered from the assessee in accordance of provisions of section 11A of the Excise Act or section 73 of the Finance Act. Sub-section (a) of section 11 (A) of the Act which is parimateria to section 73 of Finance Act requires the Central Excise Officer to serve a notice on the per chargeable with the duty which either has not been levied or paid or which has been short levied or short paid, that too, within a specific period from the relevant date. The use of word “shall” is sufficient to hold mandatory compliance of the said provision.

6. In addition, the CBEC Circular No.423/56/98-CX dated 22.09.1998 also stresses the need for concerned Departments to issue timely demands through SCN. The Hon’ble High Court of Madras in the case of **Commissioner of Central Excise, Coimbatore vs. Pricol Ltd. reported as 2015 (320) ELT 703 (Mad.)** has held that the SCN , as provided under section 11A of CEA, is mandatory in nature and the same has to be adhered to before proceeding further in the matter. The Circular is binding on the Departmental authorities. Hence, the Hon’ble Court held that in absence of any such SCN, Department cannot seek recovery of the amount. Hon’ble Delhi High Court in **Digipro Import & Export (supra)** case has observed as follows:-

> *It is indeed extraordinary that officers at the level of a Superintendent would have such vast powers of collecting duty on the spot without even a quantification of the duty amount preceded by a Show Cause Notice (SCN). No attempt has been made to demonstrate that the above is a procedure known to law. It actually points to the opposite. And that is what makes it inexcusable.*

It was also held as follows:-

> ***19.*** *This illegal practice adopted by the Anti-Evasion Department of Central Excise requires a deeper investigation. The Court has every reason to believe that this has come to light only because the Petitioner has approached this Court. This practice is perhaps being adopted in a number of instances which are yet to come to the notice of the Court. There will be serious ramifications if this practice is allowed to continue unchecked. In the first place, it must be realised that the officers of the Anti-Evasion Wing of the Central Excise Department have to function within the four corners of the law. They are bound by not only the C.E. Act and the Rules made thereunder but all the notifications/circulars/instructions issued from time to time including those issued by the CBEC. There is no scope at all to collect duty and that too without even quantifying the extent of duty evasion.*

7. In view of the above settled proposition, the payment made by the appellant at the time of audit, in absence of any SCN for the same, cannot be held to be the payment against the demand raised by the Department without even going into the merits of the nature of demand. In light of the above discussed mandate of section 11A of CEA and the absence of the requisite SCN the amount got deposited at the instance of audit team is liable to be refunded to the appellant. Whenever an amount is to be refunded in terms of section 11AA, 11BB, 11DD and 11AB of the Excise Act, an interest at the rate which varies from 6% to 18% has to be

granted. Relying upon the decision of this Tribunal in the case of M/s. Parle Agro Pvt. Ltd. vs. Commissioner CGST, Noida reported as 2021 TIOL 306 – CESTAT and upon another decision of this Tribunal in Final Order No. 51266/2019 announced on 04.09.2019 in Excise Appeal No.51370/2018 that I order that the amount of the claim in question be refunded alongwith the interest at the rate of 12%.

8. In view of the above discussion, the order under challenge is hereby set aside. Appeal stands allowed. Consequential relief to follow:-

[Order pronounced in the open Court on 28.02.2022]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita