IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No. III

EXCISE APPEAL No. 40535 OF 2019

(Arising out of Order-in-Appeal No.139/2019-SLM CEX dated 11.03.2019 passed by Commissioner of GST & Central Excise (Appeals) Coimbatore Circuit Office @ Salem Commissionerate, No.1 Foulke's Compound, Anai Road, Salem 636 001)

M/s.Annamalai Cotton Mills (P) Ltd. **.... Appellant**
Gajanaickenpatti,
Salem 636 201.

Versus

The Commissioner of GST & Central Excise, **...Respondent**
No.1, Foulke's Compound,
Anaimedu,
Salem 636 001.

APPEARANCE :

Mr. Rabeen Jayaram, Advocate
For the Appellant

Mr. R. Rajaraman, Assistant Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 21.08.2023
DATE OF DECISION : 24.08.2023

FINAL ORDER No.40716/2023

ORDER :

Brief facts are that the appellant was engaged in the manufacture of polyester / cotton blended yarn falling under Chapter 55/52 of the First Schedule to Central Excise Tariff Act, 1985 and were clearing the said yarn from their factory to their consignment agents situated throughout India. The department noticed that while clearing the

goods the appellant was adopting a lesser price than the price at which similar goods were sold by the said consignment agents on that date and place of removal during the period 01.07.1997 to 31.03.2001. The appellant had filed Annexure 2C price declaration as required under Rule 173C of erstwhile Central Excise Rules, 1944 in respect of goods intended to be removed for each of the consignment agents during the said period. As it was noticed that the assessable value declared was less than the price at which similar goods were sold by the consignment agents on the dates of removal, show cause notice dated 25.07.2002 was issued to the appellant to demand differential duty of Rs.26,73,083/- invoking the extended period along with interest and for imposing penalties. After due process of law, the original authority vide Order-in-Original dt. 05.01.2004 confirmed the demand along with interest and imposed equal penalty and also ordered appropriation of an amount of Rs.9,06,321/- already paid by the appellant. The appellant then filed appeal before the Commissioner (Appeals).

2. All along, the appellant had contended that there was calculation error and the differential duty would work out to be only Rs.17,07,752/- and that appellant has already paid an amount of Rs.18,81,515/-. They also pleaded that they were not supplied with the relied upon documents. On appeal filed by appellant, the Commissioner (Appeals) vide Order-in-Appeal dated 29.10.2004 did not accept the contention of the appellant that there was calculation error and that the differential duty works out only to Rs.17,07,752/-. However, the penalty was reduced to Rs.7,91,568/- observing that

appellant had already paid an amount of Rs.18,81,515/- being the differential duty arising out of the consignment/depot sales periodically, much before issue of the show cause notice dt. 25.07.2002 which was found tallying with the figures furnished by the Assistant Commissioner, Salem I Division and hence the balance duty payable by the appellant would be only Rs.7,91,568/. The request for waiver of interest since the unit is declared under BIFR was rejected by the Commissioner (Appeals). Against such order of the Commissioner (Appeals) the Appellant as well as the Department filed appeals before the Tribunal. The appellant contended that they were not provided the copies of documents relied upon by the department to arrive at the differential duty raised in the show cause notice and the payment of Rs.18,81,515/- was not adequately considered at the time of adjudication. They also claimed that as the unit is in the process of BIFR and no documents are available with them. It was argued by them before the Tribunal, that if the documents in the hands of the Revenue are examined, their contention that they are likely to pay very less amount can be established. The Department had also filed an appeal against reduction of penalty to Rs.7,91,568/- by the Commissioner (Appeals). The Tribunal observed that since the differential duty is raised solely on the relied upon documents and due to insufficiency of documents, the appellant has not been able to properly defend their case and remanded the matter to the adjudicating authority to pass an order leaving all issues open including the issue of limitation and imposition of penalty.

3. In such *de novo* adjudication, the original authority confirmed again the demand of Rs.26,73,083/- along with interest and directed for appropriation of duty of Rs.18,81,515/- already paid by the appellant and imposed equal penalty of Rs.26,73,083/- . The appellant again approached the Commissioner (Appeals) who vide order impugned herein dismissed the appeal and upheld the order passed by the adjudicating authority. Hence the appellant is once again before the Tribunal.

4. Learned Counsel Sri Rabeen Jayaram appeared and argued for the appellant. It is submitted by the learned counsel that show cause notice has been issued on 25.07.2002 for the period from 01.07.1997 to 31.03.2001. The Department had collected all the original documents from the appellant's factory. The factory was under closure for BIFR proceedings. The appellant vide their letter dated 24.10.2002 requested the department to return the copies of the original records taken away by the department. Para-10 of the show case notice was adverted to by the learned counsel to submit that the documents relied upon in Annexure II are the basis for computing the duty demand. In the said para of the SCN it is stated that the original documents have been taken by the department and if the appellant desires to peruse the documents, they can peruse these documents at the Adjudication Section of the Office of the Commissioner of Central Excise, Coimbatore on working days with prior intimation. The appellant had several times requested for copies of documents for which there was no response. After the matter had reached the Tribunal, the Tribunal directed the

department to allow the appellant to peruse the documents. Pursuant to the direction, on 23.02.2016, the Consultant, Sri J.R. Srinivasan and Advocate, Sri Karthika Prasad were allowed to peruse and collect the documents. However, the said consultant and advocate were issued only partial documents which were not enough to prove bonafides of the appellant. The fact that department did not supply entire documents is evidenced by letter dt. 23.02.2016 which is the acknowledgment issued by Consultant Sri J.R. Srinivasan after perusal of the documents. The appellant later vide letter dt. 21.12.2016 requested for documents and other statutory records other than that was already handed over to them by the department on 23.02.2016. On 30.01.2017 by an interim order No.304-305/2017 passed by the Tribunal in E/158-159/2005, the department was directed to furnish the documents before the Tribunal. However, the Department failed to do so. Later on 19.05.2017, the Tribunal vide Final Order remanded the matter and instructed the department to grant an opportunity to the appellant to establish their case basing upon the documents.

5. It is submitted that, on behalf of the appellant their counsel filed an RTI application dt. 11.07.2017 requesting for the documents. On 27.07.2017, the reply was received from the department rejecting the RTI application dt. 11.07.2017 and stating that the documents were already perused and that documents were given to the previous consultant. On 24.08.2017, the counsel for appellant filed an RTI Appeal against the rejection of RTI application raising the ground that the department cannot reject RTI application mentioning that these

documents were already perused and given to other consultant. On 14.09.2017, the counsel for appellant attended the personal hearing of RTI appeal and reiterated the grounds of appeal. On 04.10.2017, the department rejected the RTI Appeal stating that the documents were exempted from issuing since it is third party information which would impede the process of investigation or apprehension or prosecution of offenders under Section 8 (1) (h) of RTI Act. Again on 01.12.2017 an RTI application was filed by the appellant requesting to peruse and issue xerox copies of the documents. The Department vide letter dt. 05.01.2018 informed the appellant that the documents were already given to the previous consultant and permitted to peruse on any working day. On 17.01.2018, after giving prior intimation, the appellant visited the department to peruse the documents. However, the department did not produce any of the requested documents. On the same day a letter was issued by the department to appellant stating that the documents are not readily available and the same will be traced out from the record room and will be intimated to the appellant within a week. Thereafter, there was no intimation to the appellant with regard to the documents. However, on 29.05.2018, the adjudicating authority passed *de novo* adjudication order confirming the demand, interest and penalties as raised in the show cause notice.

6. It is submitted by the learned counsel, that though the Tribunal had specifically remanded the matter to furnish the documents to the appellant, same has not been complied with. In spite of repeated efforts, the appellant has not received the copies of relied upon

documents. If the originals are taken away by the department, the same ought to have been returned to the appellant after issuance of the show cause notice. In the present case, the department has neither returned the original documents nor given the photocopies of documents which have been the basis for quantifying the duty demand. Ld. Counsel argued that there is complete failure on part of the department in complying with the orders of the Tribunal. To support this, learned counsel relied upon the decision in the case of *Union of India Vs Kamalakshi Finance Corporation Ltd.* - 1991 (55) ELT 433 (SC) and *Jagadeesh Steels Vs CCE Coimbatore* – 2018 (362) ELT 301 (Tri.-Chennai).

7. Ld. Counsel submitted that the appellant had paid the duty liability during the disputed period. The department has issued SCN invoking the extended period alleging that the appellant has quoted lesser price for the goods which were sold by the consignment agents. There is no suppression on the part of appellant as they have paid duty of Rs.18,81,515/- much before issuance of SCN. Even in the *de novo* adjudication, the original authority did not consider the defence put forward by the appellant that they have already discharged the duty liability. In spite of this, the original authority has again confirmed the entire amount of Rs.26,73,083/- as raised in the SCN. The contention of the appellant that they have paid the duty demand as per their calculation is strengthened by the fact that the Commissioner (Appeals) in the first round of litigation has noted the same and reduced the penalty to Rs.7,91,568/- only. However, in *de novo*, the

original authority has confirmed the penalty to the total duty demand of Rs.26,73,083/- which itself would show that there is error in the quantification of demand. Ld. Counsel submitted that there is complete violation of natural justice and there are no grounds for invoking the extended period. It is prayed that the appeal may be allowed.

8. Ld. A.R Sri R. Rajaraman appeared for the Department. It is submitted by the Ld. A.R that though the appellant had filed Annexure 2C price declaration as required under the erstwhile Rule 173 of the Central Excise Rules, 1944 in respect of goods intended to be removed to each of the consignment agents during the disputed period, it was noticed that, in certain cases, the assessable value declared for the clearance of their goods to various consignment agents was less than the price at which similar goods were sold by the consignment agents on that date and place of removal. Appellant had produced relevant invoices of the depots/consignment agents for the period 15.07.1997 to 31.03.1999 except invoice No.229/97-98, 230/97-98, 241/97-98, 254/97-98, 308/97-98 and 79/98-99 as they could not locate the same and were not able to get a copy of these invoices from the consignment agents. In view of this situation, the appellant vide their letter dt. 18.02.2002 agreed for the adoption of value based on the nearest comparable price. Accordingly, the value in respect of the said invoices was adopted as per the nearest comparable price, in the above cases for the purpose of computing the differential duty on account of depot / consignment sales.

9. Though the appellant contends that the entire duty demand has been discharged by them and the quantification of duty is erroneous, the appellant has not furnished any document to establish the same and has shifted the burden upon the department to contend that copies of the documents have not been supplied to them. It is argued that the original authority has rightly confirmed the demand in the *de novo* and has been rightly upheld by the Commissioner (Appeals). He prayed that the appeal may be dismissed.

10. Heard both sides.

11. The show cause notice is dated 25.07.2002. It is not disputed that the appellant had filed price declaration as required under Rule 173C of Central Excise Rules, 1944. However, the department noticed some price variation for certain invoices in regard to clearance of goods to consignment agents for which the demand has been issued. The Ld. A.R has relied upon the observations made in para-3 of the show cause notice wherein it is stated that vide letter dated 18.02.2002, the appellant had agreed for the adoption of the value based on the nearest comparable price as they were not able to get photo copies of invoices. This observation is not supported by any document. It is seen that due to non-availability of certain invoices the department has adopted the nearest comparable price. The appellant has been in continuous litigation against the demand of duty. It has been their consistent view that the quantification of demand is incorrect and they have discharged the duty as applicable during the material time. It is also their contention that they have been requesting the department to furnish

documents relied upon by the department for quantification of the duty. Undisputedly, the original documents have been taken by the department during the investigation. Para-10 of the show cause notice reads as under :

> "10. The documents relied upon pertaining to the above charges are detailed in Annexure II which should be treated as a part of this notice. Legible copies of these relied upon documents are enclosed herewith. If the notice desires to peruse any of the said relied upon Original documents, they may do so at the Adjudication Section of the Office of the Commissioner of Central Excise, 6/7, A.T.D. Street, Race Course Road, Coimbatore-18, on any working day, with prior intimation to the said office, within 15 days from the receipt of this notice, failing which it would be presumed that they do not wish to peruse the Original records."

12. It is seen that the original documents have been taken by the department and permission is given to the appellant to peruse the documents on any working days. In the first round of litigation when the matter was pending before the Tribunal, a direction was issued to the department to permit the appellant to peruse the document. The consultant viz. Mr. J.R. Srinivasan on behalf of the appellant had perused the documents. As per the acknowledgement issued, it is seen that only part of the documents have been given by the department for perusal by the consultant. During pendency of the appeal, the Tribunal directed to produce the documents before court. However, the department failed to do so. The Tribunal thereafter remanded the matter leaving all the issues open and gave an opportunity to the appellant to furnish further evidence and also directed the department to supply the documents to appellant. It is seen that the direction of the Tribunal has not been complied by the department. The appellant

had filed RTI application and in the reply dated 17.01.2018, the department has stated that the documents are not readily available. The said Department's letter reads as under :

> " As per your letter dated 12.01.2018, you have visited this Office on 17.01.2018 with respect to above mentioned RTI application for perusing the relied upon documents in respect of SCN No.V/55/15/52/2002-Cx.Adj. dated 25.07.2002 issued by the Commissioner of Central Excise, Coimbatore.
>
> However, it is stated that since the requested documents in the said RTI application pertains to the year 1997 to 2001 are not readily available, the same will be traced out from the record room and will be intimated to o for perusal within a week."

13. However, the *de novo* order has been passed by the adjudicating authority on 29.05.2018. We do not understand, how the department has been able to pass the *de novo* order without perusing the relied upon documents if the documents were not available. In case, the documents were available, the same ought to have been supplied to the appellant before passing the order. In the personal hearing dated 08.05.2018, the counsel appearing for the appellant has stated before the adjudicating authority that appellant has not received the required documents to put forward their defence with regard to the error in the quantification by the department.

14. In page 5 & 6 of the impugned order, the Commissioner (Appeals) has held that the contention of the appellant that department had taken away the documents is not acceptable. To make this conclusion the Commissioner (Appeals) has relied on the written submissions dt. 04.10.2004 made by the Managing Director of Appellant company in

the first round of litigation before the Commissioner (Appeals). It reads as under :

> "Because our factory was in a worst condition, there was no proper and efficient staff to maintain the records, now we are not in a position to produce all records. Further, we wish to submit that after receipt of the Show Cause Notice, the Range Superintendent called all our records. Accordingly, the Supervisor of our factory who was looking after Central Excise at that time submitted all the available records to the Superintendent. No list was prepared for the submission of record. When we approached the Range Officer to get back the records, despite all their efforts and our efforts the records submitted by us could not be located. Thus we do not have any evidence to prove the submission. As such we are forced to submit the facts only by circumstantial evidences.
>
> In the order of the Adjudicating authority, it has been mentioned that a sum of Rs.9,06,321/-, paid by us has been appropriated. Actually we have paid a sum of Rs.18,80,673/- (BED Rs.16,08,332 + AED Rs.2,72,341) through RG 23-A Pt. II, RG 23-C and PLA, towards the differential duty. We are at loss to understand as to how the Audit party arrived a figure of Rs.9,06,321/-. In this connection we furnish a list with date of payment, page number and serial number of the relevant records. Copies of the records (RG-23A, RG 23-C and PLA) have already been submitted along with the appeal. As may be seen from our letter dated 16.4.2002, upto January, 2001, we had only a balance of Rs.16,578/- towards AED (T&TA). We have to pay the differential duty only for the months of February, 2001 and we could not get the same since we have stopped consignment sales by March 2001 itself. Accordingly, we have adopted the figures as arrived at by the Audit and reflected in the SCN for the months February and Marc, 2001. The differential value works out to Rs.3,12,622/- and the differential duty works out to Rs.57,522/- (BED Rs.50,019 + AED Rs.7,503). In fine the duty liability from us is only Rs.74,100/-. Apart from this we have to pay the interest as worked out by the Range Superintendent vide his letter O.C.No.1037/2001 dated 4.7./2001 (i.e. Rs.90,008 + 56,360 + Rs.24120). In addition to this the interest has to be worked out for the belated payments made for the months August 2000 to January 2001 + on the differential duty for the February and March, 2001."

15. From the above, there is nothing to conclude that the documents (especially final sale invoices) were not taken away by department. In fact it is expressly stated in the SCN that documents were taken by the department. In the above written submissions, the appellant has

stated that they have paid Rs.18,80,673/- and that they are not able to understand how the adjudicating authority has held that only Rs.9,06,321/- only was paid. It is stated by them that the differential duty, according to them, would only be Rs.57,522/-. (BED Rs. 50,019+ AED Rs.7,503)

16. The original authority in the earlier round of litigation had appropriated an amount of Rs.9,06,321/- holding that it is the amount paid by the appellant. The appellant has been consistently contending that they have paid Rs.18,81,1515/-. Commissioner (Appeals) in the earlier round of litigation after perusal of available records accepted this contention of the appellant and ordered for appropriation of Rs.18,81,515/- and so also reduced the penalty to Rs.7,91,568/- holding that the balance differential duty payable by the appellant would be only Rs.7,91,568/-. Taking all these aspects into consideration we do find that there is some confusion with regard to the quantification of the duty. If the Department had obtained original records of the appellant at the time of inspection / investigation, these records ought to have been returned to the appellant after retaining the photo copy. It is forthcoming from records that appellant has not been able to sufficiently put forward their defence due to non-supply of relied upon documents. This is indeed violation of principles of natural justice. As the matter has already been remanded earlier, affording both sides opportunity, we do not think that any purpose would be served by a further remand. It is burden of the department to prove the allegations in the SCN. They have to be clear as to the

quantification of duty. The department has not been able to throw any light as to the details of the quantification of duty for Rs.26,73,083/-.

17. We are now left with the only option to dispose the matter on the basis of the available appeal records before us. The appellant has admitted the liability of Rs.18,81,515/- and has paid the amount even before the issuance of SCN. We are therefore of the considered opinion that the duty demand has to be reduced to this amount. The appellant having paid it before the SCN and also as there is violation of the principles of natural justice the penalties are not warranted.

18. After taking note of all facts and evidences presented before us, the impugned order is modified as under :

(i) The duty demand to the tune of Rs.18,81,515/- is upheld and the balance is set aside.

(ii) The penalties imposed are entirely set aside.

The appeal is disposed of in above terms.

(Pronounced in court on 24.08.2023)

sd/-
(VASA SESHAGIRI RAO)
Member (Technical)

sd/-
(SULEKHA BEEVI C.S.)
Member (Judicial)

gs