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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT No.-2

Excise Appeal No.20017 of 2022

(Arising out of Order-In-Original No. BLR-NORTH-COMM-31/2021-22 (DENOVO) dated 29.09.2021 passed by Commissioner of Central Tax, Bengaluru)

L & T Construction Equipment Ltd. **.....Appellant**
Survey No.27/28, Thammashettihalli,
Kasaba Hobli, Doddaballapura,
Bengaluru (Bangaluru Rural),
Karnataka-561203

VERSUS

Principal Commissioner, Central Tax, Bengaluru
....Respondent
Bengaluru North Commissionerate,
Ground Floor, HMT Bhavan, Ballary Road,
Ganga Nagar, Bengaluru-560032

APPEARANCE:

Shri Prakash Shah, Advocate for the Appellant
Shri K. A. Jathin, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. P.A. AUGUSTIAN, MEMBER (JUDICIAL)

FINAL ORDER NO.21136/2023

DATE OF HEARING : 12.09.2023
DATE OF DECISION : 17.10.2023

PER: P.A. AUGUSTIAN

Appellant herein had cleared hydraulic excavators to contractors/construction companies claiming exemption under

Notification No.108/95 CE dated 28.08.1995 amended vide Notification No.13/2008 CE dated 01.03.2008. Alleging violation of the condition of the said notification, proceedings were initiated and during investigation, examination in respect of contractors/ construction companies were conducted by various jurisdictional preventive units across the country. Based on the said allegation, it is found that few of the hydraulic excavators procured from appellant M/s L&T have been withdrawn from the project, few are in the process of being withdrawn and others to be withdrawn once the project is completed. Based on the said show cause notice was issued on 08.05.2009 alleging that appellant have evaded Central Excise duty to the extent of Rs.11,70,90,398/-, education cess of Rs.23,41,808/- and secondary education cess of Rs.3,29,585/-. Appellant denied the allegations and specifically submitted that the procedure of supplying the goods to the contract or to the subcontractors for use in the execution of the projects is as per the certificate issued by the project implementing authority in the name of the manufacturers and mentioning the contractors or subcontractors has been in practice right from the year 1995 i.e. ever since the said notification came into existence from 28.08.1995 and the department is well aware of the same. Further it is submitted there is no evidence to allege that the goods were diverted or being diverted. In the absence of any evidence to the core condition of the notification, demand is unsustainable. However Adjudication Authority vide order dated 30.12.2009 confirmed the demand of Central Excise duty of

Rs.11,97,61,791/- with education CESS and Secondary Education CESS for the period 2004-05 upto December 2008.

2. Thereafter aggrieved by the said order, the appellant approached this Tribunal and this Tribunal held that the original Notification No.108/95 CE dated 28.08.1995 amended by the Notification No.13/2008-CE dated 01.03.2008 will have prospective operation and the demand against the appellant can be sustained only for one year period which is within the period of limitation and penalty imposed by the impugned order deserves to be set aside. Though the appellant submitted that they have not diverted the goods as alleged in the show cause notice, this Tribunal has only recorded said submission and no finding given on said ground. Aggrieved by the Final order of this Tribunal, an appeal was filed by the respondent before the Hon'ble Karnataka High Court which was dismissed as not maintainable. Thereafter, respondent filed an appeal before the Hon'ble Supreme Court and the Hon'ble Supreme Court also dismissed the appeal vide order dated 22.02.2021 in Civil Appeal No. 27808/2020. Only thereafter, matter was considered for *de novo* adjudication and the appellant submitted that even for one year, the exemption can be denied only if goods are removed outside the projects and not based on a probability that goods can be removed out of the project. However without giving any specific finding on said issue, adjudication authority vide impugned order confirmed the demand for one year. Aggrieved by said order, present appeal is filed.

3. When matter came up for hearing, Learned Counsel submits that they have not diverted the goods as alleged in the show cause notice and there is no evidence to substantiate said allegation. Learned Counsel draw our attention to letter issued by the office of the Deputy Commissioner of Central Excise C. No. IV/16/03/ 2008 Misc./572/08 dated 22.04.2008 where the concerned officer informed the appellant that the appellants where provisionally allowed to supply goods to project financed by United Nations or an international organization under Notification No.108/95 after taking undertaking from them. Learned Counsel further submits that in spite of submitting that there is no admissible evidence on alleged removal of goods out of the project that too from very beginning of the investigation, while submitting reply to SCN, and even in *de novo* adjudication, there is no finding given by Adjudication Authority and the demand is confirmed on the presumption that the machineries may be removed after completion of the project.

4. Learned Counsel further drew my attention to the judgment of the Hon'ble High Court of Kerala in the matter M. Syed Alavi & Others V/s State of Kerala reported in 1981 SSC Online Ker 80. Relevant para of the judgment is reproduced below:-

> *"13. The principle recognised in all these decisions is that the appealability of an order passed in the course of a proceeding and the liability of that order being challenged in appeal against the ultimate order are two distinct things. The present case stands on a par with the*

decisions referred to above. It therefore follows that the principles underlying S. 105(2) of the Code of Civil Procedure do not stand in the way of the petitioners in raising the question of liability to assessment before the Appellate Tribunal."

5. Ld. Counsel also relied the final order in the matter of **M/s Tata Motors Ltd. versus Commissioner of Central Excise & Service Tax, Jamshedpur reported in 2023-VIL-871-CESTAT-KOL-CE** and submits that only if goods removed before completion of the project, the benefit of notification can be denied.

6. Learned D.R. reiterated the findings in the impugned order and submits that entire issue was considered by this Tribunal and as per the Final Order No.20340/2016, it is confirmed that demand will sustain for one year and only for quantification of the demand of duty for one year, it was remanded. No evidence related to premature removal of goods can be considered in de-novo adjudication. Considering the ground regarding removal of goods is beyond the scope of remand order. Ld. D.R. relied the following final order

i. **M/s Shivalik Agro Poly Products (reported in 2001 (130) E.L.T 736)**
ii. **Collector of C. Excise, Aurangabad Vs M/s Tigrania Metal & Steel Industries (reported in 2001 (132) E.L.T 103)**
iii. **Commissioner of C.Excise & Customs Vs M/s D.J Malpani (reported in 2010 (258) E.L.T 185 (Bom))**

iv. **M/s Khushal Chand & Co. Vs Commissioner of Customs, Mangalore (reported in 2011 (265) E.L.T 109 (Tri. Bang))**

v. **M/s Jaya Diagnostics & Research Centre Ltd Vs Commissioner of Customs, Hyderabad (reported in 2020 (374) E.L.T 273 (Tri. Hyd)**

vi. **M/s N.K Woollen & Silk Mills Vs Collector of C. Excise (reported in 1989 (43) E.L.T 686 (Tri. Del)**

vii. **M/s Laxi Steel Industries Vs Commissioner of C. Excise (reported in 2009 (233) E.L.T 257 (Tri. Del)**

viii. **M/s ICI India Ltd Vs Commissioner of Customs & C. Excise, Hyderabad (reported in 2007 (217) E.L.T 73 (Tri. Bang)**

ix. **M/s EON Polymers Vs C.C. Excise, Jaipur (reported in 2005 (187) E.L.T 474)**

x. **Commissioner of C.C. Excise, Panchkula Vs M/s Ish Rolling Mills (Reported in 2004 (167) E.L.T 126)**

xi. **M/s Scientific Instruments Co. Ltd Vs Collector of Customs & Another (Reported in 1980 (6) E.L.T 89 (Cal).**

7. Heard both sides. Regarding scope of denovo adjudication, while remanding the matter to adjudication authority, this Tribunal has not considered the plea of appellant that they have not removed the goods before completion of the project and only held that "demand against the appellant **can be** sustained only for one year period which is within the period of limitation". Further while dismissing the revenue appeal, Hon'ble Supreme court also held that "the Tribunal has observed that the demand against the respondent **could be** sustained for a period of one year prior to the issuance of the notice to show cause". Hence considering the issue whether the appellant violated the condition of exemption notification by removing the goods before

completion of the project cannot be considered beyond the scope of remand order.

8. Further, I have gone through the notification no. 108/95 dated 28.08.1995 as amended. I find strong force in the submissions made by the appellant that the goods supplied during the relevant period by availing the exemption notification whether withdrawn from the project has to be examined and only if it is removed before completion of the project, the benefit of notification can be denied. Merely based on presumption that few of the hydraulic excavators procured from appellant have been withdrawn from the project, few are in the process of being withdrawn and others to be withdrawn once the project is completed, no finding can be made to deny the benefit of ibid notification. Appellant from the very beginning of the investigation were submitting that they have not diverted the goods as alleged. There is no averment in SCN or impugned order regarding date of sale, date of removal of the goods and date of completion of the project to ascertain whether the goods were removed from the project prior to completion of the project for one year where duty confirmed. Further the issue regarding eligibility of the exemption notification on those cases where goods withdrawn after completion of the project was considered by the Tribunal in the matter of **M/s Tata Motors Ltd. versus Commissioner of Central Excise & Service Tax, Jamshedpur reported in 2023-VIL-871-CESTAT-KOL-CE** and held that:-

> *"15. We observe that the department has interpreted the Explanation 2 wrongly. The Explanation 2 would only mean*

> *that the goods brought into the project should not be withdrawn by the contractor during the course of execution of the project. After the project is completed the contractor is well within his right to withdraw the capital goods and machinery used in execution of the project, since it does not form part of the structure of the project. The department wrongly interpreted the Explanation 2 to mean that only the goods which are consumed in the project are eligible for the exemption. If such a interpretation is accepted, then no capital goods will be eligible for the exemption, as the machinery or capital goods will not be get consumed in the project. Thus, the only plausible interpretation for the Explanation 2 would be that the goods brought into the project should not be withdrawn by the contractor during the course of execution of the project. After the project is completed and if the contractor shifts the capital goods to some other project, then the exemption cannot be denied."*

9. Hence in the absence of any evidence regarding removal of the goods before completion of the project, the benefit of the notification cannot be denied and the demand against the appellant is unsustainable.

In the above, appeal is allowed with consequential relief if any.

(Order pronounced in the Open Court on **17.10.2023**)

(P.A. AUGUSTIAN)
MEMBER (JUDICIAL)

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