CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Excise Appeal No.299 of 2011

[Arising out of OIO No. 107-110/CE/CHD-1/2010 dated 13.10.2010 passed by the Commissioner of Central Excise, Chandigarh-I]

The Commissioner of Central Excise, Chandigarh **: Appellant (s)**
C.R. Building, Plot No.19,
Sector-17C, Chandigarh-160017

Vs

M/s C.S. Zircon Private Limited **: Respondent (s)**
Kala AMB, District- Sirmaur,
Himachal Pradesh

APPEARANCE:
Shri Aneesh Dewan, Authorised Representative for the Appellant
Shri Gaurav Aggarwal and Shri Arun Mahajan, Advocates for the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60305/2023

Date of Hearing: 10.08.2023

Date of Decision:30.08.2023

Per:P. ANJANI KUMAR

Revenue assails the impugned order dated 13.10.2010 passed by the Commissioner of Central Excise, Chandigarh-I.

2. The respondents, M/s C.S. Zircon Private Limited, are engaged in the manufacture of Zirconium Oxide and Zirconium Oxychloride; the respondents applied for amendment of the classification of the impugned products from CETSH 28.25 to 26.15 vide letter dated 28.03.2003; the respondents filed a declaration dated 12.03.2004
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showing their intent to avail the benefit of Notification No.50/2003 dated 10.06.2003; the respondents continued to classify their products under CETSH 26.15; Revenue challenged the classification and an OIO dated 30.06.2006 decided the classification under CETSH 28.25; on an appeal filed by the respondents, Commissioner (Appeals) allowed the appeal and held that the impugned product merits classification under CETSH 26.15; on an appeal filed by the Department, CESTAT vide Final Order dated 24.06.2008 allowed the appeal filed by the Department and held that the impugned products merits classification under CETSH 28.25.

2.1. Meanwhile, the Department issued four show-cause notices dated 05.06.2007, 01.05.2008, 20.01.2009 and 28.05.2009; extended period was invoked in the first show-cause notice. The Commissioner vide impugned order held that extended period is not invokable; cum-duty benefit and SSI exemption can be allowed and benefit of CENVAT credit on all inputs and input services is permissible. Revenue is an appeal on the ground that the learned Commissioner has erred in holding that extended period is not invokable and that cum-duty benefit is available to the appellant on the basis of the grounds specified in the appeal.

3. Learned Authorized Representative for the Department submits that the respondent changed the classification with an intent to unduly avail benefit of Notification No.50/2003; the Commissioner was wrong as the Department was aware of the classification of the impugned goods by the respondents; concept of knowledge of the Department is

entirely absent from Section 11A of CEA, 1944; he relies on *Neminath Fabrics- 2010 (256) ELT 369 (Gujarat).* Learned Authorized Representative relies on the Hon'ble Apex Court judgment in the case of *Amrit Agros- 2007 (210) ELT 183 (SC)*and submits that unless it is shown by the manufacturer that the price of goods includes Excise duty element, no question of excluding duty from the price would arise in computing the assessable value of excisable goods; one cannot go by the general indication that the price would always means cum-duty price, particularly so, when the goods were cleared on the basis of an exemption notification.

4. Learned Counsel for the respondents submits that they have submitted the declaration before the Department on 12.03.2004 showing their intent to avail the benefit of exemption Notification No.50/2003 and classifying the impugned products under CETSH 26.15; thereafter, there was a continuous correspondence between the respondents and the appellants regarding the classification of goods; the Department was in the knowledge of the classification adopted by the respondents; therefore, no allegation of suppression of fact etc. can be levelled against the respondents. He further submits that the Department did not challenge the benefit of SSI Notification as allowed by the Commissioner; Revenue has accepted the valuation arrived at by the learned Commissioner adopting the cum-duty value; they are incorrectly challenging the benefit extended by the Commissioner in respect of the Notification No.50/2003;he submits that it was incorrect to rely on the Hon'ble Supreme Court's judgment in the case of Amrit Agros (supra) as the decision was rendered in the

context of un-amended definition of value under section 4 CEA,1944 which was amended w.e.f. 14.05.2003. he relies upon the following case law:

- *CC Vs Bombay Snuff Pvt. Ltd.- 2016 (336) ELT A194 (SC).*
- *Jain Irrigation Systems Ltd.- 2018 (14) GSTL 286 (Tri. Del.).*
- *Hi-Line Pens Ltd.- 2017 (5) GSTL 423 (Tri. Del.).*

5. Heard both sides and perused the records of the case.

6. Coming to the first issue i.e. limitation, the Department claims that the respondents have suppressed the true nature of the goods manufactured by them and have wrongly classified the same with an intent to avail the benefit of the Notification No.50/2003 in a fraudulent manner; mere knowledge of the Department is not enough. We find that in the instant case, the respondents have informed the Department as early as on 28.03.2003, their intention to change the classification; though the intent of extending area-based exemption was made public by the Ministry of Commerce in the month of January 2003, actual notification, exempting the goods by the Finance Ministry, was issued on 10.06.2003; it cannot be inferred that the appellants have changed the classification with a view to avail undue benefit; even if we accept such a proposition, the intent to change the classification was informed to the department in March 2003 itself; the Department was free to cause necessary verification and to change the classification; the argument that verification took long time because of the procedures involved like testing by the agencies, cannot be a reason to allege suppression of fact; there should be a positive act of suppression, wilful mis-statement with an intent to

evade payment of duty so as to attract the provisions of Section 11A for invoking the extended period. We find that the Department has not produced any such evidence to that effect.

7. Therefore, we are of the considered opinion that learned Commissioner had rightly held that extended period is not invokable. The basis of our conviction is derived from the ruling of Hon'ble Apex Court in the case of Pushpam Pharmaceuticals- 2002-TIOL-235-SC-CX wherein it was held that:

> *"**4.** Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

8. Regarding the cum-duty price, we find that the Department relies upon the decision in the case of Amrit Agros (supra). The learned Counsel for the respondents, however, submits that the decision in the above case is rendered in the context of un-amended

Section 4 and therefore, the same is not applicable. We find that the Hon'ble Apex Court in the case of Amrit Agros (supra) held as follows:

> *"**15.** In our view, in the facts and circumstances of the case the judgment of this Court in the case of Bata India Ltd. (supra) on principle would apply. Therefore, in the present case, the assessee will have to show as to how he has determined the value. What the appellant has really done in the instant case has to be examined. Whether the price charged by him to his customers contains profit element or duty element will have to be examined. As stated above, this examination is warranted because, in the present case, one cannot go by general implication that the wholesale price would always mean cum-duty price, particularly when the assessee had cleared the goods during the relevant years on the basis of the above exemption notification dated 1-3-1997."*

9. We find that the above judgment though rendered in the context of un-amended Section 4, lays down the principle for arriving at the cum-duty price. To our understanding, the ratio of the above judgment is that it is for the claimant to show that the price/ value shown in the invoices is inclusive of duty payable or paid irrespective of the fact whether such duty paid or payable is shown separately or not. The learned Authorized Representative for the Department argues that since they have availed the exemption, the decision of Hon'ble Supreme Court in the case of Bata India Limited- 1996 (84) E.L.T. 164 (S.C.) is applicable. We find that this being a matter of fact, needs to be decided on case to case basis. The respondents have produced the copies of the invoices issued by them. The sample invoices show the total assessable value at a lower level say "X"; right of CENVAT and CENVAT paid are shown at NIL rate; CST/ GST @ 1% are included along with freight; thus, the total invoice price is "Y", which is

equivalent to "X" plus CST/ GST plus freight charges. Therefore, it is to be understood that the CENVAT duty is not paid and is not recovered. For example, in case of Invoice No.000047 dated 19.05.2004, total assessable value is shown at Rs.6,30,000/- after adding CST/ GST @ 1% i.e. Rs.6,300/- plus freight of Rs.19,800/-, the invoice value is shown at Rs.6,56,100/-. Thus, the total invoice value subsumes the CENVAT duty. Accordingly, the value adopted requires to be considered as a cum-duty price. For this reason, we uphold that benefit of cum-duty is available to the respondents.

10. In view of the above, we hold that the extended period is not invokable and cum-duty benefit is available to the respondent. The appeal is allowed to that extent in above terms.

(Pronounced on 30/08/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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