CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No.54217 of 2014-SM

(Arising out of order-in-appeal No. 48-50/CE/DLH/2014 dated 11.04.2014 passed by the Commissioner (Appeals) Central Excise, Delhi-I).

M/s Tribhuvan Metal Industries **Appellant**
C-59/1, Wazirpur Industrial Area
Delhi.

VERSUS

Commissioner of Central Excise **Respondent**
17-B, IAEA House, M. G. Road
I.P. Estate, Delhi-110002.

APPEARANCE:

Sh. Jitin Singhal, Advocate for the appellant
Sh. Mahesh Bhardwaj, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50020/2023

DATE OF HEARING: 25.08.2022
DATE OF DECISION: 10.01.2023

ANIL CHOUDHARY:

The issue in this appeal is whether demand of duty Rs.3,23,761/- have been rightly made for the period July, 2010 to October, 2010, with penalty under Section 11AC read with Rule 25.

2. Brief facts of the case are that the appellant is engaged in the trading and manufacture of aluminium circles falling under Chapter 76 of the First Schedule to the Central Excise Tariff Act, 1985 and were registered with the Department. On the basis of an intelligence, a simultaneous search was conducted by the officers of Central Excise on 16.03.2011 at the factory premises of the appellant and residential

premises of Sh. Balbir Prasad Gupta and Jai Prakash Sharma (Partners of the appellant). During search at the factory premises of the appellant, the department found finished goods and raw materials without any documentary evidence. Thus, the goods valued at Rs.8,27,980/- was seized. Statement of Sh. Jai Prakash Sharma was recorded on the spot, wherein he stated that the appellant has started manufacturing of Aluminium (Al) circle since November, 2010. Similarly, sh. Balbir Prasad Gupta has also started in his statement that their firm has stated manufacturing from November, 2010. The department has seized various documents from the residential premises of the partner. Show cause notice dated 08.09.2011 was issued to the appellant proposing confiscation of seized goods and penalty on the firm and its partners. It was alleged in para 10 of the SCN dt. 08.09.2011 that the appellant was engaged in manufacturing of Aluminium Circle w.e.f. 11.11.2010. Thereafter, further investigation was conducted by the department wherein various statements were recorded and the seized documents were scrutinized. Based on further investigation, a subsequent show cause notice was issued alleging that the appellant has started manufacturing from July, 2010 and it has been proposed that why duty demand of Rs.10,17,041/- for the period July, 2010 to May, 2011 should not be demanded alongwith the interest and penalty on the firm and partners as well. The appellant contested the show cause notice by way of filing reply. The Adjudicating Authority passed common order-in-original adjudicating both show cause notices, wherein allegations mentioned in both the show cause notices were confirmed. In the said order, duty demand has been confirmed alongwith seizure of goods. The

appellant filed appeal before the Commissioner (Appeals), who vide impugned order-in-appeal, dropped the seizure proceedings and confirmed the duty demand to the extent of Rs. 3,23,761/- for the period July, 2010 to October, 2010 alongwith interest and equal penalty by setting aside the remaining duty demand. Being aggrieved, the appellant is before this Tribunal.

3. Assailing the impugned order learned Counsel for the appellant urges that Revenue has taken contrary stand in the two show cause notices. Pursuant to search on 16.03.2011, the first show cause notice was issued on 08.09.2011 inter alia alleging that the appellant have started manufacturing w.e.f. 11.11.2010. On the date of search, statement of Sh. Jai Prakash Sharma, Partner of the appellant was recorded who had stated that the firm was started in the month of June, 2008 and they have taken Sales Tax registration from April, 2010. Further, stated that from November, 2010, Central Excise registration was taken and production started in the month of November, 2010. It was further stated that they are paying Central Excise duty under Compounded Levy Scheme (CLS) and their production of aluminium circle is around 1 M.T. per day. They also stated that they have been filing sales tax return regularly.

4. Search was also conducted at the residential premises of the other Partner Sh. Balbir Prasad Gupta on the same date, who inter-alia stated that they have started the firm in the year 2008. Initially the firm was located at B-68/2, Wazirpur Industrial Area, Delhi-52. Subsequently, they have shifted to C-59/1, Wazirpur Industrial Area, Delhi-52 in November, 2009. He also stated that they are working

under CLS as per the Notification No. 17/2009 and are paying duty @ Rs. 12,360/- per cold rolling machine per month. They have also stated that there have one hot rolling and cold rolling machine installed in their factory. They are paying duty on CLS basis. They had also taken Central Excise registration in the month of November, 2010. Further stated that they are issuing commercial invoices which do not reflect the Central Excise registration number and/or whether duty was paid under CLS. They are not issuing invoice as per the provisions of Central Excise Rules.

5. The appellant also submitted letter dt. 24.03.2011 mentioning that as the cold rolled circle of aluminium are not exempted from duty, they started production w.e.f. 11.11.2010 after obtaining Central Excise registration, they also started paying duty from November, 2010 under CLS. They also enclosed challans evidencing payment of duty from November, 2010 to March, 2011. Thus, they have started commercial production i.e. 11.11.2020. The only lapse on the part of the appellant is that they have not applied for permission to pay duty under the CLS, in the prescribed format, which they prayed to be condoned.

6. Statement of Sh. M. K. Saxena, Excise Consultant of the appellant was also recorded. He stated that in the month of February, 2011, Sh. Jai Prakash Gupta, Partner handed over him copies of GAR-7 challan for Rs. 12,300/- for each month from November, 2010 showing that they have paid the duty under CLS. The appellant has not applied in proper format giving option to pay the duty under CLS. He did not submit the said challans with the Department, nor filed any returns

with the Range Office. The appellant has also submitted their VAT returns on 26.07.2011 to VAT Department.

7. As per show cause notice dated 08.09.2011, it appeared to Revenue that appellant was engaged in manufacturing of aluminium circles w.e.f. 11.11.2010. Further they were clearing their finished goods under commercial invoices. It is further observed that as per Notification No. 17/2007-CE duty is payable under CLS on cold rolling machine @ Rs. 12,360/- per month per machine (including Cess). It further appeared that benefit of the CLS under the said notification is available only to those manufacturer who have fulfilled the condition like - application in the prescribed format for grant of permission accordingly. It further appeared that appellant has filed application for the first time on 31.05.2011 for the period 01.06.2011 to 31.05.2012, which have been accepted by the Department. Prior to this period the appellant seems to have not filed any application. Accordingly, the show cause notice proposed to confiscate the seized goods (finished goods and intermediate goods) totally valued at Rs. 8,27,980/- with further proposal to impose penalty under Rule 25 read with Section 11AC of the Act. Personal penalty was also proposed on the Partner Sh. Balbir Prakash Gupta and Sh. Jai Prakash Sharma under Rule 26.

8. The second show cause notice dated 27.02.2013 was issued demanding Central Excise duty of Rs. 10,17,041/- for the period July, 2010 to May, 2011. In this show cause notice, it is observed that the appellant appears to have purchased aluminium circles weighing 34,184.80 kg. for trading purpose during the period 02.07.2010 to 06.10.2010 based on the documents available on record. In his

further statement Sh. Balbir Prakash Gupta, Partner of the appellant inter-alia stated that after taking the premises on rent they have purchased second hand machine in July, 2010 from M/s Kailash Metal Co., Sadar Bazar, Delhi-06 for which payment was made by cheque. After purchase of the circle manufacturing machine in July, 2010 they have taken fine in installation and test production, which is evident from the bills raised during the period 03.08.2010 to 09.09.2010 for Rs.69,511/- After this period they have obtained Central Excise registration. It was also stated that they are not taking benefit of cenvat credit. It appeared to Revenue that appellant was engaged in manufacturing of aluminium circles since July 2010, which appears to be supported by the details of electricity consumption. Further, the Partners have admitted that they were clearing manufactured aluminium circles under commercial invoice at that time. From the resumed records it appeared to Revenue that the appellant was making sales of aluminium circles since July, 2010. Accordingly, treating all the turnover as manufacturing turnover, and as the appellant was not having specific permission to bring finished goods in the factory for trading, excise duty Rs.10,17,041/- was demanded for the period from July, 2010 to May, 2011 including cess with proposal to impose penalty under Rule 25 read with Section 11AC, with proposal to appropriate the amount of duty already deposited under CLS Rs. 61,800/- for the period November, 2010 to March, 2011. Further, personal penalty was also proposed on both the Partners under Rule 26.

9. Both the show cause notices were adjudicated on contest vide common order-in-original dated 27.08.2013 whereby the proposed demand of Rs.10,17,041/- was confirmed for the period July, 2010 to May, 2011. Further, the goods seized being finished goods and raw materials valued at Rs. 8,27,980/- were confiscated giving option to redeem on payment of fine of Rs.2,10,000/-. Further, penalty was imposed under Rule 25 read with Section 11AC. The amount of duty deposited (under CLS) of Rs. 61,800/- was appropriated. Penalty under Rule 26 was imposed on the Partners. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) inter-alia on the ground that they purchased machinery for manufacture of finished goods in July 2010 and after installation of new machine and trial production thereof, production started w.e.f. 11.11.2010, the appellant were paying duty under CLS @ Rs. 12,360/- per month. Only for the venial breach that the appellant did not file application in the prescribed format for permission to avail the benefit of (CLS) scheme. It is further urged that it was option of the appellant to pay duty under CLS and the benefit of such scheme could not have been denied, which have been notified under Section 3A of the Central Excise Act. The CLS is not an exemption scheme and thus there was no discretion with the Adjudicating Authority to deny of the same. Further, the trading turnover supported by the purchase and sales invoices and also supported by the VAT return, rejection is bad in the eyes of law. It was also urged that seizure of finished goods/ aluminium circles inside the factory premises of the registered assessee is bad in law. Thus, the whole exercise of seizure and confiscation is bad.

10. Learned Commissioner (Appeals) observed that the Revenue has alleged non-compliance of the provisions of CLS as per Notification No. 17/2007 which according to the appellant is venial lapse. Further, admittedly appellant has paid excise duty under CLS from November, 2010 to March, 2011. Further Revenue have refused to give the benefit of CLS for want of application by the appellant-assessee. Ld. Commissioner took notice of para 7 of the said notification which provides for condonation in case of failure to apply and gives discretion to the adjudicating authority, who can condone the delay on sufficient reason. Ld. Commissioner was pleased to allow the benefit of CLS as the appellant has taken effective steps by depositing duty as per CLS. Further, as the duty was paid under CLS it was held that the order of confiscation of the finished goods and raw materials, being part of the seized stock on the day of search, is bad as the appellant was not required to maintain records, paying duty under CLS. As para 5 of the said notification provides that during the period an assessee is availing the CLS, he shall be exempt from Rule 8 of the Central Excise Rules. Accordingly, the confiscation was held to be bad and set aside, the penalty imposed under Rule 25 and 26 was also set aside.

11. As regards the demand of duty Rs.10,17,041/- on the alleged clearance of 2,04,740 kg., of aluminium circles, ld. Commissioner taking notice of the contention of the appellant that excise duty can be demanded on the clearances during the period from 01.07.2010 to 31.10.2010 on production capacity of 1 ton per month. However, ld. Commissioner based on the RUDs worked out the

clearances made during this period at 1,63,689.39 kg., and after giving allowance for the traded goods 34,185 kg., upheld the remaining quantity at 1,29,504.50 and accordingly held that the appellant is liable to pay duty of Rs. 3,23,761.25 (@ Rs.2500/- PMT as per Notification No. 5/2005-CE). Ld. Commissioner (Appeals) observed, after careful reading of RUD-19, which incorporates the required details, clearly show that the appellant has purchased finished goods from M/s Pawan Overseas and M/s Shree Nath Trading Company, totalling 34,185 kg., Further, observed that the Revenue has not made proper enquiry and verification. Accordingly, ld. Commissioner reduced the quantum of evasion to Rs.3,23,761 with equal penalty under Rule 25. The penalty on two Partners were also reduced to Rs.1,61,831/- each.

12. Learned Counsel for the appellant further urges that it is evident from the record that appellant had done some test production prior to 11.11.2010 and started the commercial production from 11.11.2010, they have paid duty under CLS. Thus, the demand of duty have been erroneously confirmed. Further, the appellant has produced sufficient evidence by filing IT return and Sales Tax record supporting their turnover. Thus, the confirmation of duty of Rs.32,23,761/- is bad alongwith penalty. The explanation given by the appellant is not found to be wrong or untrue. Accordingly, he prays for allowing the appeal with consequential benefits.

13. Learned Authorised Representative appearing for the Revenue relies on the impugned order.

14. Having considered the rival contentions, I find that the contentions of the appellant have been accepted by the ld. Commissioner (Appeals) to a large extent. Thus, more or less - the appellant has done only test production prior to 11.11.2010 and they have been doing mainly trading of finished goods as the factory was not fully set up at the testing stage. Further, I find that Revenue has taken contrary stand wherein in the first show cause notice it is admitted that assessee has started commercial production from November, 2010 wherein in the second show cause notice, duty have been demanded from July, 2010. Accordingly, I allow the appeal and modify the impugned order in appeal as follows:-

i) The quantum of finished goods liable to duty for the period 01.07.2010 to 31.10.2010 shall be NIL.

ii) As the duty demand from July, 2010 to October, 2010, have been set aside. The penalty under Section 11AC read with Rule 25 is set aside.

15. Accordingly, the appeal is allowed, in the aforementioned terms.

(Order pronounced on 10.01.2023).

(Anil Choudhary)
Member (Judicial)

Pant