CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 2

EXCISE Appeal No. 11893 of 2013-DB

[Arising out of Order-in-Original/Appeal No 49-COMMR-SURAT-II-2013 dated 28.03.2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-SURAT-II]

Rajashree Polyfil **.... Appellant**
Rajashree Nagar, P.O. Umalla,
BHARUCH, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Surat-ii **.... Respondent**
New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat-395001

APPEARANCE :

Shri Sanjay Nair, Advocate for the Appellant
Shri Prakash Kumar Singh, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 10.04.2023
DATE OF DECISION: 08.06.2023

FINAL ORDER NO. A/11206/2023

C.L. MAHAR :

The appellant is inter-alia engaged in the manufacture of Nylon Chips, & Pet chips falling under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985. Polyester chips and nylon chips manufactured by the appellant are used for manufacture of polyester yarns and nylon yarns at its manufacturing unit and from time to time, also clears such polyester and nylon chips to its sister concern units situated at Pune and Mahad and to independent buyers. It is claimed by the appellant that the nylon chips are hygroscopic in nature, i.e., they absorb moisture from the atmosphere and these chips are cleared in wet form immediately after it passes through the centrifugal machine, i.e. containing around 10% moisture content. In respect of nylon chips captively consumed for manufacture of nylon yarns at its manufacturing unit at Rajashree Nagar and nylon chips cleared to its

sister units, the appellant discharges excise duty on the value determined under Section 4(1)(b) of Central Excise Act, 1944 read with Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and CBEC Circular No. 354/81/2000-TRU dated 30-06-2000 and No. 692/8/2003-CX dated 13-02-2003. In terms of Rule 8 of the Valuation Rules, in case the excisable goods are not sold by the assessee but are used for consumption by him in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the cost of production of such goods. Further, as per CBEC's Circular No. 692/08/2003 (supra), the cost of production of captively consumed goods shall be determined in accordance with CAS-4. For the period from 2007-08 to 2010-11, the appellant discharged excise duty claiming 9.5% discount from per unit cost of production of nylon chips & Pet Chips determined in CAS - 4 issued by Cost Accountant towards the weight of moisture contained in the nylon chips& PET chips so as to arrive at the value of wet nylon chips cleared to its sister units.

2.1 An EA-2000 audit for the period December 2008 to November 2009 was conducted, wherein the Department raised an objection on account of deduction of moisture content. In view of the audit objection, it was alleged that there was a short payment of duty on clearance of polyester and nylon chips on the ground that the appellant had wrongly deducted 9.5% towards moisture content from the cost price determined as per CAS-4. Accordingly, a Show Cause Notice (SCN) dated 17.03.2012 was issued alleging short payment of Central Excise duty for the period 2007-08 to 2010-11 amounting to Rs. 92,28,179/- (including Education Cess & Higher & secondary Education Cess) invoking extended period of limitation of five years on the ground that the appellant had evaded central excise duty by

suppressing these facts in their ER-1 return and contravened provisions of Rule 4,6,8,11&12 of the Central Excise Rules, 2002 read with Section 4(1)(b) of the Central Excise Act, 1944 and Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rule, 2000 with intent to evaded payment of duty by recourse to suppression of facts It has also been alleged in the SCN was that the assessee failed to prove that the products i.e. Nylon & polyester chips cleared from their factory to their sister concerns were in dry or wet form and had produced no evidence to the said effect.

2.2 The appellant produced before the Ld. Adjudicating authority CAS-4 certificates issued by the Cost Accountant for the period 2007-08, 2008-09, 2009-2010 and 2010-2011. Whereas the for the year 2009-10 & 2010-11, CAS - 4 reflected net cost of production of wet chips, after discounting the per unit cost by 9.5% towards moisture content, the CAS-4 certificates for the years 2007-08 & 2008-09 did not show any such discount. The appellant in order to prove that the per unit cost determined in the CAS-4 for the year 2007-08 & 2008-09 were actually for the dry chips from which they have not claimed a discount of 9.5% while clearing to their sister units. They also produced another certificate dated 23.04.2012from the Cost Accountant obtained subsequently which certified that the cost shown in the CAS-4 certificates for 2007-08 & 2008-09 was in respect of dry chips and certifying that the moisture content in the wet chips cleared from the factory was 9.32% and 9.4 % respectively of the gross weight of wet chips. The Ld. Adjudicating authority however did not get convinced with the submissions made by the appellant and confirmed the demand of Rs. 92,28,179/- against the appellant under extended period of limitation & imposing equal penalty under Section 11AC of the Act and also demanding applicable interest as per

Section 11AA/11AB of the Act holding that the appellant had failed to clear the excisable goods in terms of the CAS-4 certificates. The relevant extract from the adjudication order is as under: -

> ***"16.*** *It is observed that the assessee cleared nylon / polyester chips to their sister concern units. As per the cost accounting standard- 4 (CAS-4) certificate issued by the company's cost accountant, the value for nylon chips was Rs. 116.79 per kg and Rs. 126.09 per kg for the year 2007-08 and 2008-09. For polyester chips, CAS-4 value was Rs. 53.71 per kg and Rs. 54.24 per kg for 2007-08 and 2008-09 respectively. However, the assessee had made a deduction of 9.5% from CAS-4 value on the ground that the goods cleared by them were wet chips whereas the CAS-4 value was for the dry chips. The assessee's contention is that the chips are hygroscopic (water catching / water loving) in nature and if they dry the chips in their factory by the time the goods reach the other factory, they will again catch the moisture and will have to be dried again. It is observed that neither the CAS-4 certificate nor the assessee's invoices or other statutory records indicate as to whether the same are for dry chips or wet chips. It is undisputed that as per cost accountant's certificate value for nylon chips was Rs. 116.79 per kg and Rs. 126.09 per kg for the year 2007-08 and 2008-09 respectively. Similarly, CAS-4 value for polyester chips was Rs. 53.71 per kg and 54.24 per kg for the years 2007-08 and 2008-09 respectively. CAS4 certificate indicates that the cost account has valued the goods, which were ready for dispatch i.e., in the condition the same are transported to the related persons i.e., sister concerns for captive consumption. CAS-4 certificates do not show specifically whether the costing is for dry chips or wet chips but if the usual practice and in fact the logical practice is to send the goods from one sister concern to another is to send the wet chips to obviate re-drying process at the factory of consumption again, the CAS-4 certificate would pertain to wet chips only.*
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> ***17.*** *It is observed that as per the CAS-4 certificate, entire cost of production consisting of material consumed, direct wages and salaries, direct expenses works overheads quality control cost, research and development cost, packing cost, administrative*

overheads relating to production is included. Further suitable adjustment for stock in work in progress finished goods, recovery of sales of scraps, wastage are required to be made. CAS-4 certificate includes all the processes upto which the goods are ready for dispatch. Therefore, the assessee's contention that deduction of 9.5% towards the moisture content has to be made is unacceptable since there is a standard practice in their company to send only wet chips, which has already been accounted for by the cost accountant. Further, the assessee could not show or demonstrate that CAS-4 certificates also include drying process. It is an admitted position that the CAS-4 certificates do not indicate as to whether the same is for wet or dry chips. I therefore observe that CAS-4 certificates has to be adopted to arrive at the value of captive consumption. Hon'ble courts have in catena of judgments have held that the CAS-4 certificates have to be followed unless a patent inaccuracy or error is shown."

2.3 Ld. Counsel for the appellant has vehemently pleaded before us that the deduction of 9.5% was correctly claimed from CAS-4 cost of production which were for the dry Nylon & polyester chips to arrive at the per unit cost of production of the wet chips. He has claimed that the impugned order fails to take into account the evidences submitted by the Appellant in reply to Show Cause Notice i.e. a Certificate dated 30.07.2010 issued by its HOD (QC), certifying the moisture content in RP extracted chips, Copy of independent cost accountant certificate dated 23.04.2012 & Copy of chartered engineer report dated 10.05.2012 who after physical verification certified that the moisture content after the centrifugal stage was in the Range of 9-13%. He further pleaded that the CAS-4 statement for the years 2009-10 &2010-11 itself arrives at the value after deducting the moisture content. The Appellant has not made any deductions on its own in the value mentioned in the CAS-4 statement for these years and this is an undisputed fact recorded in the SCN itself. These documents would show unequivocally

that there is a moisture content which is present at the time of clearance of goods to sister unit and the value of dry chips need to be arrived at for the purpose of levy of central excuse duty at the time of removal. It is undisputed that that the Appellant has paid excise duty on the value recorded in the CAS-4 statement for the years 2009-10 and 2010-11 and no suo motu deduction has been made by the Appellant from the CAS-4 value for these years. No findings have been recorded in the Impugned order with respect to the aforesaid CAS-4 certificates for the years 2009-10 & 2010-11. He relied upon the decision of Tribunal in the case of **Exide Industries Ltd., Vs. Commissioner of Central Excise Chennai reported as 2004 (164) E.L.T. 46 (Tri. Chennai)** in support to his contention that moisture content was not to be added to the assessable value of the excisable goods. Ld. Counsel for the appellant also assailed the impugned order for invoking the extended period of limitation and levying equal penalty under Section 11AC of the Act on the ground that finding in the impugned order that the deduction made from the CAS-4 was done with an intent to evade duty is without any basis and the Revenue has not advanced any proof to substantiate its contention. He relied on the Apex Court decisions in the case of **Uniworth Textiles Vs Commissioner of Central Excise Raipur 2013 (288) ELT 0161 SC**, **Padmini Products Vs Collector of Central Excise, 1989 (43) ELT 195 (SC)** that burden to prove malafide on the part of the assessee is on the department who makes the allegation and mere non-payment of duties is not equivalent to collusion or willful misstatement or suppression of facts. For invoking extended period of five years limitation duty should not had been paid, short-levied or short paid or erroneously refunded because of either any fraud, collusion or willful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act, therefore,

failure to pay duty or take out a license is not necessarily due to fraud or collusion or willful mis-statement or suppression of facts or contravention of any provisions of the Act. Revenue having not discharged its burden, Invocation of extended period of limitation is unwarranted in the present case. that clearances made to sister concerns were duly reported in the relevant ER-I returns and there was no suppression as there is no column in the ER-I returns where deduction on account of moisture content could have been reported;that there was no incentive for it to deliberately suppress the value of clearances made to sister units since whatever central excise duty was paid was available to its sister units as Cenvat credit, therefore, the situation is revenue neutral. He relied on the decision of the Tribunal in the case Of **Mahindra and Mahindra Ltd Vs Commissioner of Central Excise Mumbai, 2019 (368) ELT 105 (Tri-Mumbai)** wherein the Tribunal held that on clearances to sister units when Cenvat credit is admissible to sister units, situation would be revenue neutral and hence extended period of limitation is not invokeable in such cases which was affirmed by the **Hon'ble Supreme Court as reported in Commissioner v. Mahindra & Mahindra Ltd. 2019 (368) E.L.T. A41 (S.C.).**

3. Ld. Departmental representative has vehemently argued that the impugned order was correctly passed and reiterated the findings of the impugned order.

4. We have carefully gone through the arguments made by the Ld. Counsel on behalf of the appellant as well as the Ld. Departmental representative.

5. For the year 2009-10 & 2010-11, we find that there is a specific mention of the discount of 9.5% in the CAS-4 certificate itself and net cost of production of wet chips has been arrived at after arriving at the cost of production of the dry chips and discounting the cost by 9.5% to arrive at the cost of dry chips. The appellant has cleared their goods by taking this cost only for determining the assessable value. No evidence has been adduced by the department that the Nylon & polyester chips cleared by the appellant to its sister units was not the wet chips. This fact has also been certified by the Chartered Engineer in its report dated 10.05.2012 that the chips arising after the centrifugal stage in which these are cleared by the appellants has a moisture content of 9-13%. The report of the Chartered Engineer has not been contradicted in the impugned order. We find that the impugned order has mechanically been passed and the demand has been confirmed for these years 2009-10 & 2010-11 without any discussion in the impugned order to the CAS-4 certificates for these years and only CAS-4 certificates for the years 2007-08 and 2008-09 have been discussed in the impugned order. Therefore, there was absolutely no reason for the adjudicating authority to confirm demand for the year 2009-10 & 2010-11. For the years 2007-08 & 2008-09 we find that the CAS-4 certificates originally prepared by the Cost Accountant did not have any mention whether the cost of production arrived at was for the dry chips or the wet chips. However, the appellant in order to justify their contention that the cost of production determined in the CAS-4 certificates for these years was only for the dry chips, produced another certificate from the Cost Accountant for the years 2007-08 & 2008-09 which categorically mentioned that the cost shown in the earlier CAS-4 certificates was for the dry chips only and the average moisture content in the wet chips was 9.32% and 9.40 percent respectively for the years 2007-08 & 2008-09.

The certificate issued by KAILASH SANKLECHA & ASSOCIATES, COST ACCOUTANTS read as under :-

> "This is to certify that we have checked cost records, excise records, production records and other related records of M/s Rajashree Polyfil (A unit of Century Enka Limited) having its plant at Rajashree Nagar, Post Umalla Dist. — Bharuch for the financial year 2007-08 (1st April, 2007 to 31st March, 2008) to verify cost as given in the attached CAS-4 and moisture contents in the wet chips a previous step output in the manufacturing process to produce dry chips.
>
> We certify that the cost shown in the attached CAS-4 represents cost of dry chips and average moisture content in the wet chips from which the dry chips are produced, was 9.32% of gross weight of wet chips during the financial year 2007-08.
>
> The cost figures given in the attached CAS-4 and the content of moisture in the wet chips for the financial year 2007-08 are true and fair and are additionally based on our checking of the cost audit report and laboratory report on our visit to the company's plant on 18th April'2012."

The above certificate clearly states that the certificate has been issued by the Cost Accountant after checking cost records, excise records, production records and other related records of the appellant. It is a settled principle of law that the certificates issued by qualified professionals like Cost Accountants, Chartered Accountants, Chartered Engineers should not be brushed aside merely with the statement that corroborative evidence was not produced. They need to be accepted by the department unless investigation is undertaken in doubtful cases and the data is re-verified by appointing its own cost accountant or producing another material on record. The Tribunal in the matter of COMMISSIONER OF C. EX., TIRUPATHI vs. ELGI TYRES & TUBES (P) LTD. - 2009 (248) E.L.T. 574 (Tri. - Bang.) has held as under:-

> **"**The Appellants in the present matter has produced a Certificate dated 24-12-96 from the Chartered Accountant wherein the cost structured of a montego car was given and it included "selling, general and other overheads" also. Except alleging that the

overhead, is on the higher side, Revenue has not brought on record any material in support of that contention and to falsify the Certificate given by the Chartered Accountant. The Chartered Accountant has given the Certificate after verifying the books of accounts produced and information furnished to them. The Revenue has to controvert the Certificate by adducing material or evidence based on records. It cannot simply brush aside the Certificate by observing that the details of overheads were not furnished.**"**

Again in the case of COMMISSIONER OF C. EX., TIRUPATHI Versus ELGI TYRES & TUBES (P) LTD. - 2009 (248) E.L.T. 574 (Tri. - Bang.), the Tribunal has observed as under :-

"8. Learned Commissioner (Appeals) while arriving at the above reproduced conclusion has relied upon the decision of this bench in the case of ATS India [(2006 (199) E.L.T. 123)] Sipani Automobiles [(2004 (176) E.L.T. 807)] and ITC Bhadrachalam Paper Boards [(2002 (146) E.L.T. 582)]. We find that the leaned Commissioner (Appeals) findings in paragraphs 7 are very clear. We also concur with the view expressed by the learned Commissioner (appeals) that if the adjudicating Authority is not able to arrive at conclusion based upon the Cost Accountant's Certificate, he could have ordered the inspection of the records, by resorting the provisions in the CEA 1944. Having not done so, plainly inferring that the Cost Accountant's certificate is not backed with corroborative evidences is not sufficient reason for rejecting the refund claim. On perusal of the cost Accountant's certificate, we find that the Cost Accountant has clearly indicated in his certificate that he had gone through all the accounts/records of the Company and then only, he has come to the conclusion that the amount of refund claim by the respondents has not been passed on to the customers at any stage, against this certificate. There is no contrary evidence adduced by revenue. Accordingly in view of the above reasoning we find that the order of learned Commissioner (Appeals), is legal and correct. It does not require any interference. The appeal filed by the revenue is rejected.

6. Therefore, we hold that the original Cost Accountant CAS-4 certificates determined cost of the dry chips only and the appellant was entitled to discount the moisture percentage to arrive at the net cost of production. However, it is seen that the discount of 9.5% claimed by the appellant was marginally higher than the wet content of 9.32% or 9.40% arrived at by the

Cost Accountant for the years 2007-08 & 2008-09 respectively. However, we further find that as the whole issue was revenue neutral as any additional duty payable by the appellant was available for Cenvat credit to its sister unit, no malafide can be attributed for this small difference. As the demand, if any, for this small difference will be for the years 2007-08 & 2008-09 only and the show cause notice was issued on 17.03.2012, the demand will be time barred.

7. In view of the above findings, we set aside the impugned order on merit as well as on limitation. The appellant will be entitled to consequential relief, if any.

(Pronounced in the open court on 08.06.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL