F NO. 195/263/14-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F NO. 195/263/14-RA /949 Date of Issue: 07.03.2022

ORDER NO. 222 /2022-CX (SZ) /ASRA/MUMBAI DATED 03.03. 2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Cobra Carbide Pvt.

Respondent : Commissioner CGST Bengaluru South

Subject : Revision Application filed, under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 304/2014-C.E dated 29.05.2014 passed by the Commissioner of CGST & Central Tax, (Appeals-I) Bangalore.

ORDER

This Revision Application is filed by the M/s Cobra Carbide Pvt., Ltd., 54, Bommasandra Industrial Area, Phase IV, Bangalore 560099 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. 304/2014-C.E dated 29.05.2014 passed by the Commissioner of CGST & Central Tax, (Appeals-I) Bangalore.

2. The Applicant are the manufacturers of interchangeable tools for drilling, milling and turning falling under chapter subheading No. 82079090 of the schedule to the Central Excise Tariff Act, 1985 and are availing exemption under notification No. 52/2003 -Cus and 22/2003 - C.Ex., both dated 31.03.2003. During verification of records of the Applicant, it was noticed that there was an incidence of theft of finished goods on 07.02.2009 from the bonded store room. The value of the said goods was reported to be Rs. 30,12,568/- and the Applicant had not paid duty on the same. An application was made by the Applicant on 08.05.2012 (after three years of incidence) seeking remission of duty enclosing various documents like reply of Insurance Company, legal notice to the Insurance Company, FIR etc. It also appeared that the Applicant had failed to meet the export obligation resulting in non fulfillment of post importation conditions of duty exemption. Accordingly it appeared that the duty of Rs. 8,08,836/- involved in claimed to be stolen was liable to be demanded and recovered under 11 A of the Central Excise Act, 1944. Hence show cause notice dated 22.08.2012 was issued demanding the said duty along with interest and proposing to impose equivalent penalty under section 11 AC of the Central Excise Act, 1944. The original authority after due process of law has confirmed the demand along with interest in the impugned order imposed equivalent penalty under section 11 AC ibid.

3. However based on the documents submitted by the Applicant, the Department observed the following points: (1) There was delay in taking up the

matter with security agency and contradictory statements were given to the police and the Insurance Company. (ii) There was also inordinate delay in filing application for remission of duty and as such it appeared that there was collusion and suppression of certain facts. (iii) As such it appeared that the Applicant is trying to cover up the clandestine removal of goods by claiming theft with intent to evade payment of duty.

4. Being aggrieved by the aforesaid order-in-original the applicant filed appeal before Commissioner of CGST & Central Tax, (Appeals-I) Bangalore , who vide order- in-appeal No. 304/2014-C.E dated 29.05.2014 rejected their claim by holding that theft cases are not covered under rule 21 of the central Excise rules, 2002.

5. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant had filed this revision Application under Section 35EE of the Central Excise Act, 1944 before the Government on the following grounds :-

i) the order of the lower appellate authority is wholly misconceived and inconsistent. The order ignores all the facts of the case and is not legally sustainable. Therefore the applicant submits that the order merits interference by the Learned Revisionary Authority.

ii) No liability to pay duty when Rule 21 is applicable.

iii) whether the theft of the goods would come within the scope of Rule 21 of the Central Excise Rules, 2002 and relies on the following case laws in support of this proposition :-

a) Bavaji and v. Inspector of Central Excise, 1979 ELT (1 282)

b) Mahindra and Mahindra Ltd v Collector of Central Excise, 1988 (33)

c) G.K. Enterprises(P) Ltd v. CCE, 2003 (152) ELT 136 (T-Del)

d) Sialkot Industrial Corporation v. Union of India, 1979 (4) ELT (J 329) (Del).

iv) the lower authorities had relied on the decision of the Larger Bench of the Tribunal in the Gupta Metal Sheet case. However the applicant submits that this decision would not be applicable to the present case and the ratio of the decision of the Golden Hills Estate case (and in turn the Gupta Metal Sheet case) would be applicable only if there is any negligence on the part of the assessee to take care of the finished goods. In the instant case, they had taken proper care and shown diligence for the protection of the warehouse.

v) the notice has determined the value of the finished goods at Rs. 30,12,568/-. The applicant submits that the amount of Rs. 30,12,568/- is the List price of the finished goods. The applicant further submits that this amount includes 50% discount which the applicant offers to the buyers and the other expenses including the profit margin. Thus the applicant submits that this value of the goods is far higher than the actual transaction value of the goods i.e. the value at which the goods are actually exported by the applicant. The applicant submits that reference to the Export Valuation Rules of 2007 make it clear that the valuation of the exported goods should be made at the transaction value. But, the notice has failed to adopt the transaction value. Hence assuming but not admitting that the applicant is liable to pay any duty amount, the same is liable to be recomputed taking into account the actual transaction value of the finished goods. The applicant further submits that though this ground was urged before the lower authorities, the lower appellate authority has not entered any finding on this ground.

vi) the theft occurred on 7.2.2009. The applicant informed the Customs Authority regarding the theft vide letter dated 27.2.2009. The applicant further submits that it has entered the details of the theft in the relevant records and the same was noticed by the audit party during the verification of the records. The applicant further submits that when the audit party sought for further details it also provided the same to the department. The submits that when it has disclosed all the transactions in the regular books and records, it is not possible to hide these facts from the central excise department. Further the applicant submits that the original authority in the Order-in-Original No. 67/2013 dated 30.8.2013 has observed thus:

> 'In the instant case although the assessee has informed about the incidence of theft to the Department.....'

Thus it is clear that the lower authorities have themselves admitted that the applicant has not suppressed any facts from the department. Hence the applicant submits that the observation of the suppression of facts is baseless and without even a shred of proof, either documentary or oral.

vii) neither the bald allegation nor the borrowing of the language of the statutory provision can be made a substitute for proof to support the finding of suppression. In the context, the applicant relies on the ratio of the Supreme Court in Amco Batteries Ltd v. CCE 2003 (153) ELT 7 (SC) wherein it was held that once the transactions are disclosed in the regularly maintained records, no suppression can be alleged. The applicant further relies on the ratio of the decision in CCE v. Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC) wherein the Apex Court has held that mere inaction or negligence cannot be construed as suppression of facts and that suppression requires some

active attempt at concealment that was required to be disclosed. The applicant submits that as the notice and the impugned orders do not bring even a single instance of such active concealment of information, the applicant submits that the finding of suppression of facts merits interference by the Learned Revisionary Authority.

viii) The applicant has not clandestinely removed any goods. The applicant submits that the police department is an investigative body and it had not alleged that the applicant had been involved in colluding with any person for the theft of the finished goods. In these circumstances, the allegation in the notice that the applicant has 'claimed that there has been a theft' with intent to evade payment of duty, is baseless and without even a shred of proof. The applicant further submits that the allegation that the applicant is in some manner connected with the theft of the finished goods is baseless and absurd.

ix) the belated Remission Application is no proof of suppression of facts or collusion. The applicant had filed a writ petition before the Hon'ble High Court of Karnataka and by inadvertence, it had failed to file the remission application. The applicant submits that the belated filing would not in any manner vitiate the remission application.

x) it has also fulfilled its export obligation. The applicant further submits that the original authority in paragraph 20 of the O10 has observed thus:

'For this assessee replied that since 2002 they are exporting the goods and have achieved the positive Net Foreign Exchange as required under Foreign Trade Policy. I find that no substantial evidence is forthcoming along with allegations in the Show Cause

Notice; hence I accept the assessee's contention for having achieved positive NFE."

Thus the applicant submits that the lower authorities have also clearly agreed that the applicant have fulfilled the export obligation and hence the allegations are as far as this issue are concerned have been dropped by the lower authorities.

xi) Extended period of Limitation is not invokable. Merely because the department has conducted the audit beyond the period of one year and has raised some objections, it would not mean that any information which was more than a year old has been concealed or suppressed by the applicant. The applicant further submits that having failed to take action within the statutory period: the Revenue cannot recover the time-barred demand under the extended period of limitation.

xii) the goods were stolen on 7.2.2009 and the department had issued the present show-cause notice after almost three and half years. The applicant submits that it raises a strong presumption that it was only for the sole purpose of saving a time barred demand that the notice had alleged suppression of facts. Since the applicant had not suppressed any facts and the extended period of limitation was not invokable, the applicant submits that the entire demand is time-barred and is liable to be dropped by the Learned Revisionary Authority.

xiii) there were decided cases which clearly held that the applicant would be eligible for the remission of the duty in cases of theft., Hence the applicant submits that it reasonably believed that it was not liable to pay any duty on the stolen goods. As its conduct is based on

reasonable belief, the applicant submits that the penalty should not be imposed on the applicant. The applicant relies on the ratio of the decision in Hindustan Steel Ltd v. State of Orissa, 1978 (2) ELT 1159 (SC) in support of the above proposition.

xiv) the lower appellate authority has imposed penalty under Rule 25 of the Central Excise Rules, 2002. The applicant submits that it is a well-settled law that no penalty can be imposed if the allegations in the notice do not squarely fall within the scope of the penal provisions. The applicant submits that as the impugned order does not even mention which sub section of Rule 25 had been violated by the applicant, penalty would not be imposable on the applicant. The applicant further submits that since there is no violation of any provisions of the Central Excise Act, 1944 or the rules or the notifications issued thereunder, the applicant submits that the penalty cannot be imposed on it under Rule 25 of the Central Excise Rules,2002.

xv) The Applicant prayed that

1. Set aside the impugned order.
2. Set aside the demand of duty of Rs. 8,08,836/- under Section 11A(4) of the
Central Excise Act, 1944.
3. Set aside the demand of interest on the duty demand.
4. Set aside the imposition of penalty under Section 11AC read with Rule 25

4. Personal hearing was fixed on 10.10.2019, 20/28.11.2019, 02/16.02.2021, 05/22.07.2021, however no one appeared for the hearing. Hence the case is taken up on merits.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions/counter objections and perused the impugned Order-in-Original and Order-in-Appeal.

6. On perusal of the Revisions Application, the Government notes that the Revision application has been filed to the extent of issue related to the goods lost due to theft. In view of the above, Government restricts the order to the following grounds only :-

a) Whether theft cases are covered under rule 21 of the central Excise rules, 2002 or not ?

b) Whether there is a suppression of facts or not ?

c) Whether duty demanded warrants re-computation ?

d) Whether penalty is rightly imposed ?

7. The Government observes that Remission of Central Excise Duty means duty which is required to be paid as per statutory provisions, but waived from payment in specified circumstances by the competent authority. In the instant case it is a situation where some manufactured goods were stolen from the factory on account of theft before clearance of the same. As these are manufactured goods, Central Excise duty is leviable on these goods in terms of Section 3 of Central Excise Act 1944.

7.1 The Government finds that Section 5 of Central Excise Act 1944 provides enabling provisions for remission of Central Excise duty on Excisable goods which are found deficient in quantity or destroyed due to natural / unavoidable causes by making rules in this behalf. In exercise of powers conferred under Section 5 of the Central Excise Act, 1944, the Government has framed Rule 21 of the Central Excise Rules, 2002. Rule 21 of the Central Excise Rules, 2002 provides as follows:-

"Remission of duty. -

Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing :

Provided that where such duty does not exceed ten thousand rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Superintendent of Central Excise" has been substituted :

Provided further that where such duty exceeds ten thousand rupees but does not exceed one lakh rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be," has been substituted :

Provided also that where such duty exceeds one lakh rupees but does not exceed five lakh rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Joint Commissioner of Central Excise or Additional Commissioner of Central Excise, as the case may be," has been substituted."

7.2 In view of above, Government observes that under Rule 21, a remission of duty is contemplated where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by (i) natural causes; or (ii) unavoidable accident; or are claimed by the manufacturer as being unfit for consumption or for marketing. The remission is to be granted subject to such conditions as may be imposed. The expressions "natural causes" or "unavoidable accident" have to be interpreted in their ordinary and natural connotation. An unavoidable accident is an event which lies beyond the control of the assessee and which has taken place despite the exercise of due and reasonable care and protection. Both the expressions have to be construed in a reasonable manner to sub-serve the object of the legislature in introducing the provision for remission of duty in Rule 21.

7.3 The Government holds that the theft cases are not covered under rule 21. The same has been held by the Hon'ble CESTAT, New Delhi , in the case of Gupta metal Sheet vs CCE Gurgaon,2008(232)E.L.T. 796(Tri.-LB) , the relevant context of the judgment is reproduced as -

"We find substance in the submission of the Jt. CDR that in the case of theft or dacoity, the goods are not 'lost' or 'destroyed'; they rather enter the market for consumption, albeit stealthily, after being removed from the approved premises or the place of storage."

Government observes that the Hon'ble cestat , New Delhi categorically observed in aforesaid judgment that **in the case of theft or dacoity the goods are not considered to be lost or destroyed.** Thus, rule 21 which states goods lost or destroyed doesn't cover theft cases in its ambit. Therefore, Applicant's view that Gupta Metal case was only applicable when any negligence on the part of the applicant in taking care of the finished goods, is devoid of merit.

7.4 In their earlier judgment in case of Maneesh Exports(EOU) 2011(273)E.L.T. 466(GOI), Government held the same view that the theft cases are not covered under rule 21. Further Government observes that the case laws as cited by the applicant in the instant case are not applicable directly to the case in hand.

8. The applicant though intimated the department but failed to pay the duty voluntarily as per the provision of Central Excise rules 2002. They either have to pay the duty or had to file the remission on time as per the procedure laid down by the act and they had failed to comply with. The remission application is filed after 3 years of the incidence only when the department auditors pointed out the objection during Audit. The Government opines that the Applicant , being registered Central Excise assesse, was bound to comply with the provisions related to remission of duty on goods stolen as envisage under the provisions of Rule 21 of Central Excise Rules, 2002. In the instant

case, the respondent had failed to take the recourse available under Rule 21.

Therefore, the Government opines that the granting remission of duty without compliance of procedural requirements by the respondent would make the Rule 21 of Central Excise Rules, 2002 redundant. By going through their letter dated 27.02.2009 vide which applicant intimated theft to the Department, Government observes that the Applicant used the terms 'stolen tools/property' and suppressed the fact that goods stolen were manufactured/dutiable goods . The oxford definition of tools is that 'a device or implement, especially one held in the hand, used to carry out a particular function'. In this regards, Government finds that applicant had suppressed the facts with intent to evade payment of duty. Thus the penalty is rightly imposed in the instant case.

9. The applicant further stated that they have fulfilled the export obligation and submits that the adjudicating authority in paragraph 20 of the OIO has observed as under-

"For this assessee replied that since 2002 they are exporting the goods and have achieved the positive Net Foreign Exchange as required under Foreign Trade Policy. I find that no substantial evidence is forthcoming along with allegations in the Show Cause Notice; hence I accept the assessee's contention for having achieved positive NFE."

In this regards , Government holds that the exports in the past or getting Positive NFE does not construe that the export obligations are fulfilled in the instant case also. It is the accepted fact in the instant case that the manufactured goods in question were stolen from the warehouse and were not exported eventually. Therefore, Section 11 A of the Central Excise act to demand duty of excise on the goods produced/manufactured is applicable in the matter.

10. With reference to the re-computation of demand ,Government finds that the lower authorities did not enter and gave findings on the same though it was urged before them. The applicant stated that the value of the finished goods is determined on the list price which should be made at the transaction value. In this regards Government observes that the valuation is to be determined in accordance with the Central Excise valuation rules.

11. In view of the above discussions and findings, Government modifies the the Order-in-Appeal No. 304/2014-C.E dated 29.05.2014 passed by the Commissioner of CGST & Central Tax, (Appeals-I) Bangalore to the extent of the re-computation of demand and remands matter back to the adjudicating authority to re-compute the demand in terms of the transactional value in accordance with the Central Excise valuation rules.

3/3/22

(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No222/2022-CX (SZ) /ASRA/Mumbai Dated 03.03.2022

To,
M/s Cobra Carbide Pvt., Ltd.,
54, Bommasandra Industrial Area,
Phase IV, Bangalore 560099

Copy to:

1. The Commissioner of CGST & CX, Banglore -1 Commissionerate : CR Building ,P.B. No. 5400, Queens Road, Bengaluru-560001.
2. The Commissioner of CGST &CX(Appeals-I), No. 16/1,5th Floor, SP Complex, Lalbagh Road, Bengaluru-560027.
3. The Additional Commissioner, Banglore -1 Commissionerate : CR Building ,P.B. No. 5400, Queens Road, Bengaluru-560001.
4. Sr. P.S. to AS(RA), Mumbai.
5. Guard File.