

HIGH COURT OF CHHATTISGARH, BILASPUR**TAXC No. 33 of 2017**

Judgment Reserved On : 16/04/2018

Judgment Delivered On : 31/08/2018

- Devi Iron And Power Private Limited Sponge Iron Division, Siltara Industrial Growth Centre, Village Tanda Dharsiwa Raipur, District Raipur, Chhattisgarh, Through Its Director, Chhattisgarh

---- Appellant**Versus**

1. The Commissioner Central Excise And Customs New Central Revenue Building, Civil Lines, Raipur, Distt. Raipur, Chhattisgarh, Chhattisgarh
2. The Customs, Excise And Service Tax Appellate Tribunal, West Block No.2, R.K.Puram, New Delhi, District : New Delhi, Delhi
3. The Commissioner Appeals Customs And Central Excise, Central Excise Building Tikrapara, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh

---- Respondent**TAXC No. 129 of 2017**

- Devi Iron And Power Private Limited Sponge Iron Division, Mahamaya Tower, Infront Of Anupam Garden, G. E. Road, Near Central Automobiles, Raipur District Raipur Chhattisgarh. Through Its Director., Chhattisgarh

---- Appellant**Versus**

1. The Commissioner, Central Excise And Customs New Central Revenue Building, Civil Lines, District Raipur, Chhattisgarh , Chhattisgarh
2. The Customs, Excise And Services Tax Appellate Tribunal, West Block No. 2, R. K. Puram, New Delhi., District : New Delhi, Delhi
3. The Commissioner Appeals, Customs And Central Excise, Central Excise Building, Tikrapara, Raipur District Raipur, Chhattisgarh, District : Raipur, Chhattisgarh

---- Respondent

For Appellant : Shri Ashish Shrivastava, Advocate.
For Respondents : Shri Vinay Pandey, Advocate.

**Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Shri Ram Prasanna Sharma, JJ**

C A V JUDGMENT

The following judgment of the Court was delivered by **Prashant Kumar Mishra, J.**

1. The present Appeals under Section 35-G of the Central Excise Act, 1944 (for short 'the Act') have been admitted on the following substantial questions of law:-

“i) Whether on the facts and circumstances of the case, the Tribunal as well as the Subordinate Authorities are justified in holding that the product in relation to the assessment which has been made, falls within the description “Fly Ash Bricks” in terms of the relevant entry making it exigible to levy of duty?

ii) Whether on the facts and circumstances of the case, is the impugned demand barred by limitation in terms of Section 11A of the Central Excise Act, 1944?

iii) Whether the Authority below erred in law and due procedure in accordance with law in relying on the views of the chemical examiner without affording the appellant an opportunity of cross-examining?

iv) Has the Department arrived at the conclusion against the Assessee regarding the nature of the material passed off by the assessee “as fly ash bricks”, based on reliable material and technical data? Is such finding in accordance with law?”

2. The appellants are the manufacturer of sponge iron and fly ash bricks.

In course of audit, it came to the notice of the Revenue that the appellants have manufactured and cleared fly ash bricks containing 48.2% of ESP dust by weight without payment of central excise duty leviable @ 16% during the period 2005-06 to 2007-08 in Tax Case No.33/2017 and for the period April, 2008 to November, 2008 in Tax Case No.129/2017. The appellants were alleged to have manufactured fly ash bricks and not ESP dust bricks, therefore, notice was issued for payment of excise duty, interest and penalty. The Revenue also invoked the extended period of limitation provided under Section 11A of the Act for the reason that the appellants suppressed the material fact and information from the department with intent to evade payment of central excise duty. According to the appellant, it has manufactured ESP dust bricks and not fly ash bricks, therefore, it was not liable to pay central excise duty nor it has suppressed any material fact or information with the Revenue. Therefore, neither penalty nor extended period of limitation could be invoked.

3. The adjudicating authority of Commissioner, Central Excise, Raipur passed the order in original on 30th June, 2009 recording a finding that the appellant used coal as solid fuel in kilns for manufacturing of sponge iron; hence its combustion generates ash particles which are carried off with the waste gases and collected in Electro Static Precipitator and it is called fly ash. Therefore, since the appellants were

also selling bricks by name “Fly Ash Bricks”, which could not have been done unless it contains fly ash, the liability to pay on clearance of fly ash bricks squarely lies on the appellants. It is also recorded that the appellants have themselves mentioned fly ash bricks in their accounts and sale bills. The Commissioner further found that the noticee vide its letter dated 13.5.2008 informed that ESP dust bricks i.e. fly ash bricks manufactured by them contain 48.2% of fly ash by weight and that in its commercial invoice description of goods, it is also mentioned by the appellants as fly ash bricks, however, the noticee neither maintained proper accounts of receipt and use of fly ash nor filed any monthly return in this regard.

4. Repelling the contention of the appellants that it used bottom ash rather than fly ash, the Commissioner observed that the bottom ash and fly ash are the same in chemical composition and since the noticee have accepted that they have used ash/dust collected from the ESP, which has actually been precipitated from combustion of coal, it is nothing but “ash”.
5. The Appellate Tribunal, while affirming the order passed by the adjudicating authority, would also refer to the admission made by the appellants in various communications that the bricks manufactured have been sold in the market as fly ash bricks and that the percentage of fly ash in the bricks was more than 48%.

6. In course of submissions, learned counsel for the appellants would take us to the manufacturing process of the bricks manufactured by it to demonstrate that in fact it is ESP dust bricks and not fly ash. However, firstly, the issue as to whether the bricks were fly ash bricks or ESP dust bricks has been settled by the adjudicating authority and the Appellate Tribunal, therefore, it is not open to attack in these Appeals, as the same is pure finding of fact. Secondly, the appellants themselves would admit that they have sold bricks in the name of fly ash bricks and that the same carries more than 48% of fly ash by weight.
7. The issue as to whether the appellants are entitled to concessional duty rate or exemption under Notification No.5/09-CE has been dealt by the Tribunal in its order dated 9.2.2017 by substituting para-4 of its previous order dated 29.9.2016 by leaving it on the jurisdictional authority to verify the accounts maintained by the appellants and on fulfillment of such conditions for exemption under the subject notification, exemption available shall be extended to the appellants.
8. The appellants have admittedly not maintained any record nor filed any return even though they were selling goods as fly ash bricks, therefore, extended period of limitation in terms of Section 11A of the Act has rightly been invoked. The present is a case of willful evasion of duty.
9. Here it would be profitable to refer to the judgment rendered by the Supreme Court in the matter of **T.N. State Transport Corpn. Ltd. Vs.**

Collector of C.Ex., Madurai {2004 (166) E.L.T. 433 (SC)}. The following has been held in para-6:

“6. It was next urged that the extended period of limitation could not have been invoked. We find no substance in the submission. It is clear that the Appellants had not disclosed to the Department that they were manufacturing this product. They maintained no account and paid no duty. It is only after inspection that it was found that this product was being manufactured. Therefore, both the authorities have correctly held that the extended period of limitation could be invoked.”

10. The third substantial question of law has been framed on the appellants' assertion that they were denied right to cross-examine the chemical examiner whose report has been used against them. In this regard, discussion made in para-9 of the adjudicating authority's order needs special notice because it refers to the appellants' admission of the contents of fly ash in the bricks manufactured by them. The order passed by the adjudicating authority nowhere relies on chemical examiner's report to pass adverse order against the appellants. It is the admission made by the appellants which has been taken note of to hold that the bricks manufactured by them contain more than 48% ash by weight. For the same reason, the fourth substantial question of law is also to be answered against the appellants because admission is the best evidence. Right to cross-examine the chemical examiner would be available to the appellants only when the order is based on such report and not when it is based on the appellants' own admission. At this stage, it would be appropriate to refer to the appellants' reply to the

show cause notice (Annexure-A/4) stating that the report of chemical examiner is not on record, therefore, copy of the same may be provided to them. This itself makes it apparent that the department has not relied on the chemical examiner's report, therefore, there was no question of affording the appellants an opportunity to cross-examine the chemical examiner. The Schedule forming part of profit and loss accounts of the appellants for the period ending on 31.3.2005 and 31.3.2006 would refer to the items sold during the period specifically mentioning "sales of fly ash bricks". Thus the appellants themselves were treating the bricks manufactured by them as "fly ash bricks" and not ESP dust bricks. Similar is the situation with the accounts ending on 31.3.2007.

11. In view of the above discussion, all the substantial questions of law are answered against the appellants.

12. The Appeals being without any substance deserve to be and are hereby dismissed.

Sd/-
Judge
(Prashant Kumar Mishra)

Barve

Sd/-
Judge
(Ram Prasanna Sharma)