

OD-15

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/19/2021
IA NO: GA/2/2021
COMMISSIONER OF CENTRAL EXCISE, KOLKATA-III
VERSUS
M/S. SAI SULPHONATE PVT. LTD.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 2nd February, 2022

Appearance :-

Mr. Uday Shankar Bhattacharya, Adv.

Ms. Aishwarya Rajyashree, Adv.

... For Appellant

Mr. Arijit Chakraborti, Adv.

Mr. Nilotpal Chakraborty, Adv.

Mr. Prabir Bera, Adv.

... For Respondent

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 (the Act for brevity) is directed against the order dated 6th August, 2019, passed by the Customs Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata (Tribunal) in Excise Appeal No.75606 of 2015.

We have heard Mr. Uday Shankar Bhattacharya, learned Counsel, assisted by Ms. Aishwarya Rajyashree, learned Advocate

appearing for the appellant and Mr. Arijit Chakraborti, learned Counsel appearing for the respondent.

The appellant/revenue has suggested the following questions of law :-

- i) Whether the respondent suppressed the exact quantity of raw materials used by them in their manufacturing activity ?
- ii) Whether the respondent wilfully misrepresented regarding its own production and conversion job as well as consumption of raw material and spending of the by-products ?
- iii) Whether the respondent had clandestinely cleared the finished goods ?

The Commissioner of Central Excise, Kolkata-III issued show-cause notice stating that the assessee is liable to pay additional excise duty on account of clandestine removal of the products manufactured by them. The assessee's explanation was that the consumption of product LAB and Spent Sulphuric Acid during the material period and the ratio of LAB to LABSA and ratio of Spent Sulphuric Acid was almost the same in respect of the manufacturing activity done by the assessee for themselves and the activity done for conversion job. It was stated that the ratio of Spent Sulphuric Acid to Sulphuric Acid for the assessee's manufacture was 1:0.82 and for that conversion job it was 1:0.81 and there is hardly any difference. The Commissioner while adjudicating the show-cause notice opined that the difference in

the input output ratio between that which was adopted for the assessee's own manufacture and that for the conversion job was different and there is no reason as to why such a different ratio should be adopted and therefore came to the conclusion that there was suppression, consequently clandestine removal.

The assessee has filed appeal before the Tribunal challenging the said order and explained that their manufacturing activities as to how they were engaged in manufacture for themselves as well as they have been carrying on conversion job for another third party. After noting the facts the Tribunal held that LABSA and Spent Sulphuric Acid are of the same quality and the processing tank is also common in the factory as it is not possible to manufacture goods separately. Further, the Tribunal analysed the total consumption of LAB and Sulphuric Acid during the material period and took note of the ratio adopted and on facts held that there is hardly any difference between the ratio adopted for their own manufacture and conversion job. Further, the Tribunal noted that the department has not made any allegation that assessee procured excess quantity of LAB to manufacture excess quantity of Acid Slurry or LABSA 90%, nor the department has produced any evidence or referred to any material to show how excess amounts of LAB has been brought into the factory and how the same were removed after being manufactured into

LABSA. Thus, the Tribunal concluded that without any evidence on record the allegation of clandestine removal cannot be made.

In our considered view, the Tribunal rightly granted the relief to the assessee as allegation of clandestine removal is a very serious charge and the onus of establishing the same is first on the department and upon the onus being discharged in the manner common to law, then and then only the burden of proof shifts to the assessee. In the instant case, admittedly there was no material on record establishing the charge of clandestine removal and such charge was made against the assessee by way of an inference taking note of the ratio adopted in the manufacturing process.

Thus, we are of the considered view that the entire issue involved in this appeal is factual and no question of law as suggested by the revenue arises for consideration in this appeal. Accordingly, the appeal fails and is dismissed.

With the dismissal of the appeal, the stay application being GA 2/2021 is also dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)