

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 10554 of 2018 - DB

(Arising out of OIA-AHM-EXCUS-002-APP-165-17-18 dated 30/11/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-II)

Dhanuka Steel

Plot No. 51, Phase-iii, Gidc, Naroda,
Ahmedabad-Gujarat

.....Appellant

VERSUS

Commissioner of C.E.-Ahmedabad-ii

Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat-380009

.....Respondent

APPEARANCE:

Shri M. K. Kothari, Consultant appeared for the Appellant

Shri Himanshu P Shrimali, Superintendent (AR) appeared for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No.11988/2024

DATE OF HEARING: 07.06.2024
DATE OF DECISION: 11.09.2024

RAMESH NAIR

The brief facts of this case are that the appellant were working under the compounded of levy scheme for payment of excise duty. During the period of March-2015 and April-2015 due to non receipt of the consent order from Gujarat Pollution Control Board for restarting the production again, they were compelled to close their factory during the same period. In this regard vide letter dt.27.02.2015 regarding stop of production from 23.02.2015 intimated to the department. However, the range officer has asked the appellant to pay the duty for the month of March-2015 and April-2015 vide his letter dated.23.04.2015. The appellant had replied vide letter dated 07.05.2015 stating that they had to stop the production due to non receipt of revised consent order from Gujarat Pollution Control Board which is beyond their control, during that period duty should be abated. However,

show cause notice dated 31.08.2015 was issued by the Assistant Commissioner, Central Excise Division-I Ahmedabad-II whereby, the demand of Rs.2,40,000/- was proposed along with the proposal of demand of interest and imposition of penalty. The said show cause notice has been adjudicated vide order in original dated 14.12.2016 whereby, the demand was confirmed on the ground that the appellant's factory was not remained closed for more than 3 months. Being aggrieved by the said order in original, appellant filed the appeal before Commissioner (Appeals) who consenting with the Adjudicating Authority up held the order in original and rejected the appeal. Therefore, present appeal is filed by appellant.

2. Shri M. K. Kothari, Learned Consultant appearing on behalf of the appellant submits that even though, the factory did not remain close for more than 3 months, but it was closed for 2 months, the closure of the factory is not as per the wish of the appellant but due to the circumstances which were beyond the control of the appellant, the factory was closed due to non receipt of the consent order from the Gujarat Pollution Control Board. Therefore in this peculiar circumstances, the appellant cannot be demanded the excise duty for the period when the factory remained close. He placed reliance upon the judgment in the case of Sarthi Rubber Industries (P). Ltd. v. Commr. Of C. Ex. & S. T., Alwar 2017 (358) E.L.T. 370 (Tri.-Del.).

3. On the other hand, Mr. Shri Himanshu P Shrimali, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He also placed reliance on the decision of this Tribunal in the case of Sethi Metal Industries v. Commissioner of C. Ex., Ahmedabad.

4. On careful consideration of the submissions made by both the sides and perusal of the records, we find that it is not disputed that the closure of the factory was not on the choice of the appellant whereas, they were compelled to keep the factory closed as per the direction of the Gujarat

Pollution Control Board. Therefore, closing of the production was beyond the control of the appellant. In the identical facts, this Tribunal has dropped the demand of Excise duty for the period when the assessee was forced to close their factory by their state authority. The said judgment in the case of Sarthi Rubber Industries (P). Ltd. is reproduced below:-

"6. We have heard both the sides and perused the appeal records. The relevant legal provisions of paras 2 and 7 of the Notification No. 17/2007-C.E. are as below :-

"2. Application to avail special procedure. - (1) The manufacturer shall make an application in the form specified in Appendix-I to this notification to the Superintendent of Central Excise, as the case may be, for this purpose and the Superintendent, may grant permission for the period in respect of which the application has been made.

(2)

The application shall be made so as to cover a period of not less than twelve consecutive calendar months, but permission may be granted for a shorter period for reasons to be recorded in writing, by the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be.

(3)

If at any time during such period the manufacturer fails to avail himself of the procedure contained in this notification, he shall, unless otherwise ordered by the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, be precluded from availing himself of such procedure for a period of six months from the date of such failure.

7. Power to condone failure to apply for special procedure. - Notwithstanding anything contained in this notification, the Additional Commissioner, or as the case may be, the Joint Commissioner of Central Excise may, at his discretion, for reasons to be recorded in writing, and subject to such conditions as he may deem fit, apply the provisions contained in this notification to a manufacturer who has failed to avail himself of the special procedure, or to comply with any condition laid down in this notification.

The assessee/appellants are aggrieved by the confirmation of demand for differential duty for the period March to August, 2013. The admitted facts of the case are that during March and April, 2013 the Pollution Control Board of Rajasthan Government issued orders for the closure of manufacturing facilities of the appellants. The appellants dismantled the machinery and did not make any excisable goods during these two months. This fact is not disputed. However, the Original Authority held such non-payment of duty in terms of Notification No. 17/2003-C.E. during these two months will amount to failure of the assessee/appellants to avail the special procedure as stated in the said notification. Since such failure will attract consequences of ineligibility for payment of fixed Central Excise duty based on number of cold rolling machines, the same is not available to the assessee/appellant for six months. Accordingly, duty was confirmed in terms of actual clearance of the excisable goods based on value determined by the adjudicating authority.

7. It is very relevant to note that the assessee/appellant applied for permission to follow the special procedure in terms of the above notification. The same was granted by the jurisdictional officer of Central Excise. Nowhere in the proceedings before the Original Authority it is recorded that the

assessee/appellant has opted out of the special scheme. Neither it is recorded that any of the deliberate action on the part of the assessee/appellant will indicate that they are not continuing in the said scheme. The central point of dispute is that due to forced closure of the unit by the State authorities, the assessee/appellant could not manufacture or operate their machinery during March and April, 2013. Such forced closure cannot be termed as a failure on the part of the assessee/appellant to avail the special procedure. The permission granted to the assessee/appellant to avail the special procedure and all other circumstances which make them eligible for such concession is existing all along. The closure of units admittedly, beyond the control of the assessee/appellant, is not to be treated as a failure to comply with the provisions and conditions of the notification during the period of forced closure of the units. The non-production of excisable goods during these two months can more appropriately be termed as ceasing to work rather than failure to comply with the provisions.

8. *We note that Hon'ble Rajasthan High Court in the case of CCE, Jaipur-II v. Jupiter Industries reported in 2006 (4) LCX 370, examining the assessee's liability under compounded levy scheme during the period of non-operation of machines, held that manufacture of goods is condition precedent for charging of excise duty without which no levy can be made. Therefore, the rule cannot be made to go beyond the scope of charging provision. The Hon'ble High Court held that when there is an undisputed fact of no production during the material period no duty liability can be fixed on the assessee. We note that the Original Authority fell in error in distinguishing the said order of the Hon'ble High Court. He recorded that the case is not identical to the one decided by the High Court. The legal principle laid down by the Hon'ble Rajasthan High Court in Jupiter Industries (supra) is clearly applicable to the facts of the present case. For two months there is no operation of manufacture or production of excisable goods by the assessee/appellant. Applying the principle as announced by the Hon'ble Rajasthan High Court it is apparent that no procedure set out in a notification can overrule the substantive charging section in the Act. It is also relevant to note that while on the one side the Commissioner held that the Hon'ble Rajasthan High Court was dealing with a compounded levy scheme under Rule 96ZB and, hence, cannot be applied to the provision of Notification No. 17/2007-C.E., on the other hand in the same order he relied on the decision of Hon'ble Andhra Pradesh High Court in Sathavahana Steels & Alloys (P) Ltd. v. Government of India reported in [1999 \(114\) E.L.T. 787](#) (AP) which is also on interpretation of same compounded levy scheme under Rule 96ZO and not dealing with the provision of Notification No. 17/2007-C.E. It is apparent that the Original Authority followed dual approach in the same order without any justification.*

9. *We note that while the Original Authority emphasized on the provisions of para 2(3) of the notifications, he simply brushed aside the request of the assessee/appellant to consider the circumstances of their closure and to use the powers available to the Jurisdictional JC/ADC in terms of the said notification to condone any failure and to apply the provision of said notification to determine the duty liability of the assessee/appellant. We note that the Original Authority should have examined the request of the assessee/appellant to invoke the provision of para 7 of the said notification and should have given his finding. In case he is not inclined to allow the special procedure to the assessee/appellant, reasons for the same should have been given. No such finding has been recorded by the Original Authority.*

10. *The issue can be looked into in another angle also. The show cause notices issued to the assessee/appellants are to demand differential duty for the period March to August, 2013. For the period March and April, 2013, admittedly, the assessee/appellant did not pay any duty. The rate of excise duty fixed per cold rolling machine is Rs. 40,000 per month + cess applicable. The duty demand for the whole period emanated because of assessee's non-payment of duty for March, 2013 and April, 2013 because of*

closure. Such closure was considered as failure to follow the special procedure. Suppose we consider a situation where even during such closure the assessee/appellant discharged the duty payable as per the special procedure, based on number of cold rolling machine, then the question of "failure" would not have arisen and the demand for subsequent 4 months also would not have also arisen. We have perused one of the sample demands. Assessee/Appellant who has got six cold rolling machines installed has to discharge Rs. 2,47,200/- as Central Excise duty per month. The said assessee/appellant discharged the said duty for the period May to August, 2013 as per the said rate. However, for March and April, 2013 no duty was paid. This resulted in a demand of Rs. 1,32,38,252/-. If the assessee/appellant paid the said Rs. 2,47,200/- for each month during March and April, 2013 also then the whole demand will become unsustainable on the simple premise that the assessee/appellant continued to follow and discharge duty as per the special scheme. In other words, in case of payment of amount of about Rs. 5 lakhs as duty liability for two months, even though no manufacture happened during that period because of closure, the Revenue could not have taken the plea that there is a failure to follow the special procedure. Such non-payment of around Rs. 5 lakhs resulted in a demand of Rs. 1,32,38,252/- for the six months period, as stated above. We find the whole basis of demand is untenable if looked into in this angle that the assessee/appellant if paid an amount of rupees less than 5 lakhs for non-operating period he could have been construed to be following the special procedure and huge differential demand would not have arisen. As such, the presumption of the Revenue regarding "failure" of the assessee to follow the special procedure resulting in a differential demand for six months is not legally sustainable.

11. *The Original Authority himself recorded that the assessees/appellants themselves did not cease to work under the special procedure but ceased the work due to disconnection of power supply and sealing of DG set by the electricity department which was beyond control of the assessee. As such considering the facts and circumstances of the case he found that penalty under Rule 25 of Central Excise Rules, 2002 is not imposable. In such factual finding, we note that non-exercising power under para 7 is not legally sustainable. No reason or finding is recorded in this regard except that the assessee/appellant did not apply to the Jurisdictional AC/DC in terms of the said para. As already noted the Original Authority, being Commissioner of Central Excise, is competent to decide the issue as per the powers granted under para 7, even during the course of adjudication. We note as per the facts recorded above, there is no case for denying the provisions of special scheme to the assessee/appellant.*

12. *In view of the above discussion and analysis, we find that the impugned orders confirming the differential duty are not legally sustainable. Accordingly, we allow these appeals filed by assessee/appellant by setting aside the impugned orders. The appeals filed by the Revenue for imposition of penalty are dismissed as the impugned orders are found to be unsustainable."*

In view of the above judgment, the facts of the same are identical to the facts of the present case, we are of the view that the appellant cannot be fastened with the duty liability during the closure of the factory even though for the 2 months as the same was beyond their control. As regard the decision relied upon by the revenue in the case of Sethi Metal Industries, the fact of the said case is different from the fact of the present cases well as the Division Bench judgment of Sarthi Rubber Industries (P). Ltd.

5. As per our above discussion and finding, we are of the view that the demand is not sustainable. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 11.09.2024)

**(RAMESH NAIR)
MEMBER (JUDICIAL)**

**(RAJU)
MEMBER (TECHNICAL)**

Bharvi