IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Excise Miscellaneous [CT] Application No. 40089 of 2022
(on behalf of Appellant)
In
Excise Appeal No. 40606 of 2016

(Arising out of Order-in-Appeal No. 22/2016 (CXA-II) dated 28.01.2016 passed by the Commissioner of Central Excise (Appeals-II), Central Excise Building, 26/1, Uthamar Gandhi Salai, Nungambakkam, Chennai – 600 034)

M/s. Hivelm Industries : Appellant
(A unit of M/s. Digivision Electronics Ltd.)
No. 4, Morrison 4th Street, Alandur, Chennai – 600 016
[Sought to be changed to:
"Lakshmi Siva Apts.", Old No. 64, New No. 6/2/2,
1st Street, Kamaraj Avenue, Adyar, Chennai – 600 020]

VERSUS

The Commissioner of G.S.T. and Central Excise : Respondent
Chennai South Commissionerate,
M.H.U. Complex, 5th Floor, 692, Anna Salai, Chennai – 600 035

APPEARANCE:

Ms. S. Vishnupriya, Advocate for the Appellant

Shri Arul C. Durairaj, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40173 / 2022

DATE OF HEARING: 04.05.2022

DATE OF DECISION: **09.05.2022**

Order :

The miscellaneous application for change of cause title filed by the assessee is allowed. Both the parties submit that they are ready with the matter and hence, the main matter is taken up for hearing.

2. The only issue to be decided in this appeal filed by the assessee is: whether the rejection of their refund claim made under Section 11B of the Central Excise Act, 1944 is in order?

3. Heard Ms. S. Vishnupriya, Learned Advocate for the appellant and Shri Arul C. Durairaj, Learned Superintendent (Authorized Representative) for the Revenue.

4. Brief facts that are relevant for my consideration, as could be gathered after hearing both sides, are that the appellant had supplied isolators and spares to DVC Koderma Thermal Power Project State 1 (2x500 MW) (A deemed export project) owned by M/s. Damodar Valley Corporation („M/s. DVC" for short) through the main contractor namely, M/s. Bharat Heavy Electricals Ltd. (BHEL); deemed exports were exempted from payment of duty vide Notification No. 06/2006 dated 01.03.2006, as amended; that the appellant, however, made the payment since its name did not figure in the project certificate issued by M/s. DVC and because of that, they filed an application for refund before the Directorate General of Foreign Trade (DGFT), Chennai vide application dated 13.12.2011, which was rejected by the DGFT; that against the above rejection, an appeal was preferred before the DGFT, New Delhi and the appellant also filed a refund claim on 17.07.2014 before the Excise authorities.

5. The Adjudicating Authority vide Order-in-Original No. 34/2014 RF dated 11.09.2014, after analysing the above facts, however, rejected the application for refund on the ground that the same was filed beyond the prescribed period of one year. The appellant preferred an appeal against the said rejection before the Commissioner of Central Excise (Appeals-II), Chennai, who vide impugned Order-in-Appeal No. 22/2016 (CXA-II) dated 28.01.2016 has rejected the appeal, thereby upholding

the rejection of refund, against which the present appeal has been filed before this forum.

6.1 The Learned Advocate for the appellant would submit at the outset that there was no requirement under the law to pay the duty since it was a deemed export, which were granted exemption as early as in 2006 [vide Notification No. 06/2006 (*supra*)]. She would also submit, *inter alia*, that in the tax invoice issued by the appellant to its main contractor i.e., M/s. BHEL, which has been duly acknowledged by the Superintendent of Central Excise, Alandur Range, Chennai – 600 035, it has been clearly mentioned that the supply was "against Deemed Export Project"; that the main contractor had issued a disclaimer certificate to the effect that they have not reimbursed any Excise Duty to the sub-contractor; that they were not eligible to claim any Excise Duty refund and that they have no objection for the appellant to claim the Excise Duty refund and other deemed export benefits, as admissible under the relevant provisions, by virtue of the project being a Deemed Export Project.

6.2 She would rely on the decision of the Hon"ble Supreme Court in the case of *M/s. India Cements Ltd. v. Collector of C.Ex.* reported in *1989 (41) E.L.T. 358 (S.C.),* the decision of the Hon"ble Madras High Court in the case of *Commissioner of Central Excise, Chennai-I v. M/s. ITC Ltd.* reported in *2005 (185) E.L.T. 114 (Mad.),* the decision of the Hon"ble Karnataka High Court in the cases of *Dy. Dir. General of Foreign Trade, New Delhi v. M/s. Acer India Pvt. Ltd.* reported in *2020 (371) E.L.T. 658 (Kar.)* and *Commissioner of Central Excise (Appeals), Bangalore v. M/s. KVR Construction* reported in *2012 (26) S.T.R. 195 (Kar.)* and the order of the Principal Bench of the CESTAT in the case of *Commissioner of C.Ex., Bhopal v. M/s. Bharat Sanchar Nigam Ltd.* reported in *2017 (345) E.L.T. 549 (Tri. – Del.),* to contend that the higher courts, including the Hon"ble Supreme Court, have clearly held

that payment of duty under protest has to be gathered from the fact that there was challenge by appeals and that the same would cover cases where duty was paid by mistake or by misunderstanding the statute.

7.1 *Per contra*, the Learned Departmental Representative would submit that the appellant"s name was never shown in the project certificate issued by M/s. DVC and hence, the appellant has rightly paid the duty; that there is no mistake as claimed by the appellant in paying the duty and hence, the refund claim should have been made within the time-frame provided under the statute; that the appellant having not made the same, its claim has been rightly rejected by the lower authorities.

7.2 He also drew support from the findings in the orders of the lower authorities.

8. I have considered the rival contentions and have gone through the documents placed on record.

9. It is not in dispute that the deemed export did not attract any Excise Duty and hence, it is not the duty of the appellant / taxpayer to repeatedly plead before the authorities that the project in which it was involved was a deemed export. Moreover, the fact that the appellant filed its refund claim immediately, though before a wrong forum, itself proves the *bona fides* of the appellant and hence, the same establishes the fact that there was an application for refund claim within the limitation period prescribed in the statute, though before a wrong forum.

10. The purchase order coupled with the tax invoice also reflect the above position, which, according to me, sufficiently establish the fact that the duty payment, which was not required to be made, but still having been paid, could only be under protest.

11. In addition to the above, the main contractor itself has issued a disclaimer certificate wherein it has been clearly and categorically mentioned that the appellant has paid the duty, but the same is not refunded to the appellant and that it has no objection for the appellant to claim refund of the duty it has paid, which, according to me, takes care of the Revenue"s doubts as to the non-mentioning of the appellant"s name in the project certificate.

12. Further, when the duty itself was not liable to be paid by virtue of Notification No. 06/2006 (*supra*), the argument that the appellant was required to make the payment holds no water, as long as the Revenue does not suspect the involvement of the appellant as a sub-contractor.

13. In view of the above, I do not see any merit in the impugned order and consequently, the same is set aside.

14. The appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **09.05.2022**)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd