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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.11820 of 2015

[Arising out OIO-SIL-EXCUS-000-COM-001-15-16 passed by Commissioner of Central Excise, Customs and Service Tax-SILVASA]

M/s. Sheela Foam Pvt. Ltd ....**Appellant**
Survey No. 257, Umarkui Road, Saily,
Silvassa,Dadra & Nagar Haveli-396230.

VERSUS

C.C.E. & S.T. Silvasa ....**Respondent**
Commissioner Central Excise, Customs & Service Tax,
Silvassa, 4th floor, Adarsh Dham Building, Vapi Daman Road
Opp. Old Town Police Station
Vapi - Gujarat

WITH

1. **Excise Appeal No. 11898 of 2015 (Rahul Gautam)**
2. **Excise Appeal No. 11899 of 2015 (Dilip Kumar Mishra)**
3. **Excise Appeal No. 11900 of 2015 (Tushaar Gautam)**

[Arising out OIO-SIL-EXCUS-000-COM-001-15-16 passed by Commissioner of Central Excise, Customs and Service Tax-SILVASA]

APPEARANCE:
Sh. Pravin Sharma, Advocate for the Appellant
Sh. L. Patra, Authorised representative for the Respondent

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

Final Order No. A/ 11915-11918 /2019

DATE OF HEARING: 27.06.2019
DATE OF DECISION: 15.10.2019

RAMESH NAIR

Brief facts of the case are that during the material period M/s SNB Bedding International Ltd. (Now known as Sheela Foam Pvt. Ltd.) was a joint venture between M/s AH Beard Pvt. Ltd. an Australian company & M/s Sheela Foam Pvt. Ltd. They were engaged in manufacture of Inner Spring Mattress, Visco Mattress, Latex Mattress, Speciality mattresses products, Pillows & Manchester by trade name “Sleepwell”. Subsequently w.e.f 30.04.2011 the shareholding of firm was completely acquired by Sheela Foam and the name was changed to M/s Sheela Foam Pvt. Ltd. During the impugned period June,2009 to March,2011, the Appellant were clearing goods to M/s Sheela Foam. A show cause notice was issued to the Appellant on the ground that the Appellant and M/s Sheela foam are interconnected undertakings, the appellants were to sell their goods to M/s Sheela foam only; the secured loan of Appellant unit were secured by Corporate guarantee. It was also found that M/s Sheela foam had given amount to Appellant as loan. For above purpose balance sheet and other records of both the concerns were relied upon. It was alleged that both are interconnected firms and are related to each other. That the Appellant has under invoiced the sale value of excisable goods in connivance with M/s Sheela Foam as the central excise duty should have been paid at the value at which it is sold to unrelated buyer as per Rule 9 and 10 of Central Excise Valuation (Determination of Price of excisable goods) Rules, 2000. Accordingly a differential duty demand of Rs. 1,10,10,403/- was made from the Appellant Unit alongwith proposal to impose penalty. Penalties on Shri Rahul Gautam and Tushar Gautam, director of both the companies and Shri Dilipkumar Mishra, Senior Commercial Manager of both the companies was also proposed. Vide impugned order No. SIL-EXCUS-000-COM-001-15-16 dt. 13.08.2015, the demand as proposed were confirmed against the Appellant alongwith equivalent penalty. Further penalty on directors Shri Rahul Gautam and Tushar Gautam and Shri Dilipkumar Mishra, Senior Commercial Manager was also imposed. Hence the present appeals.

2. Ld. Counsel Shri Pravin Sharma appearing for the Appellants submits that the demand has been wrongly raised in terms of Rule 9 and 10 (a) of the Valuation Rules. The companies are interconnected and thus Rule 10 of Valuation Rules is applicable. As the relationship in terms of clause (ii), (iii) or (iv) of clause (b) of sub – section (3) of section 4 is not there, the value shall be determined as they are not related persons and Rule 10 (b) is applicable. He relies upon the judgment in case of Ramsons Castings Pvt. Ltd. 2017 (357) ELT 431 (TRI), Universal starch Chem Allied Ltd. 2017 (358) ELT 279 (TRI), Handy Wires Pvt. Ltd. 2015 (329) ELT 169 (T), Panipat Woolen Mills 2017 (357) ELT 551 (T), Rak Ceramics India Pvt. Ltd 2015 (326) ELT 599 (T) There was no mutuality of interest in the business of the assessee company and the buyer company M/s Sheela foam. The factors such as 50 : 50 JV, common director, corporate guarantee given, interest bearing loan, use of brand name or most of the sale to the buyer are purely on commercial considerations and do not create mutuality of interest in the business of each other. The valuation of

shares at the time of transfer to M/s Sheela foam was done as per statutory provisions. He submits that in JV Companies, the JV Partners in the business of each other but reverse cannot be said as the JV Company has no interest in business of JV partners. He relies upon the judgment in case of Goodyear South Asia Tyres Pvt. Ltd. 2015 (322) ELT 389 (SC) to submit that it cannot be held that the Appellant had interest in the business of buyer company and therefore there is no mutuality of interest. That in case of Atic Industries Ltd 1984 (17) ELT 323 (SC) AND T I Millers Ltd. 1988 (35) ELT 8 (SC) the Apex Court held that in case where 50% share of the manufacturing company is held by customer company as a shareholder but for this reason, it cannot be said that the manufacturing company has interest direct or indirect in the business carried out by one of its shareholder. He also relies upon judgment in case of Alembic Glass Industries Ltd. 2002 (143) ELT 244 (SC), Besta Cosmetic Ltd. 2005 (183) ELT 132 (SC), Dipareena Investment Pvt. Ltd. 2014 (314) ELT 571 (T). He submits that goods produced with customer brand name does not create mutuality of interest. He lastly submits that the entire demand is time barred as the audit was conducted in August' 2010 and show cause notice was issued in March' 2014. All the facts were known to the department. That in September 2010 all details were submitted and the demands are barred by limitation. He relies upon judgments in case of Kathivaram Pipes Ltd. 2002 (147) ELT 1266 (T), Prakash Gram Udhyog Samiti 2003 (157) ELT 580 (T) and MP Vegetable Fruit Products 1995 (76) ELT 393 (T). He also submits that duty was wrongly calculated as the prices charged by M/s Sheela foam was inclusive of excise duty. Even in case of clandestine removal the benefit of cum duty price has to be given to the assessee.

3. Per Contra Shri L. Patra, Ld. Assistant Commissioner (AR) appearing for the revenue supports the impugned order and its findings. He submits that as both the concerns are interconnected undertakings the valuation of goods at the Appellant's end shall be at the sale value of the recipient undertaking. He relies upon judgments in case of J. Foundation 2015 (324) ELT 422 (SC), Karan Engineering P. Ltd. 2017 (357) ELT 241(TRI) and 2007 (210) ELT 183 (SC).

4. Heard both the sides and perused the case records. The valuation in terms of Rule 9 and 10 is applicable only when the relationship between the two firms is covered by Section 4 (3) (b) (ii), (iii) of Central Excise

Act, 1944 i.e they are relatives, amongst them the buyer is relative and distributor of the assessee, or a sub – distributor of such distributor; or they are so associated that they have interest, directly or indirectly, in the business of each other. In the present case the allegation of related person is based upon the appellants were to sell their goods to M/s Sheela foam only, the secured loan of Appellant unit were secured by Corporate guarantee of both the JV partners and unsecured loan of buyer of goods. Apart from above we also find that during the material time loan was also provided by M/s Sheela Foam. Further it is not even disputed that all the goods produced by the Appellant company were to be sold to M/s Sheela Foam only. The Appellant has not brought on record any evidence as to why the prices were not affected by above instance of advancing of loan to appellant company and helping in funding. Further it is also not disputed that later the Appellant Unit become a part of M/s Sheela Foam. The adjudicating authority has not substantiated the charge of related person on the basis of various factors such as interest free loan, entire sale thru joint venture company and how these aspects mutually benefitted each other. The whole issue is required to be elaborately appreciated to unearth the facts which is possible only after detailed scrutiny of records. Similarly whether the Appellant had intention to suppress or had any malafide intention also need to be gone into. We are thus of the view that the case needs to be remanded back to the adjudicating authority who shall ascertain the facts as discussed above and allegation of suppression. Thus in view of our above observation we set aside the impugned order and remand back the matters to the adjudicating authority keeping all the issues open.

(Pronounced in the open court on 15.10.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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