CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 02

SERVICE TAX Appeal No. 13438 of 2013-DB

[Arising out of Order-in-Original/Appeal No 303-2013-RAJ-CE-AK-COMMR-A--AHD dated 11.07.2013 passed by Commissioner of Central Excise and Service Tax-RAJKOT(Appeal)]

Hind Marine Engineering Works **...Appellant**
Opp. Ashutosh Petrolium,
Bedeshwar, Bedi Port Road,
Jamnagar,
Gujarat

VERSUS

C.C.E. & S.T.-Rajkot **...Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot,
Gujarat-360001

APPEARANCE:
Shri Sudhanshu Bissa(Amicus Curie), for the Appellant
Shri. Anand Kumar, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), SOMESH ARORA

FINAL ORDER NO.A / 11843 /2023

DATE OF HEARING:31.08.2023
DATE OF DECISION: 31.08.2023

SOMESH ARORA

None appeared for the party, though the matter has been coming up on board six times earlier, therefore the same is taken up for disposal on merits as the matter is of year 2013. Court therefore appointed experienced Advocate Shri Sudhanshu Bissa as amicus curie for assistance.

2. The issue in short involved at this appellate stage pertains to benefit of Cum duty price which was denied to the appellant on the services of Management, Maintenance or Repair Service and Erection Commissioning and Installation Services provided by them in the year 2010-11. Party on confirmation of demand became liable for penalty under Section 67 and for duty of Rs. 2,42,901/-, as well as applicable interest thereon.

3. Department on the basis of its investigations and testimonial evidence found that the appellants were providing above services during the impugned period, but had need a taken any registration or were filing any returns at the time of search. In short these services were provided clandestinely. At this stage, appellants are before this court mainly on the point of denial of cum duty benefit, while making its calculation by the department and consequently they also want interest that should be subjected to demand of duty finally calculated on the basis of final demand, in case the appeal is accepted.

3.1 Learned AR pointed out that, learned Commissioner (Appeals), while denying the benefit has relied upon the decision of Hon'ble Supreme Court in the case of Amrit Agro Industries Ltd. reported at 2007 (210) ELT 183 (S.C), which Learned AR forcefully relies upon such decision to justify the decision of Commissioner (Appeals). Since none appeared, the court decided to benefit from the services of Shri Sudhanshu Bissa, Advocated who was present in court and agreed to both handle the brief on one day's notice and provide necessary material.

3.2 The issue which has to be decided by this court is whether there is any conflict between the decision of Hon'ble Supreme Court as relied upon reported by the Learned Commissioner (Appeals) and reported in 2007 (210) ELT 183 (S.C), of Amrit Agro cited supra, and which distinguished the decision of Commissioner of C. Ex Vs. Maruti Udyog Ltd, as reported in 2002 (141) ELT 3 (S.C), or both operate in different domains. On same issue of cum duty price is another decision decided as reported in 2008 (224) ELT 180 (S.C) in the matter of C.Ex Jaipur Vs. Dugar Tetenal India Ltd., decided on 07.03.2008, which also had the benefit of referring to the decision of M/s. Maruti Udyog Ltd., as reported in 2002 (141) ELT 3 (S.C). Learned Advocate Shri Sudhanshu

Bissa, (*Amicus curie*) has brought out the decision as indicated above to the present appeal to support party’s appeal.

4. Considered. This Court finds that in the decision of Maruti Udyog Ltd, that the cum duty price realised by the assesse was entire price inclusive of Excise duty. Therefore by not separately charging nor intending to charge assesse had taken upon itself to discharge the liability to pay taxes on the good sold, therefore cum duty benefit will be available to it, was the decision of the Hon’ble Court.

4.1 As against this, in the matter of Amrit Agro Industries Ltd Vs. Commr of C.Ex Ghaziabad cited (supra), the Apex Court held that in peculiar circumstances of matter when classification of roasted Peanuts was changed from chapter 21 to chapter 20 of the C.Ex. and an exemption granted of Notification No. 4/97 was being availed earlier and therefore duty charged was nil in effect. And when with change of classification to chapter 20 some duty became payable without the exempted rate (nil), same also should be considered as price inclusive of tax. Therefore further benefit was not required to be given to the assesse, consequent upon change of classification of the goods. Essentially the decision of Amrit Agro Industries, was in the domain of change of classification when “nil” rate of duty was applicable as is manifest from paras 12-14 reproduced below:

> *“12. In our judgment in Civil Appeal Nos. 8595-8596/2001, we have held that roasted peanuts unlike moongfali masala mazedar is a preparation falling under sub-heading 2001.90 of Chapter 20. To that extent, we have held in favour of the Department. Consequently, the question which arises in present Civil Appeal nos. 1459-1460/2002 is whether the price charged by the assessee, in the facts and circumstances of the case, has to be considered as cum-duty price. Essentially these civil appeals are quantum appeals. It is the case of the Department in the present civil appeals that all throughout the years the assessee has that roasted peanuts came under Chapter 21 and, consequently, the said item stood exempted from payment of duty under above exemption notification*

dated 1-3-1997. Therefore, according to the Department, all these years the assesse had cleared the goods on the footing that roasted peanuts were exempted. They have filed the requisite declarations/classifications on that basis According to the Department, since the assessee had cleared roasted peanuts without payment of duty during the relevant ears, the quantum of duty is required to be recomputed. According to the Department, in the normal case where the assessee does not seek exemption or in cases where goods are not exempted, the of duty has got to be recomputed on the oasis of "cum-duty price" According to the Department, the reasoning behind recomputation based on cum-duty price is that ordinarily the basis for levy of excise duty is the normal price. That normal price includes the duty element Such price is called cum-duty price. Therefore, in such cases, when the quantum of duty is required to be recomputed it has to be done on the basis of cum-duty price. In this connection, the law is well settled as held by this Court in Commissioner of Central Excise, Delhi v. Maruti Udyog Ltd. reported in 2002 (141) FLT3. In the said judgment, it has been held that the sale price realised by the assessee is the entire price inclusive of excise duty, when the assessee has by necessary implication, taken on the liability to pay all taxes on the goods sold and has not sought to realise any some in addition to the price obtained by it from the buyer. In the said case, it has been held that when the assessee has charged cum- duty price, then in arriving at the assessable value of the goods, the element of duty payable has to be excluded. To this extent, there is no difficulty. However, in the present case, the Department contends that there is no question of implication when throughout the relevant years the assessee has been clearing the goods on the basis of the exemption notification of 1997 referred to above, which is not applicable to roasted peanuts, and, therefore, according to the Department, the above judgment of this Court in the case of Maruti Udyog Ltd. has no application to the facts of the present case.

13. On the other hand, it is urged on behalf of the assessee that the basis for levy of excise duty under section 4(4)(d) (i) of Central Excises & Salt Act, 1944 is the wholesale price. According to the assessee, that price will include the element of duty payable because such duty forms part of the consideration for sale of the goods according to the terms and conditions of sale of such goods and, therefore, whenever a further demand of duty is created against the assessee and such further demand of duty cannot be passed on to a customer in view of the stipulations of the terms and conditions of sale between the assessee and his customer, the original consideration (including duty, if any) received by the assessee for sale in wholesale trade has to be taken as cum-duty price.

In this connection, reliance is placed by the assessee on the judgment of the Tribunal in Srichakra Tyres Ltd. v. Collector of Central Excise, Madras reported in 1999 (108) ELT 361.

14. In our view, the above judgments in the case of Maruti Udyog Ltd. and Srichakra Tyres Ltd. have no application in the facts of the present case. In the case of Asstt. Collector of Central Excise v. Bata India Ltd. reported in 1996 (84) ELT 194 this Court held that under section 4(4)(d)(ii) of Central Excises and Salt Act, 1994 the normal wholesale price is the cum-duty price which the wholeseller has to pay to the manufacturer-assessee. The cost of production, estimated profit and taxes on manufacture and sale of goods are usually included in the wholesale price. Because the wholesale price is usually the cum-duty price, the above section 4(4)(d)) lays down that the "value" will not include duty of excise, sales tax and other taxes, if any. payable on the goods. It was further held that if, however, a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty. He is really increasing the profit element in another guise and in such a case there cannot be any question of deduction of duty from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price. It was further held that the manufacturer has to calculate the value on which the duty would be payable and it is on that value and not the cum- duty price that the duty of excise is paid. Therefore, unless it is shown by the manufacturer that the price of the goods includes excise duty payable by him, no question of exclusion of duty element from the price for determination of value under section 4 (4)(d)(ii) will arise."

In short in the above case "Nil" duty charged when availing exemption was deemed as duty charged and therefore part of the consideration.

Again in the of Commr. Of C. Ex jaipur Vs. Dugar Tetenal India Ltd, cited (supra) though the case of invocation of Section 11A(1) of C.Ex. Act was based on mis-declaration/misstatement. The Hon'ble Apex Court after viewing various decision including Maruti Udyog Ltd., cited (Supra) decided as follows:

"13. The assesse in addition to the submission that the extended period of limitation could not be invoked had contended that the selling price of the goods was the cum duty price and they were entitled to deduct the duty element from the sale price for the purpose of determination of assessable value of the goods in terms of Section 4(4)(d)(ii)

of the Act. The Tribunal accepted this plea of the assessee relying upon the decision of the Tribunal in the case of Shri Chakra Tyres Ltd (supra). The view taken in Shri Chakra Tyres Ltd. (supra) was affirmed by this Court in Commissioner of Central Excise, Delhi v. Maruti Udyog Limited, 2002 (3) SCC 547. Learned counsel for the Revenue has relied upon the judgment of this Court in Asstt. Collector of Central Excise v. Bata India Limited, 1996 (4) SCC 563. This judgment was duly considered in Maruti Udyog Limited (supra). After considering the case in Bata India Limited (supra) this Court observed in para 5 as under:-

> *"5. A reading of the aforesaid Section clearly indicates that the wholesale price which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax, or other taxes which is included in the wholesale price is to be excluded in arriving at the excisable value. This Section has been so construed by this Court in Asstt. Collector of Central Excise and Ors v. Bata India Ltd., 1996 (4) SCC 563, and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realised by the respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty."*

14. In our view, the Tribunal has rightly remanded the case to re-determine the duty payable keeping in mind the provisions of Section 4(4)(d)(ii)."

From the foregoing, it is apparent that there is no conflict between various decisions cited supra of the Hon'ble Apex Court and there is a consistency that whenever matter pertains to clandestine removals or invocation of Section 11A, in cases where no duty on invoice was charged or no invoices issued in which the benefit is generally sought to be derived by evader by capturing market through lower price vis a vis., the general tax paying competitors, in such a case cum duty benefit will be afforded to such assesseee as it did not charge or intended to charge duty, whereas in other cases which pertain to classification disputes or there was an indication to the contrary indicting the price was cum duty or not cum duty, even if 'Nil' there the benefit shall be suitably altered. In the instant case, this court finds that services have been rendered by the appellant, but without registration or filing returns. Therefore, under the circumstances it could not be said in the facts of the case that cum duty benefit was deniable to the party. Commissioner (Appeals) having thus wrongly interpreted the decision of the Apex Court, and having ignored other decisions is directed to re-work the duty by allowing cum tax benefit to the assesse. Needless to say the interest and penalty, if any will also be re-workable accordingly.

4. This Court thanks Advocate Shri Shudhanshu Bissa (*Amicus Curie*) for his contribution in this matter.

5. Appeal is allowed by way of remand.

(Dictated & Pronounced in the open Court)

(SOMESH ARORA)
MEMBER (JUDICIAL)

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