IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos. E/1653, 1652 & 1654/2007-EX[DB]

(Arising out of Order-in-Original No.08/Commissioner/Noida/2007 dated 28/02/2007 passed by Commissioner of Customs & Central Excise, Noida)

M/s Electroparts India Pvt. Ltd. (Formerly Venugopal Engg. Ltd.)
M/s Domebell Electronics India Pvt. Ltd. &
M/s Videocon Industries Ltd.
Appellants
Vs.
Commissioner of Central Excise, Noida Respondents

Appearance:
Shri Atul Gupta (Advocate) &
Shri Hrishikesh (Advocate)
for Appellants
Shri Pawan Kumar Singh (Supdt.), AR for Respondent

CORAM:
Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 07/11/2017
Date of Decision : 07/11/2017

FINAL ORDER NOs. – 70576-70578/2018

Per: Anil Choudhary

The issue in these appeals by the Appellants - assessees is under the facts and circumstances where the provisional assessment was pending for the relevant period, whether issue of show cause notice for recovery of duty allegedly short paid on the ground of undervaluation, under the provisions of the law, Section 11A of Central Excise Act read with Rule 9B of C.E.R., 1944, was valid? And whether the Show Cause Notice issued, pending the finalization of provisional assessment is valid?

2. The brief facts are that the appellants M/s Domebell Electronics India Private Ltd. (DEIPL) and M/s Venugopal Engineering Ltd., are manufacturers of colour TV under the brand name Videocon. The brand owner of Videocon is M/s Videocon India Ltd. Other company of Appellants is M/s Videocon International Ltd. (VIL) which also manufactures the Colour TV under Videocon brand and clears the same. Further relevant fact is that the first two companies namely DEIPL and Venugopal Engineering Ltd., name changed to M/s Electroparts India Private Ltd. (EIPL), are clearing their output to M/s Videocon International Ltd., which then supplies to the dealers/retailers of the Colour TVs. The facts being common more or less and for the sake of convenience, the facts are being narrated from the appeals filed by DEIPL. The brief facts are as follows: –

2.1 Appellant DEIPL is engaged in the manufacture of Colour TV sets under the brand name, Videocon since 1987. DEIPL was purchasing raw materials from various suppliers including EIPL and VIL. The CTVs manufactured were sold in wholesale trade mainly to VIL.

2.2 DEIPL was not undertaking any trade activity at their factory, certain trading activity was undertaken at their branches.

> DEIPL had a general agreement with VIL for the sale of CTVs on principal to principal basis. DEIPL had been manufacturing CTVs for the last several years and had developed their technology for the manufacture of CTVs on their own.

> Besides, Videocon brand, DEIPL have also been manufacturing and clearing CTVs under different brand names, like Narita, President, etc.

> The CTVs were subjected to duty at specific rate up to March, 1994. After March, 1994, they were subjected to duty on ad valorem basis.

> The Appellant was regularly filing returns.

3. The Assistant Commissioner, Division-I, Noida passed an order dated 21.12.1994 under Rule 9B of the Central Excise Rules, 1994 directing the assessments to be done provisionally with effect from 1.3.1994 being investigation into all aspects relating to the valuation of the goods under Section 4 of the Central Excise Act, 1994.

4. SCN dated 05/08/1996 was issued to the Appellants, alleging:-

* Appellant (DEIPL), VIL and EIPL have been indulged in inter-unit marketing in as much as M/s DEIPL/EIPL sells the goods to VIL at a substantially lower price and vice versa, who ultimately sell it off to the dealers at a much higher price. The scheme, in view of the department had been devised to evade the due Government revenue.
* The dealer price, which has remained same for DEIPL, VIL and EIPL, is the whole sale price to be taken into consideration for arriving at the price under Section 4(1)(a) of Central Excises and Salt Act, 1944.
* During the Financial Year 1994-95, up to the month of February, 1995, M/s DEIPL has cleared 10,104 no. of CTV at a lower price to M/s VIL. Revised Assessable value was worked out as per wholesale price of VIL to independent dealer allowing the deductions on account of Sales Tax paid @ 6%. The differential duty worked out to be Rs.28,41,732/-
* M/s DEIPL paid an amount of Rs.4,10,433/- voluntarily and an amount of Rs.15,16,112/- under protest.
* Though the party claimed deduction of Sales Tax at uniform rate of 10%, however they failed to produce any evidence regarding the payment of Sales Tax @ 10%. On account of transportation charges, no proof was submitted.
* During the period, March, 1994 to February, 1995, M/s EIPL sold 15382 nos. of CTVs sets to M/s VIL at lower price. More than 90% of the sale were made by EIPL in UP only and the party was not required to pay any sales tax in respect of sale made within the State of UP. Thus for March, 1994 to February, 1995, duty works out to be Rs.41,21,137/- and for the period March, 1995 to December, 1995 in respect of 12,643 no. of CTV sets cleared, the duty liability works out to be Rs.38,10,406/-
* M/s EIPL paid an amount of Rs.52,89,768/- (Rs. 37,74,858/- voluntarily and an amount of Rs. 15,14,910/- under protest).
* M/s EIPL while depositing amount claimed deduction on account of freight/ transportation, but in support of their contention no proof was submitted by them.
* Discounts were not given on the body of invoices. The discount had been mostly passed under the cover of the credit notes at a much later date, thus the customers (dealers) did not know in advance or at the time of sale, the quantum of discount available to them. Thus deductions claimed are not admissible.

5. Thus the differential duties were demanded from DEIPL and EIPL invoking extended period of limitation. Further, SCN also proposed to impose penalty under Rule 173-Q of the CER, 1944 on M/s. EIPL and DEIPL. Further, SCN also proposed to impose penalty on M/s VIL u/Rule 209A of

the CER, 1944 for its act of collusion with M/s DEIPL and EIPL for the purpose of evading CE duty.

6. Order-in-Original dated 28/08/1997 was passed, whereby the Ld. Commissioner confirmed the demand of Rs.9,98,892/- against the Appellant DEIPL and further imposed a penalty of Rs. 10,00,000/-. Further ld. Commissioner confirmed the demand of Rs.79,31,543/- against EIPL and imposed penalty of Rs.80,00,000/- on M/s EIPL. Further, he also imposed penalty of Rs.50,00,000/- on M/s VIL.

7. Being aggrieved Appellants preferred appeal before this Tribunal. Further in the grounds of appeal, reference to provisional assessment was made and pending finalization, SCN was issued. This Tribunal vide Final Order dated 23/07/1999 remanded the matter to the Commissioner with the direction for examination of the records in detail and also examine Appellants' contentions about provisional assessment and pass appropriate order.

8. Order-in-Original dated 27/02/2003 was passed, whereby the Ld. Commissioner reconfirmed the demand of Rs.9,98,892/- on the Appellant DEIPL and also imposed penalty of Rs.10,00,000/-. However, the ld. Commissioner gave the benefit of deductions of Sales Tax and Transportation to M/s DEIPL. Further, Ld. Commissioner confirmed demand of Rs.79,31,543/- against EIPL and imposed penalty of Rs.80,00,000/- on M/s. EIPL. Further, he also confirmed penalty of Rs.50,00,000/- on M/s VIL.

9. Again Appeal was preferred before the Hon'ble CESTAT (2nd round) vide Final Order dated 19/12/2005 passed by this Tribunal remanding the matter back to the Ld. Adjudicating Authority for passing a fresh order of assessment by adopting the approved assessable values of identical sets manufactured by M/s VIL. Further, it was held that in case such value is not available for a particular variety of television, the Commissioner shall pass a fresh order of assessment for that variety, after allowing deductions in respect of freight, sales tax and trade discount, on an appropriate basis.

10. Impugned O-I-O dated 28/02/2007 was passed by the Ld. Commissioner whereby, he confirmed the demand of Rs.25,72,882/- against M/s DEIPL and imposed penalty of Rs.10,00,000/- Further, he confirmed demand of Rs.52,40,982/- against M/s EIPL and imposed penalty of Rs.70,00,000/- on it. Further, he confirmed penalty of Rs.50,00,000/- on M/s VIL.

> Reference to provisional assessment, Para-15.

11. Being aggrieved the Appellants - assessees are again before this Tribunal which is the third round of litigation. The Learned Counsel for the Appellants states that the show cause notice is ab initio void in view of the ruling of Hon'ble Supreme Court in Commissioner, Central Excise & Customs, Mumbai Vs I.T.C. Ltd. 2006 (203) E.L.T. 532 (SC) wherein Hon'ble Supreme Court under similar facts and circumstances, where provisional assessment was ordered and show cause notice under Section 11A of the Act was issued before finalization of provisional assessment. The Hon'ble Court relying on its earlier ruling in the case of Serai Kella Glass Works Pvt. Ltd. Vs Collector of Central Excise, Patna [1997 (91) E.L.T. 497=(1997) 4 SCC 641] observed that "Section 11A deals with recovery of duty not levied or not paid or short levied or short paid or erroneously refunded. The proceedings under Section 11A have to be commenced with the show cause notice issued within 6 months from the relevant date. "Relevant date" has been defined under Sub-section 3(ii) to mean in a case where duty of Excise is provisionally assessed under this Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. After final assessment, a copy of the order on the return filed by the assessee has to be sent to him. Duty has to be paid by the assessee on the basis of the final assessment within 10 days' time from the receipt of the order. No question of giving any notice under Section 11A arises in such a case.

It is only when even after final assessment and payment of duties, it is found that there has been a short levy or non-levy of duty, Excise Officer is empowered to take proceedings under Section 11A within the period of limitation, after issuing a show cause notice. In such a case, limitation period will run from the date of final assessment. The scope of Section 11A and Rule 173-I, are quite different…."

12. Heard the Learned A.R. for Revenue who has relied on the impugned order.

13. Having considered the facts and circumstances, we find that the show cause notice issued prior to finalization of provisional assessment, when admittedly the assessees were under provisional assessment scheme, is ab initio void. Accordingly, we hold that the show cause notice is not maintainable. Accordingly, we set aside the impugned order and allow all the appeals. The appellants shall be entitled to consequential benefits, in accordance with law.

14. Under the facts and circumstances, we direct the concerned Adjudicating/Competent Authority to finalize provisional assessment of M/s Venugopal Engineering Ltd., now known as M/s Electroparts India Private Ltd. and M/s Domebell Electronics India Private Ltd., with effect from 01/03/1994. So far the other appellant M/s Videocon International Ltd. is concerned the penalty against them stands deleted, in view of setting aside of the impugned order. The Appellants are also directed to appear before the Competent Authority with a copy of this order within a period of 3 months from receipt of a copy of this order for finalization of their provisional assessments, alongwith the relevant details.

(Dictated & Pronounced in Court)

Sd/- Sd/-

(Anil G. Shakkarwar)
Member (Technical) (Anil Choudhary)
Member (Judicial)Lks
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