CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 23715 of 2014
(Arising out of Order-in-Original No.BEL/EXCUS/000/COM/B.HR/ 010/2014-15(cx) Dated 08.09.2014 passed by Commissioner of Central Excise & Customs, Belgaum)

M/s. UltraTech Cement Ltd.,
(Unit: Rajashree Cement Works),
Aditya Nagar, Malkhed Road,
Dist: Gulbarga – 585 292. ....**Appellant(S)**

VERSUS

Commissioner of Central Excise and Customs,
71, Club Road,
Belgaum – 590 001. .... **Respondent(s)**

Appearance:
Present for the Appellant: Mr. Ravi Raghavan, Advocate
Present for Respondent: Mr. H. Jayathirtha Authorised Representative

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21426 / 2023

Date of Hearing: 03.08.2023

Date of Decision: 22.12.2023

Per: Dr. D.M.Misra

This is an appeal filed against the Order-in-Original No. BEL/EXCUS/000/COM/B.HR/010/2014-15(CX) dated 08.09.2014 passed by Commissioner of Central Excise and Customs, Belgaum.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of cements of various grades falling under Chapter heading 2523 10 00 of the Central Excise Tariff Act, 1985. The appellant captively consume clinker for manufacture of cement in their factory, clear the same to other units of the appellant and also sell some quantity of the same to independent customers (unrelated buyers). In clearing the clinkers to their own sister units, the appellant had determined the cost of the product as per CAS-4 method and accordingly the assessable value as 110% of the cost of the production in accordance to Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (Central Excise Valuation Rules, 2000 for short). Since independent sale to other buyers are also available, show-cause notice was issued to the appellant demanding differential duty by computing the assessable value of clinkers cleared to sister units in terms of Rule 4 read with Rule 11 of Central Excise Valuation Rules, 2000 for the period from March 2011 to November 2013. The differential duty computed accordingly for the said period amounting to Rs.78,17,68,586/- was demanded with interest and penalty by issuing show-cause notice dated 30.01.2014 invoking extended period of limitation. On adjudication, the demand was confirmed by the learned Commissioner with interest and penalty of equal amount under Section 11AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002; further, the amount of Rs.4,93,93,806/- paid by the appellant was

appropriated against the said demand. Assailing the impugned order, the present appeal is filed before this Tribunal.

3.1. At the outset, the learned advocate Shri Ravi Raghavan for the appellant has submitted that during the period in question, the appellant had cleared clinkers of 4136661 .31 MTs to the sister units against the miniscule sale of 6018.19MTs to independent buyers.

3.2. Summary of submissions of Learned Advocate are as below:

a. The question framed by the learned Commissioner is incorrect as the clinker was transferred from one unit to another unit of the same company and not related group of companies.

b. The demand is based on assumptions and presumptions. It is presumed that by adding the differential value of comparable sale price of clearances to independent buyers over the value adopted for clearances of clinkers to sister units, will be the assessable value under Rule 4 of the Central Excise Valuation Rules, 2000.

c. Rule 4 of the Valuation Rules, 2000 provides for adjustments in price on account of time and other relevant factors. The aforesaid adjustments were not considered while computing the demand.

d. The differential duty arrived by applying comparable price of the goods sold to independent buyers under Rule 4 of Central Excise Valuation Rules, 2000. The price at which clinkers were sold to independent buyers was inclusive of freight, whereas the assessable value of stock transferred goods is on ex-factory basis and freight charges are not includable in the assessable value of the clinker transferred to own units. In support, referred to the judgment of Hon'ble Supreme Court in the case of ***Escort JCB Limited Vs. CCE, Delhi [2002(146) ELT 31 (SC)].*** Therefore, the value should be calculated on ex-factory basis even if Rule 4 of the Central Excise Valuation Rules is applied to stock transferred goods i.e. it should be exclusive of freight.

e. The value under Rule 8 of Central Excise Valuation Rules, 2000 read with CAS-4 method is more than the duty payable under Rule 4 of the Central Excise Valuation Rules; hence no differential duty is payable. In support, they have cited the example of sale to independent buyer M/s. Ramco Industries Limited and the price at which during the relevant period transferred to their own units adopting Rule 8 of the Central Excise Valuation Rules.

f. Further he has submitted that the comparable price adopted in computing value under Rule 4 of Central Excise Valuation Rules, 2000 without adopting the comparable goods, which are nearest to time of clearance of goods to own units. The Commissioner has blindly confirmed the demand raised in the show-cause notice without properly applying the principles laid down under Rule 4 of the Central Excise Valuation Rules, 2000 in computing the value and in turn the differential duty, hence bad in law. In support, he placed reliance on the judgment in the case of ***Tilrode Chem Pvt. Ltd. Vs. CCE, Bangalore [2011(264) ELT 306 (Tri.***

Bang.); further affirmed by Hon'ble High Court of Karnataka as reported at Commissioner Vs. Tilrode Chem Pvt. Ltd. **[2015(317) ELT A190(Kar.)]** and in the case of ***Vinir Engineering Pvt. Ltd. Vs. CCE, Bangalore [2004(168) ELT 34 (Tri.-Bang.)].***

g. Further, he has submitted that the quantum of clinker sold to independent buyers is miniscule (approximately 0.05%) compared to clinkers cleared to their sister units for consumption during the relevant period; hence such independent sale be ignored. Further, he has submitted that there is no simultaneous sale to independent customers during the entire period of dispute i.e. March 2011 to November 2013 except only in few months, where the sale was very negligible. Thus, the finding of the Commissioner that simultaneous sale price to independent buyers was available throughout the period of clearance is incorrect.

h. The sister units, where the clinkers were received, used in the manufacture of grey cement and cleared on payment of Central Excise duty as applicable and the recipient unit is entitled for credit whatever the amount paid by the appellant on the clinkers at the time of its clearance; thus the differential duty payable is available as cenvat credit at the end of the recipient unit leading to revenue neutral situation. Further, during the relevant period, they have paid more duty than the demand through PLA., hence the finding of the Commissioner has no basis. In support, he has referred the following judgments:

a) ***Nirlon Ltd. Vs. CCE [2015(320) ELT 22 (SC)]***

b) ***CCE&C(Appeals) Vs. Narayan Polyplast [2005(179) ELT 20 (SC)]***

c) ***CCE Vs. Narmada Chematur Pharmaceuticals [2005(179) ELT 276 (SC)]***

i. Referring to Section 4(1)(b) of the Act and Rule 8 of the Central Excise Valuation Rules, 2000, he has submitted that Rule 8 is the appropriate rule for assessment, which shall be applicable to the facts of the present case, since the clinker on which the duty was proposed to be demanded was not sold but transferred to their sister units on stock transfer basis meant for manufacture of grey cement. In support of his submission, he has referred to the Circular F.No.354/81/2000-TRU dated 30.06.2000 and Circular No.643/34/2002-CX dated 01.07.2002. In view of the said Circulars, which are binding on the department, demand was confirmed, contrary to the same, hence bad in law.

j. Further he has submitted that since the subsequent amendment brought into force w.e.f. 01.12.2013 being clarificatory in nature; hence be applied, retrospectively. In support, he has referred to the following judgments: -

a) ***CCE Vs. Fosroc Chemicals (India) Pvt. Ltd. [2015(318) ELT 240 (Kar.)]***

b) ***UOI Vs. Steel Authority of India Ltd. [2013(297) ELT 166 (Chhattisgarh)]***

k. He has further submitted that the demand is barred by limitation in absence of short payment due to fraud, collusion or any willful mis-statement or suppression of facts or contravention of any provisions of the act or the rules made thereunder with intent to evade payment of duty. Therefore, the demand for the period March 2011 to December 2012 is barred by limitation. They have not suppressed any facts from the Department by the interpretation of the applicability of the relevant rules has been the subject matter of interpretation by Larger Bench, the differential duty payable by the appellant always is available as cenvat credit to the sister units; hence the effect is revenue neutral.

l. Further, he has submitted that in the similar circumstances in the case of ***Ultratech Cement Pvt. Ltd. Vs. CCE, Bhavnagar [2013(295) ELT 470 (Tri. Ahmd.)]*** affirmed by Hon'ble Gujarat High Court, CCE, Bhavnagar Vs. Ultratech Cement Pvt. Ltd. [2014(302) ELT 334 (Guj.)], it is held that extended period cannot be invoked. It is stated that the appellant has been filing ER-1 returns indicating the duty paid on transfer of clinkers to sister units, also since their books of accounts, which have been audited by the statutory auditors periodically and they were under the bona fide belief that the applicable rule for determination of value of stock transferred goods to their sister units is assessable under Rule 8 of the Central Excise Valuation Rules, 2000 invoking of extended period is bad in law, hence, the demand is bad in law; therefore interest is also not applicable; consequently imposition of penalty is not sustainable.

4. Learned Authorised Representative (AR) for the Revenue reiterates the findings of the learned Commissioner. He has submitted that the appellants were clearing the clinker to their own sister units adopting Rule 8 of Central Excise Valuation Rules, 2000 even though a part of the goods were sold to unrelated buyers during the same period. It is his contention that the issue is no more *res integra* and settled by the Larger Bench of the Tribunal in the case of ***Ispat Industries Ltd. Vs. CCE, Raigad [2007(209) ELT 185 (Tri. LB)].*** Further he has submitted that the said judgment of the Larger Bench was considered by the Hon'ble Gujarat High Court reported as ***CCE, Bhavnagar Vs. Ultratech Cement Pvt. Ltd. [2014(302) ELT 334 (Guj.)]*** and their lordships upheld the view expressed by the Larger Bench.

5. Therefore, in the appellant's case, provisions of Rule 8 of Central Excise Valuation Rules, 2000 will not apply and the assessable value of the goods cleared to their sister units be computed applying provisions of Rule 4 of the Central Excise Valuation Rules, 2000, read with Rule 11 of the said Rules. He submitted that therefore, the method of assessment confirmed by the learned Commissioner is in accordance with the said Larger Bench judgment, hence in accordance with law. Further he has submitted that since the appellants are aware of the fact that Rule 8 of the Central Excise Valuation Rules, 2000 are not applicable, since the price at which such goods are sold is available; hence invocation of extended period by the Commissioner is justified and in support, he has referred the

judgment in the case of ***Mahindra & Mahindra Ltd. Vs. CCE, Mumbai-V [2018(362) ELT 382 (Tri. Mum.)].***

6. Heard both sides and perused the records.

7. The present dispute relates to determination of assessable value of clinkers manufactured by the appellant and cleared to their own sister units during the period March 2011 to November, 2013.

8. The Revenue's contention is that Rule 8 of the Central Excise Valuation Rules, 2000 cannot be made applicable as the goods were not wholly consumed or transferred to their sister units but a portion of the goods were sold to independent buyers. It is their argument that Rule 4 of the Central Excise Valuation Rules, 2000 read with Rule 11 be applied in arriving at the assessable value of the clinkers transferred to the sister units. The relevant Rules are reproduced below:

> ***RULE 4.*** *The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.*
>
> ***RULE 8***. *Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value of such goods that are consumed shall be*

one hundred and ten per cent of the cost of production or manufacture of such goods.

***RULE 11**. If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act.*

9. We find that this issue has been considered by the Larger Bench of the Tribunal in **Ispat Industries Ltd.'s** case and their lordships after noting the Circulars issued by the Board in this regard observed as follows: -

***8.** The conclusion that we are drawing in the present case would lead to determination of a value which, in our view, will not only be reasonable but also consistent with the provisions of Section 4 of the Central Excise Act. We would, at this stage, draw support from the judgment of the Supreme Court in the assessee's own case, as reported in 2006 (202) E.L.T. 561, wherein the Court applied "The Gunapradhan Principle" in interpreting the Customs Valuation Rules. We have kept in mind the following observations of the Court in coming to our above conclusion:*

"26. In our opinion if there are two possible interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make

the rule ultra vires the Act.

27.................

36. In our opinion, the Gunapradhan principle is fully applicable to the interpretation of Rule 9(2). Rule 9(2) is subservient to Section 14. We must, therefore, interpret it in such a way as to make it in accordance with the main object that is contained in Section 14 of the Customs Act. It may be that in isolation Rule 9(2) conveys some other meaning, but when it is read along with Section 14 of the Act, it must be given a meaning which is in accordance with the object of Section 14. The object of Section 14 is 'primary' whereas the conditions in Rule 9 (2) are the 'accessories'. The 'accessory' must, therefore, serve the 'primary'."

9. *In view of what we have observed above, we answer the reference in the following terms:*

> *(a) the provisions of Rule 8 of the Valuation Rules will not apply in a case where some part of the production is cleared to independent buyers;*
>
> *(b) the provisions of Rule 4 are in any case to be preferred over the provisions of Rule 8 not only for the reason that they occur first in the sequential order of the Valuation Rules but also for the reason that in a case where both the rules are applicable, the application of Rule 4 will lead to a determination of a*

> *value which will be more consistent and in accordance with the parent statutory provisions of Section 4 of the Central Excise Act, 1944.*

10. Therefore, we have no hesitation to hold that the appropriate rules for determination of the assessable value of the goods for the transferred clinkers to sister units will be Rule 4 read with 11 of the Central Excise Valuation Rules, 2004 rather than Rule 8 of the Central Excise Valuation Rules, 2000 for the period in question.

11. Regarding the extended period of limitation, we find that the appellant has been declaring the assessable value adopting Rule 8 of the Central Excise Valuation Rules, 2000 and discharging duty during the relevant period. All these facts are recorded in their ER-1 returns and periodically filed with the department; no objection has been raised by the Department on such method of assessment. Therefore, alleging suppression or mis-declaration of facts with intent to evade payment of duty cannot be sustained. In the appellant's own case for the Gujarat Unit, this Tribunal has considered the issue of invocation of larger period of limitation reported as ***Ultratech Cement Pvt. Ltd. Vs. CCE, Bhavnagar [2013(295) ELT 470 (Tri. Ahmd.)].*** Analysing the facts more or less similar to the present one for the period March 2008 to March 2010, though the method of assessment was held to be not correct, it is held that extended period of limitation cannot be invoked. This Tribunal observed as follows: -

> ***11.*** *It can be seen from the above reproduced portion of the judgment, that Larger Bench has specifically come to*

the conclusion that provisions of Rule 8 of Valuation Rules will not apply in a case where some part of the production is cleared to independent buyers. As is already recorded by us, in this case before us, there is a sale of bulk cement to independent buyers at a value which is higher than the value arrived at by the appellant for discharge of duty liability of the cement cleared by them to their own units. On merit, we find that the judgment of the Larger Bench will apply and the value adopted by the appellant for the clearances to independent buyers should be considered for arriving at the value of the duty liability to be discharged by them for removal/clearance of bulk cement to their own units like NMCU, MCU, and RMC.

12. *We find strong force in the contentions raised by the ld. Counsel that the Show Cause Notice dated 9.11.2009 has demanded the duty liability for the period March, 2008 to May, 2009 is hit by limitation at least for the period of one year prior to the date of issuance of Show Cause Notice. On perusal of the records, we find that the appellant has been filing monthly returns to the lower authorities from March, 2008 onwards. The lower authorities have not raised any query on this issue. The appellants had every reason to believe that the Board's Circular would be applicable to them and hence sought to value of the goods based upon the cost of production and as per provisions of Rule 8 of Central Excise Valuation Rules. Accordingly, we hold that the demand of duty prior to the period of one year*

> *from the date of issuance of Show Cause Notice dated 9.11.2009 is hit by limitation and that portion of demand is liable to be set aside and we do so. All other show cause notices being within limitation, our findings on merits would apply.*

12. The said judgment of the Tribunal was carried over in appeal before the Hon'ble Gujarat High Court reported as ***CCE, Bhavnagar Vs. Ultratech Cement Pvt. Ltd. [2014(302) ELT 334 (Guj.)].*** Their lordships analysing the facts upheld the order of the Tribunal on the issue of limitation observing as follows: -

> ***19.*** *Thus on both the counts, firstly that there came a decision explaining and clearing the doubts as to in what manner the valuation requires to be done in the event of captive consumption of goods as also in case of goods transferred to sister concern or to another factory of the same assessee and till then, Board circular governed the field. And, also because from March, 2008 onwards. On regular basis, the monthly returns have been filed by the assessee respondent indicating all possible details. Thus, the Tribunal rightly turned down the demand of duty prior to the period of one year from the date of issuance of show cause notice dated 09.11.2009, holding the same to have been hit by the law of limitation.*
>
> ***20.*** *In the instant case, we are in complete agreement with the findings of CESTAT, which rightly has concluded from the gamut of facts and evidence that all the materials*

were available with the Department, which could have been questioned and at no point of time any issue was raised questioning any credential of the respondent with regard to such transfer, the extended period of limitation in the demand notice could not have been sustained. Question of law is appropriately answered by the Tribunal.

13. Following the aforesaid judgments, we are of the view in the present case also, extended period of limitation cannot be invoked. However, the demand be confined to the normal period of limitation.

14. The learned advocate for the appellant has disputed the method of application of Rule 4 read with Rule 11 of Central Excise Valuation Rules, 2004 in arriving at the differential duty. He has submitted that during the period, no comparable sale price to independent buyer is available; the Department has erroneously adopted the previous highest price and computed the duty. Further, he has submitted that even though sometimes, the value arrived applying Rule 8 is more than the sales value during that period; the Department has conveniently ignored the same. Since we are remanding the matter to re-compute the duty for the normal period of limitation, we direct the Department to strictly follow the provisions of Rule 4 read with Rule 11 of the Central Excise Valuation Rules, 2000 in computing the differential duty payable for the normal period.

15. Consequently, the impugned order is accordingly modified and appeal is partly allowed setting aside demand for the extended period of limitation and remand the matter to the

adjudicating authority to re-determine the assessable value applying the principle of Rule 4 read with Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and compute the differential duty, interest, if any, accordingly.

16. The Appeal is disposed as above.

(Pronounced in open court on 22.12.2023)

(D.M. Misra)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Raja...