CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/21107/2014-DB

[Arising out of Order-in-Appeal No. 503/2013 dated 26/12/2013 passed by Commissioner of CUSTOMS , BANGALORE]

M/s Merck Life Science Private Limited
(formerly known as Millipore (India) Pvt Ltd)
No.50a, 2nd Phase, Ring Road, Peenya,
BANGALORE
KARNATAKA

Appellant(s)

Versus

C.C-Bangalore-cus
C.R. BUILDING,QUEENS ROAD,
P.B.NO. 5400,
BANGALORE
KARNATAKA
560001

Respondent(s)

Appearance:

T SUNDARANATHAN, ADVOCATE
68 SIVA SAKTHI NAGAR II RAJAKILPAKKAM
CHENNAI
TN
600073

For the Appellant

Mrs. C.V. Savita, Superintendent (AR)

For the Respondent

Date of Hearing: 18/07/2019
Date of Decision:26/09/2019

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No.20823/2019

Per : P. ANJANI KUMAR

The counsel for the appellant submits, vide written submissions dated 22nd July, 2019, that the present appeal arises out of SVB Review proceedings; they are a manufacturer and distributor for the foreign supplier;

earlier M/s Millipore Corporation, USA and presently M/s Merck Kg AA ; the supplier and the appellants being related, for the purposes of Customs, Act, 1962, SVB investigation, to examine whether the prices declared by them on imports were free from any influence of their relationship, was initiated in 1991 and was being reviewed once in 3 years; In respect of the imports made from the related supplier, the transaction values as declared in the import documents were accepted. In the case of goods which are imported for Stock and Sale and also for warranty purposes, a discount of 45% from the Global Price List of the related supplier were accepted and any discounts above 45% were not being allowed. There have been changes, in the organizational relationship with the related supplier, prices of the import goods and currency, after the SVB order in 2008 which were duly intimated to the department; the original related supplier i.e, M/s Millipore Corporation USA and its group companies were taken over by M/s Merck Kg AA, Germany; discount pattern was rationalized for different goods; new discounts given ranged from as low as 2% to more than 45%, unlike the fixed discounts to maximum of 45% as given earlier; different discount rates were given to different goods, from the Global Price List; the net discounted prices were given as ICIN Pricelist; discounts given were fixed in case of the appellant whereas there is no limit of any discount given for the unrelated direct buyers.

2. As per Distributor Agreement, the appellant is a **Non-Exclusive Distributor** of the foreign related supplier i.e, Millipore SAS, France; appellant and the supplier are independent contractors; as can be seen under clause 6 tiled as 'Distributor Not Agent or Legal Representative of MSAS'; the foreign seller determines the prices for the appellant in respect of its import goods considering the Average Re-Sale Price; selling and Administrative Prices incurred by the appellant; and the Budgeted Gross Margin as determined by independent experts as per the Transfer Policy Guidelines, as may be seen from Distributor Agreement; these facts were not denied nor disputed in any manner by way of any evidences, findings, cross appeals or cross objections, in the proceedings thus far; the lower authorities have held that the discount above 45% were not permissible without any basis, contrary to evidences.

3. Order-in-Original no.151/2013 dated 8-2-2013 considered all the relevant documents, previous orders and the affidavit filed by the appellant; though titled review, was not a mere a review of the earlier proceedings but a detailed study of all the changes including that in the pricing policy occurred, as per Para 8; it is worth mentioning that the order observes as following.

- the organizational and the relationship changes as well as switch over from USD to Euro currency, have not adversely affected the valuation and in fact, it is perceptible that the related supply sources made use of the circumstances for a significant upward revision of prices (page No.21 of the OIO)
- the new ICIN price is a transfer price adopted by them only for the contemporary transactions; previously, the related supplier was allowing a discount of 45% from the List Price to MIPL which was accepted by the department as transaction value; the ICIN price presently applicable, is the net discounted price at which the goods are sold to MIPL; the prices indicated in ICIN when compared to the previously accepted transaction values (which was 55% of the List Price), in more than 90% cases is higher (page No.21 of the OIO)
- 'Effectively the difference between the list price and the ICIN price works out to an average discount of 32%, which is lesser than the previously discount of 45 % (page No.21and 22 of the OIO)'.
- In respect of the goods thereof (Table 3 goods), the discounts given to the appellants were more than 45% from the List Price. This needs to be examined with respect to the discount extended to the unrelated importers by the same supply source'. (page No.26of the OIO)

This discount of more than 45% given to the appellant in respect of some of the import goods is the focal point of the present appeal.

- The appellants have also demonstrated that the ICIN prices are purely determined by the foreign supplier on purely commercial considerations and thus fixed the discount rates as far as the appellants are considered as ICIN prices cannot be negotiated any further, while the Global price List can be negotiated to any level of discounts by the third party buyers, so that their prices could be lower than that of the appellants herein. (page No.11 and 12 of the OIO)
- (upon analyzing the Tables 4 and 5) Discount allowed to unrelated importer is 46% while discount given to related importer is only 2%.Quantity and time of import etc., may also be observed. It leaves no doubt that related importer was not the benefits extended to the unrelated importer.It is mostly

so in respect of data available in annexure M. It is the display of annexure M that unrelated importers are extended discounts ranging from 46% to 77% while related importer is extended ranging from 2% to 55% showing that unrelated importers are favored vis-à-vis related importer in the matter of price charged. Discounts in excess of 45% seen in Table 3 may persuade rational consideration. In the light of Tables 3 and 4 making it clear that commercial considerations appear to have played role in determination of sale price of the supplier with no regard to relationship'.

- (on analysis made vide Table 6) in most of the cases, the discount given to related buyer is almost similar or only marginally varying

4. After observing as above, the Adjudicating Authority observes contrary to earlier findings (Page No.34) that it is clear that there are two price lists; one, global price list applicable to all other than the related importer, and the other, ICIN price list applicable only to the related importer. This is different from the pricing structure available in the past. The system of Global price list was there in the past and commonly applicable to related importer and unrelated importers. At that time, 45% was considered reasonable. Special treatment through net discounted ICIN price list to the related importer is a recent development and any special treatment is unacceptable to valuation of goods for the purpose of adhering to provisions of the Customs law. Hence, I am not inclined to go with ICIN price lists especially applicable to the related importer for limited purpose, but I prefer to conclusions and decision in the immediately preceding renewal order…'.

5. The Lower Appellate Authority also has not considered the above issues and also has not considered the detailed analysis made in the Order-in-Original, and dismissed the appeal by merely holding that higher discount allowed in stray cases to independent buyers cannot be the basis for allowing the higher discount to the appellant. The lower authority has not considered that the earlier discounts given were fixed across the board, but now under the present system, the discounts are rationalized according to the each item. Global Price List is not made fixed and liable to be flexibly bargained for discounts and thus more beneficial to the unrelated buyers than to the related buyers who are given with the ICIN price lists being a net discounted pricelist which has only provided for fixed discounts for every item. Therefore, the same is not legal and not proper. The Appellate Authority also has not considered the above issues and also has not considered the detailed analysis made in the Order-in-Original, and dismissed the appeal by merely holding that higher discount allowed in stray cases to independent buyers cannot be the basis for allowing the higher discount to the appellant. The finding is without any basis and also contrary to its own finding and hence, same is not legal and not proper.

6. The foreign supplier is open to consider the commercial considerations and thus open to grant higher discount to unrelated buyers than that granted to the related buyers. Thus, the appellant is only put to disadvantage under the ICIN pricelist. In addition, the appellant has to shoulder the burden associated with distributorship like minimum stock, warranty servicing, sales promotion, etc., and without this burden, the unrelated buyers can also get higher discounts. Pricelist is merely an index of the prices of the goods of the seller and in any case, in the case herein the Global Price List is intended to serve only as an index and a basis for providing discounts and thus not fixed in any manner. Apex court held in **Eicher Tractors Ltd Vs CC, Mumbai (2000(122) ELT 321 (SC)** *that A price list is really no more than a general quotation and that …. 'A discount is a commercially acceptable measure, which can be resorted to by a vendor for a variety of reasons including stock clearance…'* Thus, the Global Price List is not sufficient to hold that the ICIN pricelist is a special treatment, as even higher discounts are given to independent buyers.

7. The ICIN pricelists is a price list fixed for the distributors considering the commercial considerations as applicable to the distributorships and not on the basis of any relationship. There are a variety of commercial considerations, such as Stock **clearance**….as found acceptable in the Eicher case(supra); **Old customer** – as held in Basant Industries Nunhai Vs Addl CC, Bombay – 1996(81) ELT195, and these reasons are not exhaustive and not limited to the above, as it has repeatedly been held that the discounts are given for a variety of reasons. Thus, a distributorship is also a commercial consideration and as the commercial levels of a distributor and an independent buyer who is not a distributor would be different and thus a discount given to a distributor cannot be rejected that the price is lower than that of the import prices of independent buyers. In this regard, reference is made to **2005(185) ELT 269 – Gemplus India Pvt Ltd Vs CC, Chennai – (Tri – Bang)** wherein the Appellant therein being an importer under Product supply Agreement and a regular importer with the foreign seller cannot be expected to have the same prices as that of an independent buyer, since their commercial levels are different. Reference is also made to **2006 (202) ELT 13 SC.,**CC, New Delhi Vs Prodelin India (Pvt) Ltd wherein it is held that 'Even assuming for argument's sake that the respondent and M/s PC, USA are related persons even in that case their transaction value is to be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price and the importer demonstrates that the declared value of the goods being valued, closely approximates to the value for identical goods or similar goods.

8. In their case, while consideration of commercial levels of a distributor explains the discount given to the appellant, it is to be noted that the same is fixed and even higher discounts are given to the 3rd party importers. Thus, only commercial considerations are kept in view in determining the discounts by the foreign seller and the relationship had no role which fact also has been admittedly a finding in the Order-in-Original as seen earlier. Hence, the ICIN prices cannot be rejected or subjected to any restrictions as the considerations thereof are commercial in nature and the relationship has not played any role.

In the case, it is an investigation of import prices of related persons and this investigation is periodically reviewed and the instant review was done exhaustively due to the reason that there has been a change in the pricing basis as the discount policy was rationalized as per the commercial considerations of each item of import goods. This was not the case in the matter of Eclipse Combustion Pvt Ltd Vs CC, Mumbai – 2005 (189) ELT 282 (Tri -Mum) relied on by the department wherein only specific imports were dealt with and in any case, both the related importer and the unrelated importers resell the imported goods and thus the difference in discount were found to be unacceptable. In their case, no such finding as to the independent buyer and the appellant are doing the same commercial activity was made and, in any case, even such third parties were given much higher discount than the appellant which was not the case in the above cited case. In our case, there has been an exhaustive and extensive investigation in respect of import goods which is not the case in the cited case law and thus the same is distinguishable and not applicable to the facts of the present appeal.

9. In the case of **CC, Mumbai Vs Bureau Veritas & others** (CDJ 2005 SC 231=2005(181) ELT 3) In the case of CC, Mumbai Vs Bureau Veritas & others 2005(181) ELT 3) the Larger Bench of Apex Court held that *'It is only when the transaction value under Rule 4 is rejected, that under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely, if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules'.*

After having admitted that the relationship had no role in granting the varying discounts and only commercial considerations are given, it is not lawful and not proper to deny the same rationale in case of few other items wherein the appellants are given higher but fixed discounts. It is also not the case of the department that a still higher discount would not be given in respect of these items even if warranted due to better commercial levels by the independent buyers, as it is seen and found clearly that the foreign seller has open policy in the matters of granting discounts and even higher discounts to the 3rd parties.

Thus, by looking from any angle and aspect, restricting the discounts given to the appellant to 45% is without any basis both in law and also on facts and thus the impugned orders are liable to be set aside and the appeal deserves to be allowed. He also relied upon the following cases:

Indo Hacks Ltd. Vs Collector of C.Ex., Hyderabad, 1986 (25) ELT 69.

MRF Ltd. Vs Collector of C.Ex., Madras, 1997 (92) ELT 309 (SC)

Commissioner of C.EX., Raipur Vs Blastech (India) Pvt. Ltd., 2011 (274) ELT 210 (Tri. Del.)

Steel Authority of India Ltd. Vs Commissioner of C.Ex., Raipur, 2015 (326) 450 (SC)

Nirma Ltd. Vs Commissioner of C.Ex., Kanpur, 2005 (183) ELT 266 (Tri. Del.)

Kakateeya Fabs (P) Ltd. Vs Commissioner of C.Ex. Bhopal, 2018 (15) GSTL 250 (Tri. Del.)

10. The Learned Authorised Representative, for the department, submits that earlier SVB orders were based on the Global Price List and discount of more than 45% on the import price was disallowed; Organisational changes and new agreements entered into force from 2008 to 2011; The Indian entity changed from a Joint Venture to a fully owned subsidiary; Subsequent to the changes, there was a change in prices across all the products (price hike), and a Global Price List was also made; however, a Separate special Price List (ICIN) was prepared only for the Related Party (Millipore (India) Pvt Ltd.). It is described as a Net Discounted Price; the method of arriving at the prices in the ICIN is not demonstrated by the importer. The rationale of having a separate price list for the related party amounts to Special treatment arising out of the relationship. And in the absence of scientific demonstration, it is to be treated as not acceptable under the Customs Valuation Rules.

11. The Learned Authorised Representative submits that it is noted from the order that there are thousands of products imported from the related buyer; in the demonstration given in the Appeal memorandum, only a few products are illustrated in the appellant's favour, whereas, the 0-i0 has taken a detailed study based on the price lists submitted and arrived at the conclusions; the importer has not demonstrated the arguments by way of production of the Transfer Price Agreement and Global, Regional and Local Balance Sheets which are essential documents to substantiate the prices under the GAAT valuation rules; it is also seen that the ICIN is being revised at shorter intervals. It was prepared in 2010 and subsequently revised in 2011.

12. The Learned AR submits that the 0-I-0 has demonstrated that there is no rationale for the arguments mooted by the importer that unrelated buyers have got more discounts for identical products and hence that relationship has not influenced the prices; comparison of Table 3 (showing cases where more than 45% discount is allowed for the importer) with Tables 4 & 5 in the 0IO shows that "commercial considerations appear to have played role in determination of sale price of the supplier with no regard to relationship"; there is no uniformity in the pricing pattern for the related buyer and this may result in arbitrariness in the transactions; in such a situation, the extent of discount given on the Global Price List has more bearing in the analysis; limitation on the discounts arrived at in the earlier SVB order was based on sound principles involved in the international commercial transactions and would ensure a fair play across products; Special Price List (ICIN) for the importer becomes a Special arrangement for the related party and hence not acceptable under the Customs Valuation Rules.

13. Learned AR submits that above aspects demonstrate that the earlier arrived methodology of accepting the discounted Price structure based on the Global Price List (with discounts limited up to 45%) was more scientific in the case of valuation involving relationship; hence, OIO upholding the stand in the earlier SVB order is justifiable and correct; the issue of allowing a Particular pricing policy for the related importer was deliberated by the Hon'ble Division Bench of the Tribunal Mumbai in Eclipse Combustion Pvt Ltd Vs. Commissioner of Customs, Mumbai 2005(189) ELT 282; it was observed that *the fact that the parent company has a particular pricing policy while transacting with their group companies cannot be a valid defence to say that the price is not influenced by the relationship; in fact it reinforces the stand that the price is influenced.". The Hon'ble Supreme Court has affirmed the observations of the Hon'ble Tribunal in the order.*

14. Heard both sides and perused the records of the case. On going through the arrival submissions and the records of the case we find that a brief issue that requires to be deciding in this case is as to whether the ICIN list followed by the Foreign supplier in respect of import by the appellant can be allowed for the purpose of assessment of value of imported goods and as to whether the relation between the Foreign supplier and importer/appellant has influenced the pricing mechanism. At the outset we find that, the appellants have submitted that the original authority has given categorical findings to the effect that it I s evident from the worksheet given by NIPL, as annexure G to their letter dated 15/10/2012, the prices indicated in ICIN when compared to the previously accepted transaction value (which was 55% of the list price), in more than 90% cases is higher. Effectively the difference between the list price and ICIN price works out to a average discount of 32%, which is lesser than the previously accepted discount of 45%; commercial consideration appear to have laid role in determination of sale price of the supplier with no regard to relationship and from the annual Financial Statement, it could be seen that they appellants have not made any other payment other than the purchase consideration and the royalties to the associated companies towards the supply of goods. We find that, the original authority all along to the discussion and findings as accepted the contentions of the appellants and has given categorical findings as above. However, in the order portion he comes to the conclusion that the declared invoice values wherever they are less than 55% of global price list. We find that, no reasoning what so ever as been given as to how he has arrived at such a conclusion. The original authority has not given any findings as to why the declare value should be rejected and the value should be re-determined following the valuation Rules.

15. The original authority as also not given any reasoning or evidence to show that the relation between the appellant and foreign suppliers has affected the pricing pattern. The original authority as sought to place reliance on Eclipse Combustion Pvt Ltd Vs. Commissioner of Customs, Mumbai 2005(189) ELT 282. We find that, learned counsel for the appellants submits that the facts of the case are different and the case law referred pertains to a stand-alone purchase and not to a continuous supply of goods as in the case of the appellant. The appellant has relied on various cases wherein it was held that a discount is a commercially acceptable measure, which can be resorted to by a vendor for a variety of reasons including stock clearance; a distributorship is also a commercial consideration and as the commercial levels of a distributor and an independent buyer who is not a distributor would be different and thus a discount given to a distributor cannot be rejected that the price is lower than that of the import prices of independent buyers and that regular importer with the foreign seller cannot be expected to have the same prices as that of an independent buyer, since their commercial levels are different.

16. We find that, the original authority has not appreciated the above case law as submitted by the appellant. Even assuming that the said case law is not submitted by the appellants before the original authority, it is evident that the original authority has not adduced to any reasons to reject the declared value and not as put any evidence on record to show that the relationship between the supplier and the appellant has affected the price. As discussed above, all through the findings the original authority appears to accept the contentions of the appellant and suddenly comes to a conclusion stating that discount over and above 45% are not acceptable. This by no such of imagination can be said to be a speaking order.

17. The learned appellant authority also has not gone into the details of the fact of the case and has given cursory findings without delving into the crux of the issue. The appellant authority simply affirms the findings of the lower authority. No reasons what so ever have been given as to why the declared prices have to be rejected and as to how the relationship has influenced, if any, the prices declared in the ICIN. Both, the lower authority and the appellant authority appear to have proceeded with a preconceived notion that the discounts over and above that have been allowed in previous SVB orders should not be allowed. Therefore, we find that neither the lower authority nor the appellant authority have rendered justice to the issue. Under these circumstances, we find that, the only way left for us is to set aside the impugned order and to remand the matter for reconsideration to the original authority.

18. In view of the above, we allow the appeal by way of remand to the original authority for a fresh reconsideration taking into account all the submissions made by the appellants and the law enunciated by various courts and Tribunal in this regard. The appellant is directed to submit their submissions along with case laws within 8 weeks of the receipt of this order. The original authority shall pass a speaking and reasoned order within further 8 weeks of such submissions.

(Order was pronounced
in Open Court on **26/09/2019**)

S.S GARG
JUDICIAL MEMBER

P.ANJANI KUMAR
TECHNICAL MEMBER

Pak/PK...