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

Appeal No.E/470/2012

[Arising out of Order-in-Appeal No.170-171/2012 dt. 31.07.2012 passed by Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli]

Appeal No. E/509/2012

[Arising out of Order-in-Appeal No.173/2012 dt. 31.08.2012 passed by Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli]

Bharat Heavy Electricals Ltd.	Appellant
Versus	
Commissioner of Central Excise, Tiruchirappalli	Respondent

Appearance :

Shri Raghavan Ramabhadran, Advocate
For the Appellant

Shri K. Veerabhadra Reddy, ADC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 13.11.2018

FINAL ORDER No. 43186-43187 / 2018

Per Shri Madhu Mohan Damodhar

Both these appeals since involving identical disputes and relating to same appellant, they are taken up for common disposal.

2. Appellants are manufacturers of boiler components and valves and valve parts etc. They supply boiler components to various power projects spread all over India on contract basis under provisional assessment of duty under Rule 7 of Cenvat Credit Rules, 2002. The present dispute is about goods supplied to Chennai Petroleum Corporation Ltd. (CPCL) and Tata Power Company Ltd. (TATA). Appellants had entered into agreement with CPCL & TATA for supply of boiler equipment. While most of the equipments to be supplied were manufactured by appellants and cleared to customers site on payment of duty, certain bought out items (shop made) were procured from third party vendors and sent directly to site of the customers (DTS items). Appellants were clearing shop made goods on payment of excise duty. However, with respect to DTS items, no excise duty thereon was discharged by the appellants. However commercial invoices were issued by the appellants both for shop made goods and DTS supplies. Appellants had established a system of accounting wherein as and when despatches are effected, the same are accounted for in the packing slips generated in the system covering various excise invoices for the purpose of ascertaining actual quantity cleared, Packing Slip Analysis maintained by appellants was relied upon. Once the supplies to these projects were completed, the appellants applied for finalization of provisional assessment. In both finalization orders, the asst. Commissioner allowed deductions for DTS supplies from assessable value based on values mentioned in the commercial invoices issued by appellants to their customers. In the finalization order of original authority dt. 25.10.2011 in respect of supplies to CPCL, the authority demanded apparently the short paid amount of Rs.21,25,792/- with interest thereon. Further

excess amount of Rs.30,15,402/- was ordered to be credited to the Consumer Welfare fund in terms of proviso under rule 7 (6) of Central Excise Rules, 2002. Both the assessee and the department went in appeal against the said order to the Commissioner (Appeals) who vide an impugned order No.170-171/2012 dt. 31.07.2012 agreed with the contentions of the department that deduction of value of DTS supplies should be allowed based on vendors invoices to BHEL and not on the basis of commercial invoices issued by BHEL to the customers. The appeal by BHEL for adjustment of short paid duty against excess paid duty at the time of finalization of provisional assessment was rejected by the Commissioner (Appeals). Hence Appeal E/470/2012 filed by BHEL.

2. So also, in respect of supplies made to Tata Power Company Ltd., Mumbai, the original authority vide finalization of provisional assessment order dt. 29.11.2011 allowed deduction of value with respect to DTS supplies from the assessable value based on values mentioned in the commercial invoices. Excess paid amount of Rs.4,92,337/- was ordered for refund, however interest under section 11BB read with Rule 7 (5) of Central Excise Rules, 2002 was held as payable to BHEL from January 2010 on the said excess amount of Rs.4,92,337/-. In appeal, in the resultant impugned Order in appeal No.173/2012 dt. 31.08.2012, the Commissioner (Appeals) allowed the appeal of department and directed the lower authority to decide the issue afresh for determination of duty and finalization of assessment after scrutiny of all related vendors invoices and corresponding commercial invoices. Hence Appeal No.E/509/2012 by BHEL.

3. When the matter came up for hearing, on behalf of the appellants, Ld. counsel Shri Raghavan Ramabhadran made oral and written submissions which can be broadly summarised as under :

(i) For both shop made and DTS supplies, the appellant issues commercial invoices to the customers. The value of the supplies in the invoices is arrived at by multiplying the total weight of supplies made with the estimated Rate/Kg. This manner of valuation has been agreed upon by the CCE in the Office Memorandum dated 22.12.2004.

(ii) Para 10 of the O.M. explicitly stated that the value mentioned in the commercial invoice issued by the appellant on the basis of Estimated Value of Goods Sold ('EVGS') should be taken for the purpose of deduction of DTS supplies than the cost of procuring the items (as mentioned in the vendor's invoice). Further, para 15 (iii) of the memorandum states that during the finalization of provisional assessment, the deduction for DTS supplies will be based on the EAVGS (Estimated Assessable Value of Goods Sold) as mentioned in the commercial invoice of the Appellant.

(iii) For the purpose of valuation for DTS supplies, the cost plus method was specifically discussed at para 9 of the O.M. Under this method, DTS supplies will have to be valued at actual costs (as per vendor invoice) plus a reasonable margin for overhead expenses and profits. However, such cost-plus method was rejected by the Commissioner of Central Excise in para 9 of the O.M.itself.

(iv) Further, the assessment of DTS goods is beyond the purview of the jurisdictional central excise authorities of the Appellant. The goods are purchased by the Appellant at a particular price and are sold to the customer at a price as per a pre-determined formula (accepted by the customer) without bringing these goods in their factory. Therefore, it is submitted that determining the value of DTS goods at the end of the Appellant is unwarranted and erroneous when the sale price as per the commercial invoice is available.

(v) These projects for which provisional assessment is requested for are entered into between BHEL and various Electricity generation Corporations which are not related in any way and the price paid by the customer is the sold consideration for the sale, therefore the contract price as agreed between the buyer and the seller is the transaction value. In other words, the value arrived at based on the rate/kg agreed to between BHEL and customers becomes the transaction value of each clearance. As it is not possible to ascertain the intrinsic value for each individual despatches/components the Rate per Kg. is arrived by dividing the total contract price by estimated design weight which method is approved by the customer. This Rate/Kg. is applied for payment of central excise duty at the time of clearance of each consignment of Boilers and also for the collection of the contract value progressively from the customer.

(vi) Hence it is submitted that submission of actual cost of production, escalation if any and other eligible expenditure or overheads is not required since it is a well-established fact that the contract price, being the agree price between BHEL and its customers, is the transaction value.

(vii) **<u>Inter-se Adjustment between duty short paid and excess paid should be allowed</u>**

As per the provisions of Rule 7 of CER, 2004, the Assistant Commissioner is required to finalise the assessment by adjusting the amount of duty provisionally paid against the amount of duty finally payable by the assessee on finalization.

Thus, Rule 7 mandates that wherever duty has been paid in excess, the same should be adjusted against duty short paid to determine the final amount payable, if any. The entire purpose of provisional assessment will be defeated if the same is not allowed.

(viii) Reliance is placed on the decision of the Hon'ble High Court of Karnataka in *Toyota Kirloskar Auto Parts Pvt. Ltd. Vs CCE LTU Bangalore* [2012 (276) ELT 332 (Kar)], wherein it was held as follows :

> *"If after taking into consideration the duty payable in respect of all the goods and the duty paid in pursuance of the final assessment order, if still the assesse is due in any duty, then for the short fall in payment of duty, the assessee is liable to pay interest."*

The aforesaid decision of the Hon'ble High Court has been followed in following decisions :

a. Jonas wood head & Sons v. CCE [2015-TIOL-1848-CESTAT-Mad]
b. Hindustan Zinc v. CCE [2015-TIOL-2427-CESTAT-Del]
Jyothy Lab v. CCE [Final Order No.40918-40919/2015 dated 27.07.2015]

4. On the other hand, on behalf of Revenue, Ld. A.R Shri K. Veerabhadra Reddy reiterated the impugned orders and also made the following submissions :

i) The value charged on BHEL by the vendors for the DTS items is very much relevant.

ii) If such bought out items are overvalued in the commercial invoices subsequently issued by BHEL that would in turn lead to undervaluation of the goods manufactured by BHEL and cleared by them. Accordingly, whenever commercial invoice values are higher than the actual cost from vendors, it will lead to uncalled for depression in the valuation of self-manufactured goods. These aspects have been considered by the Commissioner (Appeals) in para 4.8

of the impugned order for Appeal E/470/2012 and in para 4.3 of the impugned order for E/509/2012 and only for these reasons and upon application of mind, the issue has been remanded to the adjudicating authority for reconsideration. The said orders of the Commissioner (Appeals) in respect of valuation of DTS supplies may not require any interference.

iii) With regard to appellant's plea for adjustment of short paid duty against excess paid duty, Ld. A.R drew our attention to para 4.4 of the impugned order for Appeal E/470/2012, to point out that Commissioner (Appeals) has discussed the matter in length and found that as the appellants are issuing cenvat invoices and the duty incidence is passed on to others, same cannot be treated as money due to them. For these reasons, Commissioner (Appeals) has upheld the view taken by original authority that excess amount paid by assessee is not refundable since allowing refund / adjustment of excess amount of duty paid would amount to allowing double benefit.

5. Heard both sides and have gone through the facts of the case.

6.1 The period in dispute in these two appeals are November 2006 to May 2008 (in respect of Appeal E/470/2012) and November 2006 to December 2009 (in respect of appeal E/509/2012). Ld. Advocate has drawn our attention to the order dt.22.12.2004 issued by Commissioner of Central Excise, Tiruchirappalli in respect of the very same excisable goods cleared by BHEL. On perusal of the same, it is seen that that the said office order has laid down the procedure to be followed for permitting Provisional Assessment and for Finalization of Provisional Assessment. We find that the method earlier being adopted and the defects and difficulties with the said practice has been brought out by the Commissioner in paras 4 to 6 of the said office order. Paras 7 to 10 dealt with the details of study conducted, to assess whether the method presently followed was injurious to the interest of Revenue; that similar study was done in 1998 and 2001 and it was decided to continue with the method already discussed; that there are good reasons for continuing with the method. In particular, it has been noted that the total contract price is inclusive of cost of DTS items. On DTS items, excise duty was being paid by the manufacturers, based on the value at which the goods are billed to BHEL. Bills for DTS items when raised by BHEL to the customer is done on the basis of Estimated Average Value of Goods per kg (EAVGS per kg) and are called "Commercial Invoices". The reasons for continuing with the present method are given in paras 8 to 10 of the said office order. For finalization after issue of final Commercial Invoices under the contract, the following guidelines have been given in para 15 therein as under :

At this stage the excise duty payable will be worked out after taking into consideration the following :

(i) Full value of realized from the buyer including cost escalations

(ii) Full value of goods cleared from other BHEL units.

(iii) Full value of items supplied direct to site. This will also be worked out on the basis of agreed EAVGS per kg.

(iv) Assessable value will be worked out for each clearance and duty payable calculated. For this calculation, it will be necessary to arrive at the FAVGS per Kg taking into account all the factors as are known finally. Then additional Excise duty payable, if any, will be demanded.

(v) In case of refund, evidence should be produced showing that excise duty paid is not passed on to customer.

6.2 It is pertinent to note that the above office order was very much in force during the periods of dispute in both these appeals. This being so, we are of the considered opinion that the finalization of provisional assessment in both these cases could have been done only on the guidelines given in the said office order.

7. It further appears that on an earlier hearing of these appeals, vide interim order No.50-51/2016 dt. 10.06.2016 the following directions had been given to Revenue.

> "4. In view of the reply of the appellant as above, Revenue is directed to clarify; (i) the manner in which the guideline of 2004 suffers from any infirmity; (ii) Whether any of the ingredients of the cost is overlooked by the appellant to result in under-valuation of the excisable goods cleared from its factory; (iii) Whether any costing has been undertaken by Revenue to demonstrate that methodology prescribed by the guidelines suffers from any drawback; (iv) Is it possible for Revenue to pick and choose the invoices of bought out items and raise objection against the appellant?; (v) Is it possible for Revenue to conduct investigation throughout the country on the bought out items to ascertain whether the goods supplied by suppliers is over-valued?; (vi) What are the ingredients of cost added to the invoice value of the bought out items to result in over-valuation; and (vii) If there is any cogent evidence to credibly establish the case of Revenue, that should be brought out on record."

In response to the said interim order, Revenue submitted the clarification vide letter C.No.IV/16/83/2014-Arrears Misc. dt. 22.09.2016 as under :

- *With respect to query of Tribunal as to the manner in which the guideline of 2004 suffers from any infirmity, Revenue has clarified that in respect of the guideline of 2004 in Point No.15, it is mentioned that*

  ....

  <u>15. Finalization after issue of final commercial invoice under the Contract</u>

  i) Full value realized from the buyer including cost escalation

  ii) Full value of goods cleared from other BHEL units

iii) Full value of items supplied direct to site this will also be worked out on the basis of agreed EAVGS per Kg.

From the above it appears that, the Guideline 2004 suggested that agreed **Estimate Average value of Goods to be supplied (EAVGS)** per kg may be taken for the purpose of arriving at the value of the goods supplied. Here it may be noted that **even after the completion of project,** adopted the **estimated average value** of goods to be supplied may not be appropriate for the purpose of arriving at the actual value of the goods supplied. Hence to this extent, it appears that the guideline 2004 (office memorandum) **is not in line with** Section 4 of Central Excise Act, 1944 which talks about the transaction value.

- *With respect to the query of the Tribunal whether any of the ingredients of the cost is overlooked by the appellant to result in under-valuation of the excisable goods cleared from its factory, Revenue has reiterated the stand taken by Revenue by the lower authorities that if bought out items are overvalued in the Commercial Invoice; it will lead to undervaluation of goods cleared from the factory.*
- *On a query No.(iii) whether any costing has been undertaken by Revenue to demonstrate that methodology prescribed by the guidelines suffers from any drawback, Revenue submitted that Deputy Director (Cost) of the office of the Commissioner of Central Excise, Trichy had called for documents for the purpose of arriving at Actual Value / Costing of the goods supplied. However, in the absence of required documents proper costings or determining the actual value could not be undertaken.*

- *With respect to query whether is it possible to pick and choose the invoices of bought out items and raise objection against the appellant, it was clarified that it is possible for the revenue to pick and choose the invoices of bought out items and raise objection against the appellant if the BHEL, Trichy provides the copy of the invoices of the bought out items.*
- *With respect to query whether is it possible for revenue to conduct investigation throughout the country on the bought out items to ascertain whether the goods supplied by suppliers is over-valued, Revenue clarified that it is possible even though it appears to be a cumbersome process.*
- *With respect to query what are the ingredients of cost added to the invoice value of the bought out items to result in overvaluation, it was clarified that in absence of copies of the vendors invoices the same could not be ascertained.*
- *With respect to query No.(vii), if there is any cogent evidence to credibly establish the case of Revenue, that should be brought out on record, it was submitted by Revenue that verification of all the invoices pertaining to the project can be done, for which the BHEL,Trichy has to produce all the relevant documents instead of quoting the contract value as a basis for all transactions.*

7.2 What emerges from the above discussions is that the manner of invoicing / pricing of DTS items done by the appellants is very much in consonance with the office order dt. 22.12.2004. It is true that the lower authorities are harbouring a view that the Estimated Average Value of Goods per kg to be supplied (EVAGS per kg) suggested to be taken for the purpose of arriving at the value of goods supplied as per para 15 of 2004 guidelines, may not be appropriate and not in line with Section 4 of the Central Excise Act, 1944 which talks about transaction value. Nonetheless even there was such a view being entertained, the said 2004 guidelines have not been rescinded or withdrawn, at least during the impugned periods. Revenue has also not undertaken any subsequent costing exercises to demonstrate that method prescribed by the guidelines suffers from any drawback. In spite of this, Revenue has argued that they can very well pick and choose invoices of these bought out items. This assertion would only translate to an obvious conclusion that Revenue finds it proper to pick up commercial invoices of DTS goods where the prices charged by BHEL are much higher than what was suffered by them and conveniently ignore the commercial invoice of DTS goods wherein the price may have been lower than what vendors had charged to BHEL. We are also unable to fathom how Revenue while contending that the 2004 guidelines are in contra-distinction to the transaction value of Section 4 of the Act, yet finds it proper to question the commercial price charged by BHEL to their customers without any ground or reason to prove that such values are not transaction values. As seen above, there is no satisfactory response to the query raised by Tribunal in the interim order, as to what are the ingredients of cost added to invoice value of the bought out items which resulted in overvaluation. Possibly, objection to the “high” price of DTS items is on account of the apprehension that vis-à-vis the total contract cost, the cost of excisable goods manufactured by the appellants would then get depressed resulting in lower than required discharge of central excise duty. However, such a suspicion has to be sufficiently proved by the Revenue with incontrovertible evidences, nothing of that sort has been done. Though “high invoicing” of DTS goods has been wrongly flagged by the department, there has been no attempt to show that the value adopted for discharge of excise duty on goods manufactured by appellants are “not actual transaction values”.

7.3 In any case, the defects and difficulties in the very same practice for finalizing provisional assessment was addressed in detail in the aforesaid Office Order dt. 22.12.2004 and in particular, it was noted that “the basis for arriving at the value of items supplied to other units of BHEL and items supplied directly to site cannot be easily verified “at the time of finalization” The said Office Order also considered the possibility of adopting alternative method and it was concluded that the method being followed attributes higher revenue in most of the cases than under a method where cost of DTS items has reckoned 115% of the price paid to DTS vendors.

7.4 Viewed in this light, once the appellants have not been found in breach of Guidelines contained in the Office Order dt. 22.12.2004 the finalization of provisional assessment indeed will naturally be treated to have done only following the said Order. It is also to be noted that certain verifications regarding the value and weight of DTS items and the items supplied by assessee’s units for all items covered by commercial invoices are required to be done periodically, to ensure that at the time of finalization of assessment there will not be any need to check even figures with respect to any documents other than the commercial invoice.

7.5 It is also pertinent to take note that identical issue has been decided by the Commissioner of Central Excise (Appeals) Chennai-II in respect of BHEL’s Ranipet unit. In the said Orders No.73 to 89/2015 (CXA-I) dt. 1.4.2005, the said order dealt with 17 appeals filed by the department against finalization orders.

Nine of the appeals were rejected by the said Commissioner (Appeals) on grounds that department appeals had been filed beyond the statutory time limit. In respect of remaining eight appeals, it is seen that the Commissioner (Appeals), relying the relevant Office Memorandum dt. 22.12.2004 held that it is appropriate to allow deductions of DTS goods on the basis of commercial invoices, observing as under :

> "13. In this regard, I find force in the argument of Respondent who had sought for Provisional Assessment as the contracts with their customers contained price variation clause which was accorded as per law in force. The finalization of the provisional Assessment based on the available Transaction Value (Commercial Invoice Value) shall be the best recourse in the situation. The argument for modification of the Impugned Orders based on the available Transaction Value (Commercial Invoice value) merits consideration."

It has been brought to our notice by Ld. Counsel that Revenue has preferred appeal against the said order of the Commissioner (Appeals) only to the extent of nine appeals that were rejected as time-barred and <u>not against the remaining appeals that have been decided on merits</u>. The contention of the Ld. counsel is that subsequent decision of Commissioner (Appeals) allowing deduction based on commercial invoices raised by the appellants on their customers for supply of DTS goods items stands accepted by the department and has attained finality.

7.6 In the circumstances, the portion of the impugned orders ordering reconsideration of the matter by the original authority whether the bought out items are overvalued is not sustainable.

8. The other issue to be required to be addressed relates to impugned order No. 173/2012 dt. 31.07.2012 (impugned order for Appeal E/509/2012) and order No.170-171/2012 dt. 31.8.2012 (impugned order for E/470/2012) wherein the LAA has held that amount paid in excess of Rs.30,15,402/- cannot be adjusted

against short paid duty of Rs.21,25,792/-. We find that the issue is no longer *res integra* has been laid to rest in a number of decisions of higher appellate forums. The case laws relied upon by the Ld. Advocate are applicable in full force for eg.*Toyota Kirloskar Auto Parts Pvt. Ltd. Vs CCE LTU Bangalore* [2012 (276) ELT 332 (Kar.). CESTAT Chennai in *Jonas Woodhead & Sons (I) Ltd. Vs CCE Chennai – 2015-VIL-344-CESTAT-CHE-CE* and *Jyothi Laboratories Ltd. Vs CCE Pondicherry* vide Final Order No.40918-40919/2015 dt. 27.07.2015 relying upon the judgment of Karnataka High Court in *Toyota Kirloskar Auto Parts Pvt. Ltd.* (supra) has held that in finalization of provisional assessment the assessee is eligible for adjustment of excise duty paid against short payment of duty and refund of excess amount, if any, arising upon ultimate adjustment without bar of unjust enrichment being applicable. This being so, the contrary decisions on this issue in the impugned orders will also not survive.

9. In view of the discussions, findings and conclusions herein above and also following the ratio of the case laws (supra) we hold that both the impugned orders cannot be sustained and will have to be set aside in toto, which we hereby do. Both the appeals are therefore allowed with consequential benefits, if any, as per law.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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