

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNALSOUTH ZONAL BENCH
CHENNAI**

S.No.	Appeal No.	Appellant	Respondent
1.	E/632/2009	CCE Salem	ITC Ltd.
2.	E/633/2009	-do-	C.A.Nair
3.	E/634/2009	-do-	Jhon Stephen
Arising out of Order-in-Appeal No.86, 87 & 88/2009-CEX (SLM) dt. 29.06.2009 passed by Commissioner of Central Excise (Appeals), Salem			
4.	E/648/2009	CCE Salem	ITC Ltd.
5.	E/649/2009	-do-	C.A.Nair
6.	E/650/2009	-do-	Jhon Stephen
Arising out of Order-in-Appeal No.113, 114 & 115/2009-CEX (SLM) dt. 27.08.2009 passed by Commissioner of Central Excise (Appeals), Salem			
7.	E/67/2010	ITC Ltd.	CCE Salem
Arising out of Order-in-Original No.08/2009 (Commissioner (Denova) dt. 28.10.2009 passed by Commissioner of Central Excise, Salem			

Appearance:

ShriJ. Shankarraman, Advocate
For the Assessee

Shri R. Subramaniyan, AC (AR)
For the Revenue

CORAM :

Hon'ble Ms.SulekhaBeevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing :20.12.2017

Date of Pronouncement: 08-02-2018

FINAL ORDER No. 40351-40357/2018

PerBench

As the issue involved in all these appeals is common, they are taken up together for common disposal.



2. The facts of the case are that M/s.ITC Ltd. (hereinafter referred to assessee) are manufacturers of Paper Board falling under CETH 48109900 of CETA, 1985. On perusal of annual report of the assessee for the year 2006, it appeared that M/s.Wimco Ltd. is a subsidiary company of M/s.Russel Credit Ltd., which in turn is a subsidiary of the assessee. Department took the view that when Wimco Ltd. became a subsidiary of assessee, it no longer cannot be said as retaining its independence; that assessee has become holding company of Wimco Ltd. and they are "related persons" within the meaning of Section 4 (1) (b) of Central Excise Act, 1944 read with Section Central Excise Valuation Rules, 2000 w.e.f. 1.7.2005. Department alleged that paper board manufactured by assessee were cleared to their related person M/s.Wimco Ltd. at a lesser price resulting in short payment of duty amounting to Rs.98,11,438/- for the period 1.7.2005 to 31.3.2007. Show cause notice dt. 07.01.2008 was accordingly issued to the assessee proposing demand of he said amount with interest thereon and also imposition of penalty under various provisions of Central Excise law. In the original round of adjudication, vide order dt. 10.03.2008, the Commissioner confirmed proposals in the SCN in entirety and also imposed equal penalty. On



appeal against the said order, CESTAT Chennai vide Final Order No.748/2008 dt. 23.7.2008 as reported in 2009 (234) ELT 575 (Tri.-Chennai), inter alia observed that the Commissioner had erroneously applied Rule 8 of the Valuation Rules; that Wimco Ltd. being a subsidiary of the assessee, the "relationship" of the assessee to the buyer is an admitted fact; however, the question is whether this "relationship" influenced price of the goods sold to M/s.Wimco Ltd. The Tribunal observed that this question should be addressed with reference to price actually charged for comparable quantities of goods sold to independent buyers, which exercise was not even attempted by the Commissioner. Based on these findings, the Tribunal set aside the order and remanded the case to the Commissioner for de novo adjudication, leaving all issues open. In de novo adjudication, the Commissioner vide impugned order dt. 28.10.2009 held that "relationship" influenced the price, hence transaction value in terms of Section 4 (1) (a) of the Act would not apply and that the cost construction method based on the principles laid down in Rule 8 of the Valuation Rules would be more appropriate method of valuation. Accordingly, the adjudicating authority has once again confirmed the demand of the very same amount of



Rs.98,11,438/- with interest thereon. Equal penalty has also been imposed under Section 11AC of the Act and Rule 25 of the Central Excise Rules, 2002. Hence this appeal by assessee (E/67/2010).

2. Yet another show cause notice dt. 23.04.2008 had been issued to the assessee on the same issue concerning clearance of goods to a related person viz. M/s.Wimco Ltd. allegedly at lesser price resulting in short payment of duty amounting to Rs.8,74,526/- with interest for the period 01.04.2007 to 30.09.2007. The show cause notice also proposed imposition of equal penalty under Rule 25 of the Rules read with Section 11AC of the Act and imposition of penalty under Rule 26 on Shri C.A. Nair, Unit Head of the assessee and Shri John Stephen, Senior General Manager of Wimco Ltd. In adjudication, the original authority vide an order dt. 29.10.2008 confirmed the proposed demand of Rs.8,74,526/- with interest, imposed equal penalty under Rule 25 of the Rules, and also imposed penalties of Rs.90,000/- each on C.A. Nair and John Stephen under Rule 26 of the Rules. On appeal, the Commissioner (Appeals) vide common impugned Orders-in-Appeal No.86, 87& 88/2009 dt. 29.06.2009 allowed the appeals filed by the assessee, C.A. Nair and John Stephen. Aggrieved, the

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Department has filed Appeals E/632 to 634/2009 in respect of the assessee, C.A. Nair and John Stephen.

4. Yet another SCN dt. 15.10.2008 for the period 01.10.2007 to 31.03.2008 on the same issue was issued to the aforesaid three noticees inter alia proposing demand of duty amounting to Rs.10,99,445/- with interest and imposition of penalties. In adjudication, original authority vide an order dt. 02.02.2009 confirmed demand of the said amount with interest, imposed equal penalty on the assessee and also imposed penalty of Rs.1 lakh each on C.A. Nair and John Stephen. In appeal, Commissioner (Appeals) vide OIA No.113, 114 & 115/2009 dt. 27.08.2009 allowed the appeals filed by all the three noticees. Hence Appeals E/648-650/2009 by the Department.

5. Today when the matter came up for hearing, on behalf of the assessee, Ld.counsel Shri J. Shankarraman in respect of Appeal E/67/2010 filed by assessee made oral submissions which can be broadly summarized as under :

- i) The Commissioner has confirmed the demand without following the findings in the remand order of the Tribunal.



ii) For the same reasons, the appeals filed by the department against the subsequent orders of Commissioner (Appeals) are not sustainable since the impugned orders in those cases have been passed with correct understanding and application of law. The proceedings initiated against paid employees of the assessee, which were initiated in the cases pertaining to department appeals are also not sustainable in law.

iii) The Commissioner has based his conclusions only on the basis of 235 invoices out of total 10,128 invoices involved during the period of dispute. Thus, the conclusions are based only on 2% of the transaction. Even out of the 235 transactions analyzed by the Commissioner in 24 cases, the quantity of sale made to Wimco was incorrectly taken i.e. only as single invoice quantity of sale made to Wimco was taken for comparison for sales made to other customers leaving aside other invoices of sale made to Wimco on the same day, in which cases, the sale price was far higher than the prices to other customers. In 39 cases, the date of sale made to Wimco and other customers was different and also quality code of the product sold to Wimco and other customers was different. Each quality code is different and will vary on account of grammage and reel / sheet



variation detailed description. In 118 cases, the quality code of the products sold to Wimco and other customers was different. In 31 cases, date of sale made to Wimco and other customers was different. In 7 cases the quantity of sale made to Wimco and also quality code of the product sold to Wimco and other customers was different. In 5 cases, the invoice number vis-à-vis the quantities did not exist in the data submitted by appellant vide reply dt. 28.2.2008. Thus, out of 235 cases, the comparison made by the Commissioner of date of sale made to Wimco and other customers was erroneous. Out of the remaining cases in two cases price charged to Wimco (relating to Invoice at SI.No.8 dt. 9.11.2006 and No.10 dt. 4.8.2005) was higher. In the remaining 9 cases, the total quantity purchased by customers other than Wimco was much lower compared to the quantity purchased by Wimco during the same period. Hence the conclusion reached by the Commissioner that "in majority of cases (88%) the price charged for supplies to Wimco is largely lower than that charged to independent buyers", is incorrect and erroneous.

iv) Ld. Advocate drew attention to pages 64 to 79 of the appeal book wherein analysis of each of 235 invoices has been given. He further draws attention to page 82-86 of the appeal book to highlight



that quantity sold to Wimco was much higher than those sold to other customers. In some cases as many as 40 times higher.

6.1 On the other hand, Ld.A.R Shri R.Subramaniyan in respect of Appeal E/67/2010 filed by the assessee supports the impugned order. He submits that Commissioner has analyzed the applicability of each relevant rules of the Valuation Rules to the facts of the case and has thereafter only arrived at the correct conclusion that transaction value would not apply and that only cost construction method based on the principles of Rule 8 of the Rules would only be applicable. The said order is legally correct and hence Appeal E/67/2010 filed by assessee does not have merit.

6.2 Ld. A.R states that the for the same reasons, the orders of the Commissioner (Appeals) in OIA No.86,87& 89/2009 dt. 29.06.2009 and OIA No.113, 114 & 115/2009 dt. 27.08.2009 are erroneous. As per the details complied by the department, it is evident that in majority of cases, the price charged for supplies to Wimco is much lower than charged to independent buyers even for comparable quantities. The price charged for Wimco is definitely lower when compared to that charged for others and there is no cogent explanation for such variation. The notices in the present case



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proposed to adopt measure of Rule 8 only after stating that the transaction is not covered by any other rule, hence resort is taken to residuary Rule 11 read with proviso to Rule 9 which eventually has to be read with Rule 8 as the facts involved in those cases are distinguishable from that of the Tribunal's Larger Bench decision in the *Ispat Industries* case – 2007 (209) ELT 185 (Tri.-LB Mumbai). Ratio of decision of Larger Bench in that case is not relevant to the facts of this case. He submits that case laws relied upon in the impugned orders-in-appeal are not applicable to this case. In the circumstances, the adjudicating authority has correctly concluded that valuation has to be necessarily based on the principles of cost construction method as laid down in Rule 8 of the Valuation Rules, 2008. Hence the both the orders of the Commissioner (Appeals) dt. 29.06.2009 and 27.08.2009 are erroneous and require to be set aside and the respective orders of the original authority should be restored.

7.1 Heard both sides and have gone through the facts. For better understanding of the issue at hand, it would be useful to reproduce Section 4(1) (a) of Central Excise Act as follows:-



SECTION 4.Valuation of excisable goods for purposes of charging of duty of excise. –

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall-

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value ;

7.2 Discernably, as per Section 4 (1) (a) of the Central Excise Act, the transaction value would be the price adopted for assessment subject to the condition inter alia that “assessee and the buyer are not related and the price is sole consideration for the sale. The term “related person” is defined in Section 4 (3) (b) according to which, the person should be deemed to be related if, inter alia, they are interconnected undertaking within the meaning of Section 2(g) of the M.R.T.P, 1969. There is no dispute that assessee and Wimco are “interconnected undertakings” and hence are “related” for the purpose of Section 4 of the Act. This being so, the value for the purpose of charging duty of excise on the goods cleared by the assessee will necessarily to be based on Section 4 (1) (b) of the Act namely -

"(b) in any other case,including the case where the goods are not sold, be the value determined in such manner as maybe prescribed."



7.3 During the impugned period, the manner of valuation for the purpose of Section 4 (1) (b) was prescribed by the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which was notified w.e.f. 30.06.2000. The provisions concerning sale by assessee to "related person" is governed by Rule 9 of the Rules is reproduced as under :

"Rule 9 When the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in the manner specified in either of sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of the goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail :

Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8."

7.4 The adjudicating authority in de novo adjudication order dt. 28.10.2009 (Impugned order in E/67/2010) has come to the conclusion that in 88% of the cases, as shown in annexure to the order, the prices charged for supplies to Wimco is largely lower than charged to independent buyers even for comparable quantities. The adjudicating authority on the basis of such a finding, concludes that



assessee and Wimco being related Rule 9 of the Valuation Rules will have to be resorted and hence the value will have to be determined in the manner specified in Rule 8, which reads as under :

Rule 8. Where 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 shall be one hundred and ten per cent of the cost of production or manufacture of goods."

On the basis of these findings and conclusions, the adjudicating authority has once again confirmed demand of differential duty liability of Rs.98,11,438/- proposed in the SCN dt.07.01.2008.

7.5. On a critical examination of this impugned order dt.28.10.2009, we find that it suffers from a number of aberrations and misconceived conclusions. In the first place, to attract mischief of Rule 9 the situation should be when all the excisable goods are sold by the assessee only to or through a related person. The take away from this provision is that the entire quantity of the excisable goods are sold to or through related person and obviously to no other buyers. Only if this condition is satisfied, the value of such goods will be taken as the value of the goods sold by the related person or, where the related person uses or consumes the said goods in the production or manufacture of articles the value shall be determined in the manner specified in Rule 8 namely 110% of the cost of production of



manufacture of such goods. From the facts on record, however, we find that the assessee has not sold everything only to or through Wimco. It is nobody's case that there were no other buyers of the very same goods. Even in the annexure to the impugned order, the Commissioner has listed out some 235 cases where goods have been sold to buyers other than Wimco. Notwithstanding this very evident fact, the adjudicating authority has ploughed ahead to justify taking resort to Rule 9 ibid by us. The conclusions in respect of the 235 invoices and his finding that in majority of those cases (88%) the price charged for supplies to Wimco is much lower than charged to other buyers. We are unable to fathom how these findings, even if they are correct, can be taken as justification for invoking Rule 9 leading to valuation under Rule 8 of the Rules. Be that as it may, as pointed out, we find merit in the Id. Advocate's contention that out of 235 invoices compared by the adjudicating authority in 225 cases, the invoices have been wrongly compared or wrong conclusions have been arrived at. We also find credence in the contention of the Id. Advocate that the 235 invoices relied upon by the adjudicating authority comprised only 2% of the transactions during the impugned period involving 10128 invoices. We have no hesitation in holding that the



reasoning and analysis adopted by the adjudicating authority is fallacious and not based on correct interpretation of law. No allegation has been made by the department that there has been any flow back from Wimco to the assessee towards the allegedly lower pricing adopted by the assessee. In the remand order of the Tribunal dt. 23.07.2008 as reported in 2009 (234) ELT 575 (Tri.-Chennai), the Tribunal had inter alia made the following observations :

"2. The assessee contended that Rule 8 was not applicable as they had not only sold their products to M/s. WIMCO Ltd. but also to independent buyers during the above period. It was argued that Rule 8 could be invoked as a 'best judgment' method only where the excisable goods were sold to, or through, related persons. To substantiate this point, they produced the relevant invoices before the adjudicating authority. They also relied on the Tribunal's Larger Bench decision in *Ispat Industries Ltd. v. Commissioner of Central Excise, Raigad* [2007 (209) E.L.T. 280 (Trib.-LB)], wherein it was held that the provisions of Rule 8 would not apply in a case where some part of the production was cleared to independent buyers. The main grievance of the assessee at present is that the above plea was not even examined by the learned Commissioner. Today, the learned Sr. Advocate has also relied on the Hon'ble Supreme Court's judgment in *Commissioner of Central Excise, Chandigarh v. Bharti Telecom & Others* [2008 (226) E.L.T. 3 (S.C.) = 2008-TIOL-124-SC-CX], wherein it was held that, even if the assessee and their buyer were related, the transaction value should be accepted, if the relation did not influence the price at which the goods were sold. It is submitted that the Apex Court's ruling is equally applicable to a case (like the instant one) governed by the post-1-7-2000 law of valuation. We have heard the learned JCDR also, who has reiterated the findings of the learned Commissioner.

3. The facts of this case are, apparently, similar to those of *Bharti Telecom* case cited by the learned counsel. The ruling of the apex



court is to the effect that, even if the assessee sells excisable goods to a person who is "related" to the former in terms of Section 4 of the Act, the transaction value of the goods has to be accepted if it is shown that the "relation" has not influenced the price. This ruling, though rendered in relation to pre-1-7-2000 period, has universal application inasmuch as the post-1-7-2000 law of valuation continues to embody the same principle. The amended law does not call for outright rejection of transaction value on the mere ground that the assessee has sold the goods to a "related" person. The law, for such rejection, demands that it should be shown that the price at which the goods are sold has been influenced by the "relationship" between the buyer and the seller. Thus the Apex Court's ruling, impliedly, rules out the applicability of best judgment assessment method to a case where the assessee is "related" to the buyer but such "relation" has not influenced the price at which the goods are sold. The Tribunal's Larger Bench decision is explicit on this point. It has been held that the provisions of Rule 8 will not apply in a case where some part of the production of excisable goods is cleared to independent buyers. Such is the case of the present assessee. Therefore, it should not be difficult to hold that the learned Commissioner has erroneously applied Rule 8 *ibid*.

4. Voluminous record of summary of invoices issued to independent buyers as well as M/s. WIMCO Ltd. for the period of dispute was produced before the adjudicating authority by the assessee in their endeavour to establish that no favoured treatment was shown to the "related" buyer. Obviously, M/s. WIMCO Ltd., being a subsidiary of a subsidiary of the assessee, the "relationship" of the assessee to the buyer is an admitted fact. The question is whether this "relationship" influenced the price of the goods sold to M/s. WIMCO Ltd. This question should be addressed with reference to the price actually charged for comparable quantities of goods sold to independent buyers. This exercise was not even attempted by the learned Commissioner."

Only based on these observations, the Tribunal had remanded the case to the Commissioner for de novo adjudication. However, notwithstanding such clear observations and directions of this



Tribunal, we do not find any attempt by the adjudicating authority to prove with irresistible evidence that the "relationship" between assessee and Wimco has in fact influenced the price of the goods sold to Wimco or otherwise. As already discussed above, the sole attempt made by the de novo adjudicating authority was only to compare 2% of the transactions during the period which has also been done in a very flawed manner. The conclusions reached on such threadbare sampling by the Commissioner cannot be sustained.

7.6 The Tribunal in the remand order had alluded to the Hon'ble Supreme Court's judgement in *Commissioner of Central Excise, Chandigarh Vs Bharti Telecom and Others* [2008-TIOL-124-SC-CX], wherein it was held that even if the assessee and the buyers were related, the transaction value should be accepted if the relation did not influence the price at which the goods were sold; that the said ratio would continue to hold good even for Valuation Rules for post-1.7.2007 since both the Rules embody the same principle. No appeal has been filed by the department against the said Tribunal remand order dt. 23.7.08. Hence the adjudicating authority is bound by this finding of the Tribunal. Nonetheless, we find that the impugned order is only a rehash of the earlier adjudication order dt.



10.03.2008. We therefore are of the opinion that in the de novo proceedings, the adjudicating authority has not appreciated or complied with the directions of the Tribunal vide remand order dt. 23.07.2008. On this count also, the impugned order dt. 28.10.2009 (relating to E/67//2010) cannot sustain.

7.7 We find that for subsequent periods, the Commissioner (Appeals) vide orders dt. 29.06.2009 (impugned order in department's Appeals E/632-634/2009) and order dt. 27.08.2009 (impugned order in department's Appeals E/648-650/2009) has correctly understood the import and applicability of the decision of the Larger Bench of the Tribunal in the case of *Ispat Industries Ltd. Vs CCE Raigad – 2009 (209) ELT 185 (Tri-LB)* where the Larger bench answered the reference to it as follows :

"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."

The Commissioner (Appeals) has also followed the law laid down by the Hon'ble Supreme Court in the case of *CCE Chandigarh Vs Bharti Telecom Ltd.* – 2008 (226) ELT 3 (SC), which was the very same case law that was followed by this Tribunal in their remand order dt. 23.07.2008. On the reliance by the lower appellate authorities on the Hon'ble Supreme Court judgment in the case of *CCE Jaipur Vs Scan Synthetics Ltd.* - 2008 (224) ELT 12 (SC) and also on Tribunal's decisions in *Howrah Gases Ltd. Vs CCE Bolpur* - 2008 (230) ELT 512 (Tri.-Kolkata) and *CCE Chandigarh Vs Pfizer Ltd.* - 2008 (231) ELT 642 (Tri.-Del.), we find that in the grounds of appeal, the Revenue has attempted to convince us that these case laws relied upon by lower appellate authority in the two impugned orders are not relevant to the issue at hand. However, we find that this submission does not have merit since all these case laws have gone into the issue of applicability of Rule 8 of the Valuation Rules when the goods are sold not only to "related person" but also to other independent buyers. This being so, we do not find any infirmity in the OIA No.86, 87 &88/2009 dt. 29.06.2009 (Impugned order for department's Appeals



Appeal Nos.E/632-634/2009
E/648-650/2009
E/67/2010

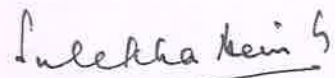
E/632-634/2009) and OIA No.113, 114 &115/2009 dt. 27.08.2009 (impugned order for department's Appeals E/648-650/2009).

8. In the light of discussions herein above, we set aside the impugned Order-in-Original dt. 28.10.2009 and allow Appeal E/67/2010 filed by assessee with consequential relief, if any, as per law. For the same reasons the impugned Orders-in-Appeal No.86, 87 & 88/2009 dt. 29.06.2009 and Orders-in-Appeal No.113, 114 & 115/2009 dt. 27.08.2009 are upheld. In consequence, the department appeals (E/632-634/2009 & E/648-650/2009) are dismissed.

(Pronounced in court on 8-02-2018)

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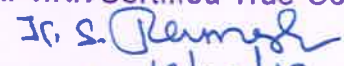

(Madhu Mohan Damodhar)
Member (Technical)


(Sulekha Beevi C.S)
Member (Judicial)

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