CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALSOUTH ZONAL BENCH CHENNAI

Appeal No.E/629/2007

[Arising out of Order-in-Appeal No.30/2007 (M-I) dt. 16.04.2007 passed by the Commissioner of Central Excise (Appeals), Chennai]

Syngenta Crop Protection Pvt. Ltd. — Appellant

Versus

Commissioner of Central Excise,
Chennai-I — Respondent

Appeal No. E/529/2007

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Commissioner of Central Excise,
Chennai-I — Appellant

Versus

Syngenta Crop Protection Pvt. Ltd. — Respondent

Appearance:
Shri S.S. Gupta, C.A
For the Assessee

Shri A. Cletus, ADC (AR)
For the Department

CORAM :

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

Date of hearing / decision : 31.07.2017

FINAL ORDER No. 41494-41495/2017

Per Bench

Issue involved in these appeals being same, they were heard together and disposed by this common order. The parties herein are referred to as assessee and department for the sake of convenience.

2. The facts of the case are that assessees are manufacturers of insecticides / pesticides. They classified the goods under CETA 3808.10 of the CETA 1985 on payment of central excise duty at 8% from their factory, to the depots for repacking and ultimate sale. For the purposes of discharging duties on such bulk clearances, the assessee determined the values of the goods based on cost construction method under Section 4 (1) (b) of the Act read with Rule 6 (b) (ii) of Central Excise Valuation Rules, 1975. Appellants were issued with periodical SCNs from 1.6.1995 to 30.06.2000 proposed classification of the product under CETA 3824.90 attracting higher rate of duty. Department also took the view that there was no sale of bulk goods at the factory gate and goods entered the market only after repacking. Hence the sale price of the retail pack after excluding packing charges was required to be adopted for determination of assessable value namely depot value. It further appeared to the department that prices declared in the cost construction statement was less than the cost audit report given by the Cost Accountant in respect of the product "Karate". Hence SCNwas issued on this score also proposing to demand differential

duty for the period 1.4.1996 to 31.3.2000 along with interest under Section 11AB of the Act and penalties under various provisions of law. After due process of adjudication, original authority vide order dt. 31.01.2003 accepted the classification under CETH 3808.10 following the Apex Court judgment in the case of *UOI Vs Pesticides Manufacturing and Formulation Association of India* – 2002 (146) ELT 19 (SC). However, with regard to valuation of goods, original authority found that the value adopted by appellant at the time of clearance of goods was higher than the cost in respect of products Cymbush, Simper, Gramaxone and Kunfu. However, for the product Karate original authority found lower assessable values were adopted and confirmed duty liability of Rs.1,57,49,271/- for the period 1.4.1996 to 31.3.2000 and Rs.31,07,595/- for the period 01.04.2000 to 30.06.2000 along with interest thereon and also imposed penalty of Rs.20 lakhs under Rule 173Q of erstwhile Central Excise Rules, 1944. In appeal, Commissioner (Appeals) vide impugned order dt. 16.04.2007 upheld the order of original authority. Hence assessee is before this forum in Appeal E/629/2007.

2. Department has also filed appeal [E/529/2007] seeking to set aside the impugned order dt. 16.04.2007 passed by Commissioner (Appeals) to the extent that it relates to the observation that CAS-4 is applicable to all pending matters.

3. On 31.07.2017, when the matter came up for hearing, assessee was represented by Shri S.S. Gupta, Ld. Consultant who reiterated the grounds of appeal and also made oral submissions which can be summarized as under :

(i) The issue pertains to the period 1.4.1996 to 30.06.2000 on valuation of pesticides cleared from their factory to the depots for repacking and ultimate sale therefrom.

(ii) In the original adjudication, the adjudicating authority has included selling and distribution expenses, interest, profit margin and other elements along with cost of production as arrived in cost audit report whereas the appellant has arrived at the cost of production on the basis of CAS-4 standard.

(iii) Although CAS-4 standard was communicated by Board in their circular dt. 13.02.2003, the said standards had already been developed and were available much earlier.

(iv) They rely upon the ratio of case law in *National Aluminium Co. Ltd. Vs CCE Bhubaneswar - 2005 (184) ELT 183 (Tri.-Del.)* which has been referred to by the Commissioner (Appeals). Ld. Counsel points out that the Tribunal in that decision has laid down that in pending matters, assessee can seek to determine valuation of his goods under a later beneficial circular. In the circumstances, there is no impropriety in appellant having adopted the principles laid down in CAS-4.

(v) Ld. Counsel states that against the total duty demand of Rs.1,88,56,866/- for the total of the impugned periods, if CAS-4 standards are adopted, their duty liability will only be Rs.15,79,776/-.

(vi) In the impugned order assessable value adopted in respect of other products namely CYMBUSH, SIMPER, GRAMAXONE and KUNFU were much higher than the cost arrived by department and accordingly they have paid excess duty on these clearances to the tune of approx. Rs.2.38 crores. It was prayed that these excess payments could be adjusted against the net duty liability that may arise after extending CAS-4 standards to clearance of KARATE during the impugned period.

(vii) Ld. Counsel contends that even after such adjustment, according to their calculation, an amount of Rs.1,62,30,208/- would still have been paid in excess by assessee as excise duty for the remaining products. However, ld counsel states that no refund is being sought on this amount.

(viii) On the matter of penalty, Ld. Consultant contends that the entire issue of classification of the pesticides was in litigation till it was finally decided by Hon'ble Supreme Court in *Union of India Vs Pesticides Manufacturing and Formulation Association of India* reported in *2002 (146) ELT 19 (SC)*. Thus there was considerable uncertainty about the classification of the impugned goods themselves. Secondly, as per the ratio of the Tribunal decision in *National Aluminum Co.*

(supra) which has been confirmed by the Supreme Court there is no bar to seek determination of assessable value under the later CAS-4 circular dt.13.02.2003.

(ix) With regard to Appeal No.E/529/2007 filed by department, the ld. Consultant submits that department is aggrieved by the reliance of Commissioner (Appeals) on the decision in *National Aluminium Co. Ltd. Vs Commissioner* - 2005 (184) ELT 183 (Tri.-Del.), on the ground that appeal has been filed by department before the Hon'ble Supreme Court. Ld. Consultant points out that the said appeal having been dismissed by the Hon'ble Apex Court [reported in *Commissioner Vs Hindustan Zinc Ltd.* - 2016 (335) ELT A27 (SC)], hence the stand of the department is not sustainable.

2. On the other hand, on behalf of Revenue, Ld. A.R Shri Cletus supports that part of the adjudication order dismissing the appeal filed by assessee. He further submits that the discrepancy in the manner of arriving at the assessable value came to light only after cost audit report initiated by department and report thereof. The period involved is 1996 to 2000-01. The original authority has arrived at the cost of production during the impugned period based on the cost audit report and annual reports of the assessee and had correctly included selling and distribution expenses, interest, profit margin and other relevant factors along with cost of production as arrived at in cost audit report.

2.1 In the circumstances, appellant is wrong in contending that cost of production can be arrived at on the basis of CAS-4 standards, since those standards had been introduced and were brought into force only vide Board's circular dt.13.2.2003.

2.3. Appellant cannot therefore take recourse to a new method of costing which was not at all in force during the impugned period and was introduced only in 2003.

2.4 With regard to departmental appeal (E/529/2007), Ld. A.R reiterated the grounds of appeal.

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

6. The core issue that comes up for appellate decision in both these appeals is whether the cost of production of captively consumed goods for which CAS-4 standards had been notified vide CBEC Circular No. 629/8/2003 dt. 13.2.2003 can be applied in pending matters for earlier periods also as held in the case of *National Aluminium Co. Ltd. Vs 2005 (184) ELT 183 (Tri.-Del.).*

6.1 Original authority has found that there is no undervaluation in respect of clearances of pesticides brands such as "Cymbush", "Simper", "Gramaxone" and "Kunfu". However, in respect of the product "Karate", original authority on his finding that Chartered Accountant certificate submitted has not taken into consideration of all overheads relatable to that product, he has revised the assessable value to Rs.378.31 as against average value of Rs.265 per litre in respect of the product "Karate"

6.2 The Cost Accounting Standard-4, (CAS-4) deals with the determination of cost of production for captive consumption. At the time of its introduction, the Indian Institute of Cost Accountants of India declared the following objectives of the CAS-4 standards :

(i) The purpose of this standard is to bring uniformity in the principles and methods used for determining the cost of production of excisable goods used for captive consumption.

(ii) The cost statement prepared based on standard will be used for determination of assessable value of excisable goods used for captive consumption.

(iii) The standard and its disclosure requirement will provide better transparency in the valuation of excisable goods use for captive consumption.

6.3 Admittedly, the overhaul of the Section 4 of the Central Excise Act and that of the Valuation Rules was effected in 2000 as a response to the large number of disputes that had been festering in respect of valuation of final products and valuation of captive consumption of goods etc. The Board's circular dt. 13.2.2003 has issued the advisory to follow CAS-4 standards for determining the assessable value in respect of captive consumption goods. Ostensibly, this has been done with an intent to ensure that cost is determined in line with universally acceptable standards of costing expressing CAS-4 standards. In such a situation, in respect of disputes on valuation of captive consumption goods, which have been pending even after 2000, the adoption of a more scientific and transparent method of costing would indeed do no harm to either parties since the said standard greatly reduces the scope for dispute. This is precisely the ratio laid down by the Tribunal in the *NALCO* case referred to supra. As correctly pointed out by the learned consultant after hearing both the parties, the Hon'ble Apex Court dismissed the appeal filed by the department against that decision. This being so, we hold that appellant will be entitled to the benefit of a subsequent beneficial circular namely that the one dt.13.2.2003 in respect of CAS-4 standards of costing in respect of this pending dispute.

6.4 Appellants have also contended that following the same cost construction method, they had nonetheless discharged duty in excess of their liability in respect of their products "Cymbush", "Simper", and "Gramaxone" to the extent of Rs.2.38 crores. According to them, if CAS-4 standards are applied in respect of the present disputed clearances of 'Karate' their differential duty liability will come down to Rs.15,79,776/-. They pray that they may be given the set off against the excess duty liability discharged.

6.5 The Learned Counsel for appellant had relied upon the judgment in the case of *Two Brothers Filaments Ltd. Vs CCE, Noida* - 2004(164) E.L.T. 56 (Tri-Del), *Vinir Engineering Pvt Ltd. Vs CCE, Bangalore* - 2004 (168) 34 (Tri-Bang) and *CCE, Hyderabad Vs. Divya Enterprises Ltd.* - 2003 (153) E.L.T. 497 (S.C.).The appellant has

Customs, Excise & Service Tax Appellate Tribunal paid excess duty on the products other than 'Karate'. The amount so excess paid would come to 2.38 Crores. The Learned Counsel has submitted that appellant has no intention for filing refund. In the case of *Divya Enterprises Ltd.* in a similar situation it was directed to give adjustment of the excess duty paid. On the peculiar facts of this case and taking note of the circumstances by which the appellant paid excess duty on three products which all revolves around the application of CAS-4 cost construction method which was under much dispute and confusion during the relevant period, we are of the view that the plea of the appellant for adjustment of the excess paid duty towards the demand requires to be allowed and we order accordingly.

6.6 On the issue of penalty, there is no doubt that the entire issue has emanated on account of different cost construction methods which have resulted in lower assessable value in respect of the clearances of Karate for captive consumption. It is also not the case that appellants have not declared the fact of such clearances or, for that matter, have totally evaded their duty liability on the impugned clearances. On the other hand, appellants had indeed discharged duty liability on the clearances, which however have been disputed by the department as having been incompletely discharged. In such a situation, there can be no allegation of suppression of facts, fraud or collusion that could be held against the assessee, especially considering that they are seeking resolution of the dispute by adoption of CAS-4 costing introduced by the department in 2003. We therefore hold that imposition of penalty of Rs.20 lakhs imposed under Rule 173Q (1) of the CER 1944 cannot then sustain and will have to be set aside, which we hereby do.

6.7 In the event, Appeal No.E/629/2007 of the assessee is partly allowed by way of setting aside the penalties imposed, partly by way of remanding the matter for de novo adjudication in the light of the directions contained in para 6.6 above. Appeal No.E/529/2007 is dismissed.

6.8 In respect of Appeal E/529/2007 filed by the department in view of the dismissal of appeal by the Hon'ble Apex Court in the case of *Commissioner Vs Hindustan Zinc Ltd.* reported in 2016 (335) ELT A27 (SC), the grounds of appeal will no more have any legs to stand on. Accordingly, this appeal does not carry merit and will have to be dismissed, which we hereby do.

Appeals disposed of in the above terms.

(Operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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