IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

E/00282,00283/2009

[arising out of Orders-in-Appeal No.20 & 21/2009-CE[SLM], dated 09.02.2009 passed by the Commissioner of Central Excise (Appeals) Salem]

M/s. THE MADRAS ALUMINIUM COMPANY LTD. APPELLANT

Versus

COMMISSIONER OF CENTRAL EXCISE, SALEM RESPONDENT

Appearance:

For the Appellant Shri V. Panchanathan, Adv.

For the Respondent Shri S. Govindarajan, AC (AR)

CORAM:

Hon'be Smt. Sulekha Beevi C.S, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Date of hearing/decision **15-09-2017**

FINAL ORDER NOs. 42093 - 42094/2017

Per B. Ravichandran:

These two appeals are on a common issue and are accordingly taken-up together for disposal. The appeals are against order dated 09.02.2009 of Commissioner (Appeals), Salem. The appellants are engaged in the manufacture of "Aluminium and articles thereof" liable to Central Excise Duty. They have cleared the excisable goods to their depots situated in various places. They have discharged duty liability at the time of clearance from the factory. However, since the goods were cleared through depots and thereafter, sold to independent buyers, the provisions of Rule 7 of Central Excise Valuation Rules, 2000 will come into operate. The appellants followed the said rule. The dispute in the present appeals relate to small portion of their clearances, which the department alleges did not suffer Central Excise Duty on proper value. It is alleged that the appellants did not discharge duty on some of the clearances based on the sale value of similar goods from the depot at or about the same time, when the goods were cleared from the factory. Accordingly, proceedings were initiated against the appellants to demand and recover differential duty on the said amount. The lower authorities confirmed differential duty of Rs.7,40,196/- in two proceedings and also imposed penalty of equal amount under section 25 of the Central Excise Rules, 2002.

2. The learned counsel for the appellants submitted that the goods were cleared on sale from the factory gate as well as to the depot for further sale. As per the standard practice followed by the appellants, they are realising the price based on London Metal Exchange Rate (in short, LMER) at any given time, the price for clearance at the factory gate is sale, as that of sale from their depots. They issue regular circulars in this regard. He emphasised that any customer intends to buy a product can get it on the same price either at the factory gate or at the depot. The present dispute is with reference to difference at any given time between the price on which they paid duty at the time of clearance from the factory and the nearest sale price from depot. The Revenue picked-up only certain instances, where the depot price, nearest to the clearance date from the factory, happened to be lesser. This happens in spite of circular for unit price, as there might not have been any sale from the depot at or about the same time, when the goods were cleared from the factory.

This does not mean that there is violation of Rule 7 and there is no short-levy on this count.

3. The learned counsel strongly objected to the demand for extended period. The only count on which the demands are sustained for extended period is that the appellants did not provide the invoices for depot sale and admitted of delay in furnishing the same. The learned counsel submitted that it is only based on their documents, the Revenue issued the present demand. However, in more than 99% of the cases, there could be no variation in applying the depot sale price to the clearance at the factory gate. However, wherever there is no sale from the depot, based on a revised selling price, the Revenue has taken-up the nearest sale price of depot, which in some instances happened to be higher. This is because of the then prevailing unit price. In such a situation, he submitted that still they have followed provision of Rule 7. The non-availability of sale on a particular fortnight from the depot has brought in a position of this dispute. Accordingly, he pleaded that there can be no question of suppression or willful mis-statement with an intent to evade payment of duty on such a minor portion of their sale transaction. He also submitted that there are two show-cause notices in the present proceedings involving extended period. Such proceedings are untenable in view of the decision of the Hon'ble Supreme Court in *Nizam Sugar Factory Vs Collector of Central Excise, Andhra Pradesh* reported in *2006 (197)E.L.T.465 (S.C.)* which was followed in various decisions of this Tribunal.

4. The learned Authorised Representative Shri S. Govindarajan reiterated the findings of the lower authorities. He submitted that the

lower authorities followed the provisions of Rule 7 of the Valuation Rules strictly. The valuation is not done based on circular of the appellants. There should be actual sale of identical goods from the depot at or about the time when the goods were cleared from the factory. The lower authorities strictly followed the available evidence like invoices etc., to apply the provisions of Rule 7. He supported the findings of the lower authorities.

5. We have heard both sides and perused the appeal records.

6. Admittedly, applicability of Rule 7 in the present case is not subject-matter of dispute. The appellants are only pleading that they have Uniform Pricing System and issues circular based on LMEP and the same is applicable at the same time both to the factory gate sale as well as depot sale. In certain fortnights, when there is no sale from a particular depot, the Revenue proceeded to take the value of preceding fortnight to arrive at the conclusion of short-levy. We note, in terms of Rule 7, the transaction value shall be based on goods sold from depot. Though, the appellants may have a circular fixing the price for a particular fortnight, in the absence of any sale, the nearest sale price is correctly adopted by the Revenue. We find no infirmity in such practice.

7. However, we find merit in the claim of the appellants regarding sustainability of demand for extended period and against the imposition of penalty on them. Admittedly, the appellants followed uniform practice and in a few instances, which they claimed to constitute less than 1% of the transaction, a situation of short-levy, by strict enforcement of Rule 7 has arisen, the reasons are explained as above. Further, the appellants submitted the various documents of

sale from the depots, which only resulted in the present demand. Delay, if any, in submission of such documents cannot by itself sustain the reason for invoking willful suppression, fraud, collusion etc. Considering the overall facts and circumstances of the present case, we find the demand for extended period that too of repeated notices cannot be sustained. On the same ground, penalties imposed on the appellants are also not sustainable. The differential duty, if any, is liable to be discharged for the period within the normal limitation. The impugned orders are set aside and the appeals are allowed to that extent.

(Dictated and pronounced in open court)

(B. RAVICHANDRAN) 15/9/17
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

ksr
15-09-2017

Customs, Excise & Service Tax Appellate Tribunal
सत्यमेव जयते

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