TELEGRAM : CEG ~ ANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/5010/2004 & 5298/04 Date 30/07/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
1. M/S NARMADA EXTRUSIONS LTD.
4TH FLOOR,RAJANI BUILDING
M.G.ROAD,INDORE

2. M/S. NARMADA EXTRUSION LTD.,
PLOT NO. 71, SECTOR-1,
INDL. AREA, PITHAMPUR (MP)

M/S NARMADA EXTRUSIONS LTD. Appellant
Vs
C.C.E.MANIKBAG PALACE,INDORE Respondent

I am directed to transmit herewith a certified copy of **Final order No. 537-538/ 2008 Excise** dated 25-7-08
passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E.MANIKBAG PALACE,INDORE
4,INDRALOK COLONY,KESARBAG ROAD,INDORE
2. Adv. / Consult SH. A. UPADHYAY, ADV.,
30/1, CHHIPA BAKHAL
INDORE (MP)
3. C.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI, COURT NO.III

EXCISE APPEAL NOS. 5010 & 5298 OF 2004

Date of Hearing: 22.7.2008
Date of Decision:22.7.2008

[Arising out of Order-in-Appeal No. IND-1/312/04 dated 22.7.2004 passed by the Commissioner of Central Excise & Customs (Appeals)-I, Indore]

(1)M/s. Narmada Extrusions Ltd. — Appellant
[Rep. by: Shri A. Upahdyaya, Advocate]

Versus

CCE, Indore — Respondent
[Rep.by:Shri V.Chaudhry, Jt. CDR]

(2)CCE, Indore — Appellant
[Rep.by:Shri V.Chaudhry, Jt. CDR]

Versus

M/s. Narmada Extrusions Ltd. — Respondent
[Rep. by: Shri A. Upahdyaya, Advocate]

Coram: **Hon'ble Mr. M. Veeraiyan, Member (Technical)**
Hon'ble Mr. D.N. Panda, Member (Judicial)

FINAL **ORDER** 537-538/08-EX

Per D.N. Panda:

Assessee came in appeal in Appeal Case No.EA.5010/2004, being aggrieved by the first appellate order dated 22.7.2004. Revenue came in appeal in Appeal Case No.5298/2004 against the same order. Both the appeals arise out of the common order and common cause. Both were heard analogous and disposed by this common order.

2. Grievance of the assessee in its Appeal is that the learned appellate authority for the first time discovered an issue that the assessee was benefited out of interest free advance of Rs.1.50 crores which was neither subject matter of show cause notice nor such issue decided by Adjudicating Authority. That authority holding that the assessee was benefited out of the advance for which undervaluation of its clearances were made, that made

the assessee liable to the impugned demand. The learned appellate authority having stepped into such a fresh issue which was never exposed to the assessee for rebuttal, the appellate order is bad in law. He having exceeded his jurisdiction and acted on extraneous considerations, the assesses is to be rendered justice. Precisely he argued that when the impugned order travelled beyond show cause notice such an order has no legs to stand. He further argued that in absence of evidence showing nexus to the quantum of benefit earned by the assessee and without clearly the assessee brought home to charges in the show cause notice, the first appellate order is unsustainable.

3. Grievance of Revenue in its appeal is that the appellants should not have succeeded on the point of freight, which was also subject matter of Show Cause Notice. Therefore, the order-in-original should be restored.

4. Learned counsel appearing for the appellant submitted that the first appellate order has gone beyond the show cause notice and the appellate order suffers from patent error of law. He further submitted that there was no advance at all made which resulted any benefit to the appellant-assessee and if that was so, quantum of benefit if any resulted and whether there was any nexus to the value of goods was not brought out in show cause notice. When the adjudicating authority dealt the matter by very descriptive order, and nowhere he whispered about the benefit that accrued to the appellant-assessee from the advance given by M/s. Malwa Laminators, the orders of Authority below is liable to be vitiated. The appellant-assessee was never favoured buyer for which charge of undervaluation against the assessee is baseless. The rule of valuation invoked by the authority below was totally erroneous and that was under suspicion and surmise without proper appreciation of role of advance in trading transactions under of law of contracts and business world.

5. The learned DR, Shri V.Chaudhry appearing for the Revenue submitted that assessee got favour from M/s. Malwa Laminators and the later was conduit to complete supply of goods to Indian Potash Limited (IPL) manufactured by the Appellant. Learned assessing authority came to the conclusion in view of the peculiar facts depicted in paragraph 25 of the order of adjudication at pages 9 and 10 thereof. The assessing authority although did not mention about the advance of Rs. 1.5 crores specifically, that was paid by M/s. Malwa Laminators to the assessee. That was also dealt in para 25.1of the order of adjudication. But of course in a different manner. In view of such a circumstance, grievance of the appellant no more sustains about the show cause notice for undervaluation of the goods. The case of Revenue was that the assessee and M/s. Malwa Laminators had direct nexus to depress price of the goods and that has resulted in jeopardy to Revenue. The relation between the assessee and the conduit was so, and as apparent from para 25 of adjudication, established link to hold that both joined together for undervaluation of the goods and Revenue was prejudiced. All these governing facts called for an appropriate order by the learned Commissioner (Appeals) who dealt the matter elaborately in para 7 of the appellate order. The learned DR also brought out a judgment of the Hon'ble Supreme Court in **General Engineering Works Vs. Commr. Of Central Excise, Jaipur** -2007(212) ELT 295)SC), where it was held that in principle that if any consideration goes to depress sale value, the sale value to that extent can be calculated for the purpose of Section 4 of the Central Excise Act, 1944 for levy of duty. So far as the grievance of Revenue is concerned the learned DR, Shri V. Chaudhry also argued that relief in relation to freight given by the learned appellate authority was not proper which is required to be reversed.

6. Heard both the sides and perused the record.

7. Claim of the appellant-assessee was that the learned Commissioner dealt with an issue of Rs.1.5 crores advance was discovery does not appear to be sound in view of own submissions of the appellant-assessee in their reply to show cause notice submitted on 25.2.2002 which is at page 28 to 35 of appeal record. The assessee categorically brought out that Rs.1.5 crores advance was given to it. Therefore this is not discovery of the appellate authority below since the matter was borne by record. There was an arrangement between the appellant and M/s. Malwa Laminators in terms of paras 7,8 & 9 of the reply to show cause notice which are reproduced as under for appreciation of the facts of the case :

> "7. *However, to avoid the penalty clause mentioned in the purchase order and not to get black listed with the above company we contracted some traders who can arrange 1.5 crore approximately and supply above goods and avoid the penalties etc. In the process we contacted M/s. Malwa Laminators who finally agreed to supply the above goods manufactured in our company. For this trading purpose they agreed to charge approximately 12% gross profit on the final contract price.*
>
> 8. *However, looking to the penalty clause and other conditions we agreed that first we will sale the goods to M/s. Malwa Laminators and in turn M/s. Malwa Laminators will sale the goods to M/s.Indian Potash Ltd. Accordingly vide fax message dated 12th October 1998 (Photocopy enclosed) we requested M/s. Indian Potash Ltd. to allow us to execute their purchase order through M/s. Malwa Laminators. Fortunately M/s. Indian Potash Ltd., agreed to our request vide their letter No.IPL/POP/GZ dated 12th October 1998. It is evident from the letter dated 12th October 1998. However, we were the registered supplier and M/s. Malwa Laminators were not registered with M/s.Indian Potash Ltd., M/s. I.P.Ltd. under normal business practice kept advising us regarding their despatch schedule , etc. to avoid communication gap.*
>
> 9. *It is noteworthy that in normal course of business a trader who is required to arrange Rs.1,5 crores will charge 10 to 15% gross margin for doing any business because he is arranging finance of such huge amount, taking business risk and considering cost of establishment, follow-up cost, risk factor involved in the business etc. Thus, it is clear that it was a purely commercial transaction between M/s. NARMADA EXTRUSIONS Ltd., and M/s. MALWA LAMINATORS and therefore the price charged by M/s.*

Narmada Extrusions Lted., to M/s. Malwa Laminators can only be taken as the price for arriving assessable value of the goods. It is noteworthy that the price at which M/s. Narmada Extrusions Ltd. sold the goods to M/s. Malwa Laminators also sold the goods, to other customers including Govt. Organisation. It is also clear that M/s. Malwa Laminators acted as a trader in this transaction because they performed all the activities of traders. Thus it is clear that despite giving 10 to 12% trade margin to M/s. Malwa Laminators we were still having profit margin in this case. In support we are also enclosing herewith a price comparison chart showing equivalent pro-rata price considering the area of different size of bags supplied to other customers. From the enclosed chart you will kindly observe that we have supplied similar type of bags to other customers (These customers are admittedly independent customers) also at more or less same price."

8. We have also noticed that the show cause notice in paras 9, 10 and 11 brought out the charge as to favoured buyer M/s. Malwa Laminators and that read as under :-

"9. The relevant factor in this process emerges that the purchase order was in favour of Noticee No.1, the goods were manufactured by Noticee No.1 but the goods were actually found to have been sold by Noticee No.2 after showing the same to be purchased from Noticee No.1. Resultantly it appears that Noticee No.1 has evaded Central Excise duty by lowering assessable value by routing the transaction of goods through Noticee No.2 and Noticee No.3 who appear to be only artificial creations of Noticee No.1 created in between and actually having no role in the whole transaction except for issuing the trader's invoices, as they never entered into the negotiation for the Supply of the goods with the original buyers and the order was also not place on them.

10. Therefore, there also does not appear to be any difficulty/internal problem as contended by the Noticee No.1 and Noticee No.2 for diversion of sales to M/s. Indian Potash Ltd. through Noticee No.2. All the goods sold by Noticee No.2 to M/s. Indian Potash Ltd. were purchased from Noticee No.1 and the goods were manufactured by the Noticee No.2. This reflects that both the units were indulged in under valuation of excisable goods. It is therefore reasonable to conclude that the HDPE woven sacks sold by the Noticee No.1 to Noticee No.2 for further supply to M/s. Indian Potash Ltd. were not sold at normal price and is contravention to Section 4(1)(a) of the Central Excise Act, 1944 in as much as the price charged by Noticee No.1 does not appear to be normal price as it is below the contract price between Noticee No.1 and the ultimate buyer which has been arrived at by way of creation of artificial purchaser/supplier i.e. Noticee No.2 to depress the valuation artificially in order to under value the goods.

11. From the aforementioned facts it is crystal clear that Noticee No.1 has devised a modus operandi and executed purchase order placed on them through the Noticee No.2. It appears that the Noticee No.1 does such transaction in the name of trading because it helps to evade Central Excise duty by way of under valuing the goods. It is further to add that benefit accused out of such under valuation is shared by Noticee No.1 and Noticee No.2 as will be discussed in forthcoming paras of this notice."

9. The reply to show cause notice and the show cause notice itself as indicated above has thrown light to appreciate argument of the learned DR, Shri V.Chaudhry that M/s. Malwa Laminators was a favoured buyer. However, it was noticed from the order of adjudication that the learned assessing authority directly jumped into the conclusion of undervaluation adopted in the cases without clearly bringing out that such a recourse was adoptable in view of materials before him. The discussions in the order of adjudication vide paras 25, 25.1 and 25.2 do not throw light that the consideration of advance was the dominant factor for undervaluation by the assessee. We appreciate that when the show cause notice could not bring out that the advance was sole consideration of undervaluation, it was a legal necessity for the learned Commissioner to examine whether such a charge was in the show cause notice itself since reply to show cause was part of the record which was not expressly dealt by order of adjudication. This calls for granting natural justice to the appellant-assessee for re-examination of the issue in thread bare by the learned Appellate Authority below granting fair opportunity to the appellant to redress its grievance that the first appellate order has travelled beyond show cause notice. If this is done, in our opinion, that may bring the litigation to an end.

10. Also we noticed that the learned Commissioner (Appeals) had made observations in para 6 of the appellate order as to why other rules of Central Excise Valuation Rules, 1975 instead of rule 7 were not applicable. But that

authority also held that determination of value under rule 7 is not sustainable in law. In view of the remand we have proposed by this order, it is left open to the learned appellate authority to set the matter at rest which may reach its finality on totality of consideration of governing facts, attendant circumstances, evidence on record and submissions of the appellant as well as on the basis of law of the land. While doing so he may also take into consideration the principles of law laid down by Apex Court in the decision cited by the Revenue.

11. So far as the issue of freight is concerned which is grievance of the Revenue in their appeal as aforesaid, we did not find any infirmity in the order of learned Appellate Authority below.to intervene the first appellate order on this score.

12. With our aforesaid observations, we remand the matter to the learned appellate authority below to only deal with the issue of valuation left open as above and the impugned order is set aside to that extent only.

[Operative part of the order and reasons of decision already pronounced in the open Court on 22.7.2008]

[M.Veeraiyan] Member (Technical)	[D.N. Panda] Member (Judicial)

nk