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

Appeal No. E/200 /2005-201 /2005 - EX[DB] Date 12/01/2010

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

To :
M/S BHOPAL WIRES PVT. LTD.
PLOT NO 7, SECTOR 1, INDUSTRIAL AREA
GOVINDPURA BHOPAL
M/S BHOPAL WIRES PVT. LTD. Appellant

Vs

C.C.E BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 07-08/ **2010 EX[DB]** dated 11-1-10 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 BHOPAL
   HOSHANGABAD ROAD, 48, ADMINISTRATIVE AREA, AREA HILLS, BHOPAL (M.P.) 462011
2. Adv. / Consult
   SH. ABHISHEK JAJU, ADV.,
   R-163, IIND FLOOR,
   G. K. PART-I, N. DELHI-48
3 C.D.R
4 ~~J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Excise Appeal No.200-201/05

[Arising out of Order-in-Appeal No.726-727/CE/BPL/2004 dt.28.10.04 passed by the Commissioner of Central Excise, Bhopal)

For approval and signature:

Hon'ble Mr. Justice R.M.S.Khandeparkar,President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?
2. Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?
3. Whether their Lordships wish to see the fair : copy of the order?
4. Whether order is to be circulated to the : Department Authorities:

M/s. Bhopal Wires Pvt. Ltd. Appellants

Versus

CCE, Bhopal Respondent

Appearance

None for Appellant

Sh. B.L.Soni, Authorised Departmental Representative(DR)
For Respondent

Date of hearing: 26.11.09
Date of decision: ~~11/1/2010~~
FINAL Order No. 07-08/2010-EX.

2. Ld. Counsel, Shri Navin Mullick submits that the appellant is a manufacturing unit and that existed long ago That was also registered with Excise Authorities. An order No. HARP/45000-16263/PC dated 13.08.2003 was placed by M/s.Larsen and Turbo Ltd. (L&T Ltd) for execution of certain work, such order was placed on Unit no.1 of the appellant. Ld. Advocate submits that the Unit no.1 was in existence at the corner of the their main unit and Authorities should neither have doubted existence thereof nor activity of manufacture carried out by that unit for execution of work which is corroborated by the said purchase order exhibiting description of work carried out and inspected Project Development India Limited should have been questioned. He emphatically submits that Purchase Order No.HARP/45000-16263/PC dated 13.08.2003, placed by L&T Limited which is apparent from page 9 and page 10 of the paper book in appeal folder. According to him, the main unit and the unit no.1 are integrally supported by same infrastructure. He submits that the activities carried out in respect of the supply made to L&T Ltd. does not amount to manufacture nor the goods are marketable. Therefore, according to him once the goods are fabricated by the main unit, the appellant shall be entitled to notificational benefit, which was also their plea in the reply to the show cause notice submitted to the Authorities on 26.08.2004. He further submits that the goods are non-excisable.

3. Ld. SDR, Shri Vijai Kumar supports the order of the Authorities below. He relied upon the decisions in the case of Collector of Central Excise, Jaipur Vs. Man Structurals Ltd. reported in 2001 (130) ELT 401 (SC) and in the case of Aarti Steels Ltd. Vs. CCE, Chandigarh reported in 2002 (144) ELT 360 (Tribunal-Delhi).

the period of dispute, as per the provisions of Rule 5 of the Central Excise Valuation Rules,2000, the deduction of only the actual freight from the place of removal to the place of delivery was allowed if the cost of transportation is charged to the buyer in addition to the price of the goods and is shown separately in the invoices for the excisable goods, that the deduction permitted was of the actual freight, not the freight charged on averaged or equalized basis, that averaged/equalized freight, in most cases were more than the actual for the short distances and less than the actual for long distance and that as per the Board's Circular No.354/81/2000-TRU dt.30.6.2000, exclusion of transportation cost is allowed only if the assessee has shown them separately in the invoice and the exclusion is permissible only for the actual cost so charged from the buyers and that if the assessee has a system of pricing and sale at uniform prices inclusive of equalised freight for delivery at factory gate or elsewhere, no deduction for freight element will be permissible.

3. We have carefully considered the submissions of the learned DR and also the grounds of appeal filed by the Appellant.

4. As mentioned in para 7 of the show cause notice dt.12.6.03(adjudicated vide order-in-original No.39/AC-I/ADJ/03 dt.17.9.03) and para 5 of the show cause notice dt.16.10.03 (adjudicated vide order-in-original No.14/AC-I/ADJ/04 dt.8.6.04) –

(a) purchase orders placed by the Electricity Boards are for supply of Transformers at various locations of the customers at a uniform FOR price,

(b) the invoices issued by the Appellant show instead of actual freight for each location, only averaged/equalized freight; and

(c) the exclusion of the freight from the place of removal to the place of delivery is sought to be denied only on the ground that the freight mentioned in the invoices is not the actual freight, but averaged freight and Rule 5 of the Central Excise Valuation Rules,2000 permits the exclusion only of the actual freight from the place of removal to the place of delivery.

5. The period of dispute in these appeals is from 1.7.2000 to 1.8.03.

5.1 Prior to 1.7.2000, there was sub-section (2) of Section 4 of the Central Excise Act,1944, as it stood during that period, which provided that –

"When, in relation to any excisable goods, the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price".

5.1.1 Hon'ble Supreme Court, in para 49 & 50 of its judgment in case of Union of India & Others etc. vs Bombay

Tyre International & Others reported in 1983(14)ELT.1896-SC with regard to Section 4(2) has held as under:

"......But the assessee will be entitled to a deduction on account of cost of transportation of the excisable article from the factory gate to the place or places when it is sold. The cost of transportation will include the cost of insurance freight on transportation of the goods from the factory gate to the places of delivery.

50. When freight is averaged and the averaged freight is included in the wholesale cash price so that the wholesale cash price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on it".

5.1.2 Thus for the period prior to 1.7.2000, as per Hon'ble Supreme Court's judgment in case of Bombay Tyre International Ltd. & others(supra) with regard to sub-section (2) of Section 4, as it stood during that period, cost of freight from the place of removal to the place of delivery is excludible from the assessable value even when the freight is charged from the buyer on averaged/equalized basis.

5.2 With effect from 1.7.2000, old Section 4 and Central Excise Valuation Rules,1975 were replaced by new Section 4 read with Central Excise Valuation Rules,2000. As per the new Section 4 -

"When 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 when the goods are sold by the assessee, for delivery at the time and place of removal, the assessee and the buyers are not related and the price is the sole consideration for sale, be the transaction value;

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

The transaction value is defined under Section 4(3)(d). Though in the new Section 4, there is no provision analogous to sub-section (2) of old Section 4, specifically providing for exclusion of the cost of transportation from the place of removal to the place of delivery, since the transaction value is for sale for "delivery at the time and place of removal", in case the transaction value is for delivery at a place other than the place of removal, the cost of transport from the place of removal to the place of delivery in respect of which evidence has been produced by the assessee, will have to be excluded.

5.2.1 Rule 5 of the Central Excise Valuation Rules,2000, as the same existed during the period from 1.7.2000 to 28.2.2003 provided that -

"When any excisable goods are sold in circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act, except the circumstance in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the actual cost of transportation from the place of removal upto the place of delivery of such excisable goods, provided the cost of transportation is charged to the buyer in addition to the price for the goods and is shown separately in the invoice for such excisable goods".

5.2.2 With effect from 1.3.2003 by Notification No.11/03-CE(NT) dt.1.3.03, Rule 5 was amended and the amended Rule 5 reads as under:

"Where any excisable goods are sold in circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act, except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.

Explanation 1 – "cost of transportation" includes –

(i) the actual cost of transportation; and

(ii) in case where the freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2 – For the removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods".

5.2.3 Other than the Explanation 2 specifically clarifying that the cost of transport from the factory to the place of removal, in case the place of removal is other than the factory gate, is includible in the assessable value, which in any case, is a natural corollary of the provisions of Section 4(1)(a), the main difference between the Rule 5, as it stood during the period from 1.7.2000 to 28.2.2003 and as it stood w.e.f. 1.3.2003 is that the Rule 5 of the later period specifically provides for deduction of cost of transportation from the place of removal to the place of delivery even when it is charged on averaged basis. In view of this, for the period from 1.3.03 to 1.8.03, the cost of freight from the place of removal to the place of delivery, charged on averaged basis is excludible from the assessable value if it has been calculated in accordance with the generally accepted principles of costing. The Board's circular No.354/81/2000-TRU dt.30.6.2000 is not applicable to the facts of this case as in this case, the freight, though on averaged basis, is separately shown in the invoices.

5.3 The question now arises as to whether during the period from 1.7.2000 to 28.2.2000, when there was no specific provision for exclusion of cost of transportation from the place of removal to the place of delivery when it is charged on averaged basis, the exclusion of such averaged freight from the assessable value can be allowed.

5.3.1 Since as per the provisions of Section 4(1)(a), as it stood during period w.e.f. 1.4.2000, the assessable value of the goods is the transaction value in respect of the sale for delivery at the time and place of removal, if the transaction value is for delivery at a place other than the place of removal, the transportation cost from the place of removal to the place of delivery, the evidence about which has to be produced by the Assessee, has to be excluded from the assessable value. In view of this, the ratio of Hon'ble Supreme Court's judgment in the case of UOI & Others vs Bombay Tyre International & Others(supra) with regard to the provisions of old Section 4(2) will be applicable while interpreting the provisions of Rule 5 of the Central Excise Valuation Rules,2000, and the exclusion of cost of transportation from the place of removal to the place of delivery from the assessable value would be permissible even when such freight is charged on averaged/equalized basis. In fact, same view has been taken by this Tribunal in case of CCE, Bhopal vs Laxmi Engineering reported in 2005(179)ELT.342(Tri.-Del) wherein it was held that transport charges will not be includible in the assessable value when the freight from the place of removal to the place of delivery is charged on equalized basis as Rule 5 of the Central Excise Valuation Rules,2000 nowhere provides that deduction of freight will be available only if charged on actual basis.

6. In view of the above discussion, throughout during the period of dispute, the deduction of the freight charged by the Appellant from their customers on equalized basis and which is shown separately in the invoices cannot be disallowed on the ground that it is equalized freight. What has to be seen is as to whether the quantum of averaged/equalized freight has been determined in accordance with the generally accepted principles of costing and for that purpose whether

the assessee has produced necessary evidences and to analyse the same to arrive at the correct finding.

7. The impugned order is, therefore, set aside and the matter is remanded to the original adjudicating authority for the above purpose in accordance with the provision of law and bearing in mind the observations herein above. The appeals accordingly stand disposed of.

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Member Technical

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