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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/1076/2005 - EX[DB] Date 11/08/2010

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

To :
C.C.E.NOIDA
OFFICE OF COMMISSIONER OF CUSTOMS,CENTRAL EXCISE AND SERVICE TAX, C-56/42, SECTOR-62, NOIDA - 201307

C.C.E.NOIDA — Appellant
Vs
M/S ELECTRON ENERGY EQULPMENTS LTD. — Respondent

I am directed to transmit herewith a certified copy of **Final order No. 597/2010 EX[DB]** dated 15.07.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   M/S ELECTRON ENERGY EQULPMENTS LTD.
   D-87,PHASE-II,NOIDA U.P
2. Adv. / Consult SH. UJJWAL RJHA, ADV., NO ADDRESS FOR VAKALAT NAMA IN THE FILE
   C/O RESPONDENT

3 S.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 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file
16. 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 – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 7, 8 and 15/07/2010.
DATE OF DECISION : 7, 8 and 15/07/2010.

Excise Appeal No. 1076 of 2005

[Arising out of the Order-in-Appeal No. 372/CE/APPL/NOIDA/ 2004 dated 10/12/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Noida.]

For Approval and signature :

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

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

CCE, Noida — Appellants

Versus

M/s Electron Energy Equipments Ltd. — Respondent

Appearance

Shri Sunil Kumar, Authorized Representative (DR) – for the Appellants.

Shri Ujjwal Kumar Jha, Advocate – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. 597/10-EX Dated : ____________

Per. Justice R.M.S. Khandeparkar :-

Heard learned DR for the appellants. None for the respondents.

2. The appeal arises from the order dated 10th of December, 2004 passed by the Commissioner (Appeals), Noida. By the impugned order, the Commissioner (Appeals) has set aside the order passed by the Deputy Commissioner of Noida dated 14th of June, 2004. As a result of the impugned order, an application for refund of the amount of Rs.22,95,510/-, which was dismissed by the Deputy Commissioner, stands allowed in favour of the respondents.

3. The respondents had supplied electric energy electricity meters to M/s. U.P. Power Corporation Ltd. in the year 2002. On account of delay in delivery of the goods and consequential default in compliance with the performance of the terms of the contract between the parties, certain amount of percentage of the price was deducted by M/s. U.P. Power Corporation Ltd. while paying the dues payable to the respondent in relation to the said meters supplied by them to the said corporation. Pursuant there to the respondents filed refund claim application dated 3.9.2003 claiming refund of Rs.22,95,510/-. The said claim was rejected by the adjudicating authority, but was allowed in the appeal before the Commissioner (Appeals). Hence, the present appeal.

4. Learned DR while placing reliance on the decision in the matters of **Bhartia Cutler Hammer Ltd. vs. CCE, New Delhi** reported in **1998 (99) ELT 436 (Tribunal), Commissioner of Central Excise, Calicut Vs. BPL Telecom Ltd.** reported in **2003 (157) ELT 35 (T-Bang.)** and **HPL Socomac Pvt. Ltd. Vs. CCE, Delhi-III (Gurgaon)** reported in **2005 (182) ELT 191 (Tribunal-Delhi)** submitted mere deduction of some amount from the price payable by the buyer in respect of the goods supplied by the manufacturer on account of breach of conditions of the contract between the manufacturer and the buyer cannot be a ground to justify the refund of the duty paid on the basis of the price agreed upon in relation to supply of such goods. He further submitted the facts of the case are similar to the case decided by the Tribunal in the matter of BPL Telecom Ltd. case. Considering the same according to the learned DR, the Commissioner (Appeals) erred in ordering refund in the matter in hand.

5. Perusal of the order passed by the Adjudicating Authority discloses that the refund claim was rejected while observing that the duty was paid on the basis of the price agreed upon in relation to the goods, which were supplied by the respondents to the said corporation, whereas the refund claim was based on alleged reduction in the price on account of penalty imposed by the corporation against the respondents for late delivery of the goods in breach of the agreement between the parties. The price

at the time of clearance of the goods having been ascertained by fixing the assessable value on the basis of the agreement between the parties regarding the same the amount collected in whatever form from the respondents by the corporation on account of breach of the conditions of the agreement cannot be the ground for deduction from the price as well as from the assessable value.

6. At this stage, learned Advocate for the respondents appeared before the Tribunal and submitted that on account of traffic problems, he could not reach the Tribunal in time. As regards the matter in issue, he submitted that amount, which was sought to be deducted from the price which was originally agreed upon was neither by way of penalty nor as the liquidated damages, but it was a case of price variation in terms of the agreement between the parties. He drew our attention to para-7 of the order passed by the Commissioner (Appeals) and submitted in order to understand the correctness of the view taken by the Commissioner (Appeals) in the matter in hand, it would be necessary to peruse the terms of the agreement between the parties. However, since the appellants have not placed on record the copy of such agreement, he requested one day's time to place on record copy of such agreement.

7. Since the point, which is sought to be canvassed on behalf of the respondents goes to the root of the matter, we are inclined to grant time to the respondents till tomorrow to produce the

copy of the agreement. Adjourned till tomorrow, the 8th of July, 2010.

Resumed on 8th July 2010.

8. Having heard for some time the learned Advocate for the respondents as the Tribunal's hearing time being over, further hearing is adjourned to 15th July 2010.

Resumed on 15th July 2010

9. The learned DR drawing attention to the memo of appeal submitted that the impugned order is sought to be challenged on three grounds. Firstly, the refund has been allowed wholly on the ground that the burden of duty claimed as refund had not been passed over to the buyers by the respondents while ignoring other relevant aspects of the matter. Secondly, the Commissioner (Appeals) failed to take note of the fact that in terms of the agreement and the purchase order, the prices for the goods to be supplied were clearly agreed upon and deductions on account of late delivery of goods could not amount to price variation. Thirdly, the concept of price variation is to be considered, bearing in mind, the concept of "transaction value" and not on the basis of use of the threshold "price variation" in the contract between the parties. He has placed reliance in the decisions in the matter of Bhartia Cutler Hammer Ltd., BPL Telecom Ltd. and HPL Socomac Pvt. Ltd.

10. The learned advocate for the respondents, on the other hand, drawing our attention to Clause 2.18 of the contract between the parties submitted that price variation resulted from late delivery of goods was rightly considered by the Commissioner (Appeals) on the basis of the terms and conditions of the agreement between the parties. He further submitted that term transaction value under Section 4 (3) (d) of the Central Excise Act, 1944 clearly visualises not only the price payable, but the price actually paid. Once the agreement clearly discloses that any deduction from the price on account of the late delivery would amount to price variation and the fact that respondents had actually received less price for the goods which were delivered late being not in dispute, according to the learned advocate, there is no case to find fault with the impugned order. Drawing our attention to the decision of the Hon'ble Supreme Court in the matter of **Union of India and others vs. Bombay Tyres International (P) Ltd.** reported in **2005 (3) S.C. cases 787**, he submitted that mere use of different nomenclature will not be a justification to deny the benefit of price variation to the respondents when factually it is not in dispute that the respondents had received less amount of price for the goods which were delivered late. He has also placed reliance in the decision of the Tribunal in the matter of **CCE, Cochin vs. Telk Ltd.** reported in **2005 (182) E.L.T. 462 (Tri. – Bang.)** and has also drawn our attention to the decision of the Hon'ble Supreme Court in the matter of **CCE, Hyderabad vs. Novapan Industries Ltd.** reported in **2007 (209) E.L.T. 161 (S.C.)**

while contending that the issue involved in the matter clearly stands answered by the Tribunal in Telk Ltd. case and that the department should have respected the said decision of the Tribunal and could not choose to have different approach in different cases on the similar issue. He further submitted that the price variation is clearly borne out from the contract between the parties and, therefore, while ascertaining the transaction value the same should be given due regard.

11. As far as factual aspects of the case are concerned, no controversy between the parties is disclosed from the records in respect of certain matters. It is not in dispute that the price for the goods to be supplied by the respondents to M/s U.P. Power Corporation Ltd. was fixed under the contract and the same remained static and firm, even in case of late delivery. This fact cannot be disputed is also apparent from the terms of the contract. Only aspect which is sought to be vehemently argued on behalf of the respondents is relating to effect of the right of the consignee of the product supplied by the respondents for the deduction which can be made by the said consignee from the price payable to the respondents for such late supply of goods in view of Clause 27 of the purchase order, which reads thus :

> "If the contractor shall fail in the due performance of his contract within the time fixed by the contract or any extension thereof, the contractor agrees to accept a reduction of the contract price by half percent per week reckoned on the contract value of such portion only of the

plant as cannot, in consequence of the delay, be sued commercially and efficiently during each week between the appointed or extended time, as the case may be, and the actual time of acceptance under Clause 29, and such reduction shall be in full satisfaction of the contractor's liability for delay but shall not in any case exceed 10 percent of the contract value of such portion of the plant."

The said Clause 27 forms part of general conditions under Form B of the agreement.

12. The Clause 2.18, to which attention was drawn undisputedly relates to the general requirements of specifications which form part of the purchase order, reads as under :-

"Where the contracted ex-works prices are variable, the contractor shall immediately after despatch submit to Engineer detailed calculations supported by photocopy of the relevant indices of applicable price variation formula. The Engineer will check these calculations and notify within 15 days of receipt of informations, the revised prices to contractor as well as to consignees.

In principle price variation shall be payable as determined on the basis of the date of offer or contractual delivery whichever is earlier.

In case of delivery (date of R/R for despatch by rail or date of receipt at purchaser's warehouse for despatch by road) failing after the contractual delivery schedule, the price variation shall be payable for applicable contractual/ amended delivery schedule notified for price variation purposes."

13. Proper reading of both the above quoted clauses would disclose that the Clause No. 27 specifically relates to a situation of reduction in the amount payable by the consignee on account of late delivery of goods and the sub-title of the said clause clearly reads "price reduction clause". In contradiction, Clause 2.18 quoted above carries the sub-title "price variation" and essentially speaks of "the relevant indices of applicable price variation formula" to be the basis to ascertain the price variation. Clause 2.18 does not relate to the price variation as such on account of late delivery of goods. Rather Clause 27 specifically deals with such situation and clearly provides that in case of late delivery, it would be the right of the consignee to have reduction from the contractual value of the goods on account of such late delivery. Clause 27 which deals with the situation arising out of late delivery of goods nowhere speaks of price variation, but it essentially relates to the right of the consignee to pay lesser amount than the contractual price of the goods on account of late delivery of goods by the respondents, while contractual price remaining static and firm.

14. As far as the price variation clause under 2.18 is concerned it relates to the price in general as prevalent in the market. It specifically uses the phrase "the relevant indices of applicable price variation formula". Undoubtedly, the third sub-para of the clause also relates to the situation arising on account of late delivery subsequent to the price variation. It does not relate to price variation on account of late delivery. But it relates to the

right of the consignee for reduction even from the price varied, in case of late delivery. In other words, in case of late delivery the Clause 2.18 provides for the right of the consignee not only to pay the price as per the price variation but also to exercise the right assured under Clause 27 quoted above. Being so, the contents of Clause 2.18 cannot be read into Clause 27, though the contents of Clause 27 will have to be read in Clause 2.18 even after establishing the price variation. The method of ascertaining the price variation is also specified in Clause 2.18, but the same does not include the case of deduction from price on account of late delivery, as specified under Clause 27.

15. The Tribunal in Telk Ltd. case was dealing with the issue as to whether the assessee therein was entitled for refund of higher duty paid by them. The assessee therein had entered into a contract with their suppliers and one of the terms of the agreement related to the obligation to pay duty on refixation of price. The prices were refixed resulting in lower duty and, therefore, the refund application was filed. Though, the lower authority rejected the claim, the Commissioner noted that the refund claim was filed within time and that there was a clause for price variation in the agreement. On that ground, the refund was ordered. While confirming the order passed by the Commissioner (Appeals), the Tribunal observed thus :

> "As the assessee were clearing transformers to their customers as per terms of contract which contain price variation clause subsequent to the clearance of the goods

and payment of duty, the customers reduce the price of the transformers in accordance with the terms of the contracts. Therefore, the assessee claimed refund of the excess duty paid. The claim was pertaining to all those invoices which were within time period as laid down in Section 11B of the Act. The finding recorded by the Commissioner that there was no need to resort to provisional assessment as the revenue also has claimed higher duty in terms of the price variation clause whenever price has increased is a correct finding."

16. Plain reading of the order would disclose that the Tribunal having found that the contract between the parties clearly provided for refixation of the price on account of variation in price and that there was a refixation of price on such ground and that therefore the higher duty paid was refundable. There can hardly be quarrel about the proposition in this regard. Once there is price variation the duty element would also vary accordingly. But the matter in hand does not relate to price variation ; it relates to a case of reduction from the price agreed and fixed for the goods by the parties, on account of breach of contract by the supplier in relation to the duty of delivery of the goods. It has nothing to do with any variation of the price. Price remains static. Only the obligation of the consignee in discharging the liability to pay the price agreed upon was sought to be reduced on account of breach of condition relating to the date of delivery of the goods.

17. In Bhartia Cutler Hammer Ltd. case the Tribunal referring to a similar situation and after taking note of Section 73 of the

Indian Contract Act as well as one of the terms of the agreement between the parties which provided that in case of delay in supply of the goods on the part of the consignor, liquidated damages at the stipulated rate shall be payable by the consignor and shall be deducted from the consignor invoices, held that :

> "The question of payment of damages arises when there is a breach of the contractual clause regarding time for performance. The parties stipulated time for performance, and provided for breach of contract, and payment of liquidated damages. The mode of payment has also been stipulated by providing that the amount will be deducted from the invoice price. When the contract goes through price is payable. Compensation is payable to the buyer when there is a breach of contract. Damages or compensation cannot be regarded as price or part of price. The provision for the deduction of the quantum of damages from the invoice price is only for the purpose of recovery of the damages. Payment of damages cannot be regarded as reducing the agreed price. The price remains constant, namely at the agreed level. The appellant by his conduct became liable to pay damages, the quantum of which was pre-estimate in the contract and such amount of damages was agreed to be paid to the buyer at the time of payment of the price, by deducting it from the price. This will not make the amount of damages go in depreciation of the price. Hence the decisions relating to the effect of price variation clause cannot apply to the present situation."

18. We are in respectful agreement with the decision of the Tribunal in Bhartia Cutler Hammer Ltd.'s case. Once the parties agree for certain deduction either by way of compensation or otherwise on account of certain default on the part of one of the

parties in performing the contractual obligation, certainly such a compensation or by whatever name it may be called, cannot result in price variation ; it would only result in payment in the nature of certain compensation to the consignee, while price remaining static.

19. In BPL Telecom Ltd.'s case the Tribunal was dealing with an issue as to whether liquidated damages due from the assessee for delayed delivery of goods can be claimed as a deduction in arriving at the assessable value of the goods and it was held that "liquidated damages is a liability of the assessee for not complying with certain terms in the agreement between the parties. It is, therefore, not an item of expenditure which can be deducted for arriving at the assessable value as contemplated by the provisions of law".

20. In HPL Socomac Pvt. Ltd., the Tribunal held that the amount payable by the supplier on account of delay in delivery is not deductable from the sale price for the purpose of ascertaining the assessable value. As rightly pointed out by learned DR, the facts of the said case were similar to those of the case in hand. Therein the assessee was a manufacturer of electricity meters. It had a contract with Dakshin Haryana Bijli Vitran Nigam Ltd. for supply of 65,000 meters upto 31st March 2002. The delivery was to be completed in a phased manner. The assessee could deliver 31,000 meters only within the contractual period. The letter dated 11th April 2002 of the Nigam disclosed that a penalty upto

5% of the value was imposed on the assessee for delayed delivery. After completion of delivery of the entire consignment, the assessee filed refund claim claiming assessment of the delayed quantity at a reduced price by 5%. The claim was rejected. The order of the lower authority was confirmed by the Tribunal while holding that :

> "It is noted that the original assessment, and payment of duty took place at the contracted price. The change in the amount paid is on account of imposition of penalty for delayed period. The penalty is separate from the price of the goods. There is no provision in the excise law for allowing deduction of penalty from the sale price for the purpose of assessable value."

21. The learned advocate for the respondents is justified in submitting that, it was a case of penalty, therefore, it would be of no help in deciding the matter in issue. However, at the same time it is to be noted that the decision readwith two other decisions namely in Bhartia Cutler Hammer Ltd. case and BPL Telecom Ltd. case would reveal that the amount, which is sought to be deducted from the agreed price on account of the delay in delivery by way of either compensation or otherwise, by whatever nomenclature it is identified, the same cannot be deducted for the purpose of ascertaining transaction value within the meaning of the said expression under Section 4 (3) (d) of the said Act.

22. As already said above, the decision in Telk Ltd. case was in the facts of the case, wherein there was no dispute about price variation. That is not the case in the matter in hand. In the case in hand, there is no price variation. The price had remained static. Certain amount out of the amount payable equivalent to the agreed price was deducted by the consignee on account of delay in delivery, which related to the breach of the contract and not to price variation. Being so, the decision of the Apex Court in Novapan Industries Ltd. is of no help to the respondents to convince us to follow the decision of the Tribunal in the matter of Telk Ltd. case.

23. For the reasons stated above, therefore, the respondents are justified in contending that the Commissioner (Appeals) was not right in interfering with the order passed by the Adjudicating Authority and ordering refund of the amount.

24. The appeal, therefore, succeeds. The same is allowed ; the impugned order is set aside and order of the Adjudicating Authority is restored with all consequential relief.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK