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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

Date 02/04/2012

Appeal No. E/2322/2009-2324/2009 - EX[DB] WITH
E/S/2410-2412/2009-EX

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

To :
M/S SARLA FABRICS PVT. LTD.
(FORMERLY M/S PALM PRINTS TEXTILE (INDIA)
PVT. LTD.
30, LONI ROAD, MOHAN NAGAR, GHAZIABAD.

M/S SARLA FABRICS PVT. LTD. Appellant
Vs
C.C.E. GHAZIABAD Respondent

STAY ORDER NO. 571-573/2012-EX

I am directed to transmit herewith a certified copy of **Final order No. A/384-386/ 2012 EX[DB]** dated 14-3-12 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. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA
NEHRU NAGAR, GHAZIABAD
201302

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

P.T.C.-2

14. SH. HARISH AHUJA C/O
M/S SARLA FABRICS PVT. LTD. 30, LONI ROAD, MOHAN NAGAR,
GHAZIABAD.

15. MRS. SARLA AHUJA, C/O
M/S SARLA FABRICS PVT. LTD. 30, LONI ROAD, MOHAN NAGAR,
GHAZIABAD.

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

Date of Hearing:14.3.2012
Date of Decision :14.03.2012

[Arising out of common Order-in-Original No.02/Comm/Ghaziabad/2009 dated 12.05.2009 passed by the Commissioner of Central Excise, Ghaziabad].

For approval and signature:

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should 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 Departmental authorities?

Excise Stay Applications Nos.2410-2412 of 2009 in
Appeals Nos.2322-2324 of 2009

M/s. Sarla Fabrics Pvt. Ltd., Mohannagar, Ghaziabad
(formerly M/s. Palm Prints Textile (India) Pvt. Ltd.)
Shri Harish Ahuja,
Smt. Sarla Ahuja

Appellants

Versus

CCE, Ghaziabad

Respondent

Appearance: Rep. by Shri V. Laxmikumaran, Advocate for the appellants.
Rep. by Shri Nagesh Pathak, SDR for the respondent.

STAY order No. 571-573/2012-EX (BR)
FINAL Order No. A/384-386/2012-EX (BR) Dated :

Per Rakesh Kumar:

The facts leading to these appeals and stay applications, in brief, are as under:-

1.1 M/s. Sarla Fabrics Pvt. Ltd., Mohannagar, Ghaziabad (hereinafter referred to as 'SFPL') are engaged in processing of fabrics. Shri Harish Ahuja and Mrs. Sarla Ahuja are shareholders of SFPL (about 4.38%) and are alleged to be controlling other group companies M/s. Sahi Export House, Faridabad, M/s. Delhi Brass & Metal Works, Faridabad, M/s. Mangumal Fatehchand, New Delhi, and M/s. Sarla Fashion Garments, who, in turn, have substantial shareholding in SFPL. They process fabrics on job work basis and on their own account. The fabrics processed on their own account are partly cleared for export and partly cleared to their own Group Companies, who use the same for captive consumption. The period of dispute in this case is from 1.3.2001 to 8.7.2004. During the period of dispute, the appellant company in respect of clearances of fabrics processed on job work basis was paying duty in terms of the judgement of Apex Court in case of **Ujagar Prints & Ors. Vs. Union of India reported in 1988 (38) ELT 535 (SC) and 1989 (39) ELT 493 (SC)** on the value equal to the cost of raw materials plus job charges plus job workers' profit. In respect of clearances to their own group companies, the appellant company was paying duty on the value which is more than 110%/115% of the cost of production under Rule 8 of the Central Excise Valuation Rules, 2000. The Commissioner was of the view that the value on which the appellant have paid the duty in respect of clearances of processed fabrics on job work basis and in respect of the clearances to their group companies, is not correct and that to the value adopted by the appellant, the losses suffered should also be included. On this basis, the department has alleged that during the above mentioned period of dispute, there is short payment of duty to the tune of Rs.4,01,19762/-.

1.2 During the period of dispute, the appellant company had received interest free loan of Rs.45,41,43,283/- from Ahuja family. According to the Commissioner, notional interests on these loans should also be added to the cost of manufacture, which has not been added. On this basis, the department has alleged that during the period of dispute, there was short payment of duty to the tune of Rs.2,83,73,169/-.

1.3 During the period of dispute, the Appellant Company had recovered total amount of Rs.18,99,000/- on account of Art & Designing charges from their customers which had not been included in the assessable value. The duty on this amount is Rs.2,24,934/-.

1.4 Besides this, it is also alleged by the department that during the period 2001-2002 to 2003-2004, the appellant company had provided the services of C&F agent to their clients on which neither any service tax has been paid nor did they obtained service tax registration or filed ST-3 returns. The service tax alleged to have been evaded is Rs.3,28,747/-.

1.5 It is on the above basis that a show cause notice dated 29.03.2006 was issued to the appellant company as well as to Shri Harish Ahuja and Mrs. Sarla Ahuja, for –

(a) Recovery of allegedly short paid duty amounting to Rs.6,87,17,865/- (Rs.4,01,19,762/- + 2,83,73,169 + Rs.2,24,934/-) from the appellant company under proviso to Section 11 A(1) of the Central Excise Act , along with interest on this duty at the applicable rate under Section 11 AB ibid;

(b) Imposition of penalty on the appellant company under Section 11 AC of the Central Excise Act for alleged evasion of central excise duty;

(c) Recovery of service tax amounting to Rs.3,28,747/- under Section 73 (a) of the Finance Act, 1994 along with interest on it at the applicable rate under Section 75 ibid;

(d) Imposition of penalty on the appellant under Section 75 A, 76, 77 and 78 of the Finance Act, 1994; and

(e) Imposition of penalty on Shri Harish Ahuja and Sarla Ahuja under Rule 209 A of the Central Excise Rules, 1994/Rules 26 of the Central Excise Rules, 2001/2002;

1.6 The above show cause notice was adjudicated by the Commissioner vide order-in-original dated 12.5.2009 by which –

(a) Central excise duty demand amounting to Rs.6,89,78,871/- was confirmed against the appellant company under proviso to Section 11 A(1) of the Central Excise Act, along with interest on this duty under Section 11 AB ibid;

(b) Service tax demand of Rs.3,28,747/- was confirmed against the appellant company under Section 73 (a) of Finance Act, 1994 along with interest on it under Section 75 ibid;

(c) While penalty of Rs.6,89,78,871/- was imposed on the appellant company under Section 11 AC of Central Excise Act, 1994, penalty of Rs.1,000/-; Rs.200/- per day for the period of failure to pay the service tax and Rs.3,28,747/- was imposed on the

Appellant Company under Section 75 A, 76 and 78 respectively of the Finance Act, 1994;

(d) Penalty of Rs.50 Lakhs each was imposed on Shri Harish Ahuja and Mrs. Sarla Ahuja under Rule 209 A of the Central Excise Act, 1994 /Rule 26 of the Central Excise Rules 2001-2002.

2. Against the above order of the Commissioner, these three appeals have been filed along with stay applications.

3. Heard both sides.

4. Though this matter was listed only for hearing of the stay applications, after hearing this matter for sometime, we are of the view that the matter can be taken up for final disposal. Accordingly, with the consent of both the sides, the matter was heard for final disposal, after waiving the requirement of pre-deposit.

5. Shri V. Laximikumaran, Advocate, ld. Counsel for the appellants, pleaded that while in respect of clearances of job work goods to their owners, the duty is required to be paid on the value determined in accordance with the principles laid down in this regard by the Apex Court in the case of **Ujagar Prints and Others Vs. Union of India** (supra), i.e. cost of materials plus job charges plus job worker's profit, in respect of the goods cleared to group companies, alleged to be related persons, for their

captive consumption, the duty is required to be paid on the value determined under Rule 8 under Central Excise Rules, 2000 i.e. on the basis of 115% /110% of the cost of production, that sofar as clearances of job work goods is concerned, the duty has been paid strictly in terms of the Apex Court's judgement in case of **Ujagar Prints & Ors. Vs. Union of India (supra),** there is no justification for adding the losses suffered by Appellant Company to this value, that sofar as clearances to alleged related persons (group companies) for their captive consumption are concerned, the appellant have paid duty on the basis of 110%/115% price of the cost of production and cost had been determined in accordance with CAS IV Standard of ICWAI, that in terms of the Board's Circular No.692/8/CX dated 13.2.2003, the cost of production is to be determined on the basis of CAS-IV Standard, that in terms of the judgement of Apex Court in the case of **CCE Vs. Cadbury India Limited reported in 2006 (200) ELT 353 (SC) 12** even for the period prior to the date of the Board's circular, wherever the cost for the purpose of determining the value of the clearances for captive consumption is required to be determined, the same must be determined in accordance with CAS-IV Standard, that the same view has been taken by the Apex Court in its subsequent judgement in the case of **CCE Vs. Raymonds Ltd. reported in 2006 (24) ELT 3 (SC),** that in terms of the Costing Standard CAS-IV, the interest cost and abnormal expenditure on account of excessive damage, damage of batches due to abnormal technical failure, etc. is not to be included in the cost of production, that the losses during the period of dispute were abnormal losses, as during that period there was under-utilization of capacity for various reasons and hence, these losses cannot be taken into account for determining the cost of production in terms of CAS-IV Standard, that the appellant in respect of the clearances to their group companies for their captive use had paid the duty on the price which is more than 110%/115% of the cost determined as per CAS-IV Costing Standard and thus, the appellant have paid the duty on the value higher than that determined under Rule 8 of the Valuation Rules, that demand of duty of Rs.4,01,19,762/- is, thus, without any basis, that sofar as duty demand of Rs.2,83,73,269/- is concerned, the same is on the basis that the notional interest on the interest free loans given by Ahuja family to the appellant company has not been added to cost, that when the cost of production is to be determined in terms of CAS-IV Standard and CAS-IV Standard clearly states that interest being financial cost shall not be taken into account, there is no justification for adding the notional interest for determining the cost of production, that the appellant company had also requested the Commissioner to get the cost of production re-determined by appointing a cost account under Rule 14 A of the Central Excise Act, but no Cost Accountant was appointed for redetermining the cost, that the appellant during the period 1999-2000 period, had declared the details of their group companies and their relationship with them and also the fact of sales to those companies, that in view of this, in respect of the alleged short payment of duty on the clearances to the groups companies, the longer limitation period can not be invoked by alleging suppression of facts and hence, the show cause notice dated 29.03.2006 issued for the recovery of allegedly short paid duty during period 1.3.2006 to 8.7.2004 is time barred, that in view of this, the duty demand of Rs.6,89,79,871/- is without any basis and is not sustainable, that as regards the service tax demand, the same is of only Rs.3,28,747/-, that the same is also without any basis, that when the duty and service tax demands are not sustainable, there is no question of imposition of penalty and that the impugned order is, therefore, not correct.

6. Shri Nagesh Pathak, the learned Senior Departmental Representative defended the impugned order by reiterating the Commissioner's findings in it and pointing out to para-4.12 & 4.34 of the impugned order-in-original, he pleaded that CAS-IV Standard has to be read with CAS-I Standard, according to which for determining the cost interest cost is also to be taken into account. He, however, stated that he has no objection if the matter is remanded to the Commissioner for ~~deno~~ denovo adjudication after getting the cost

of production redetermined by appointing a Cost Accountant under Section 14 A of the Central Excise Act, 1944.

7. We have carefully considered the submissions from both the sides and perused the records.

8. Sofar as clearances of goods manufactured on job work basis ~~is~~ are concerned, during the period of dispute, the assessable value in respect of the such clearances was to be determined by applying the formulae prescribed in the Apex Court's judgement in the case of **Ujagar Prints & Ors (supra)** read with the clarificatory judgement in the same case reported in 1989 (39) ELT 493 (SC) and accordingly, on this basis, the assessable value has to be the cost of raw materials in the hands of job worker plus job charges plus job worker's profit. The amount and designing charges would be part of the job charges, however, there is no scope for adding losses suffered by company or notional interest on interest free loans to this cost. In view of this, sofar differential duty in respect of the clearances of goods manufactured on job work basis is concerned, the assessable value has to be ~~strictly~~ determined strictly in terms of the Apex Court judgement in **Ujagar Paints** (supra). However, if the Department doubts the assessable value of the job-work goods, the same can be got verified by appointing a Cost Accountant under Section 14 A of the Central Excise Act, 1944.

9. As regards clearance to other group company alleged to be the related persons, for their captive consumption ~~is~~ on concerned, there is no dispute that in respect of these clearances, the assessable value would be 115%/110% of the cost of production in terms of the provisions of Rule 8 of Valuation Rules, 2000. In terms of the Apex Court's judgement in the cases of CCE Vs. Cadbury India Ltd. (supra) and CCE Vs. Raymond Ltd. (supra), the cost of production has to be determined strictly by applying the Cost Standard CAS-IV of ICWAI. The appellant pleaded that they have determined their cost of production in accordance with CAS-IV and the value on which the duty had been paid is much more than 110%/115% of the cost determined as per CAS-IV. If the department doubts this cost, the same should be got re-examined by appointing a Cost Accountant under Section 14 A of the Central Excise Act. The Commissioner cannot go into the correctness of the costing standards. However, for this purpose, the matter has to be remanded to the Commissioner.

10. As regards the service tax demand of Rs.3,28,742/-, according to the department, this service tax is payable on the service of C& F Agent provided by the appellant to certain clients. However, the appellant's plea, as mentioned in the grounds of appeal, is that they have not provided any C&F Agent service and in fact, they have received the service of C& F agent from some persons and the amount on which the service tax is sought

to be charged is the amount paid by them to their C& F Agent. The Commissioner must examine this plea and ascertain the factual position. If the appellant are recipient of the C&F Agent services, the service tax cannot be charged from them as it is the service providers, who would be liable to pay service tax.

11. In view of the above discussions, the impugned order is not sustainable. The same is set aside and the matter is remanded to the Commissioner for de novo adjudication in terms of our directions in this order.

[operative portion of the order pronounced in the open court immediately after hearing].

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Ckp.