IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:10.02.2017
Date of Decision:01.03.2017

Appeal No.E/57358/2013 and 57359/2013-EX(DB)

[Arising out of common Order-in-Original Nos.37-38/Commr/2012 dated 8.2.2013 passed by the ld.Commissioner of Central Excise & Service Tax, LTU, New Delhi]

M/s.AVTEC Ltd. Appellants
M/s. FORD India (P) Ltd.

Vs.

CCE, LTU, New Delhi Respondent

Appearance:

Rep by Shri B.L. Narsimhan, Advocate for the appellant.
Rep. by Shri Yogesh Agarwal, DR for the respondent.

Coram: Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order Nos. 52138-52139/2017

Per B. Ravichandran:

These two appeals are against the common impugned order dated 8.2.2013 of Commissioner of Central Excise, LTU, New Delhi. The first appellant (M/s.AVTEC Ltd.) are engaged in the manufacture of auto parts like engine, transmission, assembly of engine and transmission (power units) liable to central excise duty. They are manufacturing these items on job work basis for the second appellant, M/s.Ford India Pvt. Ltd. (FIPL). The manufacture is undertaken using the raw materials supplied free of cost by FIPL as well as certain in-house materials. FIPL procured these materials from both the indigenous as well as foreign market. They paid duty on such items, availed credit and supplied the same to AVTECH on payment of duty. On receipt of these duty paid, but freed cost materials, AVTEC availed credit and utilized the same when the final, product-power units, were cleared to FIPL. The duty so paid on power units by AVTEC is again availed as cenvat credit by FIPL. The assessable value of power units manufactured and cleared by AVTEC to FIPL is subject matter of dispute in the present appeals. The value for excise purpose, of power units, included the price of power units, value of free of cost components, as declared by FIPL, entry tax on free of cost components and amortised cost of tools supplied by FIPL. The point of dispute in the present appeal is relating to inclusion of royalty charges in the value of power units manufactured and cleared by AVTEC to FIPL. The Revenue contended that the money value of drawing, technical know-how and assistance, received free of cost by AVTEC from FIPL, is required to be included in the assessable value of power units. A differential duty of Rs.4,80,85,580/- was confirmed towards the duty liability on such charges. The Revenue calculated differential duty by adding 5% in the value of such power units on the ground that FIPL is paying 5% as Royalty Charges to foreign collaborators for supplying technical know-how for the manufacture and sale of complete vehicles by FIPL. The impugned order apart from confirming the differential duty, as mentioned above, invoking extended period, also imposed equal amount of penalty in terms of Section 11 AC of the Central Excise Act, 1944 on AVTEC. A penalty of Rs.50 lakh has been imposed on FIPL under Rule 26 of the Central Excise Rules, 2002.

2. Ld. Counsel for the appellant submitted that on the following points :-

(a) Royalty payable on the final product manufactured by FIPL (Motor Vehicles) cannot be added to the assessable value of auto parts manufactured by AVTEC. It is submitted that 5% loading as ordered by the Original Authority is arbitrary and without any factual or legal basis. The Product Development Licence Agreement dated 1.4.2007 is in respect of technical information and assistance from FORD, USA with respect to entire manufactured vehicles and not for power units only. The assistance provided by FORD, USA covers various activities for the entire vehicle. The said technical information is also used by other vendors of FIPL manufacturing parts or components of FORD model cars. It is contended that, if at all royalty charges are to be added in the value of the power units, the same should be done proportionate to the value pertaining to power units to the value of car sold by FIPL, after deducting value of components supplied by FIPL;

(b) There is no short levy of excise duty as the goods manufactured on job work basis by AVTEC for FIPL and the same could have been cleared without payment of duty under Rule 4 (5)(a) of Cenvat Credit Rules, 2004. The appellants substantially complied with the Credit Rules as job manufacturer and, therefore, no duty liability arises on such clearances.;

(c) The demand covering the extended period is not sustainable as there is no case for mis-declaration or suppression of facts in the facts of the present case. AVTEC has acted only as a job worker and were not having knowledge of the details of royalty agreement between FIPL and foreign companies. Even otherwise, the whole exercise is revenue neutral. The duty paid by AVTEC is always available as a credit to FIPL and as such, there is no ground for suppression or fraud in this transaction. Ld. Counsel relied on the decision of the Tribunal vide Final Order No.A/53881-53886/2016 dated 29.09.2016 in the appellant's own case with reference to another motor vehicles manufacturer.

(d) The substantial penalty imposed on FIPL under Rule 26 is legally not sustainable. The said rule contemplates that penalty only on natural person because the activity, which are mentioned therein, will involve physical handling of goods. A company cannot be penalized under Rule 26. Reliance was placed on the decisions of the Tribunal in this regard.

3. Ld. AR reiterated the findings recorded in the impugned order. He submitted that the principal manufacturer of FIPL chosen to supply free of cost materials on payment of duty to AVTEC. AVTEC received the goods and availed the credit. The manufactured power units were also cleared on payment of duty by AVTEC to FIPL, who availed credit on the same. The appellants have chosen not to follow the procedure under Rule 4 of the Cenvat Credit Rules, 2004. Now, at the time of deciding the proper valuation of the dutiable power units, the appellants are raising a point that they need not have paid duty at all, in terms of the Rule 4 for clearance to the job worker. Such argument is not admissible. Ld. AR referred to the Final Order dated 29.09.2016 of the Tribunal (supra) in the appellant's own case in this regard.

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

5. We note that the only issue in dispute in the present appeal is inclusion of royalty charges towards supply of design, drawing and technical know how by FIPL to AVTEC in the manufacture of power units by AVTEC. Admittedly, FIPL

had received technical know how, drawing, design and various assistance in connection with manufacture of motor vehicles. Such assistance was in terms of the agreement with foreign companies. We have noted that AVTEC are involved in the manufacture of power units (engine and transmission) of the motor vehicle which is being manufactured by FIPL. It is apparent that royalty charges paid by FIPL to foreign collaborators is with reference to the whole motor vehicles. Power unit is one of crucial and important main components of the motor vehicles. The same has to be made as per the exact design, specification and technical requirement suitable for use in the motor vehicles. In terms of the agreement dated 1.8.2006 between AVTEC and FIPL, it is very clear that the power units are to be made in accordance with the specifications, engineering drawings and other technical information provided by FIPL to AVTEC. It is clearly mentioned (in para 7.2. of the agreement) that FIPL shall provide free of charge of necessary drawings, design, process sheets, equality check sheets and other technical support required for manufacturing and supplying power units by AVTEC. Here, we note that the design supply by FIPL (drawing, design and technical know how) cannot be considered as simple information of arithmetic dimensions. These are proprietary information obtained by FIPL from foreign collaborators and are provided to AVTEC in terms of an agreement. These are not general specifications of a free floating design available in market. As such, we find that the value of such design, drawing and technical know-how, should form part of the assessable value of power units manufactured and cleared by AVTEC to FIPL. In this connection, we note that the Tribunal had occasion to examine similar set of facts in respect of appellant's own case vide Final Order dated 29.09.2016, referred to above. The relevant portion of the said order is as follows:-

> "11. The only other main issue is regarding loading of 3% in the value of FOC materials on the ground of royalty fees paid by GMI to ISUZU. We find the reasoning and methodology while arriving at such percentage of loading by the original authority is devoid of merit. GMI entered into an agreement with ISUZU for drawing and specification and paid royalty charges for this. Admittedly, the agreement is in respect of technical information and support from ISUZU with reference to entire model of car and not for transmission assembly only. The agreement encompasses a host of activities for the entire vehicle, whereas in the present case Avtec are not engaged in the manufacture of entire vehicle and they are involved only in manufacture of certain intermediary transmission assembly etc. which goes into the manufacture of the vehicle. Further, we note provision of Rule 6 of Valuation Rules are applicable to situation where additional consideration is flowing from buyer to seller. In the present case admittedly GMI are providing certain drawings and designs to Avtec based on which the products are to be manufactured. We have perused the details of drawings and technology supplied by GMI to Avtec. We are not in agreement with the appellants in their plea that these are not technical information but simple arithmetical specifications to be followed by Avtec. We find the value of design, drawing and technical specification is to added in the value of goods cleared by Avtech. The appellants contended that the quantification to load the value of materials manufactured by Avtec has not been done by any rational or scientific method. We have noted that in para 19(vi) of the

> impugned order, the original authority discussed the loading of royalty charges. We find that the loading at 3% is arrived at on the basis of total sale price of Cars vis a vis total royalty paid to ISUZU by GMI. We find that 3% loading is without any reason or logic as could be seen from finding of the Original Authority. We find that SCN proposed 3% as a round figure and added that this will be subject to revision on production of certificate of Cost Accountant by Avtec or GMI. However, the impugned order noted that no such documents was produced and hence, 3% was loaded. We find that such summary loading in the value of excisable goods in terms of Rule 6 is not legally sustainable. Accordingly, we set aside the said finding in the impugned orders and remand the matter to the original authority to arrive at the correct quantum of loading to be made for the design and drawing supplied by GMI to Avtec who manufactured the products on job work."

6. In the present case also, we find that the assessable value in respect of the power units manufactured and cleared by AVTEC and FIPL should include the value of design, drawing and technical know how supplied by FIPL to AVTEC. However, the quantification of such value, as adopted in the impugned order, is not legally sustainable. The impugned order records the submissions of the appellant to the effect that the quantification of such additional value should be on the same lines as adopted by FIPL for paying royalty to foreign collaborators. However, noting that neither AVTEC nor FIPL had disclosed the proportionate amount paid to FORD on royalty for engineering, drawing and other services, the Original Authority concluded that in absence of such data, re-calculation of duty is not

possible at that stage. We find such summary calculation is not legally sustainable. While we uphold, on merit, the proposal made by the Revenue for adding the value attributable to the engineering, drawing, design, technical know how supplied by FIPL to AVTEC in the value of the power units cleared by AVTEC, the quantification has to be done on factual and rational basis. We note that the appellants also strongly contended that the same methodology as followed by FIPL for payment of royalty to their foreign collaborators can be adopted for arriving at the notional value attributable to such technical know-how, drawing, etc. provided by FIPL to AVTEC. We are in agreement with the said proposal as the same will be both rational and reasonable. The quantification of royalty as 5% of net ex factory sale price subject to certain exclusions has been agreed upon between FIPL and FORD Motor Company, USA. In this connection, we refer to the Article 10.1 of the agreement dated 19.08.1996. We find applying the ratio of the said calculation, the additional value towards design and drawing in respect of the power units manufactured and cleared by AVTEC also can be arrived at.

7. The demand for extended period was strongly contested by the appellant. We note that in the Final Order dated 29.09.2016 (supra), involving similar facts, the Tribunal held that there is no fraud, mis-representation in the arrangement similar to the one discussed in the said case. We note that both the parties are availing cenvat credit scheme in respect of the inputs received by them. In case of increased value due to addition of design and drawing consideration in the value of power tech, the differential duty payable is available as a credit for FIPL. The power units are exclusively made only in terms of the agreement for FIPL. In such

situation, we find that the question of alleging fraud, mis-representation in order to invoke demand for extended period is not tenable. We also note that AVTEC are not in the picture with reference to royalty payment for the whole vehicle by FIPL to FORD, USA in terms of the agreement between these two parties. In such situation, it is not correct to allege that AVTEC intentionally suppressed or mis-represented any facts relating to additional considerations to be added in the value of power units. On these reasons also, we find the demand of extended period is not invokable against AVTEC. On the same reasoning, we find no penalty under Section 11 AC is imposable on AVTEC also under Rule 26 on FIPL. No malafide or fraudulent intent can be attributed to the appellants considering the facts and circumstances of the case, as narrated above. Penalties under Section 11 AC as well as under Rule 26 are imposable only when there is mala fide intent in order to evade duty or dealing with knowledge of offending nature of the said goods. We find that these ingredients are missing in the present case. We also rely on the decision of the Tribunal in **Motherson Sumi Systems Ltd. – 2002 (147) ELT 1121 (T)** and the decision of the Hon'ble Supreme Court in the case of **CCE Vs. Textile Corporation Marathwada Pvt. Ltd. – 2008 (231) ELT 195 (SC)** .

8. In view of the above analysis, we find that the value of technical know how, drawing, design provided by FIPL to AVTEC for the manufacture of power units by AVTEC for FIPL needs to be added in the assessable value for central excise duty purposes. The quantification has to be arrived at by the Original Authority in terms of the observations made above. The differential duty arising out of such addition in the value shall be restricted to normal period of demand only. The

demands beyond normal period as well as penalties imposed on the appellants are set aside. The appeals are disposed of in the above terms.

[order pronounced on 1.3.2017]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.