

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

**Date of Hearing:: 10.3.2017
Date of Pronouncement: 30.3.2017**

Appeal No. E/1432/2011-DB

(Arising out of Order-in-Original No. 8/Commr/2011 dated 28.2.2011 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, New Delhi)

M/s Hindustan Insecticides Ltd.

Appellant

Vs.

CCE, Delhi-I

Respondent

Appearance

Shri Amit Jain, Advocate

- for the appellant

Shri H.C. Saini, D.R.

- for the respondent

**CORAM: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. Ashok K. Arya, Member (Technical)**

Final Order No. 52633/2017

Per Ashok K. Arya :

M/s Hindustan Insecticides is in appeal against the Order-in-Original No. 8/2011 dated 28.2.2011 passed by the Commissioner, LTU, Delhi whereunder inter alia various demands of Rs. 26,97,254/-, Rs.2,74,73,600.49 and of Rs.11,85,461/- along with interest and equivalent penalties have been confirmed.

2. The brief facts of the case are that :

(i) The appellant viz. M/s Hindustan Insecticides Ltd. are manufacturing DDT falling under Chapter 38 of the First Schedule to the Central Excise Tariff Act, 1985 (CETA). The entire quantity of DDT manufactured by the appellant is sold to the Ministry of Health and Family Welfare, Government of India.

(ii). The dispute pertains to the question whether amount of subsidy received in this regard by the appellant from the Government of India is to be treated as additional consideration for the sale of the goods manufactured by the appellant and sold to the Ministry, Govt. of India. As the Revenue's case is that subsidy is linked with the quantity of DDT manufactured and supplied by the appellant it is required to be added to the 'value' in terms of the Section 4(1)(b) read with Rule 6 of Valuation Rules.

3. With above background, we have heard Shri Amit Jain, Id. Counsel for the appellant and Id. DR Shri H.C. Saini for the Revenue.

4. Based on the appeal memorandum and written submissions, the Id. Advocate for the appellant mainly submits as under:

- (i) The subsidy received is not in connection with or by reason of sale of DDT, therefore it is not an additional consideration;

- (ii) They rely on the Hon'ble Supreme Court's decision in the case of ***CCE Vs. Mazagon Dock Ltd.*** - 2005 (187) ELT 3 (SC) saying that the subsidy has been received subsequent to clearance of goods and has no connection with the value of the DDT manufactured and sold.
- (iii) The findings of the Commissioner are misplaced since the amount of subsidy received is not linked with the value of the DDT manufactured and sold.
- (iv) The amount of subsidy has been given as a policy of the Government to improve the viability and in recognition of social contribution of the appellant manufacturer.
- (v) Board's Circular No. 983/7/2014-CX dated 10.7.2014 dated 10.7.2014 clarifies that fertilizer subsidy is not linked to the buyer and it is not paid on behalf of the individual buyer. Therefore, it cannot be concluded that the subsidy is an additional consideration flowing from the buyer to the manufacturer.
- (vi) Reliance is also placed on the following cases :
 - (a) ***Coramandel Internation Ld. Vs. CCE & ST. Visakhapatnam-I*** – 2015 (319) ELT 526 (Tri.-Bang.);
 - (b) ***Oil and Natural Gas Corporation Ltd. Vs. CCE, Surat***- 2015 (320) ELT 614(Tri.-Ahmd.)

5. The ld. AR for the Revenue reiterated the contents of the impugned order.

6. After careful consideration of the facts and submissions of both the sides, it appears that the appellant manufacturer claims that the subsidy is having no connection with the manufacture and supply of DDT. However, this claim of the appellant is not based on the fact on the ground. The impugned order quotes from the decision taken by the Committee of Secretaries for the rehabilitation of the appellant unit, where the decision is mentioned as below:

(i) The existing formula used by the Cost Accounts Branch of Ministry of Finance would continue to be used for calculating the return on DDT.

*(ii) Ministry of Finance would make a provision for subsidy of Rs. 5 crore per annum to Ministry of Health & Family Welfare **which would be utilized for reimbursing HIL against supplies of DDT.** This provision would commence with effect from 2005-06 and would continue up to 2011.*

(iii) The subsidy of Rs.5 crore would be pegged to HIL producing of its present of production of about 8200 MT of DDT annually. Shortfall in production of every 20% from this level would entail a reduction of the subsidy amount by Rs.1.00 crore."

From the above quote, it is clear that the subsidy received by the appellant certainly is **in the nature of reimbursement for the supply of DDT** made by the appellant to the Ministry of Health & Family Welfare, Government of India.

6.1 The period involved in this appeal is from 2005-2006 to 2009-2010. Therefore, after 1.7.2000, which is the date when the new Central Excise Valuation Rules, 2002 came into force, these rules brought the concept of '**transaction value**'. Under the concept of 'transaction value' the actual value which is received by the appellant manufacturer for the subject goods is to be taken as the assessable value for the purpose of duty of Central Excise.

7. The main issue here is whether the differential amount, which has been received as the subsidy by the appellant assessee is part of value of the goods under Section 4 of the Central Excise Act, 1944 and whether duty of Central Excise accordingly is chargeable on the said differential amount (which is subsidy in the present case).

8. Duty of Central Excise is charged on the transaction value mentioned in Section 4(1) of the Central Excise Act, 1944. Section 4(1) is reproduced below for reference:

"4. Valuation of excisable goods for purposes of charging of duty of excise.-

- (1) Where under this Act, 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 where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value

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

(Explanation – For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.)”.

The Explanation appearing in Section 4(1) of the Central Excise Act, 1944 (which has been reproduced above) says that price actually paid and money value of the additional consideration, if any, for the subject goods received directly or indirectly from the buyer by the assessee shall be the price-cum-duty of the excisable goods. In other words, whatever is the total consideration received by the assessee for the subject goods (DDT) which has been received directly or indirectly from the buyer (including from the Ministry, Govt. of India as subsidy) will be the price-cum-duty where sale tax and other taxes, if any, actually paid, will be excluded and such price-cum-duty shall be deemed to include the duty payable on such goods. In terms of the contents of the Explanation to Section 4(1) of Central Excise Act, 1944, the differential price (subsidy) which has been received by the appellant assessee for the subject goods namely DDT over and above their sale will be taken/deemed as price-cum-duty. It means that subsidy received by the assessee, HIL will be deemed

to include the duty payable for such goods. The argument of the assessee appellant that they have received the additional money as 'subsidy' from Ministry cannot exempt the goods from payment of duty on the 'subsidy' portion as the Explanation given under Section 4(1) is clear that the money value of the additional consideration being received **directly or indirectly by the assessee** shall be deemed to include the duty payable on such goods.

9. The appellant's claim is that the subsidy received is independent of production/manufacture and supply of DDT to the Ministry and therefore duty of Central Excise is not chargeable on the said subsidy. However, this submission of the appellant is against the facts on record as the Committee of Secretaries in their decision clearly mentions that **subsidy is reimbursement against 'supplies of DDT'**.

9.1 It may be mentioned that said subsidy is an indirect consideration received by the assessee appellant for the subject goods only and this indirect consideration is deemed as coming from the buyer as in the present case buyer is no other than the Ministry of Health & Family Welfare, Govt. of India only and it is the Govt. of India who are giving this subsidy to the assessee viz. HIL. Though may be this subsidy is sanctioned by the different

Ministry and goods might be being supplied to some other Ministry yet both are part of the same entity, which is Government of India only and when the said subsidy is a kind of additional consideration for the same goods, which fact is very evident from the written decision (minutes) taken in the Meeting of the Committee of Secretaries for the rehabilitation of the appellant assessee.

9.2 On the same issue, CESTAT, Bangalore has given the decision in the case of ***CCE Vs. Indian Oil Corporation*** in Appeal No. E/413/2006 vide Final Order No. 20912/2016. This decision is in case of sale of Superior Kerosene Oil (SKO) which is sold at subsidized price under public distribution system and where the assessee argued that duty is payable only on subsidized price or administered price. Though, for the said product SKO the assessee was receiving subsidy or differential amount from the pool account as a compensation, CESTAT has held that Central Excise duty is chargeable on the subsidy component or differential amount also, but with the benefit of the cum duty price. The CESTAT in the said decision inter alia observes as under:

“6.2.4 It is to be noted that the provisions of Section 4(1)(a) of the Central Excise Act, 1944, require the following three conditions to be satisfied:

- (i) The sale of the goods by the assessee for delivery at the time and place of removal;
- (ii) The assessee and the buyer are not related; and

(iii) Price is the sole consideration for sale.

Here, if we consider the transaction of sale by the respondents to their buyers under PDS, we find that the 3rd condition – “price is the sole consideration for sale” is not completely satisfied as subsidized price on which the goods are delivered to buyer is not the sole or only consideration for the said goods. The assessee is receiving additional consideration in the form of reimbursement from the Oil Pool Account. Therefore, the Revenue refers to Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, in the show cause notice (SCN) dated 21.3.2005 issued for demanding duty of Central Excise from the respondents. Consequently, this value (subsidized value) which is being called ‘transaction value’ by the respondents and fixed by the Government under APM cannot be the value on which the liability of payment of duty could be completely fulfilled on behalf of the assessee. In order to discharge full obligation of payment of duty of Central Excise in terms of the provisions of Rule 6 of Central Excise Valuation Rules (supra) ‘value’ for the purpose of charging Central Excise duty has to be an aggregate of the said ‘transaction value’ and the amount of money value of additional consideration flowing directly or indirectly to the assessee which in present case is the reimbursement amount being received from Oil Pool Account. This aggregate is the value for charging duty of Central Excise.

6.2.5 The argument by the appellant that the additional reimbursement is coming from Oil Pool Account Oil Pool Account and not from buyer is not tenable, **when this consideration is in respect of the same goods** which has been sold to and received by the buyers. Therefore, this reimbursement money from oil pool account has to be **deemed to be received from buyers only, though indirectly**. Here, the receipts by the assessee from Oil Pool Account of the Ministry of Petroleum which is the reimbursement money has been deemed as receipt from buyers only when this is on account of the subject goods only. The transaction between Oil Pool Account and the assessee cannot be called a transaction without any basis or an empty transaction, where the money is exchanged without any kind of consideration or without any basic exchange of the goods.

10. The show cause notice issued to the appellant invokes Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 along with Section 4 of the Central Excise Act, 1944 for issuing the demand on the subsidy/money paid to them by the Ministry. Rule 6 of the said Valuation Rules, 2000 (supra) is given below :

Rule 6. Where the excisable goods are sold on the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

This Rule 6 makes the position further clear that the value of the goods (DDT) shall be deemed to be the aggregate of the subsidized price and the reimbursement or subsidy money (differential price/subsidy being received from the Ministry by the appellant). This aggregate is the actual value on which Central Excise duty is chargeable as this is the consideration which is flowing directly or indirectly to the appellant. The Explanation to Section 4(1) of Central Excise Act, 1944 given earlier makes it clear that in case of reimbursement/subsidy / money received from the Ministry, Govt. of India the same will be deemed to include the duty of such goods.. Therefore, the reimbursement/subsidy amount received by the appellant, M/s Hindustan Insecticides Ltd., the manufacturer of

subject goods includes the Central Excise duty component also, which is payable to the National Exchequer under the appropriate head of Central Excise Duty.

11. The appellant's submission that subsidy money received from the Ministry cannot be considered as an additional consideration flowing directly or indirectly from the buyers is not tenable, when it is conspicuously clear that the amount which has been called 'subsidy' is nothing but part reimbursement for the subject goods sold by the appellant to their buyers, who again are the Ministry of Health & Family Welfare, Govt. of India. It is an undisputed fact that this subsidy is in respect of the sale of the subject goods (DDT) only. This reimbursement or subsidy received by the appellant is not an empty transaction or a transaction in vacuum. This is substantial transaction and its basis is the sale and supply of the goods namely DDT. In terms of the contents of Rule 6 of the Central Excise Valuation Rules (supra) read with the provisions of Section 4(1) of the Central Excise Act, 1944, this reimbursement amount received from the Ministry by the appellants, M/s HIL, have to be added to the 'transaction value' for charging duty of Central Excise on the subject goods sold to the Ministry by the appellant. It is made again clear that in terms of the Explanation to Section 4(1) of the Central Excise Act, 1944, this subsidy or reimbursement amount is deemed to include the duty payable on such goods and this amount is required to be treated as price-cum-duty accordingly.

11.1 The appellant submits that the Central Board of Excise & Customs (CBEC) issued clarification circular No. 983/7/2014 saying that such reimbursement/subsidy is not to be added to the assessable value. However, when the provisions relating to valuation given in the Explanation to Section 4(1) of the Central Excise Act, 1944 and the Rule 6 of the Central Excise Valuation Rules (supra) are very clear, this submission of the appellant does not have sufficient force and cannot be accepted. Further, CBEC circulars/clarifications cannot override or supersede the provisions of Central Excise Act and the Rules made thereunder.

11.2 It is thus clear that any extra consideration received for the subject goods in whatever form (subsidy or otherwise) has to be treated as part of the assessable value for the subject goods viz. DDT under the provisions of Section 4(1) (a) of Central Excise Act, 1944 read with Rule 6 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2006. The assessee submits that CBEC circular 983/7/2014 dated 10.7.2014 in case of fertilizers clarifies that on the subsidy component of the fertilizer, Central Excise duty should not be charged. It is made clear that this circular is only for the commodity 'fertilizers', and further it is made clear again that CBEC Circular or any clarification cannot override the provisions of Section 4(1) of Central Excise Act and Rule 6 of Central Excise

Valuation Rules. This circular therefore does not provide required force to support the submissions of the assessee – appellant. The case laws cited by the assessee are also not applicable for the present facts for the reasons and discussions made above.

11.3 The assessee submits that if the demand is held sustainable they should be given the benefit of cum duty, considering the subsidy received as inclusive of the excise duty payable. This submission of the appellant is acceptable, when the assessee has got the subsidy as extra consideration and when there is no further scope to recover any other amount under the head of the excise duty from their customer. Further, in the light of discussions made in earlier paras, the assessee is entitled to cum duty price benefit in case of the extra consideration (subsidy) received by the appellant from the Ministry.

Extended period of limitation – invocable or not:

12 The time period involved in the present case is from 2005-2006 to 2009-2010. The department has issued various show cause notices on different dates though the total demand confirmed is 3,13,56,315/-. The assessee appellant has given the submission that demand beyond the period of one year is time barred as the department had the knowledge of the relevant facts. The assessee submits that the fact of receipt of subsidy was reflected in their profit and loss account and balance sheet and they are public sector undertaking therefore there is no question of them having any ‘intent

to evade payment of duty'; more so, when they have sold entire quantity of DDT manufactured to the Ministry of Health & Family Welfare, Government of India.

12.1 CESTAT in the case of *CCE, Indore Vs. Nepa Ltd.* – 2013 (298) ELT 225 (Tri.-Del.) . has held that in case of Public Sector Undertaking, it would be absurd to accuse that there was 'intention to evade tax'. CESTAT in the said decision observes as under:

“8. In any case it is seen that the show cause notice has been issued after expiry of normal limitation period of one year from the relevant date and same would not survive unless the Department proves that the respondents had deliberately suppressed the relevant facts from the Department with intent to evade the duty. In this regard we find that the respondent is a Public Sector Undertaking wholly owned by the Government of India and in our view it would be absurd to accuse a wholly Government owned company of non-payment of excise duty with intent to evade the tax. In the circumstances of the case, in our view, it would not be correct to allege that the respondent have suppressed the relevant facts from the Department with intent to evade the payment of duty and as such longer limitation period under proviso of Section 11A(1) and the penalty under Section 11AC would not be applicable. Thus the duty demand is not sustainable on limitation, also.

13. In the light of above discussions, it is held that duty of Central Excise is to be levied on the subsidy portion or (extra consideration/reimbursement received) for the period of only one year from the relevant date, which is the date of the

Show Cause Notices. Consequently, the demand of Central Excise duty on the subsidy portion beyond the period of one year cannot be sustained and is hereby dropped. Thus, the demand for the period of one year (from the relevant date) is sustained along with interest. However, for re-quantification of the liability of the demand and interest and penalty if any, the matter is remanded to the adjudicating authority, who shall decide the same afresh within four months of receipt of this order and after giving an opportunity of personal hearing and submission of documents to the assessee.

14. In the result, the appeal is partly allowed by way of remand in above terms.

(Pronounced in Court on 30.3.2017)

(Justice Dr. Satish Chandra)
President

(Ashok K. Arya)
Member (Technical)

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