IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO.I

Appeal No.E/59086/2013/[DB]

(Arising out of Order-in-Appeal No.LTU/CE/APPL/15/2013 dated 28.02.2013 passed by the Commissioner Central Excise, LTU, New Delhi)

M/s Hindustan Insecticides Ltd …Appellant

Vs

Commissioner Central Excise LTU, New Delhi …Respondent

Appearance:

Shri Amit Jain, Advocate for the Appellant
Shri HC Saini, DR for the Respondent

<u>COARM</u>

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

Date of hearing: 10.03.2017
Date of Pronouncement:05.04.2017

FINAL ORDER NO.52686/2017

<u>Per Ashok K. Arya</u>

M/s Hindustan Insecticides Limited (HIL) is in Appeal against Order-in-Appeal No.15/2013 dated 28.02.2013 passed by Commissioner (Appeals), Central Excise (LTU), New Delhi wherein the Order-in-Original No.10/2007 dated 25.05.2007 passed by Addl. Commissioner, Central Excise has been sustained.

The Order-in-Original dated 25.05.2007 confirms the demand of duty of Rs.30,43,631/- along with interest and imposes equivalent penalty against the assessee appellant.

2. The brief facts are that:

(i) The Appellant is engaged in the manufacture of pesticides and insecticides falling under Chapter 38 of the Central Excise Tariff Act, 1985. They were clearing their products to their depots situated at various parts of the country on stock transfer basis.

(ii) Show Cause Notice No.33/2005 dated 15.02.2005 was issued to the appellant alleging undervaluation of the products thereby evading Central Excise duty. It was mentioned that as per Rule 7 of Central Excise Valuation Rules, 2000 read with Section 4 of the Central Excise Act, 1944, “transaction value” will be the price at which goods are sold from the depots.

(iii) On scrutiny of the appellant’s records, it was alleged that the value of the goods cleared from their depots was much higher than the value declared for Central Excise duty assessment. There was also a demand on the ground that the assessee appellant had effected some clearances at reduced MRP even though the printed MRP was higher than what was declared to the Department.

(iv) The appellant had also cleared some consignments to a sister unit at a lower value whereas the goods are assessable at 11.5% of the cost of production as per Rule 8 of the Central Excise Valuation Rules, 2000.

(v) The Order-in-Original dated 25.05.2007 passed by Addl. Commissioner *inter alia* confirms the demand of Rs.30,43,631.00 along with interest and equivalent penalty, which was sustained by the impugned Order-in-Appeal and the assessee is now in appeal against the said Order-in-Appeal before the Tribunal.

3. We have heard both the sides represented by ld advocate Shri Amit Jain for the appellant and ld DR Sh HC Saini for the respondent.

4. The ld advocate for the appellant based on the appellant memorandum and written submissions *inter alia* submits as under:

(i) Appellant is engaged, *inter alia*, in the manufacture of pesticides and insecticides falling under Chapter 38 of the First Schedule to the CETA.

(ii) W.e.f. 01.03.2003, the insecticides manufactured by the appellant, falling under tariff heading 3808.10, were notified for assessment under Section 4A of the Excise Act vide Notification No.10/2003-CE(NT) dated 01.03.2003.

(iii) Prior to that, the goods were assessed under Section 4 of the Excise Act, though appellant was voluntarily affixing MRP on the goods.

(iv) In view of the introduction of the MRP based assessment for the product, appellant revised the MRP, which was comparatively lower than the MRP printed on the packing materials lying in their stock as on 01.03.2003. The declared revised MRP in respect of the finished goods was intimated to the Superintendent vide letter dated 05.03.2003.

(v) The Order-in-Appeal confirms the demand on the following grounds:

(a) Rs.13,20,636/- : Depot prices are higher than the price at which the goods have been cleared from factory on stock transfer to Depots.

(b) Rs.2,12,180/- : Invoice price less than the MRP affixed on the goods.

(c) Rs.15,10,815/- : Goods cleared to other units without applying 115% cost of production in terms of Rule 8 of the Central Excise Valuation Rules, 2000.

(vi) In respect of application of Rule 8 of Valuation Rules for levy of duty at 115% of cost of production of goods cleared for captive consumption, the submissions are as follows:

(a) Apart from clearance to sister units for captive consumption, appellant also sold the same goods to independent buyers at similar or lower prices.

(b) The Larger Bench of the Hon'ble Tribunal in the case of *Ispat Industries Ltd vs CCE Rajgad*, 2007 (209) ELT 185 (Tri. – Delhi) has held that Rule 8 of the Valuation Rules will apply only when the entire production of a commodity is captively consumed and not where part of the production is sold to independent buyers.

(vii) Regarding alleged undervaluation of goods stock transferred to depots and sold from depots at higher price (demand of Rs.13,20,636/-), the appellant *inter alia* submits as under:

(a) During the relevant period (prior to 14.05.2003), depot not covered by the expression 'place of removal'.

(b) Duty properly assessed at the time of clearance on the 'nearest transaction value'.

(c) Price variation at depot subsequent to the time of removal is not includible in the assessable value.

(d) Price difference is only on account of post-removal expenses.

(e) The Hon'ble Supreme Court in the case of *CC & CE, Nagpur vs Ispat Industries Ltd*., 2015 (324) ELT 670 (S.C.) has held that during period 01.07.2000 to 31.03.2003, depot, premises of a consignment agent or any other place from where excisable goods are to be sold after their clearance from the factory was no longer place of removal. Therefore, freight or transportation expenses are not includible in the assessable value.

(viii) Regarding alleged incorrect MRP assessment -- goods cleared on invoiced price which is less than the MRP prevailed till then (duty demand of Rs.2,12,180/-), the appellant submits as under:

(a) Valuation had been done on correct MRP, which was also reflected in the invoices.

(b) Further, till 10.03.2013, the appellant had pasted MRP stickers as declared to the department and the same price was shown in the invoices during the relevant period. Affixing of MRP sticker on the old MRP does not mean that the packaged goods carried two MRP out of which one was higher than the other. There is no bar under the Statute in affixing sticker carrying new MRP on the package containing the commodity intended to be sold in retail. Thus, the differential duty is liable to be set aside.

5. The ld DR reiterates the findings given by the lower authorities.

6. Heard both the sides carefully and perused the records. The impugned Order-in-Appeal confirmed the total demand of Rs.30,43,631/- along with interest and equivalent penalty. This demand comprises of three sub-demands which are of Rs.15,10,815/-, of Rs.2,12.180/- and of Rs.13,20,636/-.

6.1 The demand of Rs.15,10,815.00 has arisen on account of application of Rule 8 of Central Excise Valuation Rules, 2000, which mandates that duty of Central Excise is to be charged at 115% on cost of production, where goods are cleared for captive consumption. It is to be noted that Rule 8 of Valuation Rules is applicable only when entire production is captively consumed by the manufacturer. In the present case, the assessee is also selling the goods to independent buyers at similar or lower prices. Therefore, the application of Rule 8 of Central Excisable Valuation Rules, 2000 is not correct. In this regard, the assessee has given copies of some sale invoices as a proof that they sold the goods to independent buyers also. CESTAT in its decision in the case of *ISPAT Industries Ltd* (supra) has held that Rule 8 of Valuation Rules is applied only if entire production is for captively consumed. Therefore, the duty demand of Rs.15,10,815.00 along with interest and equivalent penalty is not sustainable and the same is hereby dropped.

6.2 Second part of the demand comprises of Rs.2,12,180/-, where department says that assessee paid the duty on invoice price which was less than the revised MRP. On the other hand, the assessee appellant argues that valuation was based on correct MRP and the same was reflected correctly in the invoices. The appellant also submits that there was no restriction on revising the MRP; and

MRP was revised and, therefore, duty was paid on the revised MRP, which was reflected correctly in the invoice. If MRP has been revised and the same was correctly reflected in the invoice, the said demand cannot be sustained. This fact is required to be verified by the original adjudicating authority. Therefore, the matter is remanded to the original adjudicating authority, who shall verify the facts and decide the issue accordingly after giving personal hearing to the assessee appellant. The impugned order in this regard is set-aside.

6.3 The third and last part of the demand comprises of Rs.13,20,636/-, where department's charge is that goods were sold from the depots at higher price(s) and duty is leviable on such differential higher price. Here facts state that goods were sold from depot. When the goods have been sold from the depot only then as per Section 4 of the Central Excise Act, 1944, the 'transaction value' charged from the buyer in case of the goods sold from the depot will be the assessable value for charging the duty of Central Excise. The appellant submits that the goods have been removed from the factory and any additional expenses thereafter are not to be included in the assessable value. It is to be noted that the goods actually have been removed from the depots only. In other words, goods have been sold from the depot and not from the factory gate; when it is so, the transaction value at the time of sale from the depot is to be taken as assessable value for charging the duty of Central Excise. The facts in the case of *CC & CE, Nagpur Vs Ispat Industries Ltd* (supra) are different and, therefore, the ratio laid-down there is not applicable to the present facts.

6.4 For the present facts where goods have directly been stock transferred (without their sale) to the assessee’s depot and when the goods are sold from the depot, Rule 7 of Central Excise Valuation Rules, 2000 is applicable. There is no instance that such goods were sold any time at the factory gate of the appellant. When sales have taken place only from the assessee’s depots located at various parts of the country, ‘transaction value’ as per section 4 of Central Excise Act, 1994 is the price at which said goods are sold from the depots and duty accordingly is to be charged on the said price. Consequently there is no scope to interfere with the impugned order in this regard.

7. In the light of above discussions, the impugned order is modified to above effect and the appeal is partly allowed in above terms.

(Pronounced in open court on 05.04.2017)

(Justice (Dr) Satish Chandra) (Ashok K. Arya)
President Member (Tech)

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