CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court - I

Appeal No. E/1097/2009

(Arising out of Order-in-Original No.13/2009-C.Ex, dated 31.07.2009 passed by CCCE & ST, Tirupati)

CCE & ST, Tirupati ….. Appellant(s)

Vs.

Shirdi Sai Electricals ….. Respondent(s)

Appearance
Shri Arun Kumar, Dy. Commissioner/AR for the Appellant.

Shri G. Shivdass, Advocate for the Respondent.

Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 25.07.2018
Date of Decision: 25.07.2018

FINAL ORDER No. A/30810/2018

[Order per: P.V. Subba Rao.]

1. This appeal is filed by the Revenue against the Order-in-Original No.13/2009 (C.Ex) dated 31.07.2009 passed by the Commissioner of Customs, Central Excise & Service Tax, Tirupati.

2. Heard both sides and perused the records. The appellant herein has been given a contract by M/s Southern Power Distribution Company of AP Ltd, Tirupati (APSPDCL) for conversion of existing low tension network into high voltage distribution systems on a turnkey basis. This involved manufacture of transformers as well as their installation on a turnkey basis.

The assessee had adopted valuation of transformers in terms of Section 4(1)(b) of Central Excise Act r/w Rule 8 of Central Excise Valuation Rules, 2000, based on the Chartered Accountant's Certificate issued under CAS-4. A show cause notice was issued to them on 29.10.2008 seeking to recover the differential duty of Rs.83,01,019/- (+) Cess for the period May, 2008 to June, 2008 along with interest under Section 11AB. It is also proposed to impose a penalty under Section 11AC of the Act. The allegation under show cause notice is that in the bills raised by the appellant to M/s APSPDCL, there is a separate element for the cost of the materials and a separate cost for the service element. The range officer had, through letter OC No.199/2008 dated 30.07.2008 requested the assessee to furnish information whether the accessories used along with the transformers for installation were manufactured by them or they were bought from outside and also to produce relevant documentary evidence and that the assessee did not respond despite reminders and therefore it is construed that all the accessories were also manufactured/fabricated by the assessee themselves and supplied or provided along with the transformers. It is therefore alleged that there is a clear sale price of the transformers and they should accordingly be valued as per Section 4(1)(a) of the Central Excise Act based on the transaction value. It is alleged that the assessee has erred in valuing the transformers as if they have been used for captive consumption under Rule 8 based on the CAS-4 Certificate.

3. After following due process of law, the Commissioner of Central Excise vide the impugned Order-in-Original dropped the demands. The Revenue felt that order passed by the Commissioner is not legal and proper for the following reasons.

(a) The Commissioner found that there is no sale invoice and therefore the transaction is not covered by section 4(1)(a). However, there is a transfer of possession of goods in the ordinary course of business for a valuable consideration and therefore it cannot be held that there is no sale as defined under the Act.

(b) As long as there is sale, delivery at the time and place of removal and the assessee is not related to the buyer of the goods, it shall be covered by section 4(1)(a). Once the conditions under section 4(1)(a) are satisfied, the value of the goods should be as per the contract and such goods cannot be treated as 'meant for captive consumption' and valued under Rule 8 of the Central Excise Valuation Rules. It is further alleged that the Commissioner has wrongly relied on the case of M/s Otis Elevator Company (India) Ltd 92008 (229) ELT 568 (Tri.-Bang.)] because in that case there was an indivisible contract and there was no sale value of the items cleared and therefore the transaction value could not be determined. Similarly, in the case of PC Pole Factory [2006 (199) ELT 865 (Tri.-Mumbai)] which was relied upon by the Learned Commissioner, the department itself has admitted that the goods were captively consumed and there was no dispute. It is further alleged that in the case of M/s Koya & Company Industries Pvt Ltd [2007 (213) ELT 691 (Tri.-Chennai)], the transactions were between interconnected undertakings and therefore not relevant to the issue on hand. It was therefore prayed that the Order-in-Original passed by the Commissioner may be set aside.

4. Learned Departmental Representative reiterated the above arguments and vehemently argued that once the transaction value of the goods is available in the contract, even if the contract is on a turnkey basis, such value should be considered for the purpose of Central Excise Duty. It is his further submission that Rule 8 pertaining to captive consumption does not apply to this case.

5. Learned Counsel for the Respondent contested that there was a transaction price in the contract. It is his submission that the contract is on turnkey basis which included the supply of the materials as well as installation. The cost of materials has been invoiced separately and the cost of services has been invoiced separately. The cost of the materials included the transformers which they have manufactured as well as several other bought out items. There is no individual cost of the transformer in the invoices. To buttress his case, he further submitted that they were audited by the Customs and Central Excise Department themselves and in the draft audit Para for EA-2000 dated 30.01.2008 it has been recorded as follows:

> *"During the Audit, on perusal of Agreement copies and clearance invoices, it was observed that the assessee had manufactured and cleared Distribution Transformers to their self projects/turnkey projects undertaken for A. P. Power Distribution Company and some small quantity to independent buyers. For independent buyers, the transaction value was the assessable value. The assessee entered into various agreements for executing turnkey projects with A. P. Power Distribution Company on bid for tenders and cleared various types of Distribution Transformers of capacities 16, 25, 40 KVA against Agreement Numbers 8, 9/2004-05, 18, 19, 20/2005-06 & 37/2005-06, 10/2007-08 for use in execution of self turnkey projects. Some of the works pertaining to these turnkey projects were completed and some are yet to be completed. The turnkey project is for execution of system improvement project works for conversion of existing LT network into High Voltage Distribution*

system. The execution of turnkey project involves procurement of many items such as disk insulators, MS stay set poles, CI earth pipe, cables, transformers, service elements (labour) etc. The transformer is the only item manufactured by the assessee. The assessee transports all these items to the works at site on their own vehicles. The payments are received basing on the progress of the turnkey project and not item wise from the A. P. Power Distribution Company. The final payment is made only when the entire project is completed in all aspects and handed over to the A. P. Power Distribution Company. The ownership of the entire project including the transformer manufactured by the assessee transfers to the A. P. Power Distribution Company only on completion of the turnkey project in full and the payment is made to the assessee completely and till such time the ownership of the transformer manufactured and used by the assessee in the turnkey project rests with the assessee only. So, the clearance is for captive use.

Goods removed for self consumption in executing works contract at customer's premises/site should be valued under Rule 8 of the Valuation Rules-2000. The Board in its Circular No.692/8/2003 dated 13.02.2003 has clarified that for calculating the cost of production for goods captively consumed the CAS-4 issued by the Institute of Cost and Works Accountants of India should be strictly followed.

In respect of clearances affected to their self/turnkey projects, the assessee adopted the value for the payment of the duty as arrived based on the cost statement prepared as on 31.03.2005 and paid duty accordingly. As per Rule 8 of Valuation Rules, 2000, the value to be adopted at the time of clearance shall be 110% of cost of production. The audit when asked about the relevancy of adopting the cost as on 31.03.2005 for clearances effected during the audit period i.e., from April-05 to Sep-07 since there is escalation in the cost of material over the previous period and when called for the CAS-4 statement relevant to the audit period for knowing the actual cost of transformer cleared, the assessee could not produce the same. The assessee vide their letter dated 12.10.2007 informed that they will submit the Cost Audited Statements later to the audit. The audit when asked for immediate payment of duty based on the escalation in the cost of material, the assessee obliged the request of the Audit and paid differential duty based on the cost statement prepared by themselves provisionally to the tune of Rs.45,57,356/- towards Cenvat with Ed.cess being Rs.91,147/- and S&H Ed.cess being Rs.6,252/- vide TR6 challan No. 3 & 4 both dated 10.10.2007 which is sum total of Rs.46,54,755/-.

The assessee later submitted the Cost Statement duly signed by the Chartered Accountant to the Audit on 03.01.2008. Basing on the Cost Statements, the final cost of the transformer has been arrived and the duty payable has been worked out to Rs.55,06,914/- towards Cenvat and Rs.1,10,138/- towards ECS and Rs.18,981/- towards S&HECS and the details of which are given in Annexure-I to the Audit Report."

6. Therefore, the learned counsel submitted that there was never any doubt at any point of time that they were manufacturing only the transformers and all other items were bought by them and used in the installation and commissioning of the transformers. This fact was admitted by the department in their own audit report. Therefore, the allegation that they had not responded to the request from the range officer to provide clarification regarding the bought out items holds no water. He further took us through one set of sample invoices and the schedule of prices and the annexure to the show cause notice calculating the differential duty to prove that the show cause notice was issued taking the entire value of the materials supplied by them including the bought out items as the cost of the transformers assuming that the transformer was sold to their customers at this price. This is contrary to facts.

7. On a specific query from the Bench, the learned departmental representative could not clarify as to how the cost of the entire material under the schedule of rates can be taken as a cost of transformer manufactured by them.

8. Having considered both sides and the facts of the case, we find that in this case, the Learned Commissioner was correct in holding that there was an indivisible turnkey contract for supply of transformers, other materials and also installation and commissioning of the same. The cost of the materials has been given in the schedule but it includes not only the cost of the transformer manufactured by them but also other bought out items as explained by the Learned Counsel for the respondent herein and also as recorded in the draft audit report by the Central Excise Department

themselves. Therefore the entire amount cannot be considered as the cost of transformer sold to M/s APSPDCL. The correct way of assessing the value of transformer, in such a case, is treating the same as captively consumed by the respondent in executing the contract given to them by M/s APSPDCL. The respondent had done so and the same was upheld by the Learned Commissioner in the impugned Order-in-Original. We therefore find no infirmity in the Order-in-Original and find that appeal is liable to be rejected and we do so.

9. The appeal is rejected.

(Operative part of this order was pronounced in court on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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