

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH – COURT NO – I

Central Excise Appeal No. 821 of 2008

(Arising out of Order-in-Original No. 06/2008 dated 24.03.2008 passed by Commissioner of
Customs & Central Excise Hyderabad)

**THE COMMISSIONER OF CUSTOMS
& CENTRAL EXCISE**

Appellant

Hyderabad-III Commissionerate
LB Stadium Road,
Basheerbagh,
Hyderabad -5 00 004

VERSUS

**M/s SANGHI TEXTILES PVT
LTD**

Respondent

p.o. Sabghi Nagar,
Ranga Reddy Distt,
Hyderabad

WITH

Central Excise Appeal No. 727 of 2008

(Arising out of Order-in-Original No. 06/2008 dated 24.03.2008 passed by Commissioner
of Customs & Central Excise Hyderabad)

**THE COMMISSIONER OF CUSTOMS
& CENTRAL EXCISE**

Appellant

Hyderabad-III Commissionerate
LB Stadium Road,
Basheerbagh,
Hyderabad -5 00 004

**M/s THE KARNATAKA HANDLOOM
DEVELOPMENT CORPORATION LTD.,**

Respondent

Tank Road, Priyadarshini Commercial Complex,
Ulsoor,
Bangalore

Appearance

Shri Mir Anwar Mohiuddin, Adv for the Appellant.

Shri G. Sudhakar, Authorised Representative for the Respondent.

**CORAM: HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER
(TECHNICAL)**

FINAL ORDER No./30476-30477/2019

DATE OF HEARING: 09.04.2019
DATE OF DECISION: 09.04.2019

[ORDER PER: P. VENKATA SUBBA RAO]

These two appeals are filed by the Revenue against order-in-original No. 06/2008 dated 24.03.2008. The facts of the case in brief are that the respondent M/s Sanghi Textiles Pvt Ltd Hyderabad are processors of textiles. They have entered into an agreement with M/s Karnataka Handloom Development Corporation Ltd (KHDCL) (a Govt of Karnataka Undertaking) as per which they received grey fabric and returned it after processing. They have been discharging central excise duty as job workers on the cost of raw materials plus processing charges. A show-cause notice was issued after investigation by the department alleging that the assessee have not taken full cost of the raw materials while arriving at the assessable value. They have only taken the price as declared by KHDCL in their price declaration given to the respondents which is lower than the actual price shown in the delivery challans. Therefore, the cost of the raw materials has been suppressed resulting in lowering of assessable value and underpaying of excise duty. Accordingly, the show-cause notice proposed to recover from the respondent an amount of Rs 28,20,460/- under Section 11 A(1) of Central Excise Act 1944 read with Rule 4,5,6 and 8 of Central Excise Rules 2001. It was also alleged that since they have suppressed the value of the goods they are not entitled to deemed credit under Rule 14 of CENVAT Credit Rules 2002/2004 and an amount of Rs 63,50,253/- availed under Notification No. 7/2001 (NT) and other notifications was proposed to

be recovered. It was also proposed to demand interest under Section 11AB of Central Excise Act read with Rule 14 of CENVAT Credit Rules 2002/04. Further, it was proposed to impose a penalty on them under Section 11AC of the Central Excise Act read with Rule 25 of the Central Excise Rules. Further M/s KHDCL were also called upon to explain as to why penalty under Rule 26 of Central Excise Rules should not be imposed upon them.

2. After following the due process, the adjudicating authority vide the impugned order dropped the proceedings initiated in the show-cause notice. He held that the difference between the price shown in the price declarations of KHDCL and price in the delivery challans is on account of transit risk amounting to 15%. In holding so, he relied on the statements KHDCL and Shri T Anjayya of M/s Sanghi. He further observed that foot note in the delivery notes explains that in case of short-supply or damage of goods, amounts will be recovered at the rate of grey fabrics as mentioned in the Delivery Challans. In para 25 of the impugned order he observed as follows:

“25. I find that the component of transit risk in the price of grey fabrics furnished in the delivery note is a notional value depicting a kind of penalty in case of default by M/s Sanghi. In the instant case, by own submissions of M/s KHDCL, transit risk accounts for short supply, quality defects etc., and amount would be recovered from M/s Sanghi at the rates shown in the delivery notes and this rate of recovery has been arrived at by adding 15% to the standard procurement cost Eg. Standard procurement cost of grey shirting is Rs 26/- per mtr. By adding 15% to the said cost, grey recovery cost was arrived at Rs 29.90 which was shown in the delivery notes for the purpose of recovery.”

Aggrieved by the impugned order, these two appeals are filed by the Revenue. Learned A.R. submits that the price of raw materials to be taken for calculating the assessable value for excise duty in case of the processors should be the actual cost of material which in this case is reflected in the delivery challans. He would further assert that no part of the delivery challan indicates that the price therein is 15% over and above the actual price and that the difference is on account of transit risk. Therefore, the

prices in the delivery challans should be taken as the cost of raw material and excise duty charged accordingly. The learned Commissioner has erred in holding that the cost of raw materials is 15% lower than what is shown in the delivery challans. Therefore, the impugned order needs to be set aside and the demands and proposals for penalties as set out in the show-cause notice needs to be confirmed.

3. Learned counsel for the respondent on the other hand submits that this issue is no longer *res integra* and on an identical matter in respect of the same customer namely KHDCL in the case of Sharda Synthetics Ltd Vs Commissioner (Thane) [2016(6)TMI 513 (CESTAT-Mumbai)], the Tribunal has held in favour of the assessee. They being just another processor for M/s KHDCL the same ratio applies to their case as well.

4. On the merits of the case, the learned counsel would reiterate the arguments made in the order-in-original. He took us through the copies of delivery challans and the price lists given by M/s KHDCL and would submit that the difference in prices is on account of 15% transit risk. He further submits that in case any raw material supplied by M/s KHDCL is damaged or not returned, they will be liable to pay to M/s KHDCL an amount equal to what is indicated in the delivery challans. He would argue that price in the delivery challan is meant only for that purpose. Otherwise the price declaration for excise made by M/s KHDCL (a Govt of Karnataka undertaking) should form the basis for central excise duty.

5. We have considered the arguments of both sides and perused the records. It is not in dispute that M/s Sanghi Textiles is a textile processor and they pay excise duty as per the cost of raw material plus processing charges. There is no dispute as far as the processing charges are

concerned. The only dispute is regarding the cost of the grey fabric supplied by M/s KHDCL for which a lower price is given in their price declarations sent to M/s Sanghi and a higher price is indicated in the delivery challans. The price declaration sent by M/s KHDCL read as follows:

“PRICE DECLARATION FOR EXCISE PURPOSE

Sir,

We submit below the following details for our goods sent to you for processing

01. Lot Number : --
02. Description : Printed bedsheet material
03. Percentage : --
04. Warp :2/20s
05. Weft :2/20s
06. Sort Number :1155
07. Processed Width :152 Cms'
08. Fresh :Rs. 49.50 Per 1 Mtr
09. Substandard :Rs 39.60 ”
10. Seconds : Rs 37.12 ”
11. Soil or damaged :Rs 24.75 ”
12. Fents :Rs 36.00 per Kg
13. Rags :Rs 28.00 ”
14. Chindles :Rs 8.55 ”
- 15.

Including packing charges and no discounts

UNDERTAKING

I/We hereby solemnly declare and confirmed that:

The quantity, description and rate per metre and per kg of the goods mentioned above) are correct.

In any event if the value of the goods declared above differs on actual sales (rate), the same will be reimbursed to you in full on demand being raised by the Excise authorities which I/We shall not dispute.

I/we give you right for lien on all my/our stocks lying with you till said amount is reimbursed to you in full.

For K.H.D.C.L

Sd/-

Dy Manager Marketing (VVS & Proc)”

It is evident from the above that the price declaration may not be the actual rate of the fabric and if the actual rate of fabric is different excise duty on the same is agreed to be reimbursed to M/s Sanghi by M/s KHDCL in full on a demand being raised by the excise authorities M/s KHDCL was not in dispute. This price declaration further gives M/s Sanghi a right of lien

on stocks lying with them until such reimbursement is made in full. From the above it appears *prima facie* that the price declaration indicates only a tentative price and not actual price of the goods. The actual price of goods may differ. Since there is no sale/purchase between M/s Sanghi and M/s KHDCL there is no actual sales value. A second price is indicated in the delivery challans.

6. Since there is no sale of grey fabric at all, either by M/s KHDCL or by respondent assessee, the value of the raw material becomes relevant only in case the material is damaged by M/s Sanghi and they have to reimburse the cost of the material to M/s KHDCL. This, in our considered view, should reflect the true value of the goods because M/s Sanghi will be making up for any loss on their account at this price. It is undisputed that in case of loss, the price to be paid by M/s Sanghi will be as per the delivery challan price (not as per the price declared in the price declaration). In our considered view, the price in the delivery challan should, therefore, be considered as correct price of the raw material.

7. We also find no evidence whatsoever to justify the contentions in the impugned order that the price in delivery challan is 15% higher than the actual cost of raw materials to cover the transit risk. Neither the delivery challan nor the price declarations nor the agreement nor any other documents presented before us would substantiate this claim. Clearly the learned Commissioner has erred in holding so merely on the basis of the statements and assertions made during the personal hearing before him. In view of the above, we find that the impugned order is not correct. We have also considered the submissions of the learned counsel that on an identical

case, in the case of Sharda Synthetics Ltd (supra) the Tribunal Mumbai has ruled in favour of the assessee. Para-4 of this order reads as follows:

“4. We have gone through the rival submissions. We find that the only ground raised in the show-cause notice for seeking to revise the assessable value was proposed adoption of the price declaration in the delivery note as the value of the grey fabrics. A perusal of para 55 and 56 of the Order-in-Original clearly shows that the said charges has not been sustained by the Commissioner. After having specifically not sustained on such charges, the Commissioner has gone on to confirm the demand on grounds not invoked in the show-cause notice. We find that the decision of the Hon'ble Supreme Court in the case of Ballarpur Industries Ltd. (supra), Saci Allied (supra) and Sun Pharmaceuticals (supra) clearly indicated that it is not permitted to go beyond the grounds raised in the show-cause notice. In case of Ballarpur Industries (supra), the Hon'ble Supreme Court has observed as under: -

21. Before concluding, we may mention that, in the present case, the second and the third show cause notices are alone remitted. The first show cause notice dated 21-5-1999 is set aside as time-barred. However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule.

In the case of Saci Allied Products Ltd. (supra), the Hon'ble Supreme Court has observed as under:

33. In the case of Commissioner of Central Excise, Calcutta-II v. TISCO Ltd., 2004 (174) EL T. 307 (S.C.) (S.N. Variava & Dr. A.R. Lakshmanan, JJ.), it was held that in order to attract the first proviso to Section 4(1)(a) of the Act, there has to be an averment and the proof of the existence of a trade practice in that trade that the goods are being sold at different prices to different class of buyers. This Court, further, held that to claim benefit of proviso to Section 4(1)(a) of the Act, a trade practice must be averred and shown to exist and it must be shown that there is different class of buyers and only on basis of facts averred and proved, a conclusion can be reached that the sale is to a different class of buyers. This is a condition precedent for invoking the first proviso to Section 4(1)(a) of the Act. As already noticed, neither the show cause notice nor the Collector's order nor the CEGAT order makes any such averment let alone proving the same with evidence. On this ground alone the invocation of First Proviso to Section 4(1)(a) of the Act must fail. Further, the first proviso to Section 4(1)(a) specifically states that the sale to different class of buyers should not be to related persons. In view of the specific provision contained in the first proviso to Section 4(1)(a) of the Act, it is difficult to understand as to how the CEGAT applied this provision.

In the case of Sun Pharmaceuticals (supra), Hon'ble Supreme Court has observed as under:-

5. We may first take up Civil Appeal No. 3263 of 2009. This has to be allowed for simple reason that the aforesaid reasons given by the CESTAT in support of its view clearly reveals that CESTAT has gone beyond the show cause notice inasmuch as this was not even the case set up by the Department in the show cause notice.”

As may be seen in that particular case, the Tribunal has set aside the impugned order only on the ground that the impugned order has travelled beyond the scope of the show-cause notice. We find no such case in these appeals. Therefore, the ratio of the order of Sharda Synthetics does not apply.

8. In view of the above, we find that the demand of Central Excise duty on the differential value is liable to be recovered under Section 11A(1) of Central Excise Act 1944 read with Rule 4,5,6 & 8 of the Central Excise Rules 2001-2002. Consequently, the deemed CENVAT credit, if any, also needs to be disallowed. For these reasons, the interest under Section 11AB also needs to be recovered from the respondent herein. We also considered the scope of extended period of limitation. It is not in dispute that the appellant has declared the value which is lower than the value in the price declaration and therefore has clearly mis-declared the value and the same is liable to be recovered.

9. However, considering the facts and circumstances of the case, there is scope to take a view that the appellant may have mis-understood about the duty liability and therefore, taking a lenient view, we set aside the penalty under Section 11AC read with Rule 25 of Central Excise Rules 2001-02. We also set aside the penalty on M/s KHDCL under Rule 26 of Central Excise Rules 2001-02.

10. The appeals are disposed of as hereinabove.

(dictated and pronounced in open court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Neela reddy