

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

REGIONAL BENCH – COURT NO – I

Central Excise Appeal No. 901 of 2008

[Arising out of Order-in-Original No. 02/2008-C.Ex. dated 12.09.2008 passed by The Commissioner of Central Excise and Service Tax, Hyderabad II Commissionerate, Hyderabad]

Commissioner of Central Excise

Hyderabad II Commissionerate
L B Stadium Road,
Basheerbagh,
Hyderabad 500004

Appellant

VERSUS

Bakelite Hylam Ltd

Sanathnagar,
Hyderabad

Respondent

With

Central Excise Appeal No. 926 of 2008

[Arising out of Order-in-Original No. 02/2008-C.Ex. dated 12.09.2008 passed by The Commissioner of Central Excise and Service Tax, Hyderabad II Commissionerate, Hyderabad]

Bakelite Hylam Ltd

Sanathnagar,
Hyderabad

Appellant

VERSUS

Commissioner of Central Excise

Hyderabad II Commissionerate
L B Stadium Road,
Basheerbagh,
Hyderabad 500004

Respondent

APPEARANCE:

Shri A.V.L.N. Chary, Authorised Representative for the Revenue
Ms. L. Maithili, Advocate for the Assessee.

CORAM:

HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 07.03.2022

DATE OF DECISION:09.05.2022

FINAL ORDER Nos. 30059-30060 /2022

P.V. SUBBA RAO

These two appeals are filed by the Revenue and M/s. Bakelite Hylam Ltd.¹ assailing the Order in Original dated 12-09-2008² passed by the Commissioner of Central Excise and Service Tax, Hyderabad II Commissionerate and hence they are being disposed of together. Assessee's appeal E/926/2008 was previously listed on 3 December 2009 and it was allowed by this Tribunal holding that when there was a clear cut finding that the ex-factory price is a genuine price and there being no appeal of the Revenue against the order of the adjudicatory authority, confirming the demand was incorrect and the impugned order was set aside. However, this finding was incorrect as Revenue had filed appeal E/901/2008 on the subject. So, Revenue moved an application in January 2010 and the order dated 3 December 2009 was recalled on 12 June 2012.

2. Thereafter, on 14 July 2016, Revenue's appeal was dismissed relying upon the findings of the order dated 3 December 2009 (which was already recalled by the Tribunal on 12 June 2012). Revenue appealed to Supreme Court against this order date 14 July 2016 in Civil Appeal No(s) 6209-6212 of 2018. These appeals were allowed by Supreme Court on 1 August 2019 and both these appeals were restored to the file of the CESTAT for

¹Assessee

²Impugned order

disposal afresh clarifying that all rights and contentions of the parties on merits were kept open. Hence these appeals are now listed before us.

3. We have heard learned counsel for the assessee and the learned authorised representative of the Revenue and perused the records. Since the matter pertains to 1991 to 1995 and there have been changes in the law since that period, we proceed to discuss the relevant legal provisions.

4. Duties of excise are levied and collected on excisable goods manufactured or produced in India under Section 3 of the Central Excise Act, 1944³ at the rates set forth in the Schedules to the Central Excise Tariff Act, 1985. The rates of excise duty can be based on the quantity (specific rate of duty) or value (ad valorem rate of duty) on different goods. If the duty is to be levied and collected based on value, such value is to be determined as per Section 4 of the Act read with Central Excise Valuation Rules. Section 4 of the Act itself underwent substantial amendments and duty is now levied on transaction value of each transaction subject to some conditions. For instance, if there are a hundred transactions at different prices, the duty is to be levied as per the transaction value in each case.

5. During the period relevant to this case, however, section 4 mandated that the value shall be the 'normal price', that is to say, the price at which such goods are sold in the course of wholesale

³Act

trade for delivery at the time and place of removal, i.e., the factory gate price. If the normal price cannot be determined in this manner, the Central Excise Valuation Rules provided for determination of the value. The assessee was required to file with the jurisdictional Assistant Commissioner a declaration of the goods being manufactured under Rule 173B and a Price List under Rule 173 C of Central Excise Rules, 1944⁴ for approval. Section 4 of the Act and Rule 173B and 173C of the Excise Rules are reproduced below:

Section 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 value, such value shall, subject to the other provisions of this section, be deemed to be-

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that-

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are

⁴**Excise Rules**

not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the Place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(4) For the purposes of this section,-

(a) " assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) " place of removal" means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed;

(c) " related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub- distributor of such distributor. Explanation.- In this clause" holding company"," subsidiary company and" relative" have the same meanings as in the Companies Act, 1956 ; (1 of 1956)

(d) " value", in relation to any excisable goods,-

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee. Explanation.- In this sub- clause," packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

Explanation.- For the purposes of this sub- clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of-

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods, and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be,-

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under section 3 of the Customs Tariff Act, 1975 , (51 of 1975) already paid on the raw material or component parts used in the production or manufacture of such, goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods;

(c) " wholesale trade" means sales to dealers, industrial consumers Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail.

Rule 173B Assessee to file declaration of goods produced or manufactured in the factory.-

(1) Every assessee, shall file with the Superintendent of Central Excise, having jurisdiction over the factory, a declaration (in quadruplicate) showing,-

(a) the full description of-

(i) all excisable goods produced or manufactured by him,

(ii) all other goods produced or manufactured by him and intended to be removed from his factory, and

(iii) all the excisable goods already deposited or likely to be deposited from time to time without payment of duty in his warehouse;

(b) the Chapter, heading No. and sub-heading No., if any, of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) under which each goods fall;

(c) the rate of duty leviable on each such goods;

(d) the exemption notification availed or proposed to be availed, if any; and

(e) such other particulars as the Commissioner may direct, and obtain a dated acknowledgement of the said declaration:

Provided that such declaration shall be filed on or before the 15th May, 1995 or such extended period as the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise may permit:

Provided further that an assessee producing or manufacturing excisable goods for the first time shall be required to submit the said declaration within thirty days of commencing the production of such excisable goods.

(2) If in the declaration so filed under sub-rule (1), any alteration becomes necessary in respect of any goods because of-

(a) the assessee commencing production, manufacture or warehousing of goods not mentioned in that declaration, or

(b) the assessee intending to remove from his factory any non-excisable goods not mentioned in that declaration, or

(c) a change in the rate or rates of duty in respect of the goods mentioned in that declaration or, by reason of any amendment to the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), a change in the Chapter, heading No. or sub-heading No. the assessee shall likewise file a fresh declaration or an amendment of the declaration already filed within thirty days of any alteration mentioned above, in the same manner as is provided in sub-rule (1).

(3) The proper officer, duly empowered by the Central Government under section 14 of the Act, may, where he considers it necessary during the course of any enquiry in connection with the declaration filed under sub-rule (1) by an assessee,-

(a) require any person to produce or deliver any document or thing relevant to the enquiry; and

(b) examine any person acquainted with the facts and circumstances of the particulars given in the declaration or other records, in the manner provided in section 14 of the Act.

(4) The proper officer may after such further enquiry as he may consider necessary, reassess the correct amount of duty payable following the provisions of section 11A of the Act and the assessee shall pay the deficiency, if any.

173C. Procedure regarding valuation of goods assessable *ad valorem*.-

(1) Every assessee who produces, manufactures or warehouses goods which are chargeable with duty at a rate dependent on the value of the goods and removes or clears such goods as provided in rules 9, 49, 144, 152 and 157, shall declare the value under section 4 of the Act of such goods in the documents such as sales invoice, invoice-cum-challan or like documents used by him for sale or removal of goods

Provided that-

(i) such documents shall indicate separately the value of goods under section 4 of the Act and the duty paid as provided under section 12A of the Act;

(ii) that such documents also contain a declaration of the price;

(iii) that such documents also indicate, wherever applicable, individually the central excise duty, other taxes, all discounts and other consideration if any, for the difference

between the price and the value of the goods under section 4 of the Act;

(iv) that such documents also indicate the date and time of removal of the goods:

Provided further that where an assessee,-

(i) sells goods to or through related persons as defined in section 4 of the Act; or

(ii) uses such goods for manufacture or production of other goods in his factory; or

(iii) removes such goods for free distribution; or

(iv) removes such goods in any other manner which does not involve sale; or

(v) removes goods of the same kind and quality from his factories located in the jurisdiction of different Commissioners of Central Excise or Assistant Commissioners of Central Excise or Deputy Commissioner of Central Excise

he shall file, with the proper officer a declaration, in such form and in such manner and at such interval as the Central Board of Excise and Customs or Commissioner of Central Excise may require, declaring the value of the goods under section 4 of the Act, the duty and other elements constituting the price of such goods along with such other particulars as the Central Board of Excise and Customs or the Commissioner of Central Excise may specify.

(2) The assessee shall certify in each such document that the amount indicated in such document represents the price actually charged by him and that there is no additional consideration flowing directly or indirectly from such sales over and above what has been declared.

(2A) Every assessee who produces, manufactures or warehouses goods notified under Section 4A of the Act shall file with the proper officer a declaration in such form and in such manner and at such interval as the Central Board of Excise and Customs may specify, declaring the retail sale price of such goods, amount of abatement, if any on such sale price and such other particulars as may be specified by the said Board.

(3) The proper officer, duly empowered by the Central Government under section 14 of the Act, may, where he considers it necessary during the course of any enquiry in connection with the declaration made in the documents referred to in sub-rule (1) or sub-rule (2A) by an assessee,-

(a) require any person to produce or deliver any document or thing relevant to the enquiry ; and

(b) examine any person acquainted with the facts and circumstances of the particulars declared in such documents or other records, in the manner provided in section 14 of the Act.

(3A) The assessee shall declare to the proper officer his marketing pattern, discount structure and such other particulars in such form and in such manner and at such intervals as the Central Board of Excise and Customs or Commissioner of Central Excise may require.

(4) The proper officer may after such further enquiry as he may consider, reassess following the provisions of section 11A of the Act and the assessee shall pay the deficiency, if any.

6. Penalty in this case was imposed under Rule 173Q of the Central Excise Rules, 1944 which reads as follows:

173Q. Confiscation and penalty.-

(1) Subject to the provisions contained in section 11AC of the Act and rule 57AH, if any manufacturer, producer, registered person of a warehouse or a registered dealer,-

(a) removes any excisable goods in contravention of any of the provisions of these rules; or

(b) does not account for any excisable goods manufactured, produced or stored by him; or

(bb) takes credit of duty or money in respect of inputs or capital goods for being used in the manufacture of final products or capital goods for use in the factory of the manufacturer of final product, as the case may be, wrongly or without taking reasonable steps to ensure that appropriate duty on the said inputs or capital goods has been paid as indicated in the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, accompanying thereof, or takes credit of duty or money which he knows or which he has reason to believe, is not permissible under these rules, or does not utilise the inputs or capital goods in the manner provided for in these rules, or utilises credit of duty or money in respect of inputs or capital goods in contravention of any of the provisions of these rules, or does not render proper and true account of the receipt and disposal of the said inputs or capital goods and the credit of duty or money taken thereon as required under these rules, or contravenes any of the provisions contained in Section AA or AAA of Chapter V of these rules; or

(bbb) enters wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of such goods which is not permissible under these rules; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (c) or clause (d) has been committed, or ten thousand rupees, whichever is greater.

then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (c) or clause (d) has been committed, or ten thousand rupees, whichever is greater.

Explanation.-For the purposes of clause (bb) of sub-rule (1), a person availing of credit of duty on inputs received by him shall be deemed to have taken "reasonable steps" if he satisfies himself about the identity and address of the manufacturer or supplier, as the case may be, issuing the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, either-

(a) from his personal knowledge; or

(b) on the strength of a certificate given by a person with whose handwriting or signature he is familiar; or

(c) on the strength of a certificate issued to the manufacturer or the supplier, as the case may be, by the Superintendent of Central Excise within whose jurisdiction such manufacturer has his factory or the supplier has his place of business:

Provided that where the identity and address of the manufacturer or the supplier is satisfied on the strength of a certificate, the person availing of credit of duty shall retain such certificate for production before the proper officer on demand.

7. The undisputed facts of this case are that the assessee manufactured paper based decorative laminates which were subject to excise duty on ad valorem basis and that it had filed the price declarations under Rule 173C of the Excise Rules with the jurisdictional authorities. The assessee sold the goods on wholesale from the factory gate and also sold goods from its depots and bulk of the sales were from depots. According to the assessee they have a genuine factory gate price which must be reckoned as the normal price for valuation as per Section 4(1) (a). According to the Revenue, the duty must be determined as per the price at which the assessee sold goods from its depots with some deductions as admissible.

8. A Show Cause Notice⁵ dated 31.1.1996 was issued invoking extended period of limitation covering the period 1991 to 1995 proposing to recover differential duty of Rs. 2,82,58,708/- under section 11A and also proposing to impose a penalty under Rule 173Q of the Excise Rules. It culminated in the Order in Original dated 29.12.1997 being passed by the Commissioner. Another order in original dated 29.5.1998 was passed by the Assistant Commissioner which was upheld by the Commissioner (Appeals) by his order dated 31.12.2003. Assessee's appeals against both these orders were decided by this Tribunal by Final Order No. 1135/06 dated 4.7.2006 remanding the matter to the Commissioner as follows:

7. We have gone through the records of the case carefully. **The appellants have pleaded that the lower authorities had come to the conclusion that there is no factory gate price even though sufficient information was furnished. It was stated that goods were sold at the factory gate price not only to Government bodies but to other dealers also.** There is also a grievance that the request for abatement on account of interest on receivables has not been considered. In these circumstances, the entire issue has to be remanded to the original authority who should quantify the duty liability afresh after giving a personal hearing to the appellants. **The appellants shall furnish all the documentary evidence in support of their contention that the factory gate sale existed during the relevant period.** The original authority shall also examine the admissibility of the various discounts claimed by the appellants in the light of the case laws and judicial decisions. The original authority shall pass the order within three months. **Thus, the appeal is allowed by way of remand.**

(emphasis supplied)

6. In pursuance of the above remand, the impugned order has been passed by the Commissioner assailing which these two appeals were filed. The assessee is aggrieved that in the impugned order the Commissioner has held that there is a

⁵SCN

genuine factory gate price as per section 4(1)(a) of the Act but still confirmed the demand based on the prices at which the goods were sold from depots with some abatements. It is also aggrieved that even while determining the value based on the depot prices, some abatements were not allowed. It is further aggrieved by the fact that demand was confirmed for the extended period of limitation when in fact it is undisputed that it had filed the price lists and its activities were in the complete knowledge of the department. Therefore, there was no element of fraud, collusion, wilful mis-statement or suppression of facts or violation of the provisions of the Act or Rules with an intention to evade payment of duty and in the absence of any of these factors, extended period of limitation cannot be invoked. Further, it is aggrieved by the imposition of penalty under Rule 173Q.

7. Revenue is aggrieved that the Commissioner held that there was genuine factory gate price but confirmed the demand. According to the Revenue, the finding of the Commissioner in the impugned order that there was a genuine factory gate price was not correct but the confirmation was correct. The demand should have been confirmed holding that there was no genuine factory gate price. The grounds on which Revenue asserts that there was no genuine factory gate price is in paragraphs 7.1 to 7.9 of its appeal which are reproduced below:

“7.1 Whereas, the assessee’s contention is that a normal wholesale price exists at the factory gate and that the same is applicable for payment of duty on the goods cleared to their Depots, from the evidence brought forth in the show cause notice, it is clear that there did not exist any genuine

factory gate sales that satisfy the norms prescribed in Section 4(1)(a) of the Act.

7.2. Clause (a) of sub-section (1) of Section 4 of the Central Excise Act, 1944. stipulates that a price, in order to be acceptable as assessable value under the said clause, shall satisfy the following conditions -

- (a) It should be the price at which such goods are ordinarily sold by the assessee to their buyers in the course of wholesale trade.
- (b) The sale should be for delivery at the time and place of removal
- (c) The buyer should not be a related person
- (d) The price shall be the sole consideration for the sale

Further, proviso (i) to the said clause stipulates that if such goods are sold at different prices to different classes of buyers, each such price shall, subject to the existence of the other circumstances specified above, be deemed to be the normal price of such goods in relation to each such class of buyers.

7.3 During investigation, various personnel of M/s BHL have deposed in their statements, given under section 14 of the Act, as follows -

7.3.1. Shri P. Anand Sagar, Depot-in-Charge, A.P Sales, inter-alia, in his statement dated 05.05.1995, has deposed that in respect of their product Decolam, they store the sheets at their Depots from where the said goods will be sold to their dealers, that they do not generally undertake retail sales; that there are few customer to whom the material is supplied at "negotiated contract price from the factory and that there is no other method of sale.

7.3.2 Shri K. Prabhakar, Manager-Decoratives Marketing, who was the overall in-charge of Marketing of Decoratives, in his statement dated 12.05.1995, had deposed, inter-alia, that the sale of Decorative Laminates is generally routed through various dealer outlets; that they stock transfer the said goods from factory to various Depots; that there are instances where dealers buy directly from the factory at "negotiated contract prices"; that those cases pertain to situations where they have no Depots and that such contract supplies are also made through dealers in cases of some project orders where a negotiated price is arrived at, but they prefer not to supply to the contractors directly for commercial reasons.

7.3.3 Shri S.Sen Gupta, Company Secretary, in his statement dated 12.05.1995, had deposed, inter-alia, that he believes the statements of Shri P.AnandSagar and Shri K.Prabhakar to be true and correct since the said persons are in Marketing Department and the statements given by them relate to the dispatches made from the factory in various forms.

7.4As illustrated in the show cause notice, during the material time, M/s BHL had effected sales at the factory gate to the following categories of buyers 1) Individuals 2) Company Employees 3) M/s Jaipur and Bikaner Trading company and 4) Public SectorUndertakings.

7.4.1 In the case of sales to Individuals and Company Employees, the goods are meant for personal consumption and in respect of sale of 'seconds / rejects' to Company Employees, the goods are also of inferior quality and the price at which such sales were effected cannot be treated as the normal wholesale value in the ordinary course of business.

7.4.2 Employees of M/s BHL have deposed, inter-alia, as extracted in para 8.3 above, that they do not generally undertake retail sale; that they supplied material to a few customers at a "negotiated contract price" at the factory gate and that the goods are mostly sold through their Depots. M/s Jaipur and Bikaner Trading Co is one such buyer to whom the goods have been supplied at a "negotiated contract price". Therefore, it appears that M/s Jaipur and Bikaner Trading Company, being a contractual buyer, constitutes a class by itself and the price charged from such buyer is applicable to them only as per proviso (i) to section 4(1)(a) referred above, and such price cannot be adopted for the goods sold to other buyers at Depots, who constitute a different class of buyers.

7.4.3 To support their claim that a genuine factory gate sale price existed, the assessee have also stated that they have effected clearances from the factory gate to Public Sector / Government Undertakings. In this regard, it is submitted that sales to Public Sector/Government Undertakings can be considered as normal price only in respect of such class of buyers in terms of first proviso to Section 4(1) (a).

7.4.4Hon'ble Supreme Court, in the case of Government of India Vs Madras Rubber Factory, reported in 1995 (77) ELT 433 (S.C), has held that - "by virtue of proviso (1) to Section 4(1)(a), the Government would be a class by itself and the price charged to it would be relevant only to the goods sold to it. So far as depot sales are concerned they are to a different class or classes of buyers and in respect of the goods sold to them, the price charged to each of such class of buyers would be the normal price. The Price

Charged to one class of buyers cannot, therefore, be directed to be adopted as the price in respect of all the classes of buyers".

7.5. From the statements given as above by the persons who were managing the affairs relating to Depots/Marketing of the goods of the company, and other submissions made above, it appears that the assessee had no practice of effecting clearances from their factory in the course of wholesale trade, and there did not exist a factory gate sale price conforming to the provisions of Section 4(1) (a). However, the Commissioner had erred in arriving at a finding contrary to the above.

7.6. Further, in the case of M/s Merinoply & Chemicals Ltd Vs CCE, reported in 1992 (60) ELT -256(T), the Hon'ble Tribunal held that where goods are partly sold from depots and partly sold from factory, ex-factory price is to be taken as the assessable value, but the Department can reject the Ex-factory price if it is satisfied that the sale price is not genuine". Also, in the case of Wood Crafts Products Ltd Vs CCE, reported in 1988(35) ELT -495(T), it was held that "If the ex-factory price is artificially low, then the goods should be assessed at the depot sale price".

7.7. In the present Order, the Commissioner had held that percentage of sales cannot form the basis for determining whether normal wholesale price exists at the factory gate. In this regard, it is to be mentioned that the show cause notice did not merely indicate the low percentage of factory gate sales, it also spelt out in detail the nature of such sales and why such sales cannot be treated as the normal wholesale price at the factory gate. Further, it was also alleged in the show cause notice that in respect of the limited sales effected by the assessee at the factory gate, the price has been kept artificially low in order to derive undue advantage of adopting the same price for payment of duty on the goods cleared to Depots, even though such goods are actually sold at much higher prices at the Depots. Thus, following the ratio of the decisions of the Tribunal in the aforesaid cases, the ex-factory price claimed by the assessee is liable to be rejected. However, in his Order, the Commissioner has arrived at an incorrect finding that the ex-factory price is acceptable.

7.8. Even though the assessee has contended that Depot prices are not relevant for determination of the assessable value of the goods since they have an established factory gate price, the fact remains that they have collected and have received amounts in the guise of Delivery Charges. When the department sought to determine value on the basis of Depot Price, they came up with an alternative plea that abatements on account of ten different factors mentioned in para 6 above, are available to them. On examination of this plea, it was found that out of ten

factors, abatement on account of seven factors i.e. sl. no. (i) to (vii) was admissible and that on account of the remaining three, i.e. sl no. (viii) to (x), abatement is not admissible and duty is payable.

7.9. Thus, all the facts of the case and the evidence brought forth in the show cause notice implied that there did not exist a normal wholesale price conforming to Section 4(1)(a) of the Act and such price claimed by the assessee is liable to be rejected for the reasons mentioned in paras 8.1 to 8.8 above. Therefore, valuation of the goods cleared to Depots has to be done in accordance with Section 4(1)(b) of the Act, read with Rule 5 of the Valuation Rules, 1975 by loading the differential price realized at depots to the assessable value after allowing eligible abatements. Even though, the differential duty has been correctly determined and confirmed in the present Order on the similar ratio as above, the findings of the Commissioner that a normal wholesale price at the factory gate price existed which is acceptable and that such price cannot be termed as bogus, are incorrect. Before proceeding to determine the differential duty in terms of Section 4(1)(b) read with Rule 5 of the Valuation Rules, 1975, the Commissioner ought to have rejected the assessee's contention of the existence of ex-factory price conforming to Section 4(1)(a)."

8. Thus, the questions to be decided by us are as follows:

- a) Is there a genuine factory gate price which can be considered as normal price under Section 4(1)(a) of the Act?
- b) If so, is the price only in respect of any particular buyer or particular class of buyers as per proviso (i) to Section 4(1)(a)?
- c) If there is no genuine factory gate price which can be considered as normal price under section 4(1)(a) of the Act as applicable to all buyers, has the value been correctly determined as per Section 4(1)(b) and the applicable Valuation Rules, especially with respect to allowing all the eligible abatements from the depot price?

d) Has the extended period of limitation been correctly invoked?

e) Was the penalty correctly imposed under Rule 173Q?

9. We find that Section 4(1) of the Act as applicable during the relevant period does not levy excise duty on the price but on the value and such value shall be a deemed value. If there is a normal price as per Section 4(1)(a), it shall be the deemed value, else it shall be the value determined as per 4(1)(b). Thus, as long as there is price under section 4(1)(a), it will be the value for determining the excise duty and not any other price or transaction value. The proportion of the goods sold under 4(1)(a) to the total sales is irrelevant. For instance, even if only 1% of the goods are sold as per the value under section 4(1) (a), such price shall be deemed to be the value for all clearances by the assessee. The value under section 4(1) (a) and its proviso is subject to the following conditions:

- a) that it is in the course of wholesale trade;
- b) it is at the time and place of removal, i.e., at the factory gate;
- c) to persons who are not related;
- d) where price is the sole consideration for sale;
- e) if the goods are not sold except to or through a related person, then the price at which the related person sells the goods shall be the normal price;
- f) if the goods are sold to different classes of buyers at different prices, then each such price shall be the value for

sales to such class of buyers; for instance, if there are industrial consumers, OE manufacturers, wholesalers, etc., each of which can be a class of buyers; and

g) for the purpose of this section, any sale other than retail is considered wholesale trade.

10. Thus, a shrewd assessee can sell a small quantity of the goods at a relatively lower price to independent buyers at the factory gate fulfilling all the conditions required under section 4(1)(a) and the rest through other methods. Once the 4(1)(a) price is available, other sale prices do not matter. According to the Revenue the Commissioner has wrongly recorded that there is a factory gate price, while according to the assessee, there was a price under section 4(1)(a). We now proceed to examine the grounds on which the Revenue asserts that there was no genuine factory gate price as per section 4(1) (a).

11. According to the Revenue, as per the statements of Shri P Anand Sagar, Depot-in-charge, AP Sales, Shri K Prabhakar, Manager- Decoratives marketing and Shri S. Sen Gupta, Company Secretary, the appellant stores sheets at their depots and sells them from there to the dealers and there were a few customers to whom they supplied goods at negotiated contract price and there is no other method of sale.

12. Further, according to the Revenue, during the material time, the appellant sold goods from the factory gate only to four categories of persons viz., individuals, company employees, Jaipur

and Bikaner Trading Company and Public Sector Undertakings. Of these, only seconds/rejects were sold to individuals and company employees and therefore, their price cannot be treated as normal wholesale value in the course of wholesale trade. The sale to Bikaner and Jaipur Trading Company was a negotiated contract price, who, therefore, constitutes a class of buyer by itself. This price cannot also be considered as a normal value. Similarly, Government undertakings and public sector undertakings can also be considered as a class of buyers and the price at which the goods were sold to them cannot be taken as normal price for all sales.

13. Learned counsel for the appellant has produced before us four spiral bound booklets with copies of ledgers of the appellant's sales during different periods covered in the present dispute as follows:

- a) Ex-factory dispatches of decorative laminates for April 1990 to March 1991
- b) a) Ex-factory dispatches of decorative laminates for April 1991 to March 1992
- c) a) Ex-factory dispatches of decorative laminates for April 1992 to March 1993
- d) a) Ex-factory dispatches of decorative laminates for April 1993 to March 1994
- e) a) Ex-factory dispatches of decorative laminates for April 1994 to March 1995

14. Each of these ledgers covers a very large number of buyers to whom the assessee sold goods at factory gate. These details

have been summarised by the learned counsel in her written submissions as follows:

Buyer group	1990-91	1991-92	1992-93	1993-94	1994-95
Dealers	78	66	69	83	56
Actual user companies	5	5	4	1	3
PSUs	8	2	2	1	2
Total buyers other than employees	91	73	75	85	61

15. Therefore, the entire argument of the Revenue in its appeal that the goods were sold from the factory gate to only four categories of persons viz., Public Sector Undertakings, M/s. Jaipur and Bikaner Trading Co., individuals and company employees is not borne out by the ledgers produced before us by the assessee. The evidence on the basis of which the Revenue relies are the statements of the employees said to have been recorded during investigation. When details of actual sales in the form of ledgers are presented before us by the assessee, even if statements of employees contrary to the available evidence are recorded by the officers, it cannot change the facts. No documents have been produced before us by the Revenue to substantiate their claim that goods were not sold to anyone except individuals, company employees, PSUs and Jaipur and Bikaner Trading Co. No evidence has been adduced by the Revenue to show either that the prices shown in the ledgers are not genuine prices or that all these buyers

are of special classes of buyers. Therefore, the argument of the Revenue that there was no genuine factory gate price is not borne out by facts. There is no error in the impugned order insofar the recording that there was a genuine factory gate price is concerned. **We therefore, find that there is a genuine factory gate price which can be considered as normal price under Section 4(1)(a) of the Act. We answer question (a) in paragraph 8 above in favour of the assessee.**

16. We also find that there is no evidence to support the claim of the Revenue that the factory gate price was only in respect of the four categories of buyers. On the contrary, the ledgers of factory gate sales for the five years produced by us show that the goods were sold to a large number of buyers including individuals. **We therefore, answer question (b) in paragraph 8 above in favour of the assessee.**

17. The questions (c), (d) and (e) which we raised in paragraph 8 above becomes irrelevant in view of our answers to questions (a) and (b) in paragraph 8 above that there was a genuine factory gate price under section 4(1)(a) and such price was not confined to any particular class or classes of buyers as evident from the ledgers produced before us by the assessee and lack of any contrary evidence on behalf of the Revenue. The mere fact that some statements were made before the officers by the employees and functionaries of the assessee will

not advance the case of the Revenue when such statements are contrary to the evidence available on records.

18. The last question to be answered is whether the Commissioner was correct in confirming the demand after holding that there was a genuine factory gate price for the goods. As discussed above, as per Section 4 of the Act, as applicable during the relevant periods, value is deemed to be the normal price, i.e., the price under section 4(1)(a). The actual price at which the goods are sold in different invoices and to different buyers is irrelevant. It is also irrelevant as to what percentage of goods were sold at the factory gate price. Once the factory gate price was available under section 4(1)(a), it shall be the value. The confirmation of demand based on the prices at which the goods were sold from the depots cannot be sustained. Consequently, the imposition of penalty also cannot be sustained.

19. Although we have decided the matter on merits, we also find in favour of the assessee on the ground of limitation as we do not find any elements necessary to invoke extended period of limitation of five years viz., fraud, collusion, wilful misstatement or suppression of facts or violation of provisions of the Act or Rules with an intent to evade payment of duty, since the assessee filed the price declarations as per its understanding. The mere fact that the Revenue has taken a different view about the value cannot be a ground to invoke extended period of limitation.

20. We, therefore, find the case in favour of assessee and against the Revenue. Assessee's appeal E/926/2008 is allowed and Revenue's appeal E/901/2008 is rejected and the impugned order is set aside with consequential relief, if any, to the assessee.

(Pronounced in Court on 09.05.2022)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)