CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

Excise Appeal No. 989 of 2012

(Arising out of Order-in-Original No. 03/2011 C.Exdt.08.06.2011 (denovo) passed by Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad)

Bakelite Hylam Ltd
Sanathnagar, Hyderabad,
Telangana – 500 018
......Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax,Hyderabad - II
LB Stadium Road, Basheerbagh,
Hyderabad, Telangana – 500 004
......Respondent

Appearance
Ms L. Maithili, Advocate for the Appellant.
ShriA.V.L.N. Chary, AR for the Respondent.

Coram:
HON'BLE MR. R. MURALIDHAR (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30284/2023

Date of Hearing: 13.09.2023
Date of Decision: 13.09.2023

[Order per: R. MURALIDHAR]

The Appellant has cleared their various products like decorative laminates, industrial laminates, polyesters, phenolic resins, mouldings during April 1994 to September 1996 to their depots and also sold the same to independent third parties during this period. On the ground that the valuation adopted by the Appellant for their clearances to the depots were not as per the prescribed statutory provisions, proceedings were initiated. This is third round of litigation on this issue. During the last round of litigation, this Tribunal vide Final Order No. 1450/2010 dated 11.11.2010, remanded the matter to the Adjudicating Authority to reconsider the issue. The Adjudicating Authority has taken up the de-novo adjudication and set aside the demand vide OIO No. 03/2011 dated 08.06.2011. Being aggrieved, the Department filed an Appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide OIA No.

01/2012 (H-II) (d) CE dated 27.01.2012 set aside the OIO and remanded the matter for de-novo adjudication to the Adjudicating Authority. Being aggrieved, the Appellant has filed the present Appeal before the Tribunal.

2. Learned Counsel appearing on behalf of the Appellant submits that the core issue to be decided in the present case is whether the Appellant is correct in adopting the independent third party factory gate price for making the payment of Excise Duty when the goods are cleared to their depots. She submits that in the first round of litigation, vide Final Order No. 1135/2006 dated 04.07.2006, this Tribunal remanded the matter to the Adjudicating Authority to determine whether there existed a genuine factory gate price. However, he did not do justification while passing the de-novo OIO, because of which the Appellant had to approach the Commissioner (Appeals). Even the Commissioner (Appeals) failed to address the issue and the matter came up before the Tribunal. This Tribunal vide their Final Order No. 1450/2010 dated 11.11.2010 had remanded the matter to the Adjudicating Authority very specifically holding that if a genuine factory gate sale price is available, the same should be applied for valuation of the clearances in question. The Adjudicating Authorityafter proper verification of all the documentary evidence placed before him, vide OIO No. 03/2011-C.Ex dated 08.06.2011, dropped the demand proposals. However, the Department continued to pursue the Appeal before the Commissioner (Appeals). The Commissioner (Appeals) after going through all the evidence placed before him, in Para 11 held as under:

> *"11. I find from the impugned order that the lower authority has arbitrarily recorded in his findings that there existed factory gate sales which can be applied to the depot sales. The lower authority did not analyze and determine how the factory gate sales are applicable to the depot sales."*

3. This shows that even after finding that the Appellant had produced all the records to show that genuine factory gate sale price exists, the Commissioner (Appeals) has gone ahead and remanded the matter to the Adjudicating Authority.

4. Learned Counsel further submits that the issue of valuation in the present case is no more *res integra*. Before this Bench, the Appellant's earlier proceedings had come up for Hearing on 07.03.2022. In that case, the period in question was April 1991 to September 1995, wherein, the SCN was issued by invoking extended period provisions. The issue involved in that proceedings are identical and factually there is no change in the practice adopted by the

Appellant during that period and the period under question in the present Appeal. The present Appeal is on account of the subsequent periodical notice issued by the Revenue for the period April 1994 to September 1996. She submits that this Bench had gone into all the details for the period April 1992 to September 1995 and then has given a detailed finding while arriving at the conclusion that the valuation adopted by the Appellant is correct. Accordingly, vide Final Order No. 30059-30060/2022 dated 09.05.2022, the Appeal filed by the present Appellant was allowed and the Appeal filed by the Revenue was rejected. She draws our attention to the following relevant portions of this Final Order:

"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 bedeemed 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 factorygate;

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 thegoods 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 tothe 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 sellsthem from there to the dealers and there were a few customers to whom they supplied goods at negotiated contract price and thereis 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 alsobe considered as a class of buyers and the price at which thegoods were sold to them cannot be taken as normal price for allsales.*

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 asfollows:

a) Ex-factory dispatches of decorative laminates for April 1990to March 1991
b) Ex-factory dispatches of decorative laminates for April1991 to March 1992
c) Ex-factory dispatches of decorative laminates for April1992 to March 1993
d) Ex-factory dispatches of decorative laminates for April1993 to March 1994
e) Ex-factory dispatches of decorative laminates for April1994 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 onlyfour categories of persons viz., Public Sector Undertakings, M/s. Jaipur and Bikaner Trading Co., individuals and companyemployees 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 agenuine 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 statementsare 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 invoicesand 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."

5. She submits that while the earlier proceedings were initiated for the extended period and this Bench had also given their findings on limitation

holding that extended period demand is not sustainable, in the present case this is not relevant as the demand has been issued only for the normal period.

6. Accordingly, she prays that the present Appeal may be allowed.

7. The learned AR does not dispute that the present litigation is on account of periodical notice issued to the Appellant for the period April 1994 to September 1996 and the same issue in respect of earlier period i.e., April 1991 to September 1995, stands decided in favour of the Appellant vide Final Order No. 30059-30060/2022 dated 09.05.2022. However, he submits that in that case, the issue involved was that of only one product i.e., decorative laminates, whereas, in the present case other four products viz., industrial laminates, polyesters, phenolic resins and mouldings are also involved. Therefore, he submits that earlier decision of this Bench may not be applicable for these products.

8. In the rejoinder, the learned Counsel submits that for all the five products including the four products pointed out by the learned AR, they have given invoice-wise,year-wise details for their factory gate clearances to various independent parties. These documents have been submitted to the Adjudicating Authority as well as to the lower Appellate Authority when the issue had come up before them. She also produces three sets of such documents before the Tribunal which were actually produced before the Lower Authorities. She submits that only after going through all these documentary evidence, the Adjudicating Authority has correctly held that there exists a proper factory gate price in respect of all the five categories of goods and has dropped the proceedings. Therefore, she submits that reading together the documentary evidence produced before the Lower Authorities and before the Tribunal now and applying the ratio laid down in the Final Order dated 09.05.2022, the present Appeal may be allowed.

9. Heard both sides and perused the documents.

10. On going through the Final Order dated 09.05.2022, we find that the identical issue was before this Tribunal in respect of the same Appellant, wherein the demand was issued for the period April 1991 to September 1995. There is nothing to suggest that the practice adopted by them during April 1991 to September 1995 was different from the practice adopted by them during the present period of dispute i.e., April 1994 to September 1996. Even the Revenue has not come out with any counter argument on this count. Therefore, we

proceed on the understanding that the procedure adopted by the Appellant right through April 1991 to September 1996 remained the same for the value adopted by them for clearances to their depots which is based on the factory gate sales done by them for which they have produced the documentary evidence before the Lower Authorities. The procedure for the discounts being given at depots remained same as per the earlier period. The earlier Final Order of this Bench has already gone into considerable depth and has allowed the Appeal filed by the present Appellant and dismissed the Appeal filed by the Revenue. There is nothing on record to show that this Final Order of this Bench was taken up further by the Revenue before the Hon'ble Supreme Court nor is there anything to suggest that this Order has been stayed by the Apex Court. Therefore, as of date, this Order is in force in respect of decorative laminates. The conclusion arrived at by this Bench vide Final Order dated 09.05.2022 is squarely applicable. So far as other four products are concerned, as could be seen from the documentary evidence placed before us, which was also present before the Lower Authorities, for each of these products, the Appellant has been able to establish that they have genuine factory gate sales by clearing these goods to various unrelated third parties. Therefore, even in case of these four products, the earlier decision of this Bench dated 09.05.2022 would be squarely applicable.

11. Accordingly, we allow the Appeal with consequential relief, as per law.

(Operative Part of the Order was pronounced in the Open Court)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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