

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal No. E/170/2003

(Arising out of Order-in-Appeal No. 01/KOL-V/2002 dated 10/12/2002 passed by the Commissioner (Appeals) of Central excise, Calcutta.

M/s. Hindustan Engineering & Industries Ltd.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise-Kolkata-V

Respondent (s)

Appearance:

Shri, J. P. Khaitan, Sr. Adv., Sourav Bagaria & I Banerjee, Advocates
for the Appellant (s)

Shri S. S. Chattopadhyay, Suptd. (A. R.) for the Revenue (s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing/Decision: - 08.10.18

ORDER NO. FO/76736/2018

PER SHRI V. PADMANABHAN

The present appeal is against the Order-in-Appeal No. 01/KOL-V/2002 dated 10/12/2002. The appellant has two units. Unit-1 (Impugned Order pertains to this) is situated at Tiljala, where various parts of wagons are being manufactured and from this unit, the parts are cleared to their second unit (Unit-2) which is situated at Santragachi. In Unit-2, railway wagons are manufactured and cleared to Indian Railways and others. The dispute is covering the period August 1998 to April 1999 and July 2000 to March 2001. The valuation of parts cleared from the Unit-I to Unit-2 is under dispute in the present case. For the period prior to 01/02/2000 (when the Section 4 of the Central Excise, Act was amended), the appellant paid duty on the basis of cost of production but did not include the element of profit

since the appellant was incurring losses during the relevant financial years. Revenue was of the view that value is required to be re-determined by adding notional profit of 13.37%. For the period w.e.f. 01/07/2000, the Revenue was of the view that the valuation was required to be done in terms of Rule 8 of the Central Excise Valuation Goods, 2000, which provides for determination of value @ 115% of the cost of production.

2. Show Cause Notices were issued covering the period under dispute which was finalized by Original Authority. The appeal against the said order was decided by way of impugned order in which the Ld. Commissioner (Appeals) remanded the issue for re-determination of value for the period August 1998 to April 1999. For the period July 2000 to March 2001, he up-held the demand already confirmed. The impugned order stands challenged in the present appeal.

3. The appellant is represented by J. P. Khaitan, Senior Advocate and the Revenue is represented by S. S. Chattopadhyaya, Ld. A. R.

4. The submissions of the Ld. Senior Counsel are summarized below:-

(i) The appellant had paid the duty for the period prior to the amendment of Section 4, on the basis of cost production without addition of profit since the appellant was incurring losses during the relevant period. He also submitted that there was no basis for the figure of 13.37% which revenue proposes to add by way of notional profit.

(ii) In any case, he submitted that any differential duty paid by Unit-1 will be available as Modvat Credit for Unit-2 to whom the parts and components have been cleared. This clearly shows that this is a Revenue neutral situation and under such circumstances there can be no allegation of suppression and the differential duty demand cannot be up-held. In this connection, he relied on the decision of Chennai Tribunal in the case of Anglo French Textiles Vs. Commissioner, of C. Ex., Puducherry, reported in 2018 (360) E.L.T. 1016 (Tri.-Chennai). He also added that the said decision was approved by the Hon'ble Supreme Court as reported in 2018 (360) E.L.T. A 301 (SC).

5. The argument advanced by the Ld. DR, in the impugned order is summarized below:-

- (i) He argued that the Revenue neutrality has never been argued by the appellant as part of the grounds of appeal. He added that the only grounds advanced in the grounds of appeal regarding challenge for the period prior to 01/07/2000, is that the original Authority has not followed the Order passed by this Senior i.e. Joint Commissioner vide this order dated 15/03/2002.
- (ii) He relied on the following case laws:
 - a) Star Industries Vs. Commissioner of Customs (Imports), Raigad reported in 2015 (324) E.L.T. 656 (S.C.),

- b) Nitin Spinner Ltd. Vs. Commissioner of C. Ex., Jaipur-II, reported in 2017 (355) E.L. T. 562 (Tri.-Del.) and
- c) Commissioner of Central Excise, Mumbai Vs. Mahindra & Mahindra Ltd. reported in 2005 (179) E.L.T. 21 (S.C.).

On the support of above decisions, he submitted that Revenue neutrality cannot be cited as a ground for non-payment of duty. Finally, he submitted that the impugned order may be upheld.

6. Heard both sides and perused the record.

7. The dispute is regarding the valuation of goods to be adopted for payment of Central Excise Duty at the time of clearance of goods from Unit-I to Unit-II. Such goods are used by Unit-II, also belonging to the appellant for further manufacture of goods. The relevant provisions under went a substantial change with the amendment of Section 4 w.e.f. 01/07/2000. The dispute covers period both prior to 01/07/2000 as well as the subsequent period. The lower authority has held that the valuation adopted by the appellant for the period prior to 01/07/2000 is incorrect, inasmuch as while computing the cost of production, no profit element has been added for the reason that the appellant was incurring losses during the relevant period. There have been various percentages mentioned regarding the notional profit to be added. Ultimately, the issue has been remanded to original authority for the determining the appropriate margin and re-determination of value. For the period after 01/07/2000, he upheld the re-determination of value in terms of Rule 8 (iii) of Central Excise, Valuation Rules, 2000.

8. The re-determination of value and the demand for differential duty has been challenged with the legal argument that the situation is one of revenue neutrality. It is not in dispute that the Central Excise Duty paid on the goods at the time of clearance from Unit-1 will be available as Modvat credit for the recipient Unit-2 also belonging to appellant.

9. The Large Benches of Tribunal in the case of Jay Yushin Ltd. vs. Commissioner of Central Excise, New Delhi-2000 (119) E.L.T. 718 (L. B.) has held that when the goods are cleared from one unit to another belonging the same manufacturer, the situation is one of revenue neutrality, inasmuch as any differential duty paid by the first Unit will be available to the second Unit as credit. It has been held that the demand itself is unjustified under such circumstances. By following the LB decision, the Chennai Bench of Tribunal in the case of Anglo French Textiles Vs. Commissioner of C. Ex., Puducherry (Supra) has set aside the demand in similar circumstances. The observation of the Tribunal is reproduced below:-

"2. On behalf of the appellant, Learned Counsel Shri C. Santhosh submitted that the fabrics produced by them in Unit 'C' is in a unprocessed stage. Since the said unit does not have the facility for carrying out the process of bleaching, dyeing and printing, the unprocessed fabric is cleared to the appellant's 'A' Unit for processing. Most of the fabrics thus received are sold at an unprocessed stage from the unit for domestic as well as export purpose. The duty is discharged on the unprocessed fabrics at the time of clearance from appellant's 'C' unit. At the time of receipt of the unprocessed fabrics at Unit A, excise duty already paid at Unit C is taken as Cenvat credit. This being so, the entire exercise is a revenue neutral situation and therefore the demand of duty is unjustified. He relied upon the decision of the Larger Bench in the case of Jay

Yuhshin Ltd. v. Commissioner of Central Excise, New Delhi - [2000 \(119\) E.L.T. 718](#) (Tri. - LB).

3. The Learned AR Shri S. Govindarajan reiterated the findings in the impugned order. He relied upon the decision of the Tribunal in the case of BOC India Ltd. v. Commissioner of Central Excise, Jamshedpur - [2004 \(168\) E.L.T. 478](#) and contended that when goods are transferred to sister unit, the valuation has to be under Rule 8 of Central Excise (Valuation) Rules and therefore it should be 115% of the cost of production. That therefore, the demand raised is legal and proper.

4. We have heard the submissions made by both sides.

5. On considering the fact that the goods are cleared to the sister unit and also the fact that the appellant is eligible for credit on the duty paid, the entire exercise is a revenue neutral situation as contended by the Learned Counsel for the appellant. This being the case, even if the appellant is directed to pay duty, other sister unit would be eligible for the credit. In the case of Jay Yuhshin Ltd. (supra), in a similar situation, the Larger Bench of the Tribunal has held that when there is revenue neutrality, the demand of duty is unsustainable.

6. We find that it is a fit case to set aside the demand on the basis of revenue neutrality which we hereby do. The impugned order is set aside and the appeal is allowed with consequential relief, if any."

Above decision has been approved by the Hon'ble Supreme Court also.

10. Revenue has raised serious objection for allowing the benefit of Revenue neutrality. They have also cited case laws. Having perused these case laws, we note that Revenue neutrality can be considered for only those cases where the clearance is made from one unit to another both belonging to the same manufacturer. In the cases cited by the Revenue, it is not clear whether the clearances were made to another unit of the same manufacturer. As such, we are of the view that

the present appeal may be allowed on the argument of Revenue neutrality in terms of case laws cited by the appellant.

11. In the result, the impugned order is set aside and the appeal is allowed.

(Dictated and pronounced in the court)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Pooja