

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

Appeal Nos. E/642 & 643/2008

(Arising out of Order-in-Appeal Nos. 33-35/CE/B-II/2008 dated 17/09/2008, passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. Ganesh Metaliks Ltd. & Ashis Kumar Majundar Appellant (s)

Vs.

CCE & ST-BBSR-II

Respondent (S)

Appearance:

Shri K. Kurmi & Shri Rajesh Sharma, Advocates, for the Appellant (s)
Shri H. S. Abedin, A. C. (A. R.) for the Revenue

CORAM:

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

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

Date of Hearing: -10.10.2018

Order No. FO/76818-76819/2018

PER BENCH

The present appeals are directed against the Order-in-Appeal Nos. 33-35/2008 dated 17/09/2008. The facts of the case are that the appellant is engaged in the manufacture of Sponge Iron. The final product is sold partly at the factory gate and partly through consignment agents. The dispute is with reference to the valuation of goods cleared from the factory but sold through consignment agents. The appellant claims that they had paid Central Excise Duty by adopting the value as per Rule, 7 of the Central Excise Valuation (Determination of price of Excisable goods) Rules, 2000. But the Revenue investigated into such transactions and came to conclusion that differential duty is required to be paid and after issue of Show Cause Notice, ordered payment of differential duty. In the impugned order, the differential duty demand was sustained and in addition,

penalties were also imposed not only on appellant but also on its Director. These findings have been challenged in the present appeals.

2. With the above background heard Shri K. Kurmi, Ld. Advocate for the appellant as well as Shri H. S. Abedin, Ld. DR for the Revenue.

3. Ld. Advocate resisted the findings of the Commissioner (Appeals) in the impugned order with the following submissions:-

(i) In terms of the Rules 7 of the Valuation of Rules, the goods cleared from the factory but sold through consignment agents, are required to be valued by adopting the normal transaction value of such goods sold from the premises of the consignment agent at or about same the time when such goods are removed from the factory. He asserted that the duty was paid in terms of Rule, 7 however, the Department has sought to demand differential duty by taking into account the price at which the goods cleared from the factory were ultimately sold from the premises of the consignment agent. For such purposes, they adopted the valuation as per the sales realization for the said goods as per the sale patties of the consignment agent.

(ii) He submitted that there is no justification for adoption for such a valuation which is in contravention of the Rule, 7 of the Central Excise Valuation Rules. In this connection, he relied on the decision of the Delhi Bench of the Tribunal in the case of E. I. Du Pont India Pvt. Ltd Vs. CCE, Chennai reported in 2005 (181) E.L.T. 27 (Tri.-Del.).

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4. The Ld. DR justified the impugned order. He submitted that the ground presently raised in the appeal was never raised before the Ld. Commissioner (Appeals) and hence, he prayed that the impugned order may be sustained.

5. The dispute in the present case is about the valuation to be adopted for payment of duty on the goods cleared from the factory but subsequently sold from the premises of consignment agents. The dispute covered the period August, 2004 to May, 2005. When the sale take place from the premises of the consignment agent, in terms of Section 4 (1)(b) of the Central Excise Act, 1944, the valuation is required to be determined in terms of Central Excise Valuation Rules. After perusal of the relevant rules it is seen that such cases are to be valued in terms of Rule 7 of the Valuation Rules. For ready reference, Rule 7 is reproduced below:-

"Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment."

6. Both sides agree that the valuation has been adopted by the appellant in terms of the Rule, 7 for duty payment at the time of clearance from factory. However, Revenue in the Show Cause Notice

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has proceeded to adopt at which the same goods were sold from the premises of the consignment agent.

7. In terms of Rule, 7 *ibid*, we are of the view that there is no mandate for adopting the valuation as has been adopted by the Lower Authorities. We note that identical issue has come up before the Tribunal in the case of E. I. Du Pont India Pvt. Ltd. Vs. CCE, Chennai (*Supra*) which has been relied by the *Ld. Advocate*. In the said case, the Tribunal has observed as follows:-

“5. We have considered the submissions of both the sides. Under Section 4 of the Central Excise Act, the assessable value of the goods on each removal shall, in a case where the goods are sold for delivery at the time and place of the removal, be the transaction value. In any other case, the value shall be determined under the Central Excise Valuation Rules. As in the present matter, the goods are only sold from the consignment stock agent's place, the assessable value has to be determined under the Valuation Rules, 2000 and admittedly the Rule applicable is Rule 7 which reads as under :-

“ Rule 7. Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment.”

6. The "normal transaction value" as per Rule 2(b) of the Valuation Rules means "the transaction value at which the greatest aggregate quantity of goods are sold." The Appellants have mentioned that they had discharged the duty liability as per the transaction value based on the normal transaction value and the greatest aggregate quantity sold by their consignment agent whereas the Revenue has demanded duty on the basis of prices prevailing on dates subsequent to the date of removal. It has not been denied by the Revenue that the Appellants have paid the duty on the basis of price at which the "greatest aggregate quantity" of goods are sold. The Revenue, however, wants to determine the assessable value on the basis of price at which the greatest aggregate quantity of goods are sold subsequent to the removal of goods. Once the normal transaction value of the impugned goods sold from other place at or about the same time is ascertainable, there is no need to determine the assessable value on the basis of price at which the goods may be sold subsequent to the time of removal of goods. The Board has also clarified this position vide Circular No. 643/34/2002-CX, dated 1-7-2002. A doubt was raised as the definition of normal transaction value Rule 2(b) of the Central Excise Valuation Rules does not indicate the time period over which the "greatest aggregate quantity" is to be computed. The Board has

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clarified as under : -

"The term "greatest aggregate quantity" has been used to define the term "normal transaction value" used in rules 7 and 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Seen in this context the time period should be taken as the whole day and the transaction value of the "greatest aggregate quantity" would refer to the price at which the largest quantity of identical goods are sold on a particular day, irrespective of the number of buyers. In case the "normal transaction value" from the depot or other place is not ascertainable on the day identical goods are being removed from the factory/warehouse, the nearest day when clearances of the goods were affected from the depot or other place should be taken into consideration."

8. By following the decision of the Tribunal as above, we find no merit in the impugned order which is set aside as far as demand on the valuation issue is concerned and corresponding penalty.

9. Appellant is not contesting the demand raised on the allegation of clearance on parallel invoice. Hence, this part of the demand is not interfered with.

10. The penalties are revised downwards as below:

(i) Penalty under Section 11AC on the appellant is reduced to Rs.64,333/-

(ii) Penalty on the Director is reduced to Rs.50,000/.

11. In the result, appeals are partly allowed.

(Dictated and pronounced in the open court.)

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

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

Pooja