IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Appeal No.E/105/2009

(Arising out of Order-in-Original No.35/Commr/CE/Kol-III/2008-09 dated 02.12.2008 passed by the Commissioner, Central Excise, Kolkata-III)

Commissioner of Central Excise, Kolkata-III …APPELLANT(S)

VERSUS

M/s. Esab India
…RESPONDENT (S)

APPEARANCE

Shri S.Chattopadhyay, Suptd.(AR) for the Appellant.
Shri Ravi Raghavan and Shri Deepro Sen, Advocate for the Respondent.

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing : 17.12.2018

Date of Pronouncement : 19.12.2018

ORDER NO.FO/77114/2018

Per Bench :

The present appeal is filed against the Order-in-Original No.35/Commr/CE/Kol-III/2008-09 dated 02.12.2008.

2. The respondent is engaged in the manufacture of Welding Electrodes. These goods are partly sold at the factory gate and partly stock transferred to depots situated in different places and sold subsequently to customers. In respect of goods stock-transferred to depots, the duty is paid by the respondent at the factory gate. The dispute in the present case relates to such stock transfer to depots made during the period April, 1997 to November, 1999. The Revenue noticed that in respect of some of

the clearances made to depots, the duty was paid at prices lower than the prices prevalent contemporaneously at the depots at the time of clearances. The provisions of Section 4 read with Rule 4 of the Central Excise Valuation Rules, 1975 was cited to take the view that duty was required to be paid for stock transfers to depots at the prices prevalent on such date at the depots. On these lines, differential duty was demanded by adopting the prices prevalent at the depots at the time of clearances of goods from the factory. The adjudicating authority, while deciding the show cause notice, dropped the demand against the respondent. Hence, the present appeal filed by the Revenue.

3. Revenue is represented by Shri S.Chattopadhyay, Suptd.(AR). The revenue's case is submitted as follows:

i) Ld.DR submitted that the disputed clearances are made on stock transfer basis to the depots by paying duty at the factory gate. In terms of Section 4 of the Central Excise Act, 1944 read with Rule 4 of the Central Excise Valuation Rules, 1975, the respondent was required to pay duty on the value of such goods sold by the assessee from the depots at about the same time. He emphasized that the respondent has paid duty at prices lower than the prices prevalent on that date at the time of clearance. He placed reliance on the decision of the Tribunal in the case of Ganges Manufacturing Co. Ltd. vs. Commissioner of C.Ex., Kolkata-IV [2012(276) ELT 262 (Tri.-Kolkata)]. The Tribunal in that case had occasion to consider the sale of goods through consignment agents for period similar to the present dispute. The Tribunal decided that in terms of the provisions of Section 4 prevalent at the relevant time, duty was required to be discharged at the time of clearances from the factory to the consignment agent, at the prices at which the goods were sold from the consignment agent, at or about the same time. By following such decision he prayed that the impugned order is not justified and required to be set aside.

ii) Ld. DR referred to the definition of Section 4 prevalent at the relevant time. In particular, he referred to the Sub-Section 4(1)(b) and submitted that the goods were not sold at the factory gate and hence the value is to be ascertained in terms of prescribed Central Excise Valuation Rules, 1975. Rule 4 of the said Rules specifically provides that the valuation shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of removal of goods under assessment. He also referred to the CBEC Circular No.251/85/96-CX dated 14.10.1996, in which it has been clarified, after the amendment in Section 4, that duty is to be paid at the price prevailing at the depot on the date such goods meant for that depots are cleared from the factory gate. In the instant notice, the appellant has adopted lower price for payment of duty and hence differential duty has become payable.

4. Ld. Counsel on behalf of the respondent argued the following;

i) He submitted that the impugned order has been passed in line with the provisions of law. Ld. Advocate referred to the provisions of Section 4 prevalent at the relevant time and submitted that Section 4(1)(a) defines 'normal price' as the price goods are ordinarily sold to a buyer in the course of wholesale trade for delivery at the time and place of removal. The Proviso (i) to Section 4 (1)(a) specifically provides for different normal prices for different classes of buyers and it has been specified that each such price be deemed to be the normal price of such goods in relation to each such class of buyers.

ii) He submitted that goods are sold from depots not only to individual buyers but also to buyers with whom the respondent had agreed to contract prices. He submitted that such contract prices are negotiated and are often lower than the prices to other individual customers. He submitted that the goods meant for supply to such contracts are already pre-identified and such goods are paid central excise duty at such contract prices. The name of the customer is invariably reflected in the invoices issued at the factory gate for such stock transfer. He submitted that each such contract price may be considered as the price for one class of buyers which is sanctioned by Section 4(1)(a) Proviso (i). As such he justified the payment of duty at such lower price for contract sales and he submitted that there is no infirmity in the impugned order.

5. Heard both sides and perused the appeal records.

6. For ready reference, the provisions of Section 4 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;

(ia) where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;

(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, not-withstanding 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 not sold to such dealers, to dealers (being related person), 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;
(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and,
From where such goods are removed;
(ba) "time of removal", in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory;"

It is seen from the definition of Section 4 that depots have been defined as a place of removal distinct from the factory gate. When goods are cleared from the factory gate to the depot, there is no sale but only a stock transfer. But duty is required to be paid at the time of clearance from the factory by virtue of Section 4(1)(ba). When goods are removed from the factory, it is deemed to be clearances of goods from the depots. Section 4(1)(a) defines normal price as the price for delivery at the time and place of removal since removal in this case is deemed to be the depot, the normal price will be the price at the depot at the time of clearance from the factory gate.

7. While there is no dispute to the legal interpretation of the issue as above, dispute has arisen on account of the fact that the appellant has more than one price for sales of the goods from the depot at any given date and time. There is one price charged from individual customer at the depot, whereas in respect of certain class of customer, there are contract prices which are often less than the price charged to the individual customer on any given date and time. Revenue has taken the view that duty is required to be paid only at the highest such price charged to individual customer. This is resisted by the appellant with the submission

that Section 4(1)(a) Proviso (i) provides for different normal prices for different classes of buyers. We have carefully considered the proviso as above and note that it provides when goods are sold at different prices to different classes of buyers (not being related persons) each such price shall be deemed to be the normal price in relation to such class of buyers.

8. In the present case when we find that there is a price charged on any given date from individual buyers, but at the same time at the same date, the lower prices are charged to different customers with whom the appellant has contracted prices, keeping in view the volume of business, promptness of payment etc. It appears to us that each contract price can be considered as applicable to a particular class of buyers. A perusal of the invoices issued at the factory gate in respect of goods meant for supply at contracted prices reveals that, the invoice issued for stock transfer invariably indicates the name of the customer and the contract price. On subsequent sale at the depot, the depot invoice indicates the very same price. In view of the above we are of the view that the appellant has discharged duty for such goods transferred to depot appropriately. Consequently, we find no infirmity in the impugned order which is sustained.

9. In the result, the appeal filed by Revenue is rejected.

(Pronounced in the open court on 19.12.2018)

S/d. S/d.

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(V. Padmanabhan)
MEMBER (TECHNICAL)

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