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

Appeal No.E/256/2009

(Arising out of Order-in-Original No.01/Commissioner/CE/Haldia/Adjn/2009 dated 12.01.2009 passed by the Commissioner of Central Excise, Haldia Commissionerate, Kolkata)

M/s Haldia Petrochemicals Ltd. ……… APPELLANT(S)

Versus

Commissioner of Central Excise, Haldia

…RESPONDENT (S)

APPEARANCE
Shri H.K.Chakraborty, GM(F&A) & Suprabhat Roy for the Appellant
Shri K.Choudhari, Suptd. (AR) for the respondent.

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

Date of Hearing : 11.12.2018

Date of Pronouncement : 14.12.2018

ORDER NO.FO/77096/2018

Per Bench :

The present appeal is against the Order-in-Original No.01/Commissioner/CE/Haldia/Adjn/2009 dated 12.01.2009. The appellant is engaged in the manufacture of various petrochemical products including HDPE, LLDPE, PP Granules classifiable under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985. The department noticed that the appellant was charging a lower price in respect of clearances made to certain buyers in return for invalidation and transfer of Advance License in favour of the appellant. In respect of other buyers who did not effect such transfer of Advance License, higher price was found to have been charged for identical goods. The Departmental Authorities took the view that the difference in price between the clearances made to buyers who surrendered Advance License and others who did not, should be considered as additional consideration flowing for the goods and in terms of Rule 6 of the Central Excise Valuation Rules, 2000, it was proposed to add the difference in price as an additional consideration. Accordingly, differential Central Excise Duty was worked out and demanded for clearances made during the period November,2002 to June, 2007, by issue of a show cause notice dated 24.10.2007. After completion of the due process of adjudication, the impugned order was passed upholding the demand for differential central excise duty. In addition, the Order also imposed interest and penalty under Section 11AC, equal to the demanded differential Central Excise duty. This Order is under challenge in the present appeal proceedings.

2. The appellant is represented by Shri H.K.Chakraborty, GM(F&A) & Suprabhat Roy and Revenue is represented by Shri K.Choudhari, Suptd. (AR).

3. On behalf of the appellant, the following main submissions were made;

i) The appellant has made clearances of the goods manufactured to different classes of buyers at different prices. He added that for clearances made to 100% Export Oriented Unit (EOU), Deemed Export as well as buyers who transferred advance license in favour of the appellant, were charged the same price uniformly. He submitted that such prices were determined on the basis of Import Parity Price. He added that the benefit accruing to the appellant by way of transfer of advance license was never explicitly deducted to arrive at the lower price.

ii) In terms of the provisions of Section 4 of the Central Excise Act, 1944, the manufacturer is allowed charge different transaction values for different classes of buyers. He emphasized that clearances made to buyers transferring advance licenses, EOUs and Deemed Export form one class of buyers. The prices charged to this class of buyers cannot be compared with clearances made to be any other class. He pointed out that the department has proceeded to add additional consideration on the basis of the price at which goods were cleared to other independent buyers outside the above class. He submitted that the Central Excise Law on Valuation does not sanction such loading. He admitted that the Adjudicating Authority has supported his order for upholding payment of differential duty by placing reliance on the decision of the Hon'ble Supreme Court in the case of CCE, Bhubaneswar-II vs. IFGL Refractories Ltd. [2005(186) ELT 529(SC)]. He added that the issue before the Apex Court was not identical to the present facts of the case. The Apex Court in that case was considering a different dispute whether the benefit accruing by way of transfer of advance license has to be considered as a consideration even though the same was flowing as a consequence of Government Policy.

iii) He also submitted that the demand in this case is, in any case, hit by time bar. He submitted that the assessable value used for computing the applicable Central Excise duty was declared by the appellant in their periodic returns. Appellant was also under the bonafide belief that there was no need to include such benefit as additional consideration since the Tribunal in the same case of IFGL had earlier held in favour of the assessee by taking the view that the benefits received from Government Policies cannot be considered as additional consideration.

The decision was subsequently reversed by the Apex Court. Following such bonafide belief, he submitted that the demand in any case cannot be upheld beyond normal time limit. To support his arguments he relied on the decision of Mumbai Bench of the Tribunal in the case of KDL Biotech Ltd. vs. CCE Raigad [2013(288) ELT 81 (Tri-Mum)].

iv) Finally he submitted that the impugned order may be set aside.

4. Ld. DR justified the impugned order. He made the following arguments;

i) He referred to the decision of the Hon'ble Supreme Court in the case of IFGL Refractories Ltd. (supra) and submitted that the findings of the Hon'ble Supreme Court in the case is that the benefits in the form of surrender of advance licenses are to be considered as additional consideration for the transaction between the assessee and the buyers who transfers such advance licenses as a condition for such purchase. The condition for such sale is infact to be considered as the consideration for the sale as has been held by the Hon'ble Supreme Court.

ii) He further reiterated the fact that the Supreme Court itself has reiterated their own findings in the case of IFGL Refractories Ltd. (supra) in the subsequent decision in the case of Commr. Of C.Ex, Nagpur-I vs. Indorama Synthetics (I) Ltd. [2015(323) ELT 20 (SC)]. He also referred to the provisions of the Contract Act, 1872. In Section 2 (d) of the Contract Act, the consideration has been defined. He also relied on the case of Commr. Of C.Ex, Mumbai vs. Fiat India Pvt. Ltd.[2012(283) ELT 161 (SC)] to support his argument that 'Consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promise or by the transferor to the transferee.

iii) Finally he submitted that the impugned order needs no interference.

5. Heard both sides and perused the appeal records.

6. As per the facts of the present case, the appellant has charged lower price for the buyers who transferred the advanced licenses in favour of the appellant. The adjudicating authority has also with the money value of such additional consideration is to be added to the price charged from such buyers to arrive at the correct transaction value in terms of Rule 6 of the Central Excise Valuation Rules. This proposing has been strongly contested and resisted by the appellant. It has been submitted that the buyers who transferred advanced licenses alongwith buyers who are EOUs and Deemed Exports, are considered to be in the same class of buyers by the appellant who are charged the same price arrived at on the basis of Import Parity Price. It is not disputed that the buyers who are EOUs and Deemed Exports do not transfer the advanced licenses in favour of the appellant, but are still charged the same lower price as those buyers who transferred advanced licenses.

7. The crux of the dispute which needs to be settled is whether the transfer of advanced licenses are to be considered as a consideration for sale of the goods by the appellant to the buyers. The transferred advanced licenses, can be beneficially used by the appellant for duty free import of the raw-materials required for the manufacture in the appellant’s factory. Naturally it is obvious that certain benefit accrues to the appellant through the

transferred advanced licenses. From the record it is seen that the demand for differential duty has been confined to only those cases where advanced licenses have been transferred in favour of the appellant though such prices have been charged from buyers who are EOUs as well as Deemed Exports, no demand for differential duty has been raised.

8. The adjudicating authority has followed the decision of the Hon'ble Supreme Court in the case of IFGL Refractories Ltd. (supra) we have very carefully gone through the decision of the Supreme Court. Relevant portions of the Supreme Court are reproduced below:

> *"9.Ultimately it was agreed that M/s. Visakhapatnam will surrender its Advance Licences and in lieu thereof the Respondents get the Advance Intermediate Licences. Thus, without the Advance Licences of M/s. Visakhapatnam Steel Plant, being made available to the Respondents, the prices would have been as were quoted earlier. It is only because of the Advance Licences being surrendered by M/s. Visakhapatnam Steel Plant and in lieu thereof Advance Intermediate Licences being made available to the Respondents that the Respondents could offer lower prices. The surrendering of Licences by M/s. Visakhapatnam Steel Plant and as a result thereof the Respondents getting the Licences had nothing to do with any Import and Export Policy. It was directly a matter of contract between the two parties. This resulted in additional consideration by way of "Advance Intermediate Licence" flowing from M/s. Visakhapatnam Steel Plant to the Respondents. The value received therefrom is includable in the price. The Tribunal was wrong in stating that such an arrangement can never be placed upon the platform of additional consideration. In so stating the Tribunal has ignored and/or lost sight of the fact that it was in pursuance of the contract of sale between Respondents and M/s. Visakhapatnam Steel Plant that the Licences were made available to Respondents. The Export and Import Policy had nothing to do with the arrangement/contract under which the Licences flowed from the buyer to the seller. At the costs of repetition it must be mentioned that had the Respondents had Advance Intermediate Licence on their own i.e. without M/s. Visakhapatnam Steel Plant having to surrender its Licences for the purposes of the contract, then the reasoning of the Tribunal may have been correct. But here, in pursuance of the Contract of Sale, there is directly a flow of additional consideration from the buyer to seller. The value thereof has to be added to the price. We are thus unable to accept the broad submission that where parties take advantage of policies of the Government and the benefits flowing therefrom, then such benefit cannot be said to be an "additional consideration"."*

Ratio of the above decision is that in addition to the price being paid for the goods, the transfer of advanced import license in favour of the seller by the buyer enable the seller of the good to effect duty free import of the raw-materials and brings out the cost of production. Hence, this constitutes additional monetory consideration which has to be added under the provision of Rule 6 of the Central Excise Valuation Rules. It is further seen that the Supreme Court has reiterated the above view in the subsequent case of Indorama Synthetics (I) Ltd. (supra) which has been relied by the Revenue. The Supreme Court has found no reason to review its own decision in IFGL Refractories Ltd. case. By respectfully following the decisions of the Supreme Court, we conclude that the Revenue was justified in adding such monetory value attributable to the transfer of advanced lincenses in favour of the appellant by the buyers.

9. The appellant has sought to distinguish the decision of the Supreme Court in the case of IFGL Refractories Ltd. with the submission that clearances made to EOUs, Deemed Exports as well as transferors of advanced license, constitute a single class of buyers, for whom the same Import Priority Price is charged. We are not much impressed by the argument. Even if same price is being charged for all the three categories as above, it is evident that the benefit accrues to the appellant only in cases where advanced licenses are transferred in their favour. Consequently, the Revenue is justified only in loading such clearances.

10. The appellant has also submitted arguments on the grounds of time bar. The show cause notice dated 24.10.2007 has raised the demand for the period November, 2002 to June, 2007; clearly the demand involves extended period of limitation. The Supreme Court decision in the case of IFGL Refractories Ltd. (supra) reversed the earlier decision of the Tribunal reported in [2001(134) ELT 230(Tri.)]. Hence, it is to be noted that the issue was in favour of the appellant till the decision of the Supreme Court. Consequently, we are of the view that the appellant is entitled to a bonafide

belief that such additional consideration is not required to be added. Hence, we are of the view that the Revenue is not justified in invoking the extended period of limitation by alleging suppression of facts. Consequently, the demand is to be restricted to normal time limit. Further in the facts and circumstances of the present case, we set aside the penalty.

11. In the result, the appeal is partly allowed.

(Pronounced in the open court on 14.12.2018)

S/d.	S/d.
(P. K. CHOUDHARY) **MEMBER (JUDICIAL)**	**(V.Padmanabhan)** **MEMBER (TECHNICAL)**

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