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

Appeal No. E/134/2007

(Arising out of Order-in-Original No. 08/COMMR/CH-44/ADJ/DIB/06 dated 09.11.2006 passed by the Commissioner of Central Excise, Dibrugarh.

M/s. Assam Forest Product Pvt. Ltd.
Appellant (s)

Vs.

Commissioner of Central Excise, Dibrugarh
Respondent (S)

Appearance:
Dr. Samir Chakrabarty, Sr. Adv. & Shri Abhijit Biswas, Adv. for the Appellant (s)
Shri S. K. Chowdhary, Suptd. (A. R.) for the Revenue

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: -16.07.2018
Date of Pronouncement:-15/11/2018
Order No. FO/77190/2018

PER SHRI P. K. CHOUDHARY

This is the third round of Litigation before the Tribunal. Briefly stated the facts of the case are that the appellant is having their registered office and Head Office at Dibrugarh and factory at Makum. A Show Cause Notice dated 11/12/1985 was issued alleging under valuation and consequent short-levy and short payment of Central Excise Duty on Ply-wood, commercial block boards, etc. The instant appeal is against the Denovo Order-in-Original dated 09/11/2006 pursuant to the Order dated 28/03/2003, passed by the Tribunal in appeal No. E/184/2002. Period of the dispute is June 1981 to February 1984. The issues involved in this case are as under:-

(i) Whether the goods sold from the factory gate of the appellant during the said period were sold to/through firms which were "related persons" within the meaning of the Act.

(ii) Whether for the purposes of determining assessable value of goods sold from depots/selling agent's places in the light of the statutory provision then prevailing factory gate sales available, though of a small percentage, would be the basis on which the assessable value and consequently the excise duty payable on the subject goods sold from the depots/selling agent places are to be determined?

(iii) Whether the demand of duty confirmed by the said order is barred by limitation?

(iv) Whether the duty demand confirmed the said order is sustainable.

(v) Whether the penalty imposed upon the appellant under Rule 173Q of the said Rules is legally valid and tenable?

2. The Ld. Senior Advocate filed a compilation of the case laws, written notes of arguments and list of dates and argued the issue one by one.

3. Regarding the first issue, it is the submission of the Ld. Senior Advocate that it has been conclusively established that at all materials times the subject goods which were sold on ex-factory basis by the appellant were to independent wholesale buyers at arms length and on principal to principal basis and the allegations/perfunctory finding that they were sold to firms having "related person' within the meaning of the Act has no merit or substance whatsoever.

It is also his submission that there can be no dispute whatsoever that the appellant and the parties to whom the said goods were sold at the factory gate on wholesale basis during the said period cannot be termed as a "related person" within meaning of Section 4 of the Act.

In support of his submissions, he relied upon various decisions which are as under:

(a) Union of India Vs. Atic Industries Limited, 1984 (17) ELT 323 (SC)

(b) The Commissioner of C. Ex. Vs. Goodyear South Asia Tyre Pvt. Ltd., 2015 (322) ELT 389 (SC)

(c) Eastern Bakeries Pvt. Ltd. Vs. Commissioner of Central Excise, Kolkata, 2013 (293) ELT 593 (T-Kol)

(d) Southern Bottlers Pvt. Ltd. Vs. Collector of Central Excise, 1989 (43) ELT 427 (T)

(e) Collector of Central Excise Vs. Southern Bottlers Pvt. Ltd., 1997 (92) ELT 70 (SC).

4. Regarding the Second issue i.e. issue no. 2, the Ld. Senior Advocate argued that though the extent of sale at factory gate was small as compared to the total turnover of the appellant. There was in fact such sale at the factory gate to wholesale buyers. It is also established from the aforesaid that such sales were to independent buyers on principle to principle basis and not to "related persons" within the meaning of the Act. As such, in terms of Section 4(1)(a) of the Act, as was in force during the relevant period, the normal price thereof i.e. the price at the factory gate would be the value on which Central Excise Duty is chargeable and

payable on the Subject goods manufactured and cleared during the said period.

The Ld. Senior Advocate further argued that this issue stands settled by the decisions of Hon'ble Supreme Court, Hon'ble High Courts and the Tribunal. Some of the decisions are as under:-

(a) Indian Oxygen Limited Vs. Collector of Central Excise, 1988 (36) ELT 723 (SC)

(b) Nagpal Petro Chem. Limited Vs. Assistant Collector of C. Ex., 1979 (4) ELT (J) 117 (Mad.)

(c) State of Karnataka Vs. Union of India, 1978 (2) ELT (J) 564 (Kar.)

(d) Tata Pigments Limited Vs. Commissioner of C.Ex., 2001 (37) ELt 1212 (T-Kol.)

(e) Kitply Industries Limited Vs. Commissioner of Central Excise, 2003 (152) ELT 198 (T-Kol.)

(f) Collector of Central Excise Vs. Falcon Tyres Limited, 2002 (147) ELT 1166

(g) Voltas Limited Vs. Commissioner of Central Excise, 2005 (191) ELT 1132 (P)

(h) In Re: Woodcrafts, Assam, 1982 (10) ELT 583 (GOI)

4. Regarding the 3rd issue, it is the submission of the Ld. Senior Advocate that the demand confirmed is barred by limitation.

5. Regarding the 4th issue it is submitted that there has been no short payment or short levy of Central Excise Duty in the instant case.

6. In respect of the last and 5th issue, is has been submitted that penalty of Rs.50,000/- imposed under Rule 173Q) of the Rules is illegal, invalid and bad in law.

7. Heard both sides and perused the appeal records.

8. We find that the Tribunal vide the Order No. SP-125/A-154/CAL/1991 dated 20/02/1991 in Appeal no. E/565/90 (CAL) allowed the appeal on the ground of violation of principles of Natural Justice.

We observe that in the de novo proceeding, the Appellant made submissions based on the preliminary reply filed by it under letter dated April 22, 1987, while continuing with its demand for supplying of certain relied upon documents, which allegedly had not been provided, but this contention was disputed by the Department. Pursuant to the said hearing , the impugned de novo adjudication order dated November 9, 2006 was passed by the Commissioner.

9. The first issue that is to be determined is, whether the goods, sold from the factory gate of the Appellant, during the period from January, 1981 to February, 1984, were sold to or through the persons who were 'related persons' within the meaning of Section 4(4)(c) of the provisions of the Central Excise Act then in force.

10. We find that the issue is no more res-integra as this stands settled by the decision of Hon'ble Supreme Court in, inter alia, ***Union of India Vs. Atic Industries Limited [1984 (17) ELT 323 (SC)]***. It was held in the said judgment as under:-

> ***" 5. .... What the first part of the definition requires is that the person who is sought to be branded as a 'related person' must be a person who is so associated with the***

assessee that they have interest, directly or indirectly, in the business of each other. It is not enough that the assessee has an interest, direct or indirect, in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The equality and degree of interest, which each has in the business of the other may be different. The interest of one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect. That would not make any difference, so long as each has got some interest, direct or indirect, in the business of the other."

11 This principle has been reiterated by Hon'ble Supreme Court in the case of ***CCE Vs Goodyear South Asia Tyres Private Limited [2015 (322) ELT 389 (SC)]***. In paragraphs 8 and 9 of the Judgment it has been held as follows:

> *"8. The expression 'in the business of each other' clearly denotes that the interest of the two persons have to be mutual i.e. in each other, in order to treat them as related persons. We find that the order of the Member Justice that only on the ground that the two companies had given a loan of Rs. 85.66 Crores to the assessee company was treated as sufficient to establish the relationship between the assessee and the buyer. That only shows one way traffic whereas, requirement is that of the two way traffic. The other Member, in our opinion, aptly held that this cannot be the*

> *factor which would show the mutuality of interest. For this purpose, he referred to the judgment of this Court in 'Union of India Vs. Atic Industries Limited [1984 (17) E.L.T. 323]. The Third Member has, therefore, rightly concurred with the aforesaid view of Member (Tribunal).*
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> *9. The assessee did not have any interest in the business of the buyers (Goodyear Indian Limited and CEAT Limited). Given this, the requirement of 'mutually of interest' which is a pre-requisite under Section 4(4)(c) of the Act does not get satisfied. The matter is squarely covered by the decisions of this Court in the case of Atic Industries Ltd."*

12. We observe that in the instant case, there is no evidence disclosed in either the show cause notice or the impugned order which establishes that the requirement as stated above, laid down by Hon'ble Supreme Court that both the Appellant and the parties to whom it sold the goods, had interest in the business of each other. The evidence on record discloses that the Appellant did not have any interest in the business of its buyers. Hence, there was one way interest .Whereas the pre-requisite is that of mutual interest, which has not been satisfied. Therefore, it cannot be said that the Appellant and its buyers were related persons and that the sale of the goods were to or through related persons, as envisaged under Section 4(4)(c) of the Central Excise Act. The contrary finding of the Commissioner is thus not sustainable.

13. The next issue to be decided is whether there was factory gate sale of the Appellant's goods during the material period along with depot sale of such goods and if so, whether in determining the assessable value of the goods, the factory gate sale price or the depot sale price is to be considered and duty liability determined accordingly.

14. We find that in the impugned order of the Commissioner, it is acknowledged that the Appellant Company 'sold small quantity of their goods at the factory gate' and that such goods were cleared 'ex-factory to the independent buyers'. It is, therefore, established that the Appellant had factory gate sales, though of small quantity, which were cleared to independent buyers.

15. Dealing with the provisions of Section 4 of the Central Excise Act, as prevailing during the period involved herein, it has been held by Hon'ble Supreme Court in ***Indian Oxygen Limited Vs. Collector of Central Excise [1988 (36) ELT 723 (SC)]*** that if ex-factory price is ascertainable, such ex-factory price shall be the basis for determination of value under Section 4 of the Act and the question of adding of transportation charges from the factory gate to the place of delivery and other transport related expenses cannot be added to the wholesale price at the factory gate because the duty of excise is taxed on manufacture and not on the profits made on transportation charges. These charges have to be excluded from the assessable value. Following the said decision, it has been held in the case of ***Southern Bottlers Private Limited Vs. CCE [1989 (43) ELT 427 (Tri - LB)]*** that in such a case wholesale price, charged at the factory gate, is treatable as assessable value irrespective of the quantum of such sales. The appeal against this order of the Tribunal's Larger Bench, preferred by the Department, was dismissed by the Supreme Court [***Collector Vs. Southern Bottlers Private Limited – 1997 (92) ELT A70 (SC)***] To same effect is the decision of the Tribunal in the case of ***CCE Vs. Falcon Tires Limited [2002 (147) ELT 1166 (Tri – Del)]***. In this case 2% sales were

effected at factory gate whereas 98% sales were effected through depots. It was held that ex-factory price is to be taken as basis in determining assessable value even with reference to depot sales, ex-factory price being ascertainable and that transportation charges, being post manufacturing expenses, are not included in assessable value, following the decision of the Supreme Court in ***Indian Oxygen Ltd. Vs. CCE (Supra)***.

16. On behalf of the Department the learned DR has relied upon the decisions of the Tribunal in ***Collector of Central Excise Vs. Taparia Tools Ltd.***, ***2001(131)ELT 306(Tri-LB)*** and ***Allied Resins & Chemicals Ltd. Vs. Commissioner of C.Ex. 2008(226)ELT 126 (Tri-Kol)*** to distinguish the decision of Hon'ble Supreme Court in Indian Oxygen Ltd. Vs. Collector of Central Excise (supra). It is seen that the decision of the Supreme Court in Indian Oxygen Ltd. Vs. CCE (supra) and the ratio laid down therein that where there are sales from factory gate and from the depot, it is the factory gate price that should be applied to determine the value both of goods sold from the factory gate and goods transferred to the depot for sale therefrom was reaffirmed by the Larger Bench decision of Hon'ble Supreme Court in ***Government of India Vs. Madras Rubber Factory Ltd., 1995(77) ELT 433(SC)*** (paras 18 & 21). In view of this, the distinction sought to be made by the Larger Bench of the Tribunal in Taparia Tools Ltd.'s case (supra) which was followed in Allied Resins & Chemicals Ltd. (supra) can no longer be applicable as observed in the case of ***Commissioner of C.Ex.& Cus Vs. Kinetic Engineering Ltd. 2001 (138) ELT 344 (Tri)***. The said

decisions therefore stand effectively overruled by the decision of the Apex Court in Madras Rubber Factory Ltd.'s case (supra).

17. We find that In the impugned order it has been observed that the Appellant Company had collected additional charges through statement of value as regards the goods cleared ex-factory from the buyers without declaring the same to the Central Excise Department and had consequently evaded Central Excise duty amounting to Rs.4,89,544.86, during the material period. However, it is seen from the show cause notice that the statement of value represented 'various expenses of transport, delivery charge, storage charge, handling charge, packing charges, octroi and other selling expenses.' These are all post manufacturing expenses and there is no evidence that any part of the said expenses were incurred within the factory premises prior to clearance of the goods from the factory gate. Hence, these charges are not to be included in determining the assessable value of the goods cleared ex-factory by the Appellant.

18. It is our considered view that there has been no under-valuation of the goods sold by the appellant during the material period and hence, there has been no short payment of Central Excise duty payable. The demand of duty and interest, confirmed by the impugned order, is thus unsustainable. The penalty imposed is also unsustainable.

19. The Appellant has also challenged the impugned order on the ground that the demand of duty is barred by limitation. However, since we have decided the issue on merits, in favour of the Appellant, we refrain from dealing with this issue.

20. In the result, the impugned order of the Commissioner is set aside and the appeal is allowed with consequential relief, if any.

(Order pronounced in the open court on 15/11/2018.)

Sd/-
(BIJAY KUMAR)
MEMBER (TECHNICAL)

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

Pooja