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

Ex.Appeal No.42/09

(Arising out of Order-in-Original No.09/Kol.VI/Commr./2008 dated 05.11.2008 passed by the Commissioner of Central Excise, Kol. VI)

M/s Paharpur Cooling Towers Ltd.
Applicant (s)/Appellant (s)

Vs.

CCEx., Kol.VI
Respondent (s)

Appearance:

Shri N. K. Kothari, C.A. for the Appellants(s)
Shri S. S. Chattopadhyay, Supdt. (AR) for the Revenue

CORAM:

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

Date of Hearing : 09.01.2019
Date of Decision : 09.01.2019

ORDER NO.FO/75152/2019

Per Bench :

The present appeal challenges the Order-in-Original No.09/Kol.VI/Commr./2008 dated 05.11.2008.

2. The appellant is engaged in the manufacture of cooling towers and parts thereof falling under Chapter Heading 84 of the First Schedule to the Central Excise Tariff Act, 1985. The dispute pertains to the factory of the appellant situated at Diamond Harbour Road, Kolkata. They have other manufacturing units located at Bhasa (Bishnupur) and Sahibabad. During the period of dispute i.e. April, 2003 to October, 2007, the appellant manufactured and cleared certain

excisable goods from Diamond Harbour Factory on stock transfer basis to their other sister units for carrying out further manufacture. The dispute in the present case is regarding the valuation to be adopted for payment of Central Excise duty on such stock transfer. During the course of Audit, the Departmental officers, after scrutiny of records, came to the conclusion that the valuation has not been properly adopted in accordance with the CAS-4 specification. Since the clearance of goods are to their own sister units, valuation is required to be done on the basis of Rule 11 read with Rules 5,8 & 9 of Central Excise Valuation (Determination of Value of Excisable Goods) Rules, 2000. After re-determining the value for such stock transfer, the Department proceeded to demand the differential duty amounting to Rs.68,82,870/- by issuance of show-cause notice dated 05.05.2008. After conclusion of the adjudication proceedings, the lower appellate authority, by passing the impugned order, confirmed the demand for differential duty. In addition, he also imposed penalty equal to such differential duty under Section 11AC of the Central Excise Act, 1944. The adjudicating authority, further, also appropriated an amount of Rs.46,44,174/- already admitted and paid by the appellant. This order is under challenge in the present proceedings.

3. The appellant is represented by Shri N. K. Kothari, ld.C.A. and Revenue is represented by Shri S.S.Chattopadhyay, ld. D.R.

4. The ld.C.A. for the appellant, advanced the following arguments :

(i) He submitted that the appellant had paid the duty for such stock transfer on the basis of the value ascertained by them. However, during the course of adjudication proceedings, the appellant has re-worked the cost of the goods cleared on the basis of CAS-4 valuation and has paid the differential duty as per their own calculation.

(ii) The Department, however, has not accepted the valuation as re-determined by the appellant. It is the view of the Department that the value arrived at by the appellant as per CAS-4 Standards, is required to be further loaded with the amount of freight payable for transportation of the goods from the Diamond Harbour Unit to the sister units. He further submitted that there is no basis for the stand adopted by the Department.

(iii) In respect of one of the items i.e. PVC Waste (PVC Granulated Chips), these goods have been cleared not only to their sister units, but also to certain independent buyers. In this connection, it is the stand of the appellant that the valuation of such goods can be done on the basis of value adopted for clearance to independent buyers as decided by the Larger Bench of the Tribunal in the case of Ispat Industries Ltd. reported in 2007 (209) ELT 185 (Tri.-LB).

(iv) The ld.C.A. submitted that the differential duty arising on the basis of CAS-4 Standards for most of the items and as per value adopted for clearance to independent unit, in respect of the PVC Waste, has been worked out totaling to Rs.46,44,174/-. The liability to this extent has been admitted and paid by the appellant.

(v) Finally, he submitted that the differential duty demand may not be maintainable in any case since, any differential duty paid at the end of the Diamond Harbour Unit, will be available as cenvat credit by receiving sister unit. This leads to revenue neutral situation and under such circumstances, the levy of differential duty as well as levy of penalty is not justified in view of the decision of the Tribunal in the case of Anglo French Textiles Vs. CCEx. : 2018 (360) ELT 1016 (Tri.-Chennai) affirmed by the Hon'ble Supreme Court in Commissioner Vs. Anglo French Textiles : 2018 (360) ELT A301 (SC).

5. The ld.D.R. for the Revenue justified the impugned order. He submitted that the valuation of the goods has been done properly leading to demand for differential duty.

6. Heard both sides and perused the records.

7. The dispute in the present case is regarding the valuation of the goods cleared by the appellant from Diamond Harbour Unit to other sister unit. Since no sale is involved in such transfer, valuation is required to be done in terms of the Central Excise Valuation Rules, 2000. The Department, during Audit, formed an opinion that the valuation has not been done in terms of the above Rule and in terms of CAS-4 Standard prescribed in this regard. The appellant has since re-worked the valuation of the goods cleared during the disputed period in terms of CAS-4 Valuation and has admitted the liability and paid the differential duty to the extent of Rs.46,44,174/-, but the adjudicating authority has taken the view that in addition of the amount admitted as payable by the appellant, further differential duty is required to be paid by including freight, which is payable for transfer of the goods from the Diamond Harbour Unit to their other sister units. We find no legal basis for addition of this freight amount. The goods are required to be valued at the time of clearance from the appellant's unit and

freight upto the recipient unit is not required to be added. As such, we find that there is no justification for adding such amount for arriving at the differential duty.

8. In respect of the PVC Waste, the claim of the appellant is that the value is not required to be done on the basis of Rule 8 and CAS-4 Standard inasmuch as the value for clearance to independent buyers was available. We find no infirmity in this stand since as per the decision of the Larger Bench of the Tribunal in the Ispat Industries (supra), the valuation of the goods as per sale to independent buyer, may be adopted even in respect of clearance to sister unit.

9. In any case, we find that this is a case for revenue neutrality inasmuch as any differential duty paid by Diamond Harbour Unit will be available as cenvat credit by receiving unit. On the ground of revenue neutrality also, we find no basis for demand of differential duty and imposition of penalty. In this connection, the observation of the Tribunal in the case of Anglo French Textiles (supra) 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."*

10. The above decision has also been affirmed by the Hon'ble Supreme Court.

11. In view of the above findings, we restrict the demand for differential duty to Rs.46,44,174/-, which has been admitted and paid by the appellant as above. In these circumstances, we find no justification for imposition of penalty, which is set aside.

12. In the result, appeal is partly allowed.

(Dictated and pronounced in the open court)

Sd/	Sd/
(P.K.Choudhary)	**(V.Padmanabhan)**
Member (Judicial)	**Member (Technical)**

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