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

Appeal No. E/444/2009

Arising out of Order-in-Original No. 12/COMMR/CE/KOL-III/2009-10 dated 11.05.2009 passed by the Commissioner of Central Excise, Kolkata-III.

M/s EXIDE INDUSTIES LTD.

….Appellant (s)

Vs.

Commissioner of Central Excise, Kolkata-III

….Respondent (s)

Appearance:
Shri Ravi Raghavan, Advocate & Shri Harsh Shukla, C. A. for the Appellant (s)
Shri A. Roy, Suptd. (AR) for the Respondent(s)

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

Date of Hearing: - 17.07.2018

Date of Pronouncement:-11.01.2019

ORDER No…FO/A/75170/2019

Per Bench:

The present appeal has been filed against Order-in-Original No. 12/Commr./CE/KOL-III/2009-10 dated 11.05.2009 passed by the Commissioner of Central Excise, Kolkata-III.

2. The facts of the case in brief are that the appellant is engaged in the manufacture of electrical accumulators classifiable under Chapter 85 of the Central Excise Tariff Act. The appellant sold the goods at the

factory gate and also stock transferred to their depots for further sale. The appellant also sold some quantity of the goods to Exide Products Limited (EPL) who further sold the goods to independent customers. The price for the goods sold at the factory gate was adopted as the price for sale to EPL on which excise duty was paid.

Proceedings were initiated against the appellants by noice dated 28.6.1999 on the ground that since EPL is a related party, the price at which EPL sold to their customers should be adopted as the basis for determining duty. The notice proposed to demand differential duty of Rs.42,23,240/- for the period of 01.12.1998 to 31.03.1999.

The Commissioner by the impugned order has confirmed the demand on the ground that the appellant had sold goods to its related party (Exide Products Limited) for further sale, hence in terms of proviso (iii) to Section 4(1)(a) of the Central Excise Act, 1944, the value at which the related party sold the goods should be adopted as assessable value for the purpose of levy of excise duty. The impugned order has confirmed the demand alongwith interest and imposed penalty under Section 11AC of the Central Excise Act, 1944. Hence, the present appeal before the Tribunal.

3. The Ld. Counsel for the appellant submits that proviso (iii) to Section 4 (1) (a) of the Central Excsie Act, 1944 was not applicable in the instant case since the price to wholesale dealers and related party remained same. He submitted that since comparable price to unrelated buyer was available, the rejection of assessable value and demanding duty on the basis of sale price of EPL is not correct. It was further submitted that in the appellant's own case for the prior period, the

issue has been settled by the Hon'ble Tribunal as reported in Exide Industries Limited 2002 (144) ELT 451 (Tri-Kol.).

The Ld. Counsel further submitted that the department had adopted an adhoc percentage to contend that prices were not same without actually substantiating that the prices charged by the assessee was different.

4. The Ld. Authorized Representative for the Respondent while reiterating the findings of the Commissioner in the impugned order relied on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs Detergents India Limited 2015 (318) ELT 559 (SC) to contend that since the assessee was selling goods through related party, Section 4(1)(a)(iii) of the Central Excise Act, 1944 was applicable.

5. The Ld. Counsel for the appellant in his rejoinder contended that the Hon'ble Supreme Court had laid down applicability of Section 4(1)(a)(iii) of the Central Excise Act, 1944 under three circumstances, i. e. (i) presence of arrangement, (ii) sale of goods generally through related party and (iii) sale of goods directly and indirectly through related party. It was submitted that first condition was not satisfied inasmuch as the Department failed to show any arrangement in place. Further, the percentage set by Hon'ble Supreme Court i.e. 50% does not flow any statute to be adopted in all cases. He further submitted that the Department has also failed to show that price at which goods were sold was lower than sale made to other wholesale dealers. Thus, Section 4 (1)(a)(iii) of the Central Excise Act, 1944 was not applicable in the instant case.

6. We have considered the submissions made by both sides and perused the documents on record including the findings given by the Commissioner in the impugned order. the dispute in the present case relates to the valuation of the goods sold by the appellant to their related entity Exide Products Limited (EPL) for further sale. The appellant had adopted the comparable price available for the same goods sold at the factory for discharging duty liability on the goods sold to EPL. The case of the department is that the price at which EPL has sold the goods to their customers should be adopted for discharging duty in terms of 3rd proviso to Section 4(1)(a) of the Central Excise Act.

The contention of the appellant is that since the entire quantity of goods have not been sold through EPL there is no question of resorting to the 3rd proviso to Section 4(1)(a) and consequently adopting the price at which EPL sold the goods for the purpose of payment of duty.

7. Proviso (iii) to Section 4(1)(a) of the Central Excise Act, 1944 is reproduced below:-

> "(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 of dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail."

The above provision clearly stipulates that the same will apply when the goods are generally not sold in wholesale trade except to or through the related person. In the present case, admittedly the appellant has sold goods to independent customers in addition to sale to EPL. The price at which the goods were sold to independent buyers was adopted as the basis for the valuation of goods sold to EPL.

8. In our considered view, the above provision specifically excludes from its operation cases where the goods are partly sold to un-related wholesale dealer and partly to related person. It is clear from the wording of the said proviso itself. The Commissioner in the impugned order has admitted the fact that the appellant in addition to sale of the goods to EPL has also sold the goods to unrelated buyers. There is also no dispute on the fact that the comparable price to independent customer has been adopted as the basis for discharging duty on sale to EPL.

9. We further note that similar issue has been decided by the Tribunal in the Appellant's own case reported at 2002 (144) ELT 451 (Tri-Kol.) wherein it was held that sale of goods to others buyers alongwith related party sale would not attract third proviso to Section 4(1)(a) of the Act. The relevant finding of the Tribunal is extracted below:-

> ñIn the present case, a small portion of the goods is sold at the factory gate to Government buyers etc. Remaining goods are sold from the depots. The depot price and ex-factory price are the same. A considerable portion of the sales ranging from 23% in 1997-98 to about 50% in 1995-96 was to un-related wholesale dealers. Revenue

has no grievance that the sale price to un-related wholesale dealers does not constitute normal value of the goods. Sales to the subsidiary are at the same price as to wholesale dealers. In such a situation, we are not able to agree with the finding in the impugned order that the goods have not been generally sold to wholesale dealers and that proviso (iii) to Section 4(1)(a) is attracted in the present case. This position remains settled by the decision of the Honðble High Court of Bombay in the case of *Cosmos (India) Rubber Works, Pvt. Ltd. & Anr.* and the other decisions relied upon by the ld. Counsel for the appellants. We do not find this position anyway affected by the fact that most of the sales are from the depots of the assessee.

8. In view of our above findings, we hold that proviso (iii) to Section 4(1)(a) is not attracted to the present case and the duty demand made in the impugned order by taking resort to this proviso is not sustainable. Penalty imposed cannot survive independently of the duty demand. Accordingly, we set aside the impugned order and allow appeal with consequential relief, if any, to the appellants. We are not going into the merits of other submissions of the appellants as the appeal succeeds on the question of applicability of proviso (iii) to Section 4(1)(a) itself.ö

10. We further note that in the present case there is no evidence led in by the department to show that the relationship has influenced the price for the same to be rejected. It is also noticed that though the department has proposed to invoke the 3rd proviso to Section 4(1)(a), there is no evidence to show the prices which have been adopted for determining the differential duty. On the contrary we note that the impugned order has confirmed the demand on a notional basis by enhancing the price at which duty was paid by 12.14%. There is no justification of adopting this method of quantifying the demand as the

same is not supported by any provisions of law. We also note that the judgment of the Hon'ble Supreme Court in the case of Detergents India Limited (Supra) relied by the Ld. Authorized Representative for the department is distinguishable on facts. The Hon'ble Supreme Court while analyzing the 3rd proviso to Section 4(1)(a) held as under:-

> *"**10.**Proviso (iii) then deals with the price that is to be taken into consideration in case sales are made to related persons. Three basic ingredients are necessary before proviso (iii) gets attracted. The first ingredient is that the assessee must "arrange" that goods are sold by him in a particular manner. The second ingredient is that such arrangement must be such that the goods are "generally" sold by the assessee in the course of wholesale trade to or through a related person. And thirdly, such sale need not be to the related person - it can even be through the related person.*
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> ***11.**We are of the view that the "arrangement" spoken of in the proviso must be something by which the assessee and the related person "arrange" that the goods are sold at something below the normal price, so that tax is either avoided or evaded by such arrangement. Secondly, the expression "generally" also shows that such goods must predominantly be sold by the assessee to or through the related person - in mathematical terms, sales that are to or through a related person must consist of at least 50% of the goods that are manufactured and sold. The expression "to or through a related person" again goes back to the "arrangement" and is another way of saying that such sale can be effected directly to or indirectly through such related person. It is only when all three considerations are cumulatively met that proviso (iii) can be said to be attracted."*

The three ingredients stipulated by the Hon'ble Supreme Court are not satisfied in the present case. As evident there is no arrangement between the appellant and EPL. It is also undisputed that the goods are also sold to unrelated buyers at more or less the same price at which it was sold to EPL. Hence, in our view there cannot be said to any arrangement between the appellant and EPL to sell the goods below normal price so as to avoid payment of tax and the transactions are tainted. Considering the facts on hand, the above judgment of the Hon'ble Supreme Court does not support the case of the department. We have also noted that for the earlier period the Tribunal has already decided the issue in favour of the appellant.

11. In view of the foregoing we are of the view that the impugned order is not sustainable hence liable to be set aside. We therefore set aside the impugned order and allow the appeal of the appellant with consequential relief, if any.

(Pronounced in the open court on…11.01.2019.)

(Bijay Kumar)
Member (Technical)

(P. K. Choudhary)
Member (Technical)

Tushar Kr.