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

Excise Appeal Nos. E/207/09 & E/217/09

(Arising out of Order-in-Original No. 10/COMMISSIONER/CE/KOL-VII/ADJN./2008-09 dated-30.01.2009 passed by the Commissioner of Central Excise , Kolkata-VII)

1) M/s. Solux Galfab Pvt. Ltd.
2) Shri Siddhartha Baid

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise, Kolkata-VII

Respondent (s)

Appearance:

Shri B.N. Chattopadhyay, Consultant

For the Appellant (s)

Shri S.S. Chattopadhyay, Supdt. (A.R.)

for the Respondent (s)

CORAM:

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

Date of Hearing/Decision :- 27.03.2019

ORDER NO. : FO/75504/2019

PER SHRI V. PADMANABHAN

The present appeals are against the Order-in-Original No.10/COMMISSIONER/CE/ KOL-VII/ADJN./2008-09 dated-30.01.2009 passed by the Commissioner of Central Excise, Kolkata-VII. The appellant is engaged in the fabrication of Iron & Steel structures. The period of dispute is 2005-06 and 2007-2008. During this period, the appellant received several purchase orders from Mobile Service providers such as M/s. Airtel and Vodaphone. As per the terms of these purchase orders, the appellant was required to fabricate and supply mobile towers. Such towers were required to be installed at the destination specified by the buyer. However, the terms of the contract provided for separate consideration for supply of towers as well as for the further works to be carried out at the site i.e. installation of the tower including Erection and Painting. The contracts further specified that if the supplies were to be made within Calcutta, the freight amounts are included in the supply cost. However, in case of destinations beyond 250 kms. from the factory, freight shall be paid extra.

2. After examination of the records of the appellant including the various contracts, the Department formed the opinion that in terms of the contracts, the ownership of the goods remains with the appellant till the erection and painting was complete after which towers were handed over to the clients. The goods though sold, comes into existence only at site where the goods are installed. Considering the Place of Removal to be site of the towers, the Department proceeded to include all expenses till the sale of goods i.e. erection charges, painting charges and transportation charges from the factory upto the site. On the above lines, show cause notice dated 26/08/2008 was issued to the appellant-assessee and Sri Siddhartha Baid, Chief Executive Officer. The adjudicating Authority upon conclusion of the adjudication, upheld the demand for differential duty to the extent of Rs.75,24,506/- alongwith interest and penalty of equal amount. Penalty was also imposed on Shri Siddhartha Baid under Rule 26 of the Central Excise Rules, 2002. The appellant-assessee as well as Shri Siddhartha Baid have filed the present appeals challenging the above order which is taken up for a decision through this common order.

3. The appellants are represented by Shri B.N. Chattopadhyay, Ld. Consultant and the Revenue is represented by Shri S.S. Chattopadhyay, Ld. A.R.

4. The Ld. Consultant submitted that the demand for differential duty is not justified for the following reasons:

i) He submitted that the goods are fabricated in the appellant's factory and cleared in dismantled form to the site of the client. At the site, the other activities i.e. erection, installation and painting are completed. The resultant product becomes the Microwave Towers which is an immovable property.

ii) He submitted that no Central Excise Duty can be levied on immovable property and the appellant has already discharged Central Excise duty on the fabricated components at the factory gate and as such, no further excise duty is payable. He also submitted that there is no justification for including the freight amount in the assessable value in as much as the appellant has already discharged the Service Tax on the freight amounts under the category of "goods transport agency service".

iii) On the erection, commissioning and painting charges, the appellant has already discharged Service Tax under the appropriate categories of Finance Act, 1994.

iv) Finally he submitted that the demand is totally unjustified.

5. Ld. D.R. justified the order passed by the Commissioner. His arguments are summarised below:

He referred to the para 28.6 of the impugned order and emphasized the discussions by the Adjudicating Authority. He submitted that as per the terms of the Sale of Goods Act 1930, the sale of goods in the present case has taken place at the buyers' premises after carrying out the process of installation, erection and painting. As such, he submits that the manufacturing of the towers is completed only at the site where it is delivered to the clients. Thus the Place of Removal is to be considered as not factory gate but the site of the towers and as such, the expenses incurred till the sale of goods i.e. transportation charges, erection charges and painting are rightly includible in the assessable value for payment of Central Excise Duty.

6. We have heard both sides and perused the appeal records.

7. The appellant/assessee has manufactured and cleared mobile phone towers. The Towers were cleared in dismantled form from the factory and transported to the sites as per the requirement of the buyers and erected, installed and painted at the sites. The contract placed by the buyers was a consolidated contract including supply, transportation and also carrying out other activities at the site. However, separate amounts have been indicated for supply costs as well as for installation, erection and painting. The freight charges are included in the supply cost for sites situated at Kolkata but additional freight amounts will be payable to the assessee in other cases.

8. The Department's view is that as per the terms of the contract, the sale has taken place at the respective sites, after carrying out installation, erection and painting. As such, the adjudicating authority has held that the place of removal of the tower components is not factory gate but the site where the towers are installed. Accordingly, he has loaded to the value of tower materials, the costs towards erection, installation, painting as well as freight amounts incurred for transportation of materials upto the site. This loading is resisted by the appellant with the submission that at the site, the result of erection is that immovable property comes to existence on which there can be no levy of Central Excise duty.

9. In the facts of the case as above, we are required to determine :

i) which is the place of removal ?

ii) Where does the liability for excise duty arise ?

10. It is not in dispute that after completing the process of erection, the tower comes into existence as immovable property. Even though there can be no levy of Central Excise Duty on immovable property, we note that tower is cleared in dismantled form from the factory. As such, we are of the view that the liability for payment of excise duty gets crystalised at the factory gate and such liability is for the goods in the form in which they are cleared from the factory i.e. the tower components.

11. The second related question is the Place of Removal. We have perused two sample contracts which are part of the appeal papers. The contract dated 18/2/2005 placed by Airtel specifically mentions that the rate will be on “FOR site basis”. This clearly points to the fact that the sale of goods is deemed to have happened at the site. This further points to the fact that the Place of Removal is to be considered as the site and not the factory gate.

12. Section 4(3)(c) defines “Place of Removal” as follows :

> “Place of Removal” includes any other place or premises from where excisable goods are sold after their clearance from the factory.”

11. Central Excise Valuation Rules, 2000 provides for Valuation of goods in certain cases. In Rule 5 of said rules, Explanation 2 clearly provides as follows:

> “For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods.”

in terms of the above Explanation, the cost of transportation from the factory to the place of removal, where the factory is not the Place of Removal, shall not be excluded for determining the value of excisable goods.

12. In terms of Section 4 as above, read with Rule 5 of the Rules, it emerges that since the place of removal in the present case, in respect of the Airtel contract, is the premises of the site installation, the cost of transportation of the tower materials from the factory gate to the site will need to be included in the value and to be added to the supply cost.

13. We have also perused the other sample contract which is available in the appeal records. That is also placed by Airtel; contract dated 1/11/2007. The said contract does not clearly provide that the rates are FOR site basis. In respect of this contract, there is a need to consider; the other terms of the contract to arrive at the conclusion, where the sale of goods has taken place.

14. Next we turn to the issue whether the installation, erection and painting charges are required to be added to the supply cost of towers for payment of duty. The Adjudicating authority has held that once place of removal is decided, all expenses incurred upto that place is required to be added. As such, he has loaded the installation cost. We find it difficult to accept this proposition. We have taken the view that the tower is to be assessed in the form in which it is cleared from the appellant's factory i.e. in dismantled form. Once we take the view that the excise duty liability is on the goods in the form it is cleared from the factory, it follows that the installation, erection and painting cost which has been incurred at the site where the goods are taken to form immovable property, cannot be added. It has further been submitted that the appellants have already discharged service tax on the activities of erection, painting and commissioning.

15. To sum up the decision above, we are of the view that the goods are required to be assessed in the form in which they are cleared from the

factory at the factory gate. There is no justification for adding erection, commissioning and painting charges. Accordingly, we set aside the demand made by including the erection, installation and painting cost.

16. In cases of those contracts which are FOR site, the place of removal becomes the site and the cost of transportation from the factory gate to the site is required to be included. In respect of the Airtel contract dated 18/02/2005, it clearly indicates i.e. FOR basis. However in Airtel contract dated 1/11/2007, these facts are not very clear. Hence, we direct the original authority to see the relevant contracts in the present demand to decide the question of includibility of cost of transportation. However if, contract indicates that it is for clearance at the factory gate, there will be no justification for adding the freight amount.

17. Before we conclude the matter, we would also like to clarify that when the Place of Removal is the site of the customer; Appellant will be entitled to the CENVAT Credit of Service Tax paid on transportation cost.

(Dictated and pronounced in the open court.)

P.K. CHOUDHARY
(JUDICIAL MEMBER)

V. PADMANABHAN
(TECHNICAL MEMBER)

k.b/-