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

Excise Appeal No. 102 of 2012

(Arising out of the Order-in-Original No. 16/Kol-III/2012 dated 14.02.2012 passed by Commissioner (Appeal-I) of Central Excise, Kolkata.)

M/s WIMCO Limited,
P.O.- Alam Bazar, Kolkata-700035.

...Appellant (s)

VERSUS

Commissioner of Central Excise, Kolkata.
180, Shanti Pally, Rajdanga Main Road, Kolkata-700107.

. ...**Respondent(s)**

APPERANCE :
None, for the Appellant
Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...76491/2023

DATE OF HEARING: 24.08.2023
DATE OF DECISION : 24.08.2023

PER K. ANPAZHAKAN :

M/s Wimco Ltd.(The Appellant) is in the business of manufacturing matches. The Appellant sells their goods either from its factory at the ex-factory price or from its depots/premises of clearing and forwarding agents at the ex-depot price. They have appointed clearing and forwarding agents for providing such services and pays commission to them. For the period upto January 31, 2006, they have appointed distributors/stockists to whom they sold the matches on principal to principal basis and the distributors/stockists became the owners of the goods upon dispatch thereof from the Appellant's factory. The distributors/stockists after purchasing the goods from the Appellant, further sold the goods at a price not exceeding the maximum price recommended by the Appellant. In the agreements with the distributors/stockists, the difference between the cost of the goods to the distributors/stockists and the suggested maximum price was loosely referred to as "commission" though it actually represented the maximum profit which the distributors/stockists could make upon subsequent sale of the goods. In respect of the goods sold by them to the distributors/stockists from the factory, the Appellant separately recovered the amount of actual freight paid by them from the factory to the place of delivery, since such freight was paid by them to the transporters. Such freight was referred to as secondary freight. Similarly, in respect of goods sold by them to the distributors/stockists from the depots/premises of the clearing forwarding agents at the ex-export price, the Appellant collected but reimbursed such secondary freight to the clearing and forwarding agents. With effect from January 1, 2006, the Appellant stopped charging/collecting secondary freight from their buyers though they continued to pay for the same.

2. With effect from July 1, 2005, there was a change in the Appellant's management since ITC Ltd., acquired substantial shareholding in the appellant. Prior to this acquisition, ITC Ltd. was their related person, as they have been selling their goods to ITC Ltd., in respect of which they have been discharging duty with reference to the price at which ITC Ltd., has further sold the goods. Further, with effect from January 21, 2006, the Appellant terminated the old distributors/stockists' agreements.

3. In respect of the goods sold by them to the distributors/stockists from their factory at ex-factory price, the Appellant paid central excise duty on such ex-factory price. For the period upto December 31, 2005, they did not include in the assessable value the secondary freight representing the cost of transportation from the factory to the place of delivery. In respect of the goods sold by them to the distributors/stockists from their depots/premises of clearing and forwarding agents at the ex-depot price, the Appellant paid central excise duty in accordance with Rule 7 of the Central Excise Valuation

(Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as “the Valuation Rules”) on the normal transaction value (ex-depot price) of such goods prevailing at the depots/premises of clearing and forwarding agents at the time of removal of such goods from their factory.

4. Two Show cause Notices were issued to the Appellant on 15.02.2007 and 20.04.2007. In the Notice dated 15.02.2007, Central Excise duty of Rs. 42,21,647/-along with Cess was demanded for the period 01.03.03 to 31.03.2006, by including the Commission paid to the clearing and forwarding agents and the secondary freight collected by them. On the same allegations, Notice dated 20.04.2007 was issued for the period 01.04.2006 to 31.12.2006, demanding duty of Rs.6,30,062/-along with Cess. The said Notices were adjudicated by the Additional Commissioner vide Order-in-Original dated 31.03.2008, wherein the duty demanded in the said Notices were confirmed along with interest. Penalty equivalent to the duty was also imposed under Section 11AC of the Central Excise Act, 1944. On appeal, vide the impugned order dated 14.02.2012, the Commissioner (Appeals), set aside part of the impugned order demanding duty by including the 'commission' paid. Regarding the inclusion, of secondary freight in the assessable value, the Commissioner (Appeal) held that it is includable only for the period prior to 31.12.2005. He also set aside the interest and penalty in proportion to the demand dropped. Accordingly, he confirmed the demand along with interest and penalty in the impugned order, for the period upto 31.12.2005 . But, this amount has not been quantified in the impugned order. Aggrieved against the impugned order, the Appellant preferred the present appeal.

5. In their grounds of appeal, the Appellant states that the Commissioner (Appeals) disposed of the appeal vide his order dated February 14, 2002, wherein the demand for duty, interest and equivalent penalty in respect of commission for the entire period from March 1, 2003 to December 31, 2006 as

also the demand of duty, interest and equivalent penalty in respect of secondary freight for the period from January 1, 2006 were set aside and the rest of the adjudication order was upheld.

6 The Commissioner (Appeals) failed to appreciate that the Additional Commissioner travelled beyond the scope of the allegations made in the show cause notice. There was no allegation in the show cause notice that the sales by the Appellant to the distributors/stockists were not on principal-to-principal basis or that the premises of the distributors/stockists was the place of removal, etc. He failed to appreciate that if that was the case upto December, the show cause notices would have demanded duty on the selling price of the distributors/stockists and not by merely seeking to include the secondary freight in the appellant's transaction value.

7. The Commissioner (Appeals) erred in confirming the demand of duty for the period upto December 31, 2006 in respect of secondary freight representing the cost of transportation from the appellant's factory or the depots/premises of clearing and forwarding agents, as the case may be, to the premises of the buyers, that is the distributors/stockists. In terms of Section 4(1)(a) of the Act as well as in terms of Rule 5 of the Valuation Rules, the cost of transportation from the place of removal upto the place of delivery did not form part of the assessable value. In the appellant's case, in accordance with the provisions of section 4(3)(c) of the Act, the place of removal in respect of goods sold from the factory was the factory, and in respect of goods sold from the depots/premises of the clearing and forwarding agents, the was such depots/premises of clearing and forwarding agents was the place of removal. There was no question of inclusion of the cost of transportation from such place of removal to the place of delivery in the assessable value for payment of duty.

8. The Appellant submits that they have sold the goods to the distributors/stockists on principal to principal basis. They charged sales tax/VAT from the distributors/stockists and they became the owners of the goods upon dispatch from the appellant's factory/depot/premises of clearing and forwarding agents. Any damage/shortage, etc. after the goods left the appellant's factory/depot/premises of clearing and forwarding agent was to the account of the distributors/stockists and it was for them to take out transit insurance if they so desired.

9. The Commissioner (Appeals) failed to consider that the actual amount of secondary freight for the period from April 1, 2003 to March 31, 2006 on which they had not paid duty as tabulated from the individual central excise invoices was only Rs.1,53,56,969.96 whereas the show cause notice dated February 15, 2006 was issued with reference to an amount of Rs.2,41,28,545/-. The said sum of Rs.2,41,28,545/- was the expenditure debited to the profit and loss account and included van delivery expenses reimbursed to the distributors/stockists for the period April, 1, 2003 to January 31, 2006 and secondary freight for the period January, 2006 to March, 2006 in respect of which no abatement/deduction was at all claimed by them. Accordingly, they contended that the remaining demand confirmed in the impugned order by the Commissioner(Appeals) is not sustainable.

10. The Ld.A.R. reiterated the findings in the impugned order.

11. Heard the Ld.A.R. Since, none appeared on behalf of the Appellant and the issue can be decided based on the written submissions made by the Appellant, the appeal is taken up for decision based on the material available on record.

12. We observe that in the present appeal, the only issue to be decided is whether secondary freight charges, if any, collected by the Appellant are includable or not in the assessable value for the purpose of payment of duty.

The impugned order has already held that the secondary freight charges are not includable in the assessable value after 01.01.2006, as there was no evidence of collecting the same by the Appellant. For the period upto 31.12.2005, the Appellant stated that the Commissioner (Appeals) has erred in confirming the demand of duty in respect of secondary freight representing the cost of transportation from the appellant's factory or the depots/premises of clearing and forwarding agents, as the case may be, to the premises of the buyers, that is the distributors/stockists. We agree with the contention of the Appellant. In terms of Section 4(1)(a) of the Act as well as in terms of Rule 5 of the Valuation Rules, the cost of transportation from the place of removal upto the place of delivery is not liable to be included in the assessable value. In this case, in accordance with the provisions of section 4(3)(c) of the Act, the place of removal in respect of goods sold from the factory was the factory, and in respect of goods sold from the depots/premises of the clearing and forwarding agents, it was such depots/premises of clearing and forwarding agents. Therefore, there was no question of inclusion of the cost of transportation from such place of removal to the place of delivery in the assessable value for the purpose of payment of duty.

13. We find that the Appellant has paid duty on the goods on the transaction value, which includes cost of transportation or secondary freight collected by the Appellant. The secondary freight collected pertains to the transportation cost from the place of removal upto the place of delivery of the buyer, which is not liable to be included in the assessable value. Thus, we hold that the secondary freight collected need not be included in the assessable value again and duty cannot be demanded by including the same in the transaction value on which duty has already been paid. Accordingly, we hold that the demand confirmed in the impugned order by the Commissioner (Appeals) is not sustainable. Since the demand of duty is not sustainable, the question of

demanding interest and imposing penalty does not arise. Accordingly, we set aside the impugned order.

11. In view of the above discussion, we allow the appeal filed by the Appellant.

(Dictated and pronounced in the open Court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar