IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No.701 of 2011
(On behalf of Revenue)

(Arising out of Order-in-Appeal No.23-25/Kol.VI/2011 dated 05.05.2011 passed by Commissioner (Appeals) of Central Excise, Kolkata)

Commissioner of Central Excise,Kolkata VI
180,Shantipally, Rajdanga Main Road,Kolkata-700107

Appellant

VERSUS

M/s Castrol India Limited
P-7, Paharpur Siding Road, Kolkata-700088

Respondent

WITH

Excise Appeal No.710 of 2011
(On behalf of Revenue)

(Arising out of Order-in-Appeal No.23-25/Kol.VI/2011 dated 05.05.2011 passed by Commissioner (Appeals) of Central Excise, Kolkata)

Commissioner of Central Excise,Kolkata VI
180,Shantipally, Rajdanga Main Road,Kolkata-700107

Appellant

VERSUS

M/s Castrol India Limited
P-7, Paharpur Siding Road, Kolkata-700088

Respondent

AND

Excise Appeal No.711 of 2011
(On behalf of Revenue)

(Arising out of Order-in-Appeal No.23-25/Kol.VI/2011 dated 05.05.2011 passed by Commissioner (Appeals) of Central Excise, Kolkata)

Commissioner of Central Excise,Kolkata VI
180,Shantipally, Rajdanga Main Road,Kolkata-700107

Appellant

VERSUS

M/s Castrol India Limited
P-7, Paharpur Siding Road, Kolkata-700088

Respondent

APPERANCE :

Shri K.Chowdhury, Authorized Representative for the Appellant
Shri Rajeev Agarwal, Advocate for the Respondent

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

FINAL ORDER NO……76523-76525/2023

DATE OF HEARING : 25.08.2023
DATE OF DECISION : 25.08.2023

Per Ashok Jindal :

The Revenue are in appeals against the impugned order.

2. The facts of the case are that the respondent is a manufacturer of lubricating oil and other allied preparations. In respect of removal of lube oils in 205/210 litres barrels during the calendar year, 2005, in respect of 205/210 litres barrels and 50 litres packs of lube oils removed during the calendar year 2006 and 2007 and in respect of pack size of more than 25 litres of lube oils removed during the calendar year, 2008, a dispute arose as to what should be the value of the goods in terms of Section 4 of the Central Excise Act, 1944. Thus the assessments were provisionally made during these four calendar years.

2.1 The Adjudicating Authority has finalized the provisional assessments and raised the demand of differential duty from the respondents and the ld. Commissioner (Appeals) held that the provisional assessments are to be finalized on the basis of normal transaction value and to determine the value of the goods, distributors' discount as provided in the contract is required to be deducted. This is in addition to the deductions from the price which are to be allowed on account of PME, quantity discount, cash discount etc..

2.2 Against the said order, the Revenue are before us.

3. The ld.A.R. for the Revenue submits that the respondents are not entitled to the discount considered by the ld. Commissioner (Appeals) in his order, therefore, the impugned orders are to be set aside.

4. Heard both the parties and considered the submissions.

5. We find that in all the appeals, the facts are that the respondent does not sell these goods at their factory gate. The goods are first transferred to stock transfer basis to the premises of different C & F Agents wherefrom the goods were sold to the distributors under dealers' invoices. The distributors further sell the goods within their respective areas. Therefore, the respondent sought finalization of assessments on the basis of normal transaction value. Further, discounts are given to the distributors. These discounts vary from year to year. Therefore, it is the contention of the respondents that the assessable value has to be determined on normal transaction value after allowing the distributors' discounts and other discounts, such as, quantity discounts, cash discounts, PME etc.

6. The adjudicating authority held that in terms of the agreements entered into between the respondent and the distributors, the respondent has imposed such conditions on the distributors, which meant that the distributors were being controlled in all respects by the respondents. In effect, the distributors were the agents of the respondents.

7. In view of this, there was no question of deduction of the discounts payable by the respondent to the distributors. Further, the goods could be assessed to duty on the value which could be determined under Section 4 (1)(a) of the Central Excise Act, 1944. Thus, it is not necessary to charge the duty on the normal transaction value as claimed by the respondents. Further, in view of the relationship of the distributors as that of agents, the deduction of discounts claimed by the respondents for various calendar years was not permissible. However, the respondent was entitled to deductions on account of cash discounts, quantity discounts, PME etc..

8. The said issue has been examined by the ld.Commissioner (Appeals) in his order and observed as under :

> *"8. I have gone through the grounds of appeal, submissions made during the course of hearings and all other evidence on record. The impugned orders are finalization of provisional assessments for the calendar years 2005 to 2008. These relate to the valuation of lube oils, which are stock transferred in various packs by the appellant to their clearing and forwarding agents' premises and from where these goods are sold by the appellant to their distributors. I have gone through the 'AGREEMENT WITH THE DISTRIBUTOR' entered by the appellant with each of the distributors. The goods are purchased by the distributors at the rates fixed by the appellant from time to time. It is expressly provided in the Agreement that all transactions between the appellant and the distributor are on principal to principal basis and that nothing in the Agreement shall constitute or be deemed to constitute by either party as the agent of the other. Other clauses of the Agreement have been reproduced in the impugned order dated 25/07/2008.*
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> *9. There is no dispute that the goods, which are the subject matter of the three impugned orders, are not sold at the factory*

gate. The sale takes place subsequently from the premises of the C & F agents to the distributors, in terms of the Agreements entered into by the distributors with the appellant. When that is the case, the valuation of the goods cannot be in terms of Section 4(1)(a) of the Central Excise Act, 1944 as the goods are not sold for delivery at the time and place of removal, the time of removal being the time at which goods are cleared from the factory. Putting it differently, the sale of such goods from the C & F agents' premises is at a time which is subsequent to the 'time of removal', that is, subsequent to the time at which such goods had been removed from the factory. Therefore, valuation of such goods would be governed by Section 4(1)(b) of the said Act and the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The lower authority has come to the wrong conclusions that valuation of such goods can be determined in terms of Section 4(1)(a) of the said Act.

10. The next point for determination is whether the sale made to the distributor is a genuine sale or does the distributor act as an agent of the appellant and the real sale is to the customers/dealers. In this context, it is necessary to refer to the Agreement in terms of which there is a sale between the distributors and the appellant. It is clearly stated in the Agreement that the sale between the distributor and the appellant is on principal to principal basis and that the distributor is not an agent of the appellant. The distributors have paid for the goods purchased by them from the appellant. There is evidence which indicates so. If the distributors were agents, in that case, somebody else would have purchased the goods and that some other person would have directly paid for the goods to the appellant. But, that is not the case here. The sales are made to the distributors.

11. It is necessary to examine why the lower authority considered the distributers as agents of the appellant. First and foremost, the lower authorities drew his conclusions from the terms of the Agreement. It is stated in the impugned orders that *under the contract, the distributors are at the receiving end. They are to comply/execute the order/follow instructions of the appellant. Further, distributors are to sell the goods to the price fixed by the appellant. Even after sales are effected by the distributors, transportation cost and insurance are borne by the appellant. In other words, distributors are appointed persons and act on behalf of the appellant.*

12. The appellant sell their products to the ultimate consumer at the listed price which is uniform throughout India. The goods are first sold by the appellant to the distributors, who in turn sell these to the dealers/consumers. The sale between the appellant and the distributors are governed by the Agreement. The terms of the Agreement are very much in line with those standard agreements which are entered into between a company and its distributors. In order to ensure that the distributors comply with the policy and various requirements of the company, the terms as mentioned in the Agreement are fixed including those regarding payments, etc. But that does not make the distributor an agent of the appellant. The transportation and insurance is paid by the appellant upto the premises of the distributors. Further, there is nothing in the letter dated 23rd July, 2009 of the appellant which suggests that 'the distributor discount is a quantity discount'. The appellant during the course of hearing clarified that the appellant also carry out survey at the retail level and make all efforts to market their products. The distributors, on the basis of such survey and market survey imputes from the appellant obtain orders from various customers. But, in doing so, the distributors do not become agents. The appellant carry out this exercise so that they are able to market their products to the greatest extent and in doing so supplement the efforts of the distributors. Thus, I hold that the distributors are not agents as so wrongly held by the lower authority. The distributors for their services are entitled for distributors' discounts.

13. In view of the above, when the sale of goods does not take place at the factory gate, valuation of the goods is governed by *rule 7. In terms of rule 7, the valuation has to be on the NTV. It has further been pleaded that determination has to be made ER-1 wise. In this context, attention is invited to paras 2.6 and 2.7 of Chapter 3 of the CBEC Supplementary Instructions, which reads as-*

> *"2.6. Finalisation of provisional assessment means finalization of an issue/ground and thereafter finalization of each ER-1. The amount will communicated to the assessee at the earliest. The amount of each differential duty shall be paid along with interest at the rate specified by the Central Government by Notification issued under Section 11AA or 11AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.*
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> *2.7. If the assesee is in a position to ascertain the duty himself, he may pay the duty on his own at the earliest and in that case he will not have to incur interest on account of time taken by the department to finalise assessment and communicate the amount."*

In terms of this, finalisation of assessment has to be done of each ER-1. This plea of the appellant is allowed, on the basis of the Board's instructions.

14. Summing up, the provisional assessments are to be finalised on the basis of the normal transactional value (the NTV). Further, this is to be done for each ER-1. In determining the value of the goods, distributors' discount as provided in the contract is required to be deducted. This is in addition to the deductions from the price which are to be allowed on account of PME, quantity discount, cash discount, etc. I, therefore, set aside the impugned orders. The lower authorities shall finalise the assessments on the above basis for each of the four calendar years and pass orders accordingly. The appeals are allowed in these terms."

9. We have also gone through the observations made by the ld.Commissioner (Appeals) in the impugned order and also gone through the decision of the Hon'ble Apex Court in the case of Commissioner of Central Excise Vs. Escorts Limited reported in 2003 (158) ELT A 42 (SC).

10. In terms of the agreement with the distributors, the goods were purchased by the distributors at the rates fixed by the respondents from time to time and it is expressly provided in the agreement that all the transactions between the respondent and the distributor are on principal to principal basis and nothing in the agreement shall constitute or be deemed to constitute by either party as the agent of the other.

11. Further, it is admitted fact that the goods are not sold at the factory gate. The sale takes place subsequently from the premises of the C & F Agents to the distributors in terms of the agreements entered into by the distributors with the respondent. Therefore, the valuation of the goods cannot be done in terms of 4 (1)(a) of the Central Excise Act, 1944 as the goods are not sold for delivery at the time and place of removal, the time of removal being the time at which the goods were cleared from the factory.

12. In this case, the sale of the goods from C & F Agents, premises is at a time , which is subsequent to the time of removal i.e. subsequent to the time at which such goods have been removed from the factory. Therefore, the valuation of goods shall be governed by Section 4(1)(b) of the Act and the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

13. We, therefore, hold that the valuation of the said goods is to be done under 4(1)(b) of the Central Excise Act, 1944 i.e normal transaction value.

14. Further, we hold that as per the agreement and the above various observations made, the respondents are entitled to deductions of discount as claimed from the value of the goods and the ld.Commissioner (Appeals) has gone through the issues and held so.

15. In view of the above observations, we do not find any infirmity with the impugned order and accordingly, the same is upheld.

16. In the result, all the appeals field by the Revenue are dismissed.

(The operative part of the order was pronounced in the open court.)

Sd/-
(Ashok Jindal)
Member (Judicial)

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

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