

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

Excise Appeal No. 213 of 2009

(Arising out of Order-in-Original No. 08-09/Pat/C.Ex/Appeal/2009 dated 23.01.2009 passed by Commissioner of Central Excise, Bhagalpur.)

M/s ITC Ltd.,

Unit- Financial Controlling packaging and Printing
Division Basdeopur- Munger-811202. Bihar,

...Appellant (s)

VERSUS

Commissioner of Central Excise, Patna.

Central Revenue Building, B. C. Patel Path, Patna-800001.

.

..Respondent(s)

APPEARANCE :

Shri J. P. Khaitan, Sr. Advocate and Shri Agnibesh Sengupta & Shri Asit Kr. Hazra, both Advocates for the Appellant

Shri S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77224/2023

DATE OF HEARING : 26.09.2023

DATE OF PRONOUNCEMENT: 09.10.2023

PER K. ANPAZHAKAN :

ITC Ltd., Munger (The Appellant) are manufacturers of cigarettes and Packaging Materials like Shells, Slides, Printed Sheets Gold Printed Sheets, Hinged Lid Packets (HLPs) and Card Board Outers (CBOs). These packaging materials are cleared by them to their cigarette factories for captive consumption in the manufacture of cigarettes. Valuation of the aforesaid goods has been the subject matter of dispute over several years. Due to dispute in valuation, the assessment during disputed period was made provisionally and pursuant to the directions issued under various orders from time to time, the provisional

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assessments for the period 1982-83 to 2004-05 were taken up by the Deputy Commissioner of Central Excise, Bhagalpur for finalization. The Deputy Commissioner has passed an Order-in-Original dated 12.12.2007, wherein he has finalized the provisional assessments upto 2004-05 and upon finalization, directed the Appellant to pay an amount of Rs.3,99,41,490/- as differential duty. In addition to the issue of valuation, the said Order-in-Original also dealt with eligibility of Modvat claim amounts to Rs.114.44 lakhs for the period 1986-87 to 1993-94 and disallowed the credit. On appeal, the Commissioner (Appeals) allowed the Modvat credit to the Appellant, vide impugned order dated 23.01.2009. However, regarding the valuation issue, he has remanded the matter to the adjudicating authority for fresh adjudication. Aggrieved against the remanding of the matter on valuation issue, the Appellant has filed the present appeal before this Tribunal. Thus, the dispute in the present appeal is only related to the method of valuation adopted by the Deputy Commissioner for finalization of the provisional assessments for the disputed period.

2. While finalizing the provisional assessments, the Deputy Commissioner has arrived at the differential duty of Rs.3,99,41,490/- on two counts of valuation. He worked out the cost of production on the basis of CAS-4 and the assessable value has been arrived at on 110% of the cost of production during the period 1982-June 2004-05. In the impugned order, the notional cost of production has been added to the tune of 15% instead of 10% for the period 2000 to 2003. However, the Appellant has not pressed for any relief against this issue, in the present appeal.

3. The Revenue has not accepted the method of valuation adopted by the Adjudicating authority in the Order-in-Original dated 12.12.2007 and observed that, as per CAS 4, cost of production shall consist of material consumed, direct Wages and Salaries, direct expenses on works overhead, quality control cost, research and development cost, packing cost, administrative overheads related to production. The Deputy Commissioner while deciding the cost of production as per CAS-4 principles, examined documents pertaining to different years on test basis supplied by ITC Ltd., Munger and observed that broad principles of CAS-4 have been followed. However, certain elements of unabsorbed overhead have not been considered by the Deputy Commissioner for arriving at the cost of production. It is not correct to exclude unabsorbed overheads and hence The Revenue contended that the method of valuation adopted by him was not proper. The Revenue contended that overheads have not been examined and bifurcated into variable and fixed overheads. Since variable overheads are to be observed on the basis of actual production, the Revenue has preferred appeal before the Commissioner(Appeals) on the above grounds and challenged the method of valuation adopted for finalization of the provisional assessments.

4. On appeal, the Commissioner (Appeals) agreed with the Revenue's contention and remanded the matter to the adjudicating authority with the following observations:

"I have examined the issue. The Special Audit Team's Report dated 14.11.07 is itself with a rider in Para 5, which reads "Though professionally not qualified, a sincere effort was made to ascertain if the broad principles of CAS-4 have been followed by the assessee in calculation of cost of production". The Lower Adjudicator in the

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impugned order has only this to say – " In view of the above, as far as question of inclusion of unabsorbed overhead and other elements in cost of production is concerned, the contention and explanation submitted by the assessee appears to be reasonable". There is no discussion or finding on any of the Accounting figures and compliance with the norms. Both, the Special Audit Team and the Lower Adjudicator have been content to just define text book accounting terms. No doubt, it is highly professional subject, so all the more, expertise of professionals ought to have been secured. At the Appellate stage to come and seek remand for a matter that is pending since 23.03.1982 is not in the interest of Revenue. Further, vide CBEC Circular No.382/15/98-CX dated 19.03.1998, time limit for finalizing provisional assessment has been fixed. The instant case is pending now for almost 27 years which is an unreasonable span of time. The ground reality also cannot be lost track of, personnel on both sides changing, and rules/regulations/circulars being lost track of due to efflux of time. Since the impugned order has only made a fleeting reference to the theoretical parameters of CAS 4 and CAS 2 without any analysis whatsoever to the assessee's operating figures, I am reluctantly compelled to remand this portion of the impugned order for fresh adjudication. The assessee is directed to furnish the details required to ascertain their compliance with CAS 4 and CAS 2 norms. The Department shall cause necessary verification of the details (not confine to the text book definitions only) so furnished by the assessee and satisfy itself about the correctness of the same. For example it has been simply stated in the impugned order that "In view of the above, as far as question of inclusion of unabsorbed overhead and other elements in cost of production is concerned, the contention and explanation submitted by the assessee appears to be reasonable". Neither the assessee nor the department has examined any of these factors, from both the sides there is only a reference to the theoretical definitions and their scope. This will not suffice for the requirements of an order for finalization of provisional assessment. Therefore, I have no other option but to remand this portion of the impugned order."

5. In their submissions, the Appellant stated that that unabsorbed overhead is the overhead for the time the machines are idle without any jobs and other abnormal idle capacity. The abnormal cost arising due to abnormal idle capacity shall not form part of cost of production as per clause 5.17 of CAS-4. After hearing the explanation and arguments at

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the time of personal hearing, the Deputy Commissioner has finalized the provisional assessments and ordered the assessee to pay differential amount. Accordingly, the Appellant contented that the Deputy Commissioner has examined the issue of includability of unabsorbed overheads and took a conscious decision that the same are not includable in the cost of production as per CAS-4 standards.

6. They contended that the Commissioner (Appeals) failed to appreciate the very fact that during the course of finalization of provisional assessment, the Department's Team and the Adjudicating Authority found that certain elements such as unabsorbed overheads had not been included in the cost of production and raised queries on this issue, which would show that the costing figures were scrutinized thoroughly and were not accepted at face value. Hence, they submitted that there is no basis for the finding of the Commissioner (Appeals) that both, "the Special Audit Team and the Lower Adjudicator have been content to just define text book accounting terms." Even a cursory glance at the records of the case and even the appeal memorandum filed by the Department would show the fallacy in the above finding. By remanding the matter, the Commissioner (Appeals) has, in one stroke, swept aside several hours of painstaking efforts on the part of the Departmental officials and the officials of the Appellant, who had diligently undertaken the mammoth exercise with due care. This has been done without even an iota of evidence produced by the Department to show any error in the Appellant's workings. They further contended that the Appellate functions are restricted to remedying defects in the order of the lower authority and not an invitation to throw

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open the entire dispute for fresh investigation. The Commissioner (Appeals) has practically given the Department a free hand to raise any dispute on valuation. If such an approach is permitted, the matter will never reach finality. The observation of the Commissioner (Appeals) that expertise of professionals ought to have been secured, is not justified in the present case. He failed to note that a conscious decision was made by the Chief Commissioner for finalization of the provisional assessments without cost audit under section 14A and he constituted a Special Team of Central Excise Officers for the said purpose. The Commissioner (Appeals) failed to appreciate that in fact the Department had secured professional expertise by having several sittings with the Cost Accountant who had audited the Appellant's figures. When all the figures supplied by the Appellant were duly certified by an independent Cost Accountant and were further scrutinized by a Special Team constituted by the Chief Commissioner, it was not open to the Commissioner (Appeals) to doubt the correctness of the figures. This is more so when the Department had not even pointed out a single error in the workings. The Commissioner (Appeals) failed to appreciate that neither the Authority who constituted the Special Team nor the Reviewing Commissioner had pointed out any lacunae in the Report of the Special Team. The Appellant submitted that the impugned order having exceeded the scope of the appeal by the Department is liable to be set aside in limine on this ground alone. Accordingly, they prayed for setting aside the impugned order to the extent of remanding the valuation matter for re adjudication.

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

8. Heard both sides and perused the appeal records.

9. We observe that the dispute in the present appeal is related to the method of valuation adopted by the Deputy Commissioner for finalization of the provisional assessments for the disputed period. The Revenue has not accepted the method of valuation adopted by the Adjudicating authority on the ground that certain elements such as unabsorbed overheads had not been included in the cost of production arrived at by the Deputy Commissioner while finalizing the provisional assessments. The Revenue's contention is that while computing the cost of production it is not correct to exclude the unabsorbed overheads.

10. We observe that the Deputy Commissioner has decided the cost of production as per CAS-4 principles after examining various documents pertaining to different years on test basis supplied by the Appellant. He has categorically observed that broad principles of CAS-4 have been followed to determine the cost of production. However, he opined that certain elements of unabsorbed overhead have not been considered for arriving at the cost of production. We observe that whether unabsorbed overheads are includable in the cost of production or not is a legal principle that is to be decided by an expert. In this case, for the purpose of arriving at the cost of production, Cost Audit under Section 14 A of the Central Excise Act, 1944 by an independent Cost Accountant was ordered by the Chief Commissioner. In addition to this, the Chief Commissioner, Central Excise, Ranchi Zone, Patna has also constituted a special team to finalize the provisional assessment. On 14.11.07, the special team submitted their report. Though they were not professionally qualified to study the issue and submit a report, a sincere

effort has been made to adopt the broad principles of CAS-4 to arrive at the cost of production. It was also observed by the special team that the cost incurred against the expenditure under "unabsorbed overheads" has not been considered while calculating the cost of production. We observe that this observation of the Special Team which is the basis of this appeal by the department has not been supported by any evidence. When all the figures supplied by the Appellant were duly certified by an independent Cost Accountant and were further scrutinized by a Special Team constituted by the Chief Commissioner, it was not open to the Commissioner (Appeals) to doubt the correctness of the figures.

11. We observe that when the Special team submitted their report and made an observation regarding non-inclusion of certain elements in cost of production as per CAS-4 principles, the Appellant submitted the clarifications/explanation wherein they categorically stated that the cost of production has been arrived at as per the principles adopted in CAS-4. We observe that the Order-in-Original passed by the Deputy Commissioner has taken into account all such elements at the time of finalization of provisional assessment. We also observe that the finalization of the Provisional Assessment has been concluded on the basis of the Department's own Special Audit Team. There is nothing on record to Show that there were any deficiencies in the Report of the Special Audit Team. Neither the Authority who constituted the Special Audit Team nor the Reviewing Commissioner has expressed any lacunae in the Report. The Lower authority has gone by the Report and finalized the pending Provisional Assessments. Accordingly, we hold that the

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Deputy Commissioner has finalized the provisional assessments by adopting the principles of CAS-4 to arrive at the cost of production and the assessable value for the purpose of payment of duty has been correctly determined in the Order-in-Original dated 12.12.2007.

12. In view of the above discussion, we hold that the method of valuation adopted by the adjudicating authority is as per the principles enshrined in CAS-4 and it does not warrant any intervention. Accordingly, we set aside the order of the Commissioner (Appeals) remanding the matter for fresh adjudication for determining the valuation issue afresh. We uphold the impugned order relating to allowing the Modvat credit, as the same has not been disputed. The impugned order is modified to that extent.

14. In view of the above, we uphold the method of valuation adopted by the adjudicating authority in finalization of provisional assessment vide Order-in-Original dated 12.12.2007 and set aside the impugned order to the extent of remanding the matter for adjudication of the valuation matter afresh. The appeal is disposed on the above terms.

(Pronounced in the open court on...09.10.2023...)

Sd/-
(Ashok Jindal)
Member (Judicial)

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

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