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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 528 of 2011

(Arising out of Order-in-Appeal No. 30-31/Kol-IV/2011 dated 24/03/2011 passed by Commissioner (Appeal-IV), Central Excise, Kolkata.)

Commr. of Central Excise, Kol-IV
(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107)

Appellant

VERSUS

M/s. ITC Ltd.
(Unit- Tribeni, Chandrahati, Dist.- Hooghly, West Bengal-712504)

Respondent

With

Excise Appeal No. 658 of 2011

(Arising out of Order-in-Appeal No. 30-31/Kol-IV/2011 dated 24/03/2011 passed by Commissioner (Appeal-IV), Central Excise, Kolkata.)

Commr. of Central Excise, Kol-IV
(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107)

Appellant

VERSUS

M/s. ITC Ltd.
(Unit- Tribeni, Chandrahati, Dist.- Hooghly, West Bengal-712504)

Respondent

And

Excise Appeal No. 659 of 2011

(Arising out of Order-in-Appeal No. 30-31/Kol-IV/2011 dated 24/03/2011 passed by Commissioner (Appeal-IV), Central Excise, Kolkata.)

Commr. of Central Excise, Kol-IV
(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107)

Appellant

VERSUS

M/s. ITC Ltd.
(Unit- Tribeni, Chandrahati, Dist.- Hooghly, West Bengal-712504)

Respondent

APPEARANCE :

Mr. S. S. Chattopadhyay, Authorized Representative for the Appellant
Mr. J. P. Khaitan, Sr. Advocate & Mr. S. Bhowmick, Advocate for the Respondent

CORAM:
HON’BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON’BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.75282-75284/2024

Date of Hearing : 22 February 2024
Date of Decision: 22 February 2024

PER R. MURALIDHAR:

These Appeals have been filed by Revenue being agitated by the Order-in-Appeal Nos. 30-31/Kol-IV/2011 dated 24/03/2011 passed by Commissioner (Appeals-IV), Central Excise, Kolkata. The Commissioner (Appeals) in the impugned OIA has held that the secondary packing charges recovered by the Respondent from their customers are not includable in the assessable value. He has also held that the Freight Cost recovered by the Respondent from their customers for the onward movement of the goods from the factory gate to Railway Station is also not includable in the assessable value. He has also held that the earlier finalization of their provisional assessment confirming the demand of Rs. 3,01,72,409/- is also legally not sustainable. Being aggrieved, the Revenue has filed the present Appeals before the Tribunal.

2. The Learned AR reiterates the grounds taken by the Revenue in their Appeals. He submits that the Respondent have not been in a position to provide adequate evidence to establish their claim regarding the secondary packing being provided only as per the request of their customers. Therefore, he prays that the present Appeals may be allowed.

3. The Learned Advocate appearing on behalf of the Respondent relies on the detailed findings given by the Commissioner (Appeals) while arriving at his conclusion. He also submits that the issue is squarely covered by the judgment of the Hon’ble Supreme Court in the case of Union of India & Ors, Vs. Bombay Tyre International Ltd.-1983 (14) E.L.T. 1896 (S.C.) & Union of India & Others Vs. Godfrey Philips India Ltd. & Oters-1985 (22) E.L.T. 306 (S.C.). The Respondent has also cited the case law of National Leather Cloths Mfg Co. Ltd. Vs. UOI-2010 (256) ELT 321 (SC) & Kesoram Rayon Vs.

Commr. of Central Excise, Calcutta-II-2001 (136) E.L.T. 382 (Tri.-Kolkata). Accordingly, he prays that the Revenue's Appeals may be dismissed.

4. Heard both sides and perused the documents placed before us.

5. On going through the OIA, we find that the Commissioner (Appeals) has given very detailed findings on the issue raised in the Show Cause Notice. The relevant extracts are reproduced below:-

> *17. While there is no dispute that the cost of primary packing is includible in determining the assessable value of goods, for includibility or otherwise of the secondary packing <u>it needs to be enquired into whether the goods at factory gate could be marketed without secondary packing. Paraphrasing it, if the goods are marketable at the factory gate even without secondary packing, then for goods to be ordinarily sold at the factory gate secondary packing is not essential. Or in other words, if these goods are marketable then the manufacturer can sell all his goods at the factory gate without secondary packing. It is here that the customer enters the scene. If he wants that the goods he has purchased do not suffer any injury during transit to his premises, he can make a request for additional or secondary packing and pay extra for it. Such extra packing at the behest of such customer would not form part of the assessable value.</u> But if the goods cannot be sold and marketed at the factory gate without such secondary packing then its cost would invariable be includible in the assessable value of the goods.*
>
> *18. In the light of the above law enunciated by the Apex Court, it needs to be further examined whether the cost of wooden crates/cases or gunny bags is required to be included in determining assessable value of goods. At para 5 above, the details of the percentages of goods of the total goods cleared which were subjected to secondary packing in various years are mentioned therein. This percentage varied between 25% to 36% in the early years of the material period buct increased from 45% to 52% in the later years. In stray cases, as in September 1996, the percentage had even shot up to more than 85%. <u>Whatever the percentage may be, the fact remains that a substantial percentage of goods were purchased by buyers at factory gate without secondary packing (whether for transit within West Bengal or outside), which implies that such goods could be bought and sold at the factory gate without secondary packing.</u> In other words, not only were the*

goods marketable without secondary packing during the material period at the factory gate but these were actually marketed. Thus when goods were marketable during the material period without secondary packing where is then the question of including this cost of secondary packing in working out the assessable value of goods.

19. As stated in paras 15 & 16 above, it is a fact admitted by the Department that the appellant was always providing secondary packing at the behest of the customer. This aspect was never questioned during the material period. It is only now while finalizing the provisional assessments has the lower authority insisted for production of invoices/purchase orders, in each and every case, for him to determine whether secondary packing was procided at the instance of the customers. The finalization of assessments has been made after 7 to 27 years, and with the passage of time it cannot be ruled out that it may not be possible for the appellant to produce each and every invoice or order covering the whole of 20 years. The lower authority did not accept the sample invoices produced by the appellant during the course of adjudication proceedings. The appellant has now in course of appeal proceedings been able to produce copies of a substantial portion of the invoices/purchase orders. Copies of these were also provided to the Department when the first hearing of this appeal took place on 09.04.2010. All these invoices have been scrutinized in the appeal section and it is clear from the examination of that these secondary packing was provided to the goods at the behest of the customers and for which the customers are charged extra. The Department has themselves admitted so as seen in the Valuation Orders and the review notice. In a quasi judicial proceeding, like this, the degree of proof required is that of the preponderance of probablitiies. Applying this standard of proof, one finds that in all cases that one has come across, the insistence to use secondary packing was at the instance of the buyers and not at the will of appellant. Hence, I hold that during the material period, secondary packing to the goods was provided at the instance of the buyers. Therefore, the cost of secondary packing will not form part of the assessable value of goods during the whole of the material period.

20. My above decision is fortified by the Tribunal decision in Kesoram Rayon (supra) where it was held that if secondary packing is not essential for marketability of goods, the cost of such packing is not includible. I would also *like to refer to the decision of Stallion Shox Ltd. (Supra), which has been relied upon by the lower authority to come to a contra conclusion. The lower authority firstly, erred on facts when he stated that even if 35% of goods are sold in secondary packing, then according to the Tribunal decision, the cost of such secondary packing is includible. The facts of the case narrated in the Tribunal order indicate that this percentage was 65 and not 35. Secondly, the Tribunal while rendering decision has equated the term "ordinarily sold", as used in section 4 to mean "generally sold" or sold in majority of the cases. This proposition of law as enumerated by the Tribunal in Stallion Shox (Supra) is no longer good law in view of the Supreme Court decision in National Leather (Supra). Thirdly, if such a construction is given to the term 'ordinarily sold', it will lead to an anomaly as in some years when the percentage is more than 50, the cost of secondary packing will get included and not so when the percentage is less. This will lead to further uncertainties as this percentage will get determined at the end of the year while at the time of clearances of goods from the factory doubt will persist when to include or not the cost of such packing.*

21. <u>For the aforesaid reasons, the lower authority erred in including the cost of secondary packing in work out the assessable value of goods during the period 01.04.1980 to 30.06.2000. Thus the order on this count is not sustainable in law and on facts.</u>

22. The other part of the impugned order relates to including, during the period 01.04.1982 to 30.06.2000, the cost of "forwarding charges" in working out the assessable value of goods. It has always been the case of the appellant that these charges are nothing but transportation and other charges for transporting the goods from the factory gate to the railway booking and for storage in godowns, etc. There is even a reference to these in the order of the Assistant Collector dated 29.1.1986. The appellant has all along, right from day one, taken this consistent stand. For this initial period upto 1985 or so, the appellant has even furnished documents which go to show that the amounts of forwarding charges, collected from various buyers, were passed on through credit notes to various persons who provided such services of transporting goods to the railway booking or for godown charges. Such persons have also given affidavits in support of the receipt of money for this purpose. Apart from this, the invoices of purchase orders which were provided by the appellant during the appeal proceedings, on verification, *have been found to have reference to such forwarding charges etc., and which have been charged in addition to the price of the goods.*

23. Carrying of goods to a booking station or storage in godown are services which have been provided beyond the factory gate. When the appellant has sold the goods at the factory gate, then such charges which are collected for providing services beyond the factory gate cannot be added to or included in the assessable value. It is not the case of the Department, that the appellant is collecting these as part of the price of the goods and in the guise of forwarding charges. Such a proposition would be contrary to evidence as there is uniform sale price of goods at the factory gate and inclusion of such forwarding charges to be declared price would lead to differential price of goods. Hence, such forwarding charges cannot be included in the assessable value of goods. The lower authority in including such forwarding charges has erred and thus the impugned order on this count is unsustainable in law and on facts. The same is liable to set aside.

24. Summing up, the assessments of the appellant for the period 01.04.1980 to 30.06.2000 are required to be finalized without including the cost of secondary packing and the forwarding charges. Thus, the impugned order dated 20.07.2007 is set aside and the first appeal is accordingly allowed. Consequently, the finalization of the provisional assessments for the period 01.04.1980 to 30.06.2000 are required to be made by excluding such cost of secondary packing and forwarding charges. The second impugned order is accordingly modified and the demand of Rs.3,01,72,409/- and the interest charged on it are set aside.

[Emphasis supplied]

6. In case of Union of India & Ors, Vs. Bombay Tyre International Ltd.- 1983 (14) E.L.T. 1896 (S.C.), the Hon'ble Supreme Court has held as under:-

51. *The case in respect of the cost of packing is somewhat complex. The new Section 4(4)(d)(i) has made express provision for including the cost of packing in the determination of "value" for the purpose of excise duty, inasmuch as the case of the parties is that the new Section 4 substantially reflects the position obtaining under the unamended Act. We shall proceed on the basis that the position in regard to the cost of packing is the same under the Act, both before and after the amendment of the Act. Section 4(4)(d)(i) reads :*

"(4) For the purposes of this section -

(d) "value", in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

> *Explanation. - In this sub-clause "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound."*

It is relevant to note that the packing, of which the cost is included, is the packing in which the goods are wrapped, contained or wound when the goods are delivered at the time of removal. In other words, it is the packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer. The degree of packing in which the excisable article is contained will vary from one class of articles to another. From the particulars detailed before us by the assessees, it is apparent that the cost of primary packing, that is to say, the packing in which the article is contained and in which it is made marketable for the ordinary consumer, for example a tube of toothpaste or a bottle of tablets in a cardboard carton, or biscuits in a paper wrapper or in a tin container, must be regarded as falling within Section 4(4)(d)(i). That is indeed conceded by learned counsel for the assessee. It is the cost of secondary packing which has raised serious dispute. Secondary packing is of different grades. There is the secondary packing which consists of larger cartons in which a standard number of primary cartons (in the sense mentioned earlier) are packed. The large cartons may be packed into even larger cartons for facilitating the easier transport of the goods by the wholesale dealer. Is all the packing, no matter to what degree, in which the wholesale dealer takes delivery of the goods to be considered for including the cost thereof in the "value"? Or does the law require a line to be drawn somewhere? We must remember that while packing is necessary to make the excisable article marketable, the statutory provision calls for strict construction because the levy is sought to be extended beyond the manufactured article itself. It seems to us that the degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise levy. To that extent, the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate.

52. *If any special secondary packing is provided by the assessee at the instance of a wholesale buyer which is not generally provided as a normal feature of the wholesale trade, the cost of such packing shall be deducted from the wholesale cash price.*

[Emphasis supplied]

7. These decisions are squarely applicable to the facts of the present Appeals. Therefore, we do not find any reason to interfere with the detailed findings and conclusion arrived at by the Commissioner (Appeals).

8. Accordingly, we dismiss the Appeals filed by the Revenue.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja