IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. E/1694/2010

(Arising out of Order-in-Appeal No. SB(63)63/M-V/2010 dated 30.6.2010 passed by Commissioner of Central Excise (Appeals), Mumbai-I)

Amardeo Plastic Industries **Appellant**

Vs.

Commissioner of Central Excise, Mumbai-V **Respondent**

Appearance:

Shri S.K. Babaladi, Consultant, for appellant
Shri M.R. Melvin, Superintendent (AR), for respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 8.10.2018
Date of Decision: 8.10.2018

ORDER No. **A/87579/2018**

Per: Sanjiv Srivastava

The appeal is directed against the order of Commissioner (Appeals) Central Excise Mumbai Zone-1 dated 30th June 2010. By the said order Commissioner (Appeal) has upheld the order of Deputy Commissioner Central Excise, Malad Divison, Mumbai V Commissionerate holding as follows:

"25. I confirm the demand of differential Central Excise duty amounting to Rs 2,46,296/- (Rs 2,40,390/- (Basic) + Rs 4,808/- (Education Cess) + Rs 998/- (Higher Education Cess)) 9rupees Two Lakhs Forty Six Thousand Two Hundred and Ninety Six only) on M/s Amardeo Plastic Inds under proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944.

26. I impose equal penalty amounting to Rs 2,46,296/- on M/s Amardeo Plastic Inds under Section 11AC of the Central Excise Act, 1944.

27. I do not propose to impose any penalty under Rule 25 of Central Excise Rules, 2002, since imposition o0f penalty under Section 11AC of Central Excise Act, 1944 meet the ends of justice.

28. The interest at appropriate rate is also recoverable under section 11AB of the Central Excise Act, 1944."

2.1 During the course of preventive checks it was observed that the appellants were clearing the goods to their sister concern on payment of duty on the assessable value which is determined on rate reduced by Re 1 to Rs 2.50 per kg then the declared assessable value. The said value for clearance was agreed mutually and verbally without any written contract. Statements of the concerned persons in the unit, i.e. Shri Prabhat Singh, Partner, Shri Simon D Rodrigues an employee in the unit and Shri Panchdeo Singh Business Controller and Partner in M/s Indian Extrusions (sister concern) were recorded.

2.2 On the basis of the investigations undertaken it was alleged that the Appellants and their sister concern are interconnected units and hence related person for the purpose of Central Excise. Since the sister concern was captively consuming the goods, by application of Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, valuation of the said goods was sought to be done in terms of Rule 8, by applying the cost construction method.

2.3 Appellants contested the notice before the adjudicating authority stating that the their entire clearances were not made to their sister concern, but they were clearing the same goods to other buyer as well, thus in view of the specific wording of Rule 9, the valuation in their case needs to be done under Rule 10. However said contention of the appellants was not agreed to by the adjudicating authority and he confirmed the demand against them.

2.4 Matter was taken in appeal before the Commissioner (Appeal) who upheld the order of adjudicating authority, hence this appeal before us.

3.1 In the appeal filed appellants have assailed the order of Commissioner (Appeals) on grounds as follows:

i. The issue is in respect of 18% of their total clearances, made to their sister concern. Remaining 82% of the sales were made to independent buyers. Since all the sales were not made to or through related person Rule 9 of valuation rules shall not be applicable for determination of the assessable value of the goods cleared to related person.

ii. Further none of the authorities have held them and their sister concern to be related person in terms of Section 4(3)(b)(ii), (iii), (iv) or clause 41 of Section 2 of the Companies Act, 1956 (1 of 1956). Thus invoking the provisions of Rule 9, for determining the assessable value may not be justified.

iii. Both the authorities have failed to appreciate that Rule 9 of the Valuation Rules 2000, is applicable only when the goods are sold through related person. Rule 10 of the valuation rule specifically cover the situation when sales are to through interconnected undertakings and the sales were also made to independent buyers.

iv. Quantity discounts offered by them need to be allowed. It is not the case that quantity discounts on the list price were given only to their sister concern, but were also given to Marico Limited.

v. In the case of sale to their interconnected undertaking there is no favored treatment. Nothing has been brought on record that the price to their sister concern was a favoured price and there was any extra commercial consideration.

vi. In their view clearances to interconnected undertakings are covered by the provisions of Section 4(1)(b) read with Rule 10 of Central Excise Valuation (DPEG) Rules, 2000 and not by Rule 9 read with Rule 8 as have been held by the authorities below.

vii. Further the orders of authorities below is erroneous because even if the clearances made by them were to be valued in terms of Rule 9 read with Rule 8, then also the assessable value should be 110% of the value arrived on cost construction and not 110% of the invoice value.

viii. They have been following the same practice for clearance to the sister concern for last twenty years and they were under bonafide belief that Rule 8 is not attracted in their case as they were selling the goods to independent buyers too. There was no intention or motive top evade Central

Excise duty and hence extended period of limitation has been wrongly invoked.

ix. Since demand itself is not sustainable imposition of penalty cannot be justified.

4.1 We have heard Shri S K Babaladi, Consultant for the Appellants and Shri M R Melvin, Superintendent Authorized Representative for the revenue.

4.2 Learned Consultant submitted that in the case of clearances made to interconnected unit, the valuation has to be done in terms of Rule 10 and not in terms of Rule 9 as has been held by the lower authorities. He submitted that this issue has been settled by the larger bench of tribunal in case of Ispat Industries [2007 (209) ELT 185 (T-LB)]. He submitted that in the case of interconnected units where, the goods are being sold to the interconnected unit and also to independent buyers, the valuation should have been done in terms of Rule 10 only.

4.3 Learned A R reiterated the order of adjudicating authority and the Commissioner (Appeal).

5.0 From the facts as stated the issue for consideration is in very narrow compass with regards to applicability of Rule 9 or Rule 10 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Undisputed fact is that appellants have been clearing the goods to their interconnected unit as well as other independent buyers. The value of the goods for clearance to their interconnected unit was approximately lower by Rs 1 to Rs 2.5 per kg from the printed price list. They have offered quantity discounts to other bulk buyers namely M/s Marico Limited. In fact about 82% of the goods were being cleared to independent buyers and only 18% have been cleared to their sister concern (inter-connected unit)

5.1 For proper appreciation of law we reproduce Sub Section (3) of Section 4 of the Central Excise Act,1944 and Rule 8, 9 and 10 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, below:

"Central Excise Act, 1944

Section 4

(3) For the purpose of this section,-

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be "related" if -

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

Explanation.- In this clause-

(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practice Act, 1969 (54 of 1969); and

(ii) ***"relative"*** *shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);*

Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000

Rule 8.

Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the cost of production or manufacture of such goods.

Rule 9.

When the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in the manner specified in either of sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of the goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail :

Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.

Rule 10.

When the assessee so arranges that the excisable goods are not sold by him except to or through an inter-connected undertaking, the value of goods shall be determined in the following manner, namely :-

(a) If the undertakings are so connected that they are also related in terms of sub-clause (ii) or (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act or the buyer is a holding company or subsidiary company of the assessee, then the value shall be determined in the manner prescribed in rule 9.

Explanation. - In this clause "holding company" and "subsidiary company" shall have the same meanings as in the Companies Act, 1956 (1 of 1956).

(b) in any other case, the value shall be determined as if they are not related persons for the purpose of sub-section (1) of section 4."

5.2 From the plane reading of provision noted above, it is quite evident for the purpose determining the value in terms of Rule 9, the persons transacting should be related as per the clause (ii), (iii) or (iv) of sub section 3 to Section 4.

5.3 As per Para 7 of the Show Cause Notice, *"In view of the above it is amply clear that, in legal terms, M/s Amardeo Plastic Industries and M/s Indian Extrusions are inter-connected undertakings. As such they should have considered the value of their products sold to M/s Indian Extrusions in terms of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000,* *and not the value which was verbally decided among them."*

5.4 Para 17 of the order in original states *"Thus, it is quite clear that the department has strived to prove in the Show Cause Notice itself that since two partners in both the firms are common, both the firms are proved to be inter-connected undertakings and prices charged are favoured prices. The department has mentioned in the show cause notice all the relevant act and rules to prove their contentions. But assessee is not accepting the same simply stating that the same are allegations. Neither the assessee provides any proof nor refer to any law to prove that they are not inter-connected undertakings or that they do not have interest in each other's business. Further, they are admitting in their reply that they are selling the said goods to other independent and non related buyers also on discounted prices, which means indirectly they are admitting that M/s Indian Extrusion is their sister concern or inter-connected undertaking."*

5.5 Further in Para 7 of Commissioner (Appeals) order, Commissioner (Appeal) records " .... Further the clause (g) of Section 2 of Monopolies and Restrictive Trade Practices Act, 1969 defines

"inter-connected undertakings" *where the undertakings are owned by firms, if such firms have one or more common partners.*

M/s Amardeo Plastics			M/s Indian Extrusions	
Names of Partners (S/ Shri)			Names of Partners (S/ Shri)	
1	Amarnath H Singh		1	Amarnath H Singh, Karta Amarnath H Singh, HUF
2	Panchdeo H Singh		2	Shail V Singh
3	Rahul A Singh		3	Manju R Singh
4	Prabhat B Singh		4	Panchdeo H Singh

As may be seen from above table there are one or more common partners and as such can definitely be called as "inter-connected undertakings."

5.6 Thus it is quite evident the case of department is that the appellant and their sister concern fall within the definition of inter-connected undertakings and hence are related persons as defined under sub section (3) to Section 4 of the Central Excise Act, 1944. There appears to be no dispute that the supplier and recipients are inter-connected undertakings and hence are related in terms of clause (i) of said sub-section and not clauses (ii), (iii) and (iv).

5.7 Since the appellants and their sister concerns are related persons in term of clause (i) and not in terms of clause (ii), (iii) or (iv), for the purpose of valuation of goods cleared to sister concern the valuation cannot be done in terms of Rule 9 as the said rule is applicable only in cases where the units are held to be related person in terms of (ii), (iii) or (iv). Our view is the view as have been held by various authorities listed below:-

i. Handy Wires Pvt. Ltd. v. Commissioner of Central Excise, Nagpur – [2015 (329) E.L.T. 169 (Tri.-Mumbai)];

ii. South Asia Tyres Pvt. Ltd. v. Commissioner of Central Excise, Aurangabad [2003 (152) E.L.T. 434 (Tri.-Mumbai)];

5.8 Hon'ble Supreme Court has in case Commr. Of C. Ex., Aurangabad Versus Goodyear South Asia Tyres Pvt. Ltd [2015 (322)ELT 389 (SC)]

"***14.*** *No doubt that the assessee became the fully owned company of Goodyear, the relationship between the two would be that of related persons as they became "inter connected undertaking" and are covered by the provisions of amended Section 4(4)(3)(b) of the Act which provides that the person would be deemed to be "related" if :*

"i. they are inter-connected undertakings,

ii. they are relatives,

iii. Amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor, or

iv. they are so associated they have interest, directly or indirectly, in the business of each other."

15. *This position was not denied even by the assessee. However, their submission was that provisions of Rule 9 of the Valuation Rules are not attracted as this Rule applies only when assessee so arranges its affairs that the excisable goods are not sold by it except to or through* *a person who is related in the manner specified in either of the sub-clauses (ii), (iii) or (iv) of Section 4(3)(b) of the Act. [Rule 9 does not cover clause (i)].*

16. *This contention of the assessee is accepted by the CEGAT and the CEGAT is justified in adopting this course of action. It is clear that the two are companies and therefore, they are not relatives and therefore, clauses (ii) and (iii) are not applicable on the basis of it. Insofar as clause (iv) is concerned, what is to be shown is that they have interest, directly or indirectly, in the business of each other. The expression "each other" would signify the element of mutuality and we have already held above that this mutuality principle has not been satisfied in the instant case.*

17. *Apart from the above, it would be significant to mention that after taking over of the assessee company by Goodyear, more than 70 per cent of the sales by the assessee company are to the third parties. That apart, there was another contention of the assessee, viz., that the goods sold to the outsiders are at a lesser rates than sold to Goodyear. These two contentions have not been refuted by the Revenue. The case, therefore, would be clearly covered by a recent judgment of this Court in 'Commissioner of Central Excise, Hyderabad v. M/s. Detergents India Limited and Another' [2015 (4) SCALE 631 = 2015 (318) E.L.T. 559 (S.C.)] wherein it was held :*

"We are of the view that the "arrangement" spoken of in the proviso must be something by which the assessee and the related person "arrange" that the goods are sold at something by which the assessee and the related person "arrange" that the goods are sold at something below the normal price, so that tax is either avoided or evaded by such arrangement. Secondly, the expression "generally" also shows that such goods must

predominantly be sold by the assessee to or through the related person - in mathematical terms, sales that are to or through a related person must consist of at least 50% of the goods that are manufactured and sold. The expression "to or through a related person" again goes back to the "arrangement" and is another way of saying that such sale can be effected directly to or indirectly through such related person. It is only when all three considerations are cumulatively met that proviso (iii) can be said to be attracted."

5.9 Further Hon'ble Supreme Court has in case of Commissioner Of C. Ex., Pune Versus Mahindra Ugine Steel Co. Ltd [2015 (318) ELT 592 (SC)] held as follows:-

3.*The question before us, in the present appeal, is as to whether Rule 8 of the Central Excise (Valuation) Rules, 2000 (hereinafter referred to as 'the Rules') or Rule 11 thereof would apply in arriving at the valuation of the goods at the end of the respondent/assessee. As per the appellant/Department Rule 8 is applicable and therefore, the value has to be 115% of the cost of production. Rule 8 reads as under :*

*"**RULE 8 :** ...."*

4.*On the face of it Rule 8 will have no application to the facts of the present case. It is rightly pointed out by the CEGAT that for the applicability of this Rule two requirements are to be fulfilled. The first is that the excisable goods that the assessee manufactures are not sold by him and the second requirement is that these goods must be used for consumption either by him or on his behalf in the production or manufacture of other articles. In the present case, first condition is* *undoubtedly satisfied as the goods are not sold by the respondent. However, second condition is not at all met or fulfilled inasmuch as the goods are not used by the assessee for consumption either by him or on his behalf in the production or manufacture of other articles. As stated above, these goods are supplied to the manufacturer of the motor vehicles.*

5.*Learned Counsel for the appellant, however, referred to Rule 9 and submitted that the proviso to the said Rule would attract the applicability of Rule 8 in the present case. In order to appreciate this argument, we take note of Rule 9 which is reproduced below :*

*"**RULE 9 :**…………"*

6.*In order to attract this rule, first requirement is that the assessee sells the excisable goods to or through a person who is related in the manner stated in S.4(3)(b) of the Act. There are four eventualities provided in sub-clause (i) to (iv) which such a person can be related.*

***Section 4(3)(b) :** ………..*

7.*However Rule 9 mentions relationship that is visualised in sub-clauses (ii) to (iv) only and excludes clause (i).*

8.*Thus, this Rule would be applicable only in those cases that assessee is related in the manner specified in either of sub-clause (ii), (iii) or (iv) of clause (b) of sub-section (3) of Section 4 of the Act and not in those cases where the person is related in the manner as stated in clause (i) thereof. In those cases where Rule 9 is applicable, for the purpose of valuation, normal transaction value at which such goods are sold by the related person, is to be taken as the value of the goods. Proviso becomes applicable only when goods are not sold by the related person at all and used or consumed for home production. As there is* *no sale transaction by the related person, question of value thereof will not be available and therefore, to arrive at the value in such a situation one has to fall back on Rule 8.*

9.*However, if main Rule 9 is not attracted, question of applicability of proviso thereto does not arise.*

10.*In the present case what we found is that a specific finding is arrived at by the Assistant Commissioner himself that the respondent who has manufactured goods on job work basis for M/s. Mahindra and Mahindra is treated as related to Mahindra and Mahindra in terms of Section 4(3)(b)(i) of the Act. The Commissioner in this behalf stated as under in his order:*

"I find that assessee have manufactured goods on job work basis for M/s. Mahindra & Mahindra and others. M/s. Mahindra & Mahindra are the related persons in terms of Section 4(3)(b)(1) a fact which the assessee has also admitted and others i.e. M/s. Ashok Leyland, M/s. Ameja & M/s. PSSL are not related."

11.*Such a relationship is excluded from Rule 9 as sub-clause (i) is conspicuously absent therefrom. On this ground alone proviso to the Rule 9 shall not be attracted at all. Therefore, from whatever angle the matter is looked with, Rule 8 would not apply here.*

12.*Once we come to the conclusion that Rule 8 is not applicable in the case of the respondent, it is Rule 11 only which becomes applicable as that is residuary provision for arriving at the value of any excisable goods which are not determined under any other rule."*

5.10 Thus in view of the specific decisions of the Hon'ble Supreme Court on the issue, the decision of Commissioner (Appeal) cannot be sustained.

6.0 The Appeal is allowed with consequential reliefs if any.

(Pronounced in court)

(Archana Wadhwa)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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