IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: E/625/2010

[Arising out of Order-in-Appeal No: SR/36/NGP/2010 dated 25th January 2010 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur.]

For approval and signature:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Amitasha Enterprises Pvt Ltd … ***Appellant***

versus

Commissioner of Central Excise & Customs
Nagpur ***…Respondent***

Appearance:

Shri PV Sadavarte, Advocate for appellant

Shri NN Prabhudesai, Superintendent (AR) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 09/08/2018
Date of decision: 14/12/2018

ORDER NO: A/88117 / 2018

Per: C J Mathew

The dispute centres around the demand for differential duty of central excise amounting to ₹ 24,30,998 on the clearances of 2389.4 metric tons and 608.59 metric tons of 'MS steel transmission line parts' and 1544.2 metric tons and 517.44 metric tons of 'HT steel transmission line parts' in 2003-04 and 2004-05 by M/s Amitasha Enterprises Pvt Ltd arising from their conversion contract with M/s Tata Power Company Ltd requiring the latter to supply 'steel angles' and 'zinc'. The appellant discharged tax liability on ₹ 27,500 per metric ton for 'MS steel parts' and at ₹ 29,000 per metric ton for 'HT steel parts' as declared by the principal.

2. Relying upon circular no. 619/10/2002-CX dated 19th February 2002 of Central Board of Excise & Customs, which mandated valuation of goods manufactured by 'job worker' to comply with rule 11, read with rule 6, of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 along with the judgement of

the Hon'ble Supreme Court in *Ujagar Prints Ltd [1989 (39) ELT 493 (SC)]* and *Pawan Biscuits Co Ltd [2000 (120) ELT 24 (SC)]* requiring the assessable value to be the sum of the job charges and the cost of raw materials used in manufacture, the cost of 'steel' and 'zinc' supplied by the principal was recomputed, and to which was added 'local freight' and the conversion charges, based on the rate incorporated in the conversion agreement and the additional amount of ₹ 2,365 per metric ton for which bill had been raised by the appellant, to arrive at revised assessable value ₹ 27,841 and ₹ 36,417 for 'MS steel parts' and ₹ 30,017 and ₹ 40,522 for 'HT steel parts' for 2003-04 and 2004-05. Further duty of ₹ 1,83,064 on the value of prototype erection and dismantling on which duties had not been discharged by the appellant was also held to be leviable. The consequent confirmation of demand proposed in the show cause notice, recovery of interest thereon, the appropriation of ₹ 17,11,520/- paid during the investigations and the imposition of penalty of like amount under section 11AC of Central Excise Act, 1944 and under rule 25(1) of Central Excise Rules, 2002 upheld by Commissioner Customs & Central Excise (Appeals), Nagpur in order-in-appeal no. SR/36/NGP/2010 dated 25 January 2010 is now assailed before us.

3. The appellant submits that 'job work' is governed by notification no. 214/86-CE dated 25th March 1986 and claimed that they were not in control of the materials supplied by the principal to

enable computation of the cost for the purposes of determination of duty liable to be paid on clearances effected by them. The upward revision of the conversion charges adopted by central excise authorities was also disputed by appellant. According to them, notwithstanding the adoption of contemporary prices for the raw material supplied free of cost and the revision in conversion charges to which they have objected, the duty liability arising from these additions would yet not render them liable to any recovery as the declared value on which duty liability was discharged by them had the effect of payment of duty in excess.

4. It would appear that, other than the confirmation of duty liability on the cost of 'prototype', the dispute is thus limited to the value assigned to the scrap arising from the conversion process that was retained by the appellant and the percentage of 'scrap' adopted in the findings of the lower authorities. In the impugned order, the recovery of prime material in the conversion process has been assumed to be 5% against the 0.007% established empirically by the appellant.

5. Learned Counsel for appellant relies upon the decision of the Tribunal in *PR Rolling Mills Pvt Ltd v. Commissioner of Central Excise, Tirupathi [2010 (249) ELT 232 (Tri-Bang)]* which was approved by Hon'ble Supreme Court, in *Campco Chocolate Factory*

v. Commissioner of Central Excise, Mangalore [2010 (258) ELT 273 Tri-Bang)] and in *Ad-Manum Packaging Ltd v. Commissioner of Central Excise, Indore [2016 (341) ELT 348 (Tri-Del)]*.

6. On the other hand, Learned Authorised Representative relies upon the decision of the Tribunal in *Jay Engineering Works Ltd v. Commissioner of Central Excise, Hyderabad [1997 (93) ELT 492 (Tribunal)]* which was approved by the Hon'ble Supreme Court, that of the Hon'ble Supreme Court in *Commissioner of Central Excise, Nagpur v. Lloyds Steel Industries Ltd [2007 (213) ELT 339 (SC)]* and of the Larger Bench of the Tribunal in *Thermax Babcock and Wilcox Ltd v. Commissioner of Central Excise, Pune-I [2017-TIOL-4390-CESTAT-MUM-LB]*.

7. As far as the duty liability on prototype is concerned, there is very little information available in the records including the show cause notice. It is not clear whether the prototype is subjected to testing within the factory of the appellant or elsewhere. Similarly, it is not ascertainable if the prototype is assembled in the premises of the appellant or at another location after clearance of the disassembled parts. In the absence of any such evidence, it is impossible to crystallise the leviability of duty, if at all. It was in almost identical circumstance that the Tribunal held in *Commissioner of Central Excise, Mumbai – II v. Jyoti Structures Ltd [2004 (170) ELT 190 (Tri*

-Del)] that ‘destruction testing’ erases the prototype out of existence and, thereby, of dutiability. In arriving at this decision, the contention of Revenue that the cost of assembling and destruction, of prototype should be included in the value of clearances of finished goods was not found sustainable because

> *‘4.... We are not inclined to accept the contention raised by the Revenue that these testing are conducted in relation to the goods manufactured by the assessee, namely, parts of transmission towers. Parts are cleared from the factory after undergoing required quality test. The charges for the destruction test which is conducted on the prototype towers cannot therefore be added to the assessable value of the goods manufactured by the Respondent.’*

and thus according finality to the present dispute on that score. An earlier decision of the Tribunal in *Commissioner of Central Excise, Mumbai–II v. KEC International Ltd [1998 (102) ELT 621 (Tribunal)]* noted a similar lack of evidence to sustain the claim of Revenue that prototypes, subjected to destruction, are excisable goods cleared from the factory. Following these two decisions, we set aside the demand on the prototype in the impugned order.

8. As posited by Learned Counsel for appellant, ‘job work’ does not find a place in Central Excise Act, 1944; a ‘job worker’ is, thus, but a manufacturer and, to the extent that excisable goods emerge from ‘job work’ duty liability devolves on such enterprise. The

difference between the two is merely the absence of control over the primary inputs and the disposition of the product emerging from 'job work'. However, notification no. 214/86-CE dated 25th March 1986, which does define 'job work', enables shifting of this tax liability conditional upon assumption of such by the principal. That is not a claim in the present dispute thus, unambiguously, requiring discharge of duty liability on the goods manufactured by the appellant even as a 'job worker'. The contention of the appellant that payment of duties on the basis of the price declared by the principal as per contractual agreement suffices is, *ex facie*, not acceptable without the test of the computation of liability by the appropriate rule in Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

9. Revenue contends that circular no. 619/10/2002-CX dated 19th February 2002 of Central Board of Excise & Customs requires application of rule 11, read with rule 6, of the said Rules and the two seminal decisions of the Hon'ble Supreme Court referred *supra*. According to Learned Authorised Representative, with the relationship between principal and 'job worker' at arm's length, this determination would be the appropriate assessable value. He contends that it was thus that the central excise authorities directed the inclusion of value of 'scrap' generated, and retained, by the appellant for assessment. He submits that finality on this has been attained with the decision of the Hon'ble Supreme Court in *General Engineering*

Works v. Commissioner of Central Excise, Jaipur [2007 (212) ELT 295 (SC)] stipulating that

> *'5. It must be clarified that the value of scrap would be included in the value of the points and crossings only in case where it is shown that the conversion charges get depressed by the fact that the processor is allowed to keep and sell the scrap.... If the conversion charges are not depressed or if the scrap/waste is returned then their value will not get added.*
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> *6. The burden of proving that the price is so depressed would be on the Revenue. But one of the methods of proving it would be through the contract between the parties itself....'*

which was followed in *re Lloyds Steels Industries Ltd*. The decisions in *re PR Rolling Mills Pvt Ltd* and in *re Campco Chocolate Factory* cited by Learned Counsel are not at variance inasmuch as these were guided by the absence of any evidence to conclude that the conversion charge had been depressed owing to retention of scrap.

10. We observe that there is no finding in the impugned order on the manner in which the conversion charge has been influenced by the retention of 'scrap' with the appellant. Nevertheless, as advised by the Hon'ble Supreme Court in *re General Engineering Works*, we take note that the provision in the contract pertaining to

> *'14. Wastage of Raw Materials*
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> *As TCPL's role shall be limited to placement of Order on vendors nominated by AEPL, and release of payment to them as per the terms finalised by AEPL, AEPL shall be fully*

> *responsible for wastage and no additional liability shall be passed on to TCPL. AEPL shall be the owner of all scrap and wastage.'*

is not a privilege accorded to the appellant but is intended to ensure that the vendors identified by the appellant do not compromise on quality. In these circumstances, the addition of value of 'scrap' to the value of clearances is not in conformity with the decision of the Hon'ble Supreme Court *supra*. Furthermore, the claim of the appellant that the show cause notice had erred in attributing wastage of 5% cannot be ignored; more so, as it has been demonstrated by appellant that the 'scrap' generated was negligible. Therefore, the inclusion of value of 'scrap' in the computation of assessable value does not have the sanctity of law.

11. It is seen that the exercise of ascertaining the appropriate assessable value did assign a value to the material supplied by the principal. It is apparent from the contract that these materials, though paid for by the principal, were received from vendors identified by the appellant and the corresponding invoices should be available for verification. It is this cost of raw material that should have been the basis of any computation. As the entirety of supply was owned by the principal, to whom the appellant was responsible for proper accountable thereof, the actual consumption alone would have sufficed in the ascertainment of assessable value instead of loading it

for the assumed percentage of ‘scrap’ generated.

12. The various elements of the ascertained assessable value suffer from infirmities that we have pointed out *supra*. To determine any deficit in the value adopted for assessment in comparison with the price declared as per the contract, the exercise requires to be carried out afresh in the light of our observations on these elements. We, therefore, set aside the impugned order and remand the matter back to the original authority to re-determine the acceptability of the declared price for assessment and the duty liability, if any, arising from unaccounted value of these elements which we have approved for inclusion.

(Pronounced in Court on 14/12/2018)

(S K Mohanty)
Member (Judicial)

(C J Mathew)
Member (Technical)

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