CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Excise Appeal No. 914 of 2010
&
Excise Cross No. 32 of 2010

(Arising out of Order-in- Appeal No. YDB/109 & 110/BEL/2010 dated 25.02.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai II)

Commissioner of Central Excise, **…..Appellant**
Belapur, 1st Floor, CGO Complex,
CBD Belapur
Navi Mumbai

Vs.

M/s. Asahi India Glass P. Ltd. **…..Respondent**
Plot no. T-7, MIDC,
TALOJA,
Taluka Panvel, Dist. Raigad

With

Excise Appeal No. 915 of 2010
&
Excise Cross No. 31 of 2010

(Arising out of Order-in- Appeal No. YDB/109 & 110/BEL/2010 dated 25.02.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai II)

Commissioner of Central Excise, **…..Appellant**
Belapur, 1st Floor, CGO Complex,
CBD Belapur
Navi Mumbai

Vs.

M/s. Asahi India Glass P. Ltd. **…..Respondent**
Plot no. T-7, MIDC,
TALOJA,
Taluka Panvel, Dist. Raigad

APPEARANCE:

Shri N. N. Prabhudesai, Supdt (Authorised Representative) for the appellant
Shri Prashant Patankar, Consultant for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/85747-85748/2019

DATE OF HEARING : 17.12.2018
DATE OF DECISION : 16.04.2019

PER: C J MATHEW

M/s Asahi India Glass Pvt Ltd, the respondent herein, cleared goods on 'stock transfer' from their factory at Taloja to their depot at Roorkee before sale to their customers and had sought recourse to 'provisional assessment' on the ground that it would not be possible to ascertain the assessable value as various discounts, on account of bulk purchase, trade discount and prompt payment, would not be known at the time of clearance from the factory. The assessments were being finalised every quarter on the basis of the discount actually passed on to buyers on sale from the depot at Roorkee. The finalisation, ordered for October 2008 to December 2008 and from January 2009 to March 2009, which was challenged on behalf of the department was disposed off by order in appeal no. YDB/109 & 110/Bel/2010 dated 25 February 2010 of Commissioner of Central Excise (Appeals), Mumbai Zone-II, and, while dismissing the challenge to finalisation of assessment on the actual transaction value of the goods sold at the depot, allowed the plea in relation to assessment of unsold goods also being subjected finalised with the direction for that to remain as provisional. In effect, the first appellate authority held that, in finalizing the provisional assessment, there was no requirement to resort to the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Continuing the grievance, Revenue is now before us challenging the impugned order for having approved the adoption of transaction value to finalise the 'provisional assessment' of goods sold at the depots instead of ascertainment under rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

2. According to Learned Authorised Representative, duty liability under section 4 of Central Excise Act, 1944 was, consequent upon amendment of 1st July 2000, to be computed on transaction value at the place of removal which, owing to the amendment, was restricted effectively to

> *'4(3) ...*
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> *(c)(i) a factory or any other place of premises of production or manufacture of the excisable goods;*
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> *(ii) a warehouse or any other place of premises wherein the excisable goods have been permitted to be deposited without payment of duty; ...'*

and that the adoption of transaction value at any other place is not consistent with the scheme of valuation under Central Excise Act, 1944. It is his contention that the first appellate authority had erred in concluding that the reliance placed by Revenue on certain portions of circular no. F No 354/81/2000 dated 30th June 2000 of Central Board of Excise & Customs to the exclusion of paragraph 9 therein was inappropriate. According to him, the error is manifest in allowing the various discounts, offered at the time of sale after clearance from the factory in the face of various decisions to the contrary. He placed reliance on the decision of the Hon'ble Supreme Court in *Purolator India Ltd v. Commissioner of Central Excise, Delhi-III [2015 (323) ELT 227 (SC)]* and in *Commissioner of Customs & Central Excise,* *Nagpur v. Ispat Industries Ltd [2015 (324) ELT 670 (SC)]* and of the Tribunal in *Century Laminating Co Ltd v. Commissioner Central Excise*, *Meerut-II [2013 (288) ELT 276 (Tri-Del)]*, in *Wearwell Tyres & Tubes Industries P Ltd v. Commissioner of Central Excise, Bhopal [2010 (257) ELT 126 (Tri-Del)]* and in *Samtel India Ltd v. Commissioner of Central Excise, Jaipur [2001 (136) ELT 1009 (Tri-Del)]*.

3. Considering the determination before us in this appeal, *viz*., the correctness of the decision of the first appellate authority in discarding the very grounds of appeal that is on record herein, without pursuing the admissibility of the various discounts, the submissions of Learned Authorised Representative beyond the two grounds are not relevant. The Hon'ble Supreme Court, in *re Purolator India Ltd*, did rule on the allowing of certain discounts, and did refer to the restriction effected by the amendment *supra*; nevertheless, the decision holds that the components of assessable value remained unchanged insofar as discounts, as held in various precedent decisions, are concerned. The Hon'ble Supreme Court elaborated at length on the consequences of amendment of 'place of removal' in section 4 of Central Excise Act, 1944. We have no doubt that 'place of removal' is not the depot in the impugned clearances and, even if it was, the definition of 'time of removal' would render it irrelevant. The decision of the Tribunal in *re Century Laminating Co Ltd,* pertaining to the pre-amended version of section 4 of Central Excise Act, 1944, was on the admissibility of various deductions which is not within the sphere of our determination. In *re Wearwell Tyres & Tubes Industries P Ltd*, the Tribunal, dealing with the amended section 4 of Central Excise Act, 1944, held that the exclusion of discounts cannot be at variance with trade practice which is known prior to removal of goods and having

been actually expended by the manufacturer. The decision in *re Samtel India Ltd* is in a similar vein.

4. Learned Consultant for the respondent relies upon the provisions of section 4 of Central Excise Act, 1944, on the decisions of the Hon'ble Supreme Court in *Commissioner of Central Excise, Jaipur v. Rajasthan Spinning & Weaving Mills Ltd [2007 (218) ELT 641 (SC)]* and in *Paper Products Ltd v. Commissioner of Central Excise [1999 (112) ELT 765 (SC)]* and the acceptance by the Department of the subsequent orders of finalisation on identical terms. In *re Paper Products Ltd*, it has been held that the tax authorities, both original and appellate, are required to comply with instructions and circulars issued by Central Government or Central Board of Excise & Customs in exercise of powers conferred by Central Excise Act, 1944. The decision in *re Rajasthan Spinning & Weaving Mills Ltd* to the effect that

> *9. If one analysis the above table it is clear that if one has to work out the assessable value on "comparable goods method" under Rule 6(b)(i), there has been, according to the assessee, value addition between lump fabric and graded fabric. ……. The Commissioner has given discounts but not abatement. The two concepts are different. The concept of abatement arises on account of the condition of the goods cleared at the factory gate which is materially different from the condition of the goods cleared from the Sales Depot.*
>
> *10. xxx*
>
> *11. Before concluding, we may state that valuation is not an exact science. Some amount of guess work exists in valuation. Therefore, different methods are prescribed by Valuation Rules. These rules are prescribed in order to find out the actual realization which realization constitutes the basis of assessable value. At the same time*

> *one must keep in mind that different methods prescribed have to converge to a common valuation. For example, as stated above, Rule 6(b)(i) prescribes "comparable goods method", Rule 6(b)(ii) prescribes "cost method" and Rule 7 which contemplates best judgment assessment states that the Assessing Officer is free to apply any of the methods prescribed by Rules 1 to 6 of 1975 Rules. We would like to, therefore, emphasize the aspect of convergence. It is not possible to accept wide variation in the result. The Department may apply different methods of valuation, but it has to ultimately ascertain by applying rule of convergence the estimated ad valorem value which would constitute the basis of assessable value.*

is, according to us, important in the context of the present dispute just as the decision in *re Paper Products Ltd*.

5. If there is one certainty in indirect tax disputes, the sticking point of 'valuation' arising from different meaning in different contexts would be voted to the top. The simplicity of alternatives are sacrificed at the altar of revenue buoyancy afforded by *ad valorem* taxes. The bone of contention is dictated by the chasm between revenue maximisation that motivates tax authorities and liability minimisation on the part of the assessee. The 'measure of value' being, at best, a legislated approximation, strict adherence to the valuation scheme is a necessity failing which tax collection would be discriminating and whimsical. Assessment is a product of rate of duty on valuation; valuation is to be accepted to extent of conformity of circumstances with the phraseology adopted in the valuation provision of the taxing statute. In the scheme of duties of central excise leviable on *ad valorem* basis and 'self-removal procedure', determination of duty liability by the assessee is a pre-requisite for discharge thereof. Under rule 6 of Central Excise Rules, 2002, the assessee is required to assess itself to duty liability on each clearance and under rule 7 of

Central Excise Rules, 2002, the assessee has the option of seeking 'provisional assessment' should 'rate of duty' or 'valuation' be in doubt. There is, thus, statutorily no difference between a provisional assessment under rule 6 of Central Excise Rules, 2002 and a final assessment under rule 5 of Central Excise Rules, 2002; both are required to be in compliance with section 4 of Central Excise Act, 1944 and merely evicts the bar of limitation in adjusting the dues, either way, on finalization of assessment.

6. Section 4 of Central Excise Act, 1944 enacts two mutually exclusive provisions: the first is of acceptance of 'transaction value' that is in accord with description of circumstances therein and the second is to cater to all situations that do not conform. Therefore, an assessment, provisional or final, will have to comply either with section 4 (1) of Central Excise Act, 1944 or with the Rules. This is apparent from the placement of rule 6 and rule 7 of Central Excise Rules, 2002. The various situations envisaged in Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 are independent of each other and mutually exclusive; rule 4 and rule 7 of the Rules apply in entirely different situations. It would appear that the appeal of Revenue is motivated by a less than acceptable appreciation of the scope of the expression 'place of removal'; 'place of removal' is certainly relevant for acceptance of transaction value but not for the ascertainment of 'duties'. Consequently, the reviewing authority felt compelled to raise this particular issue as the basis of the ground of appeal before us as well as before the first appellate authority.

7. Duty on manufactured goods is normally assessed once and for all upon for each removal; however, in circumstances of some doubt pertaining to the applicable rate of duty or valuation, resort may be had to provisional assessment. In the circumstances of the present

dispute, it was the incapability of the appellant to crystallise the net value, owing to the remoteness in time from the stage of removal from the factory at which goods are to be sold to an independent buyer that prompted such resort. The urging of the reviewing authority, both before the first appellate authority and before us, is for reliance on rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which requires adoption of the value on sale of like goods from the depot at the time of removal of the impugned goods from the factory as the assessable value; if such sale did not occur then the value of the nearest sale of like goods immediately preceding is acceptable as a substitute. If that was the intent of the scheme, there would be no requirement to resort to provisional assessment at all. That provisional assessment has been sought from, and was allowed by, the proper officer implies the immediate non-availability of confirmation for assessment but not non-ascertainability of value.

8. From the above, it would appear that the scheme of valuation provides for assessment of duty on the transaction value which conforms to the parameters laid down in section 4 (1) of Central Excise Act, 1944. Such assessment may be final or could be deferred for final assessment through recourse to rule 7 of Central Excise Rules, 2002. In either situation, the transaction value is to be adopted unless at the time of clearance and assessment, under rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2002 there is lack of conformity to the word picture depicted in section 4(1)(a) of Central Excise Act, 1944. Therefore, it is only when the assessee opts for final assessment in the first instance despite doubt about rate of duty or valuation at the place of removal that recourse may be had to Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2002. Any other interpretation

would render the provisions of rule 7 of Central Excise Rules, 2002 to be inoperable and superfluous.

9. The respondent was unable to determine the transaction value at the time and place of removal as a sale, that conforms to section 4 (1)(a) of Central Excise Act, 1944 was yet to occur. They did not opt for final assessment. The discounts that were intended to be granted to the buyer at the depot was known at the time and place of removal itself from the factory; however, the identity of the buyer, quantity sold and consideration, being an event of the future, could not be evidenced as invoice value at the time of removal to itself. Hence, the recourse to provisional assessment. Had there been a sale at the time and place of removal, these very discounts would have been eligible for abatement to arrive at the assessable value. There is, therefore, no flaw in the findings of both the lower authorities insofar as the goods sold from the depot are concerned.

10. The impugned order has directed that the goods remaining unsold at the time of finalisation of provisional assessment should continue to retain that status till sale does occur. It is seen from the records that the order of the competent authority for provisional assessment, under rule 7 of Central Excise Rules, 2002, requires that the assessment be finalised at the end of every quarter. The said rule prescribes an outer time limit of six months for such finalisation which may be extended by the competent authority. Should be goods remain unsold beyond such statutory limit, the absence of a transaction value from the depot would bring the impugned goods within the ambit of section 4 (1)(b) of Central Excise Act, 1944 and rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2002. We, accordingly, modify the order of the first appellate authority to this extent.

11. The appeal of Revenue is dismissed and Cross objection is also disposed of.

(Pronounced in Court on 16.04.2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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