

Collector of Central Excise Vs. Crompton Greaves Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-24-1996

Reported in : (1997)(90)ELT486TriDel

Appellant : Collector of Central Excise

Respondent : Crompton Greaves Ltd.

Judgement :

1. These appeals arise out of a common order passed by the Collector (Appeals) dismissing two appeals filed by the Department under Section 35E(2) of the Central Excises Act, 1944 (in short, the Act) against two separate orders passed by Assistant Collector approving five different price lists filed by respondent herein.

2. Respondent is engaged in the manufacture of electric motors and transformers for which intermediate products, namely electric stampings and laminations are also produced and captively consumed. We are concerned in these appeals with five price lists filed during the period from 1-8-1980 to 16-6-1982. Price lists were provisionally approved and by the two separate orders finally approved. The price lists were filed under Rule 6(b)(ii) of Valuation Rules, 1975 on the ground that Rule 6(b)(i) of the Rules was not applicable. Assistant Collector agreed with the stand taken by the respondent and granted approval. Collector of Central Excise directed Assistant Collector to file an appeal before the Collector (Appeals) on the ground that Rule 6(b)(ii) of the Rules is the residuary Rule which can be invoked only where Rule 6(b)(i) of the Rules cannot be invoked and the assertion by the respondent, Rule 7(b)(i) was not applicable which was impliedly accepted by the

Assistant Collector by approving the applicability of Rule 6(b)(ii) of the Rules was illegal. The Collector dismissed these appeals on the ground that the applicability of Rule 6(b)(i) of the Rules and determination of value of comparable goods produced by assessee or by any other persons was a matter not adverted to by the Assistant Collector and gave rise to a new issue and therefore could not have been projected under Section 35E(2) of the Act. This order is now challenged by the Department.

3. According to Shri M. Ali, JDR the Collector obviously erred in holding that the question raised before him did not arise from the record of the case before the Assistant Collector and was a new question raised for the first time in appeal. Shri R.G. Sheth representing the respondent supported the impugned order and placed reliance on two decisions of the Tribunal, namely, COC v. Phoenix Overseas (P) Ltd. - 1992 (62) E.L.T. 366 (Tribunal) and Senior Magnetics Ltd. v. COC -1992 (62) E.L.T. 377. Section 35E(2) enables the Collector of Central Excise to call for and examine the record of any proceeding in which a subordinate adjudicating authority has passed any decision or order under the Act. The purpose of calling for and examining the record should be to satisfy himself as to legality or propriety of any such decision or order. Where the Collector is so satisfied he may by order direct the subordinate authority to apply to the Collector (Appeals) for determination of such points arising out of the decision or order, as may be specified in his order. According to the Collector (Appeals) the contention that Rule 6(b)(i) of the Rules was applicable did not arise from the record of the case or from the decision of the Assistant Collector and therefore, the Collector could not have directed determination of the point.

4. In Phoenix Overseas (P) Ltd. case the Tribunal indicated that the authority acting under Section 35E has to confine itself to the record of proceedings and to confine its decision to the points arising out of its order. In Senior Magnetics Ltd. case the Tribunal held that a direction under Section 35E of the Act could not have been issued on the basis of quotation which came to the notice of the Department subsequent to the adjudication order and which was admittedly not before the adjudicating authority at the time of adjudication.

5. The question arising for consideration in the case is whether Clause (i) or (ii) of Rule 6(b) of the Valuation Rules was applicable. It is not disputed that in the price lists the respondent indicated that Rule 6(b)(i) of the Rules was not applicable and that Rule 6(b)(ii) was applicable. The Assistant Collector in approving the price lists filed under Rule 6(b)(ii) of the Rules erroneously accepted the statement of the respondent in the price lists that Rule 6(b)(i) of the Rules was not applicable. In other words, the question of applicability or otherwise of Rule 6(b)(i) of the Rules arose from the record, namely, the price lists and the order of the Assistant Collector. It is a question which did arise from the price list. The order of the Assistant Collector in approving the price lists in effect and substance accepted the claim of the respondent that Rule 6(b)(i) of the Rules was inapplicable. In the circumstances, we hold that even confining oneself to the record of the proceedings, namely, the price lists and the order of the Assistant Collector, the question of applicability or otherwise of Rule 6(b)(i) of the Rules did arise from the record and the order. Hence, the Collector of Central Excise was justified in directing the Assistant Collector to apply to the Collector (Appeals) under Section 35E(2) of the Act to decide the point as to the applicability of Rule 6(b)(i) of the Rules. In this connection we may refer to a decision of a Three-Member Bench of the Tribunal in *COC v. Northern Plastics Ltd.* -1980 (45) E.L.T. 263. It was argued before the Bench that the Board under Section 129D of the Customs Act, 1962 (similar language in Section 35E of the Central Excises Act, 1944) directed the Collector to file application before the Tribunal in respect of points not considered by the Collector. The Tribunal held that where an order is passed in total disregard of certain provisions of law, the Board cannot be expected to be a silent or mute spectator specially when it is empowered and is required by Section 129D to take appropriate action, namely, to direct the Collector to file an appeal before the Tribunal and to approach it for orders on the specified points. The Tribunal held that Section 129D cannot be interpreted in a restrictive manner so as to defeat and render nugatory the very purpose of Section. The Tribunal took the view that the phrase "points arising out of the decision" referred not only to commissions but also to omissions so long as they are relevant and relate to the facts and aspects of the matter before the Collector.

6. In view of what we have indicated above, the impugned order of the Collector cannot stand and requires to be set aside. However, in view of what we propose to indicate hereinafter we find it unnecessary to remand the matter to the Collector (Appeals); on the other hand remand of the matter to the Assistant Collector would be justified.

7. Sub-clauses (i) and (ii) of Rule 6(b) of the Valuation Rules are to the following effect: "(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee : Provided that in determining the value under sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods; (ii) if the value cannot be determined under Sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods." According to Sub-clause (i) the valuation is based on the value of the comparable goods produced or manufactured by the assessee or any other assessee. According to Sub-clause (ii) if the value cannot be determined under Sub-clause (i) the value shall be based on the cost of production including profits, if any, which the assessee would have normally earned on the sale of such goods. This would indicate that Sub-clause (ii) is residuary in nature where applicability of Sub-clause (i) is ruled out. That being so, the Assistant Collector should have enquired and examined whether during the relevant period comparable goods were being sold by other assessees. He would be justified in invoking the residuary clause, only if he is satisfied that comparable goods are not sold by any other assessee. This is an exercise which he ought to have performed but [he] did not. Therefore, we think it necessary to remand the matter to the adjudicating authority and direct that the materials, if any, collected by the adjudicating authority will be made known to the assessee and an opportunity of hearing will be given to the assessee before a fresh order is passed.

8. We set aside the impugned orders passed by the Assistant Collector and the Collector (Appeals) and remand the cases to the jurisdictional Assistant Commissioner for fresh decision on the approval of price lists, in accordance with

law and in the light of the observations in this order.

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