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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-12-1998

Reported in : (1998)LC466Tri(Delhi)

Judge : U Bhat, S T K.

Appellant : Orient Pre-stressed Products (P)

Respondent : Collr. of C. Ex.

Judgement :

1. The order-in-original dated 22-3-91 passed by the Additional Collector of Central Excise, Allahabad is under challenge in this appeal.
2. Appellant engaged in the manufacture of PCC Poles was from time to time entering into contracts for supply of the goods to U.P. State Electricity Board and filing price lists declaring the contract prices and on approval of the same, paying duty on the basis of such approved prices. In respect of the period from 1984 to October, 1988 show cause notice dated 19-1-90 was issued stating that under the terms of the relevant contract, the buyer was to pay appellant labour charges for loading of the goods in the trucks for the purpose of transport the goods to the premises of the buyer and the element of loading charges should have been included in the assessable value but was not so included and also alleging deliberate suppression of material facts with an intent to evade payment of duty and invoking larger period of limitation under the proviso to Section 11A of the Central Excise Act, 1944. The condition of the contract was that if required by the

buyer, loading of poles in the trucks should be done by the appellant in their premises and loading charges at the rate of Rs. 2/- per pole should be paid extra where the loading was required to be done by the appellant on the written instructions of the buyer. Appellant contended before the Additional Collector that there were no written instructions from the buyer and therefore, the buyer had not paid loading charges to the appellant and the demand was not correct. The Additional Collector overruled this contention holding that if loading charges were payable, the same should be included in the assessable value irrespective of whether actual payment had been made or not. The Additional Collector also overruled the plea of bar of limitation. Accordingly, the demand was confirmed. This order is now challenged.

3. Shri P.L. Kanodia, representative of the appellant stated that the buyer had never issued written instructions requiring the appellant to undertake loading of the goods in the trucks and therefore, had not incurred any liability to pay loading charges, as stipulated in the contract to the appellant and it was not a question of non-payment on the part of the buyer but it was a question of non-incurring of liability by the buyer. He also contended that with a view to maintain good relationship even in the absence of written instructions appellant attended to the loading work employing only the regular salaried staff and without employing any hired labour and the regular staff had been paid regular, salary and nothing more and the overhead cost including the salaries had been taken into consideration in fixing the price of the goods and it must be regarded that the cost of loading undertaken by the appellant was already included in the assessable value. The contention in this perspective was not raised before the lower authority. We asked the appellant's representative whether the appellant would be in a position to prove that loading was done by the salaried staff without payment of any extra remuneration and the work was not done by hired labour who had been paid remuneration for the work and he answered that documentary evidence would be available in proof of this contention. In this view we are inclined to remand the matter to enable the appellant to prove the contention now raised before us.

4. Next contention urged is that the show cause notice dated 19-1-90 for the period 1984 to October, 1988 was barred by time. Show cause notice alleged

suppression of facts and/or contravention of the provisions of the Central Excise Act, 1944 and the rules made thereunder with intent to evade payment of duty. It is pointed out that the price lists filed during the period specifically indicated in Column No. (5) that value was based on contract price between the UPSEB. The copy produced before us also indicates that the resident inspector had seen the contract letter of the Board. There is no dispute that the contract letter contained a clause regarding payment of loading charges, if loading was to be done by the appellant on the written instructions of the Board. This circumstance would indicate that the contractual term was within the knowledge of the department and the appellant had not concealed the same. There is no dispute that the contracts also contained clause on variation of price, variation of price of the inputs, wages, etc. However, price escalation would be subject to approval by the Board. In *Indian Aluminium Cables Ltd.* [1997 (95) E.L.T. 386 (T)] the Tribunal held in the context of refund application that prices stipulated under contracts containing price variation clause should be treated as provisional and the provisionally also attached to approval granted to the price lists following the decision of the High Court of Bombay in *Premier Automobiles Ltd.* [1987 (30) E.L.T. 71 (Bombay) (HC)]. It is contended for the appellant that the price variation clause relates only to variation of price of inputs and has nothing to do with the loading charges. That may be, but the provisionality of the price and the approval of the price lists springs from the price variation clause and once it is seen that the contracts contained price variation clause, the provisionality attaching to the price and the approval cannot be restricted to any particular aspect.

If it is provisional for one purpose, it must be provisional for all purposes. Therefore, the period of limitation prescribed in Section 11A(1) of the Act cannot apply to the facts of the case and there is no bar of limitation.

5. In view of what we have indicated above, we set aside the impugned order and remand the case to the jurisdictional adjudicating authority for decision afresh after giving appellant an opportunity of producing of evidence to prove that loading work in the factory premises was done by the regular salaried staff of the appellant and not by labourers hired for the purpose who would be paid specifically for the purpose and of personal hearing.

6. Appeal is allowed as indicated above. The cross-objection being merely supportive is dismissed.

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