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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-17-1998

Reported in : (1998)(102)ELT26TriDel

Appellant : Garlick Engineering

Respondent : Collector of Central Excise

Judgement :

1. Appellant engaged in the manufacture, supply, erection and commissioning of Electric Overhead Travelling Cranes (EOT Cranes), was following the procedure in Notification No. 120/75 and paying duty on the price collected under various invoices issued to buyers. The dispute in this appeal relates to the period from 1-4-1984 to 30-9-1985. Show cause notice dated 3-3-1988 was issued alleging that during the period in question, besides the price collected under the invoices, appellant had collected various amounts by way of charges for design, engineering, transportation and commissioning under separate debit notes which were suppressed from the scrutiny of the Department, that these charges should have been shown in the invoices and would be part of the assessable value and duty should have been paid thereon and proposing demand of differential duty on that basis invoking larger period of limitation under the proviso to Section 11A of the Central Excise Act, 1944. Though the appellant resisted the notice on merits and on the ground of limitation, the Collector of Central Excise confirmed the demand. Hence, the present appeal.

2. There is no dispute that the design and engineering charges collected by the appellant from buyers, under separate debit notes, related to the particular EOTs designed and manufactured by the appellant for the particular buyers according to the specifications of those buyers. EOTs are not standard goods manufactured for general use or available across the shelf. They are highly sophisticated goods made to the specifications of the buyers. Therefore, the goods cannot be manufactured unless the design and engineering is planned and implemented. Necessarily, the charges therefor must be part of the assessable value under Section 4(1)(a) of the Act.

3. According to the learned Counsel, since the appellant was availing benefit of Notification No. 120/75, the benefit of exemption in excess of the price shown in the invoices would be available. Learned Counsel placed reliance on the decision in Texmaco Ltd. -1995 (77) E.L.T. 501 (S.C.). In that case, the appellant availing the benefit of Notification No. 120/75 was receiving wheel sets free of cost from the buyer, namely, Railways and the invoices showed only the fabrication charges relating to wagon bodies. The Supreme Court held that the notification was intended to grant exemption in relation to the value in excess of the invoice value and, therefore, the cost of wheel sets supplied free of cost by the Railways cannot be regarded as dutiable.

We do not think the decision applies to the facts of the present case.

Even in Texmaco Ltd. case if the Railways had not supplied wheel sets free of cost and the appellant was required to buy the same, the invoice price would have been much more than the actual invoice price shown in that case. There cannot be any dispute that the invoice price under Notification No. 120/75 must correspond to the assessable value under Section 4(1)(a) of the Act. If the invoice includes certain elements which are deductible for the purpose of Section 4 of the Act, the mere mention of these elements in the invoices will not result in those elements becoming dutiable. Similarly, if the invoice omits certain elements which would otherwise be includible in the assessable value under Section 4 of the Act, the mere omission of these elements in the invoice cannot lead to non-dutiability of those elements or exemption in respect of those elements. If it were not so, it

would be open to anyone availing the benefit of the notification to deliberately reflect in the invoices only a part of the real price and claim exemption in regard to the balance not reflected in the invoices; that cannot be result of the notification.

4. Since the charges for designing and engineering in this case would be legitimately part of the assessable value under Section 4(1)(a) of the Act, such charges must be deemed to be part of the invoice price, irrespective of the fact that they were shown in the invoices, but in separate debit notes. We agree with the view taken by the lower authority that the appellant is liable to pay duty on the amount of these charges.

5. We are unable to agree that the same result should follow in regard to charges for transportation, installation and commissioning of EOTs at the sites of the buyers. According to the appellant, these activities are merely services rendered to the buyers, at the option of the buyers. This, in our view, may not have much relevance. There cannot be any dispute that the EOTs supplied to the buyers came into existence in the factory of the appellant and were tested before being dismantled for the purpose of easy transport to the sites of the buyers to undertake the activity of installation and commissioning. Since the excisable goods come into existence at the factory, the charges for transport to, installation and commissioning at the sites of the buyers cannot be regarded as part of the assessable value and duty cannot be demanded thereon.

6. According to the appellant, the show cause notice is barred by time since it was issued on 3-3-1988 in respect of the period from 1-4-1984 to 30-9-1985. The appellant contends that the period of limitation under the proviso to Section 11A of the Act is not available to the Department, since even in 1984 the Department was aware that the appellant was collecting these charges under separate debit notes. Our attention is invited to letter dated 27-2-1984 of the audit officer to the appellant seeking information about the engineering and inspection charges for the period from 1-4-1980 to 31-12-1983 and erection, drawing and designing charges for the period prior to 1-4-1979 and whether these items had been included in the contract and the invoice and whether duty had been discharged on these items. Appellant also placed reliance on show cause notice dated 19-12-1984 issued to

the appellant proposing demand of duty on the value of designing, engineering and inspection charges in respect of the period prior to 31-3-1979. It appears the Assistant Collector confirmed the demand, but the Collector (Appeals) in 1990 set aside the confirmation of demand.

From these two documents it is contended that even in 1984 the Department was aware that the appellant was collecting these charges under separate debit notes. All that can be inferred from these documents is that the Department was aware in 1984 about the collection of these charges for the periods referred to earlier, the periods being prior to 31-12-1983. We are concerned in the present case with the period from 1-4-1984 to 30-9-1985. We have already adverted to the contention of the appellant that these are services which are rendered at the option of the buyers. Even assuming that the Department was aware that during the period prior to 31-12-1983 the appellant had collected these charges from some of the buyers that will not be sufficient to impute knowledge to the Department of collection of similar charges under separate debit notes and for declaring the same to the Department, in respect of any period on or after 1-4-1984. We are, therefore, not impressed by the contention that the Department was aware of the state of affairs disclosed in the show cause notice in respect of the period covered by the show cause notice. It is also contended that the appellant was under the bona fide belief that duty was not liable to be paid in respect of these charges. No doubt, non-dutiability has been raised as a ground in the reply to the show cause notice. The show cause notice does not contain any averment that during the period relevant to this case appellant had any such bona fide belief. In these circumstances, the allegation of suppression of facts and collection of dutiable amounts under separate debit notes with intent to evade duty must be regarded as having been established.

The larger period of limitation was rightly invoked.

7. We find from the annexure to the show cause notice that while some of the items relate exclusively to designing and engineering, some of the items also relate to transportation, installation or commissioning charges. Since we have held that out of these charges only design and engineering charges would be regarded

as dutiable, we are of opinion that in respect of the debit notes which relate to charges other than designing and engineering charges also, the amount referable to design and engineering has to be quantified and demand reduced accordingly.

For this purpose the matter has to go back to the adjudicating authority.

8. We set aside the order to the extent it confirmed the demand of duty on the charges for transportation, installation and commissioning, but confirm the finding regarding demand in respect of the charges for design and engineering. The jurisdictional adjudicating authority will work out these amounts, reckon the duty payable and pass a fresh order after giving the appellant an opportunity of hearing. In passing a fresh order, the adjudicating authority will also requantify the amount of penalty in an appropriate manner. Appeal is accordingly allowed.

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