

A. Infrastructure Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-29-2000

Reported in : (2000)(69)ECC284

Appellant : A. Infrastructure Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. The issue referred to the Larger Bench is, whether a claim for refund of duty paid should be preferred within six months of the date of payment even if the goods were supplied pursuant to a contract which contained a clause for escalation of price.

2. This reference has been made by Bench A of the Tribunal while doubting the correctness of the law laid down in Aluminium Cables Ltd. v. Collector of Central Excise, 1997 (95) E.L.T. 386 by the Bench consisting of two Members of this Tribunal to the effect that where the purchase orders contained price variation clause and the copies of the purchase orders and the contract were submitted alongwith the price list, the price agreed and declared would be provisional and that the approval granted to the price list by the Revenue would also be treated as provisional and the provisions of limitation contained in Section 11B of the Central Excise Act will not be attracted.

3. Before reverting to the issue it would be beneficial to refer to the relevant provisions of the Central Excises Act and the Rules framed thereunder regarding

determination of assessable value of the goods, payment of Excise duty thereon by the assessee and subsequent maintainability of claim of the assessee for the refund of the duty on the plea of existence or non-existence of price variation clause in the contract/purchase orders.

4. Section 4 of the Act provides for the valuation of excisable goods for purposes of charging of duty of excise. This Section enacts that where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be the normal price thereof that is to say the price at which the goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale, provided that (i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different price to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a) of the Section be deemed to be the normal price of such goods in relation to each such class of buyers; (ii) where such goods are sold by the assessee in the wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso the price or the maximum price, as the case may be so fixed, shall in relation to the goods so sold, be deemed to be the normal price thereof (iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade, the normal price of goods sold by him shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal to dealers.

5. The Apex Court while interpreting the provisions of this Section 4 in Union of India and Ors. v. Bombay Tyre International, 1983 E.L.T.1896 had observed as under:- "The normal price mentioned in the new Section 4(1) (a), is the price at which the goods are ordinarily sold by the assessee in the course of wholesale trade. It is the wholesale price charged by him, it is a price which may vary according to the first proviso to new Section 4(a) with different classes of buyers. It

may also be according to the second proviso to the new Section 4(1) (a) the price fixed as the wholesale price under any law or the maximum price where the law fixed the maximum. The price may also be different price if the case falls, within the third proviso to the new Section 4(1) (a). In that event it will be the price charged by a related person in the course of wholesale trade." 6. Therefore, the assessable value under this section for the purposes of determining the duty payable is the value at which the goods are sold in the wholesale trade and it differs in the three different situations covered by the provision referred to above under this section.

7. The procedure to be followed for removal of excisable goods on determination of duty by the producers/manufacturers/private warehouse licensees is contained in Chapter VII-A. Rule 173B of this Chapter cast duty on every assessee to file declaration of goods produced and manufactured in the factory showing the full descriptions of all (i) excisable goods manufactured by him (ii) all other goods produced or manufactured by him or intended to be removed from his factory (iii) all excisable goods already deposited or likely to be deposited from time to time without payment of duty in his warehouse (iv) the rate of duty leviable in each such goods (v) the exemption notification availed or proposed to be availed, if any, and such other particulars, as Commissioner may direct. The assessee under this rule is required to obtain acknowledgement of this declaration from the proper officer.

However, he has been permitted under clause (ii) of this rule to file fresh declaration or amendment of the declaration already made where the alteration has become necessary because of the circumstances mentioned in this clause.

8. Similarly, the procedure regarding valuation of the goods assessable ad valorem, to be followed by the assessee has been detailed in Rule 173C. This rule enacts that every assessee who produces, manufactures or warehouses goods which are chargeable to duty at a rate dependent on the value of goods and removes or clears such goods, shall declare the value under Section 4 of the Act, of the goods in the documents such as sale invoice-cum-challan or like documents used by him for sale or removal of goods provided that such documents shall indicate separately the value of goods under Section 4 of the Act and the duty paid

as provided under Section 12A of the Act and such documents also contain a declaration of the price and further indicate the date and time of removal of the goods. He is also required by Clause (2) of this Rule to certify in each such document that the amount indicated in such documents represents the price actually charged by him and that there is no additional consideration flowing directly or indirectly from such sales over and above what has been declared.

9. Even regarding the use of principal raw material in the manufacture of the excisable goods, the assessee under Rule 173D is required to give intimation to the competent authority. The determination of his normal production has to be made by the competent authority under Rule 173E.10. About the determination of the duty due on the goods and their removal on payment thereof, Rule 173F enacts that where the assessee has complied with the provisions of Rules 173B and 173D he shall himself determine his liability for the duty due on the excisable goods intended to be removed and shall not except as otherwise expressly provided in these rules, remove such goods unless he has paid the duty as determined. The procedure to be adopted in this regard, has been laid down in Rule 173G which enjoins duty on the assessee to keep an account-current with the Commissioner separately for each excisable goods falling under different Chapters of the schedule to the Central Excise Tariff in such form and manner as the Commissioner may require, of the duty payable on the excisable goods and in particulars such account (and also the account in Form RG 23, if the assessee is availing of the procedure prescribed in Rule 173K) in triplicate and to periodically make credit in such account-current by cash payment into the treasury so as to keep the balance sufficient to cover the duty due on the goods intended to be removed at any time. This rule also requires that the assessee shall pay the duty determined by him for each consignment by debit to such current-account before removal of the goods. This procedure is known as self removal procedure (SRP).

11. The assessment of the excise duty payable on the goods removed by the assessee under the SRP referred to above, has to be ultimately made by the proper officer under Rule 173-1. This rule enacts that the proper officer shall on the basis of information contained in the return filed by the assessee under Rule 173G (referred to above) and after such further enquiry as he may consider

necessary, assess the duty due on the goods removed and complete the final assessment memorandum in the return. The duty determined and paid by the assessee under Rule 173F shall be adjusted against the duty assessed by the proper officer and where the duty so assessed is more than the duty determined and paid by the assessee under the SRP, he shall pay the deficiency by making a debit in the current-account within three months from the date of receipt of copy of the return from the proper officer and where such duty is less the assessee shall take credit in the account current for the excess on receipt of the assessment order, in the copy of the return duly countersigned by the Superintendent of Central Excise.

12. In a situation, where the assessee is unable to determine the exact value of the goods and duty due thereon, on account of variation/escalation clause in the contract/purchase order before the removal of the goods, under SRP, he has to ask for provisional assessment of duty under Rule 9B of the Rules and to make the debit entry of the duty amount provisionally assessed by him in his declaration, furnished under Rule 173C of the Rules, in the account-current maintained by him under Rule 173G referred to above. He has to furnish copy of the contract/purchase order and other relevant documents regarding the price variation, condition of the goods sold by him, alongwith that declaration to the proper officer. Thereafter, the proper in that case shall accordingly make the assessment provisionally under the Rules. The final assessment will also have to be prayed for/requested by the assessee by supplying in detail the information regarding the receipt of actual price from the buyer, in accordance with the terms of the contract/purchase order and only thereafter the proper officer after getting the necessary details, will pass order regarding the final assessment of the assessee under Rule 173-1. The duty provisionally assessed and debited by the assessee shall be then adjusted against the duty finally assessed. If the duty provisionally assessed and debited in the account current by the assessee, falls short of or is in the excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

13. How and in what manner, the refund of excess duty paid by the assessee, can be claimed, is embodied in Chapter VII-B. The sole Rule 173-S of this Chapter

which had been inserted in the statute w.e.f.

20-9-1991, reads as under :- "Rule 173-S. Application for refund of duty - (1) Any person claiming refund of any duty of excise shall make an application in duplicate, to refund of such duty in the proper form to the Assistant Collector of Central Excise having jurisdiction over the factory of manufacture.

(2) An application for refund shall be made in accordance with the provisions of Section 11B of Act." 14. From the perusal of this rule, it is quite evident that application for refund of any duty of excise irrespective of the fact whether duty was paid under the final assessment where the price of the goods was fixed or under provisional assessment where the exact price of the goods and the duty due thereon was not determinable on account of price variation/escalation clause in the contract/purchase order has been subjected to the provisions of Section 11B of the Act. The said section clearly enacts that any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such a manner as may be prescribed and the application shall be accompanied by such documentary or other evidence as the applicant/assessee may furnish to establish his claim. However, second proviso appended to this Section makes the limitation of six months non-applicable where the duty had been paid under protest.

15. Therefore, the assessee cannot be allowed exemption from the period of limitation prescribed by Section 11B of the Act for seeking refund of the duty on the simple ground that his contract/purchase order under which he supplied the goods contained variation/escalation clause. The language of Rule 173-S is quite plain, unambiguous and covers all claims for the refund of any duty whether paid under final assessment where the price was already fixed in the contract/purchase order or under the provisional assessment made under Rule 9B of the Rules due to variation clause in the contract/purchase order. The application for the refund of the claim, in both the eventualities has to be made by the assessee within a period of six months as stipulated in Section 11B of the Act.

16. However, the relevant date from which the period of six months is to be reckoned for filing the refund claim application, may vary in a case of payment of duty under the final assessment and when it had been paid under the provisional assessment. In the former case, the relevant date would be the date on which the assessee makes payment of the duty of the goods sold by him on a fixed price without any variation/escalation clause in the contract or purchase order, either in cash by depositing in Government Treasury or by making debit entry in the account-current maintained by him under Rule 173G. The debit entry made by him in that account would not be a mere adjustment entry but an effective payment, in the view of the observations made by the Apex Court in *Samrat International Pvt. Ltd. v. C.C.E.* 1992 (58) E.L.T.561 wherein it has been ruled by the Apex Court that the date of payment of duty under Section 11B, Explanation (B), Clause (f) shall be the date of the debit entry in the personal ledger account and not the date of assessment of RT12 Return.

17. In the latter case, the relevant date would be the date on which the final assessment has been got made by the assessee on furnishing the necessary details regarding the actual price charged by him under the contract or purchase order containing variation/escalation clause, from the buyer and the provisionally paid duty by him at the time of removal of the goods, is adjusted. The adjustment of the provisional duty would amount to effective payment by him in view of the observations made by the Apex Court in the case of *Samrat International Pvt. Ltd.*, (supra).

18. Therefore, application for the refund of the duty amount under all circumstances and in all cases, must be filed by the assessee within a period of six months from the relevant date, as required by the provisions of Section 11B of the Act. If, he fails to put up the that claim within that period, the bar of limitation as contained in that section would be attracted and his application will be rejected on that account. The statement of law made in *Indian Aluminium Cables Ltd.* (supra) by the Bench of the Tribunal that provisions of Section 11B are for claiming refund of the duty amount where the contract/purchase order contains a variation/escalation clause, would not be attracted, cannot be said to be correct one. In that case, the Bench had, no doubt, placed reliance on the judgment of

Bombay High Court in *Premier Automobile Ltd. v. Union of India and Ors.*, 1987 (30) E.L.T. 71 but the facts therein before the Court were quite different. There, the control price for the car was challenged by the manufacturer who fixed the higher price before the Supreme Court, but continued to sell the vehicles on control price by reserving his right to charge higher price if control order was invalidated by the Supreme Court. When later on he succeeded in the Supreme Court, he recovered difference between control price and the price fixed by him. Under these circumstances, the Hon'ble Bombay High Court was pleased to observe that the "higher price fixed by the manufacturer was to be taken as assessable value under Section 4 of the Act, irrespective of finalisation of the assessment.

The Revenue department was entitled to claim differential duty, when the manufacturer was entitled to recover additional price. The finality of assessment was immaterial". Therefore, the ratio of the law laid down by the Bombay High Court could not in any manner be relied upon by the Bench of the Tribunal in *Indian Aluminium Cables'* case (supra) being based on altogether different facts and circumstances for holding that the bar of limitation under Section 11B of the Act where the contract price was subject to variation/escalation, for claiming refund of the excess duty would not be attracted. This statement of law laid down by the Bench in that case is legally erroneous and cannot be endorsed. In such a situation also, the provisions of Section 11B of the Act, are attracted and application for claiming refund of the excess duty has to be filed by the assessee within a period of six months from the relevant date, as observed above.

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