Commissioner of Central Excise, Vs. Essem Engineering and Beehive

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Sep-28-2001

Reported in : (2002)(79)ECC656

Appellant : Commissioner of Central Excise,

Respondent : Essem Engineering and Beehive

Judgement :

1. This revenue appeal is against Order-in-Appeal No. 209/97 (CBE) dated 28.5.97 on the ground that respondents had not included the notional interest accrued on the advances received from their customers from whom they have obtained the deposits and therefore differential duty on this count on the notional interest was not paid. The Ld.

Commissioner (Appeals) has recorded his findings in para-3 to 5 of the impugned order as follows:- 3. From the records I find that I have decided similar matters earlier -vide combined Order-in-Appeal No. 555 to 559/96 (CBE) dated 18.7.96, based on the Madras High Court judgements as also on the Board's latest instructions dated 27th May 1996. Therefore I am deciding these appeals also on the same lines. The relevant paras 6, 7 and 8 of the Order-in-Appeal dated 18.7.96 above are extracted below for the sake of easy reference:- "6. I find force in the above submissions made by the appellants.

The issue here was examined in detail by the Honourable High Court of Madras in the case of Laxmi Machine Tools reported in 1992 (57) ELT 211 (MAd.), laying

down the principle that the notional interest on deposits made by the customers will be includible only if such deposits have a nexus to the sale price of the excisable goods and that this question will depend upon the facts of each case.

Accordingly, the High Court held that the Board's earlier circular dated 20.10.86 was valid and should be implemented in all cases and set aside the Board's Circular No. 18/90-CX.1 dated 16.3.90 (ie. the subject matter of writ the proof of nexus between the security deposits and the ultimate price of goods as these orders were contrary to Section 4(1) (a) of the Act read with Rule 5 of the Valuation Rules.

7. On appeal, the Division Bench of the High Court vide decision reported in 1995(77) ELT 799 (Mad) modified and upheld the earlier single Judge decision (as above) taking the support of the Supreme Court decision in the Metal Box case vide 1995 (75) ELT 449 (SC) - only to rule that it is necessary for the department to point out the extent of benefit obtained by the assessee in the interest free advance and to that extent only the price could be loaded for the purpose of determining the assessable value. In the light of the above pronouncements and after consulting the Ministry of Law in the matter, the Board has also issued fresh instructions-vide Board's Circular No. 215/49/96-CX dated 25.7.96 reported in 1996(85) ELT T5 to the effect that normally, when the same price is charged from buyers who have given the deposit and from those who have not given the deposit or where the advance is purely of security deposit and the interest earned by such deposit is credited to the buyer, the notional interest on such advance cannot be added to the price. The Board has also instructed that the extent of benefit in any derived out of such advance has to be ascertained as laid down in the above judgements.

8. Coming to the subject appeals, it appears form the records that the advance amounts received by the appellants were towards the order of specialised equipment manufactured and had no bearing on the sale price of the goods. The plea taken by the appellants that the advance serves as a security since the goods are tailor made, is understandable. From the record, it is apparent that the price is already fixed by contract depending on the customer and the type of

specifications/ equipment to be supplied and the deposits have been taken only as an insurance against cancellation of orders.

Therefore, unless it is proved by evidence that the deposits received had a nexus with the price or had served to depress the price, the interest on such deposits cannot be included applying the ratio of the Madras High Court's decisions referred to above. The Assistant Collector has not cited any evidence in this regard nor has he ascertained the extent of benefit derived by such advance.

So, his conclusion to add the notional interest on account of advance across the board in all cases is not maintainable".

4. Reverting to the subject appeals, the AC has observed in all the impugned orders that the burden of proof lies on the assessee to show that the advances received have not been utilised as working capital or for any other purpose relating to business and that the appellants have not produced any proof to this effect. In his view, the advances served as cash flow as it is adjusted at the time of clearance of final product. Relying on the case of Resistance Alloys (India) Limited reported in 1995 (77) ELT 721 (T) the AC confirmed the demands in these cases.

5. The appellants have claimed that the advance received was only a very small percentage of the contracted price and part payment of final price and was meant only as security deposit to avoid any lose in the event of cancellation of orders and does not contribute to the working capital. They have also submitted that the items produced by them are tailor made items as per specific requirements of the customers and the contracts finalised as per the tender documents and that the advance is taken as notional guarantee so that they could proceed in the matter without any apprehension of the withdrawal of orders at any intermediate stage. They have also stated that the advances cannot be equated to borrowings since the price is fixed first based on the cost of production and profit without taking into account the advance. It is only after acceptance of the same that a portion is received as advance and os it is not as if the advance is received first and the price fixed later in consideration or in relation to the advance realised. They have also questioned the AC's order on the cash inflow as it is not clear to them how the adjustment of the advance received in the price could be considered as cash

inflow. Further it is argued that in the absence of any evidence particularly without considering the advance vis-a-vis the total turn over of the company, the raw material purchased etc. the AC could not come to the conclusion as per the inpugned orders. They have also submitted that there are sales to customers from whom no advance is taken but the price is the same.

They have also cited order No. 60/96 dated 29.3.96 of the Commissioner of Central Excise, Coimbatore, wherein a similar issue has been decided in favour of the assessee dropping the show cause notice proceedings.

2. These revenue appeals are filed against Order-in-Appeal No. 98 & 99/97 (M) dated 25.6.97 passed by the Commissioner of Central Excise (Appeals) in respect of respondent M/s. Beehive Foundry Engg. Works Ltd. on the same grounds as noted above. In this case, the Ld.

Commissioner has held in his finding portion in para- 6 & 7 of his order as follows:- 6. I find force in the submissions of the appellants From ;the records I find that I have decided similar matters earlier - vide combined Order-in-Appeal No. 555 to 559/96 (CBE) dated 18.7.96, based on the Madras High Court judgements as also on the Board's latest instructions dated 27th May 1996. The relevant paras 6 and 8 of the Order-in-Appeal dated 18.7.96 above are extracted below for the sake of easy reference:- "6. I find force in the above submissions made by the appellants.

The issue here was examined in detail by the Honourable High Court of Madras in the case of Laxmi Machine Tools reported in 1992 (57) ELT 211 (Mad) laying down the principle that the notional interest on deposits made by the customers will be includible only if such deposits have a nexus to the sale price of the excisable goods and that this question will depend upon the facts of each case.

According, the High Court held that the Board's earlier circular dated 20.10.86 was valid and should be implemented in all cases and set aside the Board's Circular No. 18/90-CX.1 dated 16.3.90 (i.e.

the subject matter of writ before the court) dispensing with the proof of nexus between the security deposits and the ultimate price of goods as these orders

were contrary to Section 4(1) (a) of the Act read with Rule 5 of the Valuation Rules.

7. On appeal, the Division Bench of the High Court vide decision reported in 1995 (77) ELT 799 (Mad) modified and upheld the earlier single Judge decision (as above) taking the support of the Supreme Court decision in the Metal Box case vide 1995(75) ELT 449(SC) only to rule that it is necessary for the department to point out the extent of benefit obtained by the assessee in the interest free advance and to that extent only the price could be loaded for the purpose of determining the assessable value. In the light of the above pronouncement and after consulting the Ministry of Law in the matter, the Board has also issued fresh instructions vide Board's Circular No. 215/49/96-CX dated 27.5.96 reported in 1996 (85) ELT T5 to the effect that normally, when the same price is charged from buyers who have given the deposit and from those who have not given the deposit or where the advance is purely on Security deposit and the interest earned by such deposit is credited to the buyer, the notional interest on such advance cannot be added to the price. The Board has also instructed that the extent of benefit if any derived out of such advance has to be ascertained as laid down in the above judgements.

8. Coming to the subject appeals, it appears from the records that the advance amounts received by the appellants were towards the order of specialised equipment manufactured and had no bearing on the sale price of the goods. The plea taken by the appellants that the advance serves as a security since the goods are tailer made, is understandable. From the records, it is apparent that the price is already fixed by contract depending on the customer and the type of specifications/equipment to be supplied and the deposits have been taken only as an insurance against cancellation of orders.

Therefore, unless it is proved by evidence that the deposits received had a nexus with the price or had served to depress the price, the interest on such deposits cannot be included applying the ratio of the Madras High Court's decision referred to above. The Assistant Collector has not cited any evidence in this regard nor has he ascertained the extent of benefit derived by such advance, So, his conclusion

to add the notional interest on account of advance across the board in all cases is not maintainable." 7. In the light of the above, I have no reason to change my views taken in the earlier order-in-appeal cited supra and adopt the same reasoning here also. I therefore hold that the Assistant Commissioner's orders here cannot be sustained in law in the absence of any evidence brought on record to show that the advances taken by the appellants had, in fact, depressed the price or that the appellants had derived benefit by receipt of such advance, particularly in the absence of quantification thereof. So the impugned orders do not survive in law in the light of the Judicial pronouncements as above and the demands confirmed have to be set aside.

3. Ld. SDR Shri G.Sreekumar Menon has reiterated the submissions made in the appeals and has requested that the case may be remanded back to the original authority to examine whether there is depression in the value as a result of such accrual of the notional interest on the deposits/securities.

4. None appeared for respondent viz. M/s. Essem Engineering and Shri Srinivasa Raghvan, Ld. Counsel appeared for M/s. Beehive Foundry Engg Works Ltd. Ld. Counsel has submitted that all these cases pertained to a batch decision and they have already been decided by the Commissioner (Appeals) as well as by the Tribunal in favour of other assessees. They have requested that the appeals of the Revenue should be dismissed as it is not maintainable in view of the decision rendered by this tribunal and other benches through out the country.

5. We have carefully considered the submissions made by both sides and find that large number of appeals have been decided by us as well as by various other co-ordinate benches. We also find that revenue has not submitted any proof before us or before the Commissioner (Appeals) that there was any degression in the value because of the deposits/securities. Relying on the various decisions rendered by this Bench as well as Co-ordinate Benches in the country and also the Hon'ble Apex Court judgement in VST INDUSTRIES LTD, reported in 1997 (98) ELT 395 (SC), which have been consistently followed by this Bench, we confirm the findings recorded by the Commissioners and reject the Revenue appeals.