

**Cce Vs. thermotech Ltd.**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Aug-23-2002

**Reported in :** (2002)(83)ECC564

**Judge :** S T G.R., P Bajaj

**Appellant :** Cce

**Respondent :** thermotech Ltd.

**Judgement :**

1. Revenue has filed this appeal being aggrieved by the order of the Ld. Commissioner (Appeals) ordering re-quantification of duty on the basis of cum duty price.

2. The facts of the case in brief are that the respondents herein are engaged in the manufacture of excisable goods. It was alleged that during the period Nov. 1993 to 1995-96, the appellants cleared excisable goods clandestinely without accounting for the same in the statutory records on duplicate/parallel set of invoices and had evaded Central Excise Duty to the tune of Rs. 77,04,883. The Commissioner of Central Excise while adjudicating the case confirmed demand of duty of Rs. 58.39 lakhs against an alleged evasion of duty of Rs. 77.05 lakhs.

The Central Board of Excise reviewed the order of the Ld. Commissioner whereunder he had allowed abatement taking the entire consideration of the clandestinely cleared goods to be cum duty price.

3. Arguing the case for the appellant Shri R.D. Negi, Ld. DR submits that the decision of the Ld. Commissioner about treating the price as cum-duty price was contrary to the provisions and scope of Section 4 of Central Excise Act. He submitted that price is not defined in the Act; that the price in the context in which it has been referred to Section 4(1)(a) is the gross amount of consideration that is received by the seller from the buyer in the course of wholesale trade; that where the price is inclusive of the amount of duty of excise, Section 4(4)(d)(ii) expressly provides that value does not include the amount of duty of excise payable on such goods. He submitted that the Ld. Commissioner did not take note of the Apex Court decision in the case of CCE v. Bata India Ltd. . Ld. DR submitted that the Ld.

Commissioner should have noted that the cum duty price is relevant only in such cases where the assessee is paying Central Excise Duty and not in the present case where no Central Excise Duty was being paid. Ld. DR submits that the Ld. Commissioner should have taken into consideration Paras 10, 11 and 14 of the decision of the Apex Court in the case of Bata India Ltd. cited above. Ld. DR submitted that in view of the above submissions, the appeal may be allowed.

4. Shri Naveen Mullick, Ld. Counsel appearing for the respondents herein submits that the Ld. Commissioner in the impugned order has given them the benefit of treating the price as cum duty price. He submits that Larger Bench of this Tribunal in the case of Shrichakra Tyres Ltd. 2002 (80) ECC 588 (LB) held that whenever price was the sole consideration, it should be treated cum duty price. He submitted that the Hon'ble Supreme Court in the case of CCE, Delhi v. Maruti Udyog Ltd. in para 5 of its judgment observed: 5. A reading of the aforesaid Section clearly indicates that the wholesale price which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which is included in the wholesale price is to be excluded in arriving at the excisable value. This Section has been so construed by this Court in Asstt. Collector of Central Excise and Ors. v. Bata India Ltd. , and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realised by the

respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was complete, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty.

5. He submitted that the Hon'ble Court held that wholesale price which is charged is deemed to be the value for the purpose of levy of excise duty under Section 4 of Central Excise Act, 1944, but the element of Excise Duty, Sales Tax or other taxes which is included in the wholesale price is to be excluded in arriving at the assessable value.

6. Ld. Counsel submitted that against the decision of the Ld.

Commissioner confirming demand of duty amounting to Rs. 58,39,070 and imposition of penalty they filed an appeal which has been sent back for examination by the adjudicating authorities. He submits that there is nothing common in the two cases and that the issue is specific in the present appeal and, therefore, may be decided.

7. We have heard the arguments adduced by both the sides. On careful consideration of the submissions made and the case law cited by the Ld.

Counsel for the respondents, we find that the limited issue in the instant case is whether the price is cum-duty price or not. We note in the instant case that there is no other amount except the price. Price is the only consideration that was received by the appellant while selling the goods, therefore, the price should be taken as cum-duty price and once it is treated as cum-duty price then the judgment of the

Apex Court in the case of Maruti Udyog squarely covers it. Thus, we find that the facts of the present case are squarely covered by the facts of Maruti Udyog Ltd. Following the ratio of the decision of the Apex Court in the case of Maruti Udyog Ltd. 2002 (80) ECC 249 (SC) . We hold that there is no merit in the appeal filed by Revenue.

Accordingly, the appeal is rejected.

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