

Hira Cement Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-13-2002

Reported in : (2003)(86)ECC467

Judge : S Kang, a T V.K.

Appellant : Hira Cement

Respondent : Cce

Judgement :

1. M/s. Hira Cement have filed the present appeal being aggrieved with the Adjudication Order No. 432/2001 dated 21.9.2001 under which Commissioner, Central Excise has confirmed the demand of Central Excise duty amounting to Rs. 5,45,412,36 P and imposed a penalty of Rs. 50.000 on them.

2. Shri R. Santhanam, learned Advocate, submitted that the Appellant manufactures cement; that the Commissioner, under Adjudication Order No. 55/93 dated 10.12.93 had demanded the duty of excise on the ground that the Appellant had indulged in undervaluation of cement cleared by them to M/s. Hira Industries; that the Appellate Tribunal, vide Final Order No. 1077-78/99-A dated 5.8.99 had set aside the said order and directed the case to be decided afresh in accordance with law in the light of the specific directions given to allow the deduction legitimately due under Section 4(4)(d) (i) and 4(2) of the Central Excise Act; that the Appellant and Hira Industries are not related persons and the impugned order passed on the erroneous assumption of both being related person is totally illegal

and unsustainable; that Hira Industry is an altogether different class of buyer and, therefore, the question of comparing the normal price for sale to other dealer/actual user does not arise; that the cement sold to other parties are on the basis of sale offered at F.O.R. destination whereas in case of the cement sold to Hira Industries, the sale is lower as the freight, loading, unloading charges were borne by Hira Industries; that other parties were the actual consumers and not the traders/stockists and that is why no concession, rebate or discounts were allowed to them; that in case sales made to Hira Industries, some incentive was provided to them on account of bulk purchases; that the Commissioner has not considered all these pleas while adjudicating the matter. The learned Advocate, further, submitted that the duty of excise has been demanded on the basis of price at which cement has been sold to other consumers which is not correct; that as per Section 4 of the Act at the relevant time, the normal price of the goods sold by the related person is deemed to be the assessable value and from this value the various deductions permissible under law should have been made; that this exercise was required to be done by the Department as all invoices were with it, that this has not been done. The learned Advocate finally submitted that the demand is time barred as the show cause notice was issued on 22.5.92 for demanding duty for the period from February 1988 to June 1991; that there was no wilful suppression or mis-statement by the appellant to justify the invoking of the extended period of limitation; that as the allegation of using the brand name of Hira Industry had been dropped, the entire basis of the show cause notice had disappeared; that no penalty is also imposable in absence of wilful mis-declaration and suppression.

3. Countering the arguments, Ms. Krishna A. Mishra, learned SDR, submitted that when the matter was heard first time by the Tribunal, the Appellant had admitted Hira Industries to be their related person and as such the Appellant cannot argue that they are not related persons. She further mentioned that the Tribunal had remanded the matter only for considering the deductions under Section 4(4)(d)(i) and 4 (2) of the Central Excise Act; that the Appellant had not claimed specific quantum of deduction from the assessable value even in the written submissions submitted by them; that in the absence of any quantification done by them the same could not be allowed; that the Department had taken the assessable value

arrived at on the basis of average value at which the cement was sold to the independent buyers during the relevant period; that the price was ex-factory price and as such question of deduction of transport charge did not arise. She finally submitted that there was specific allegation in the show cause notice about suppressing their relationship with Hira Industries and as such invocation of larger period for demanding duty is justified.

4. We have considered the submissions of both the sides. The impugned order has been passed by the Commissioner on remand by this Tribunal vide Final Order Nos. 1077-81/99-A dated 5.8.99. The said decision reads as under: "Arguing for the appellants Shri G. Shiv Das, learned Advocate submitted that two issues are to be considered in these two appeals.

He said that it was charged by the department that appellant M/s.

Hira Cement and M/s. Hira Industries Ltd. are related persons. He said that this was the only issue agitated before the authorities below. However, before the Tribunal he concedes that they are related persons. As regards other issue, he said that statutory deductions in terms of Section 4(4) (d) (i) and 4(2) which was neither claimed by the assessed before the adjudicating authority nor was considered. This being a statutory deductions even at the appellate stage it can be claimed. In support of his contention he referred to the decision of the Supreme Court in the case of Snow White Industrial Corporation v. CCE, 1989 (22) ECC 287 (SC): 7989 (41) ELT 360 (SC). Particularly he drew our attention to paras 13 and 14 of the said order wherein it was held that permissible deductions allowed even if not claimed before the Tribunal or in the ground of appeals to the Supreme Court. Apart from this, he also submitted that the party is entitled to small scale benefit in terms of Notification No. 175/86.

2. Heard Shri P.K. Jain, learned SDR who reiterated the findings given by the authorities below.

3. We have carefully considered the matter. We find that all along before the authorities below the party was agitating that M/s. Hira Industries Ltd. was an independent buyer. Price at which the goods are sold by M/s. Hira Industries

cannot be taken as a basis in determining the assessable value. It appears that in view of this plea the party has not taken a plea with reference to the statutory deduction in terms of Section 4(4) (d) (i) and 4(2) of the Act. This being the statutory deduction in view of the decision of the Supreme Court referred to above are to be allowed even at the appellate stage as it was observed by the Supreme Court. In view of this position, we are of the view that it is appropriate that this issue requires to be examined by the jurisdictional adjudicating authority. Since we are remanding this matter to the concerned adjudicating authority, the party is at liberty to raise the other connected pleas before the adjudication proceedings." 5. It is thus apparent from the perusal of the said decision of the Tribunal that the Appellant had admitted that Hira Industries and the appellants were related persons. It is not the case of the Appellant that any appeal or Rectification of Mistake Application was filed against the said final order and as such the Appellant cannot now argue that they are not related person. The matter was remanded by the Tribunal as the Appellant had not taken a plea with reference to statutory deductions under Section 4(4)(d)(i) and 4(2) of the Central Excise Act and the Tribunal was of the view that the said issue required to be examined by the jurisdictional Adjudicating Authority.

As such in the present appeal the Appellant can only raise the said issue and other connected pleas. Section 4(4)(d)(i) provided at the relevant time that where the goods are delivered at the time of removal in a packed condition, value would include the cost of such packing except the cost of the packing which is of durable nature and is returnable by the buyer to the assessee. Further, Section 4(2) of the Act provided that where the price of goods was not known at the time of removal, the cost of transportation from the place of removal to the place of delivery would be excluded. The burden is cast upon the assessee to claim these deductions. The Commissioner has given his findings in the impugned order that since the value had not been arrived at on the basis of the value at which Hira Industries had sold the cement, the provisions of Section 4(2) of the Act were not attracted. He has also given his findings that since the cement packing is not of durable and returnable nature, the cost of packing is included in the assessable value. The learned Advocate had not rebutted these findings. Instead he had pleaded before us that the Commissioner should have taken the price at which Hira Industries

sold the goods as price under Section 4 and then should have arrived at the assessable value by giving permissible deductions. We observe that the Appellants had not mentioned the quantum of deduction they are eligible for. The learned Advocate has only contended that the Department should have itself worked out the same as all invoices were with them. On query, the learned Advocate fairly mentioned that they had not requested for inspection of the documents with the Department or for their return.

They have also not rebutted the findings of the Adjudicating Authority about packing being not returnable and durable. We also agree with the submissions of the learned SDR that extended provisions for demanding duty has been duly mentioned in the show cause notice regarding suppression and mis-statement relating to value of cements.

Accordingly, extended period of limitation is invocable for demanding the Central Excise duty. The amount of penalty of Rs. 50,000 is not on the higher side and as such warrants no interference. Accordingly, we reject the appeal.

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