

Sterlite Inds (i) Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-08-2005

Reported in : (2005)(189)ELT329Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : Sterlite Inds (i) Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. Heard both sides. Brief facts for the purpose of disposal of this appeal are as follows :- 1.1 Appellant manufactures copper cathodes, copper rods and coils falling under Chapter 74 of the Central Excise Tariff Act, 1985. The price of copper cathodes / rods that the appellant sells locally depends upon the international prices of copper, which are published in bulletins of the London Metal Exchange (LME). Consistent with the practice in the industry in the course of a month, are priced with reference to the average LME price of copper during that particular month. Since such an average is ascertainable only at the end of the month. They have been following a policy of issuing a provisional invoice at the time of clearance of goods wherein the price declared is 95% of the previous month's average LME price. On the last day of the month, when the average price for that month becomes known, a final price circular is issued and the differential price payable or receivable for the clearances already effected in the course of the month is paid / received by issue of a supplementary invoice. The differential duty payable on the supplementary invoices is paid along with the amount of duty due

for a particular month.

1.2 While most of the clearances to the local market are governed by the price circulars, there are several instances where such clearances are effected at further negotiated rates either on account of the buyer being an OEM or belonging to a separate class (such as exports or deemed exports). Appellant submits that the marketing and the pricing pattern that it follows is consistent with the industry practice.

1.3 Appellant were issued two identically worded show cause notices, dated 6-6-2003 and 12-8-2003, demanding differential duty aggregating to Rs. 10,68,80,155/- in respect of copper cathodes and rods cleared during the period May 2002 to June 2003 on the ground that in respect of certain clearances, appellant had failed to discharge duty liability on the basis of the values shown in the price circulars issued by them from time to time. The annexure to the show cause notice which works out the duty liability shows that the prices shown in the price circulars have been adopted as the basis for determining the assessable value of the clearances effected during the particular month and the said price circular has then been compared with the average assessable value of all the clearances effected during a particular month as shown in RT-12 returns.

1.4 In reply to these notices, it was contended that the prices shown in the invoices reflected the correct "transaction value" of the goods which had been sold to independent buyers. It was further submitted that under the amended Section 4 of the Central Excise Act, 1944, the assessable value was determinable "for each clearance" with reference to the "price actually paid or payable by the buyer" to the appellant (i.e. the transaction value) and that there was no legal basis for charging duty with reference to any "price circular" or "normal" value. It was further submitted that in any case the price circulars merely contain indicative prices and that in several cases the actual prices charged to the customers were higher or lower depending upon various commercial factors.

These factors were :- a) Clearances made for deemed exports for which price circulars were not applicable; d) Clearances cleared at previous month's rates due to spill over (unexecuted purchase order for previous month).

A complete list of invoices under which clearances had been effected under each of the four categories above were submitted along with the written submissions. Copies of some invoices and supporting documents were also submitted to illustrate the point, along with the written submissions.

1.5 It was pointed out in these replies that while demanding differential duty of Rs. 10,68,80,155/-, the show cause notice had omitted to give credit for Rs. 5,83,97,856/-, being duties paid, on supplementary invoices prepared at the end of each month, issued on determination of the final prices.

1.6 The impugned order, passed by the Commissioner confirms the demand of Rs. 4,84,82,299/- (after granting credit for duty of Rs. 5,83,97,856/- which was paid at the end of each month under supplementary invoices). The contentions urged for justifying the difference between the prices actually charged in the invoices and the price circulars have been rejected on the ground that sufficient documentary proof in the form of invoices, purchase orders, rejection slips etc. were not produced to justify the claim of the appellant that there were legitimate reasons for the difference between the prices as shown in the invoices and the price circulars.

1.7 During the hearings held before this Hon'ble Tribunal, the learned departmental representative made a submission that in regard to the clearances for deemed exports, the price charged by the appellant was not the sole consideration for the sale, as in addition to the price that the appellant recovered from the customer, it also received drawback in respect of the said clearances on the strength of a disclaimer issued by the buyer. It was explained that the buyer who held an advance licence permitting duty-free import of its raw materials surrendered the said licence to the DGFT and obtained an Advance Release Order (ARO) against which supplies were effected by the appellant, which are considered to be deemed exports as per the EXIM Policy. As one of the incentives available for such deemed exports, compensation is to be given by the DGFT's office. It was the submission of the Department that this drawback amount which the appellant received on its deemed export supplies was an additional consideration for the sale, which was liable to be included in the assessable value

of copper cathodes and copper rods.

a) The impugned order ignores the provisions of the amended Section 4 of the Central Excise Act, 1944, which clearly provide that after 1-7-2000, the concept of 'normal' value no longer exists, in its place the new section provides that duty of excise is chargeable; on each removal with reference to a 'transaction value' of the goods for each such removal. The expression 'transaction value' has been defined in the following manner: 'transaction value' means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods." When there was no allegation or finding in the notice and the impugned order that the appellant had received any amount in addition to the price disclosed in the invoice. Then the approach adopted in the show cause notice of applying the concept of 'normal price' to all clearances effected by the appellant was inconsistent with the provision of the amended Section 4 of the Central Excise Act. The binding instructions of Board Circular No.F.No.354/81/2000-TRU, dated 30-6-2000, wherein para 4 and 5 clarifies as under: 4. The definition of "transaction value" needs to be carefully taken note of as there is fundamental departure from the erstwhile system of valuation that was essentially based on the concept of 'Normal Wholesale Price', even though sales were effected at varying prices to different buyers or class of buyers from factory gate or Depots etc. had to be determined.

5. The new Section 4 essentially seeks to accept different transaction values, which may be charged by the assessee to different customers, for assessment purposes so long as these are based upon purely commercial consideration for sale. Thus, it enables valuation of goods for excise purposes on value charged as per commercial practices rather than looking for a notionally determined value." b)

Since the burden of proving that the invoice price did not correctly reflect the price paid or payable for the goods, is entirely upon the department, the Commissioners in confirming the demand on the ground that all necessary documents such as purchase orders, invoices, goods rejection notes etc. had not been produced by the appellant in support of its defence contention that there were no legitimate reasons for the difference between the invoice price and the price circulars is not correct and cannot be upheld, Since the department has not discharged the initial burden of proof which lay upon it, the appellant was not under any onus to produce such documents on its own and absence of the same cannot be a cause to upset the value.

c) Since the appellant had, along with the written submissions, gave a detailed list of all the invoices falling under each of the four categories mentioned in para 1.4 herein above and had also submitted illustrative copies of such invoices, purchase orders etc., the Commissioner is not justified in rejecting the submissions made by the appellant merely on the ground that all the relevant invoices had not been produced. If the Commissioner wanted to see the remaining invoices, he could have stated so in the course of the hearing or and exercised the powers under the law to procure the documents Commissioner cannot be considered to be helpless speculator.

d) The show cause notice as well as the impugned order of the Commissioner proceed on the premise that all the clearances effected by the appellant were in terms of the price circulars. Even though the appellant explained in their reply that price circulars contained indicative prices which were not applicable for certain class of supplies such as deemed exports, the Commissioner has nevertheless proceeded on the basis that all the clearances effected by the appellant were liable to be assessed with reference to the price circulars issued by it. Price circular is a pre-offer document and it was always open to the contracting parties to negotiate and fix a different price & no material exist to rebut this plea of the appellant. Under the Section 4, now 'a negotiated price' alone is liable to be treated as the 'transaction' hence assessable value for each clearance.

e) The argument of the learned Jt CDR that the Drawback to be received by the appellant from DGFT was an additional consideration for the sale of goods is an attractive argument and is considered.

It is found - i) It was submitted that the department should not be allowed to enlarge the scope of the show cause notice by making an entirely new allegation at this stage. The plea that neither the notice nor the impugned order had alleged at any place that Drawback receivable from the DGFT was an additional consideration for the sale of goods has force.

ii) Even otherwise, it is now well settled that the 'additional consideration' referred to in Section 4 of the Act refers only to 'additional consideration' flowing from the buyer to an assessee.

This is further clear from the definition of "transaction value" in Section 4 now which states that such value refers to a price actually paid or payable for the goods and includes "any amount that the buyer is liable to pay to, or on behalf of the assessee". This position has also been clarified in para 22 of the Board Circular No. 354/81/2000-TRV dated 30-6-2000. In the case before us no such consideration is flowing from the 'deemed export' buyers. No material exist of a nexus between the Depressed Price to such buyers & the Drawback to be paid by the DGFT is brought out.

iii) Tribunal's decision in the case of IFGL Refractoriness Ltd. v. Commissioner of C.Ex, Bhubaneswar-II, 2001 (134) ELT 230, wherein it was held that statutory benefits allowed by statutory authorities cannot be considered as additional consideration flowing to a manufacturer from the buyer. The said decision of the Tribunal was rendered in very similar circumstances, as would be evident from para 2.2 and 2.3 of that order, which sets out the factual backdrop.

After considering the decided case law on the subject, the Hon'ble Bench came to the following conclusion in para 9 of its order: 9. The ratio of all the above discussed judgements is to the effect that benefit received under an altogether different scheme promulgated by the Govt. cannot be considered to be a part of total sale value of the goods or the total sale turnover. In the instant case the

appellant have availed the benefit from the customs duty under the advance intermediate licences issued to them by the statutory authorities in accordance with the relevant provisions of the import policy. Such benefits are under the duty exemption scheme and have to be treated as statutory benefits allowed by the statutory authorities. The same can never be placed upon the platform of 'additional consideration' flowing to the manufacturer from the buyer, directly or indirectly. It has so happened that because of the benefit of the customs duty in terms of the said advance licence, the appellants have been able to import the inputs without corresponding payment of customs duty which has resulted in lower cost of their final product. As the appellants could afford to sell their goods at a lower price they have offered the same to VSP, which was accepted by them and the contracts finalized. In these circumstances it cannot be said that any additional consideration has flown from VSP to the appellant, which is a condition essential for discarding the contract price between the buyer and the seller.

At this stage we can also take note of the Hon'ble Supreme Court's judgement in the case of *Dai Ichi Karkaria* - 1990 (112) ELT 353 (SC) wherein the benefit of the Modvat credit of duty paid on the inputs has been allowed to the assessee while arriving at the contract price between the seller and the buyer. As the taking of credit on the inputs results in lowering the cost of the final product, the price arrived at between the buyer and the seller after taking into consideration the said factor has been held to be correct assessable value for the purposes of payment of duty. Taking the clue from the above decision of the Hon'ble Supreme Court we hold that the benefit derived by the appellant under DEEC scheme cannot be considered to be an additional consideration towards the value of the goods flowing from M/s VSP when there is no dispute about the contract and the actual price charged by the appellant in terms of the said contract." (Emphasis supplied)

Similar view have been expressed by the Hon'ble Tribunal in the following decisions: *Universal Wires & Industries v. Collector of Central Excise, Patna*, *Brindavan Beverages Ltd. v. Commissioner of C.Ex., Bangalore*, 2001 (135) ELT 766 (T) *Tata Refractories Limited v. Commr. of C.Ex. & Cus., Bhubaneswar*, 2002 (141) ELT 460 (Tri.), wherein the assessee was recovering an extra amount of Rs. 6,500/- per MT by raising a supplementary bill on its customer (SAIL). In the facts of that case, the Tribunal came to a conclusion that since an additional

consideration of Rs. 6,500/- per MT had actually flown from the buyer (SAIL) to the manufacturer (Tata Refractoriness Ltd.), the said amount was additional consideration liable to be included in the assessable value. The facts prevailing in Tata Refractories' case where there was evidence of a consideration from the buyer to the assessee, are entirely different from the facts in the present case, where there is no flow of any additional consideration from the buyers to the assessee. Ld Jt CDR's reliance on this case therefore does not help the Revenues case.

v) It was pointed out that the Drawback which the appellant received from the DGFT is granted in terms of para 8.3 of the EXIM Policy 2002-2007 read with para 8.3 of the Handbook of Procedure (Vol-1).

It is clear from the relevant provisions of the EXIM Policy and Hand of Procedure that such Drawback benefit would be available only to an assessee by virtue of being a deemed exporter and could not have been availed by the buyer. As such, the alleged disclaimer given by the buyer will not have the effect of transferring in favour of the appellant a statutory entitlement due to the buyer. As such, payments which the appellant would receive as Drawback from DGFT was not a payment on account or on behalf of a buyer and as such could not be considered as additional consideration for the sale of goods flowing from such buyer. The case, before us is similar to the case of IFGL Refractories Ltd., Brindavan Beverages Ltd. and Universal Wires & Industries, where benefits were flowing to the appellant from the statutory authorities. The consistent view which has been taken by the Tribunal in cases of this type is that such consideration flowing from a statutory authority cannot be regarded as additional consideration flowing from the buyer to the assessee.

We find no reason to depart from the same view.

iv) The view is also supported by the opinion of the Department of Legal Affairs as in para 11 of Board Circular No. 549/45/2000-CX dt 18.9.2000 "Taking up the second angle, CBEC has raised a query as to the valuation of goods sold to State Electricity Boards to be used in IBRD funded projects where duty drawbacks are received as deemed exports. A question was raised whether the duty drawback is

an indirect flow of consideration from the buyer to the assessee. The question was bisected as (i) whether the duty drawback flows from the buyer to the assessee, (ii) whether it is an additional consideration for sale. A view was expressed in the opinion of the Id. ASG that since the State Government / State Electricity Board and the Central Government are distinct and separate entities under the law, the extra consideration does not flow from the buyer to the assessee. It was further pointed that the duty drawbacks that are given, are as incentives, in pursuance of the Central Governments policy to permit Indian bidders in international tender. They are not in respect of trade transactions. Therefore, it cannot be said to flow as a consideration, whether direct or indirect, in respect of a sale made by the assessee to a buyer." (f). In respect of the remaining three categories of the clearances, i.e. clearance for replacement of rejected consignments, special contract rates from the customers and clearance of previous months' contract (spill over), it was submitted that appellant's case is clearly covered by paras 4 and 5 of the Board's Circular No. 354/81/2000-TRU dated 30-6-2000 which clarifies that the new Section 4 seeks to depart from the erstwhile system of valuation based on 'normal wholesale price' by accepting different transaction values that may be charged by an assessee to different customers as long as these different values are based on purely commercial consideration where the buyer and seller have no relationship and the price is the sole consideration for sale. Para 5 of these instruction concludes by stating, "thus it enables valuation of goods for excise purposes on value charged, as per commercial practices rather than looking for a notionally determined value". Since it is nobody's case that appellant and the customers to whom goods had been cleared under the last three categories were related and since there is also no doubt that the consideration received by the appellant from these buyers was the sole consideration for the sale, the said values represented the transaction value for each such clearance and therefore deserves acceptances. That genuine commercial reasons exist for charging prices different from the price circular in each of three categories is not contested. In respect of the first category where goods initially supplied were found sub-standard or defective, it was an obligation to provide replacement for such rejected consignments and therefore it could not have possibly charged a higher price from the customer for the such replacements cleared to them. As regards the special

contract rates, they were negotiated rates with big and reputed customers, such as GE with whom assessee would be keen to establish a long term and continuing business relationship. As regards the last category, it was contractually not possible for the appellant to charge a higher value when it had been unable to fulfill its contractual commitment to supply a given quantity in the previous month. It would be not commercial prudence & would be thus absurd to expect as assessee to charge a higher value for such clearances when a customer is crying hoarse absent short supplies in the previous month against a valid contract. These genuine commercial reasons sufficiently justify the acceptance of different prices that the assessee charged from the customers in three categories.

(g) When duty demand cannot be upheld on merits in view of the findings herein interest & penalty cannot be upheld.³ In view of the findings arrived herein above no merits are found in the impugned order to uphold the same. The order is set aside & appeal allowed.

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