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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Nov-27-2006

Judge : S Peeran, J T T.K.

Appellant : iti Ltd.

Respondent : The Commissioner of Central

Judgement :

1. This appeal arises from Order-in-original No. 15/2005 dated 30.11.2005. The appellant is a PSU unit. They have obtained clearance from the Committee of Secretaries to contest this matter. They were manufacturing telephone exchanges viz., OCB 283, cables, printed circuit boards and allied parts and accessories falling under various chapters of the Schedule to Central Excise Tariff Act, 1985. During the period 1.9.99 to 31.3.2001, they were supply OCB 283 Exchangers to DOT/MTNL on the basis of purchase orders issued by DOT against tenders participated by the assesses at their corporate level by submitting quotations with both items-wise and per line price. The price given in the purchase order was a provisional all inclusive per line price. At the time of clearance of exchanges, invoices were raised and excise duty was paid based on item-wise price shown therein. Subsequently, commercial invoices were raised or realization of payment was done as per line basis. The commercial invoices reflected the sales made by the appellant as well as their sister unit and also private vendors. The Revenue did not accept the price declared by the appellants and proceeded to revise the assessment on the allegation of suppression of facts with willful intention to evade

payment of duty.

2. One of the assessee's matter which was decided against them was appealed before this Bench. This Bench presided by Hon'ble President has considered the matter in extenso. This Bench vide Final Order No.2068 to 2072/2005 dated 10.11.2005 upheld the assessee's contentions that there was no suppression of facts. Further it was held that assessments were provisional. It has also held that the correct assessable value has to be based on the final price that will be arrived at in the matter. In terms of the Final Order, the matter has been remanded to the Original Authority to work out the differential duty in the matter. It has also been held that in case, if any refund arises, the same has to be made to the assessee. The finding recorded in Para 12 to 16 are reproduced herein below.

12. The Commissioner has proceeded on the footing that the assessee did not disclose that it was collecting higher amounts as per the consolidated commercial invoices reflecting the price of the purchase order and had suppressed the material facts from the department manipulating their accounts despite being aware by their internal advice that the procedure adopted by diem could be objected to by the department.

12.1 It would appear from the material on record, that the assumption that the assessee suppressed the material fact of collection of price under the consolidated commercial invoices was totally unwarranted. The record reveals clear intimations given by the assessee to the department about the raising of the consolidated commercial invoices at the instance of their consumers MTNL/DOT for the sake of convenience, while preparing the excise invoices also, at the time of removal. In this regard, we may first refer to the letter dated 7.8.95, which was written by the assesses to the Assistant Commissioner specially in the context of issuance of commercial invoices regarding the new product, namely OCN 283 Exchange. The assessee informed the Assistant Commissioner that they were issuing invoices in the prescribed form under Rule 52A of the rules in respect of all the parts of Telephone Exchanges manufactured by them directly from their factory at Kanjikode.

Invoices were also raised by them for the "bought out" items supplied direct to site. It was then stated that in the assessee's recently introduced product, i.e. "OCB 283 Exchange" there were some parts which were supplied direct to the site by the other units of the assessee. The concerned units while supplying the Telephone Exchange parts were observing all the excise formalities while clearing the goods. It was then specifically mentioned that as their customers, namely, DOT and MTNL, were requiring single invoice for making payment, they had to raise a consolidated commercial invoice/bill to al| supplies made by them as well as direct to site items and other items supplied by their other units. It was informed that, the assessee would be raising a set of commercial invoices for all OCB Exchanges with Sl. Nos. beginning from 5900001 to 5910000.

Thus, the information conveyed was very specific to the effect that the consolidated commercial invoices were being raised only for the convenience of the said customers and that they included supplies direct to the site as well as items supplied by the other units. It is also evident from the inter office note dated 8.6.95, a copy of which is on record, that the OCB supplies consisted of supplies from Palakkad, and "direct to site" supplies from various manufacturers to site, based on their POs of respective manufacturers, and that some more equipments were supplied from Bangalore and Mankapur units of the assesseee. It was slated that their corporate office had decided that Palakkad Unit had to claim realization on behalf of all units by raising a commercial invoice based on "per line" cost basis. It was proposed to number these commercial invoices in separate serial Nos. The office note reflects the concern of the assessee to observe all the formalities of Central Excise. By letter dated 16.10.95, the assessee informed the Assistant Commissioner in continuation of their communication dated 7.8.95, that for the purpose of consolidated invoices they were now to use serial Nos.

5920001 to 5921000 instead of the serial Nos. intimated earlier. In their internal communication of March 20, 1998, which is cm record, there was a reference to the fact that the dispatches of the CSN/OCB were done by item-wise excise invoicing at a provisional price. The billing to the customer was, however, not for the items as despatched against individual invoices, but was for the total exchange as per the purchase order or bill of material (BOM.) It was stated that in some cases bills were of average price per line and in some cases itemized price of the priced purchase order, and that the despatches had taken place from three units. Therefore, it was not possible that when making bill to the customer the notional amount of excise could exactly be matched with the actual amount paid by units and put together. There was, therefore, a consistent practice, as stated in this letter, that the bill to the customer \vas as per the all inclusive prices as finalized in the tender. A certificate was, however, submitted by the excise signatory, that for all the items despatched for the Exchange the requisite duties/taxes had been paid, since the actual despatch invoices were not given to the consignee or to the paying authority.

12.2 It is thus amply clear from the record that the proper officer was given a clear intimation of the raising of the consolidated commercial invoices by which full justification was communicated to him and no objection was raised at that time against adoption of such a procedure by the assessee. Even the reason for not supplying the excise invoices to the customers in view of the system of raising consolidated commercial invoices had been duly explained and no adverse inference ought to have been drawn by the learned Commissioner on that count against the assessee, especially when certificates were submitted by the excise signatory, for all items despatched for the Exchange, stating that the requisite duties had been paid, which aspect appears to have been overlooked. Though the procedure of raising consolidated commercial invoices for the sake of convenience of the customers DOT/MTNL was fully intimated to the concerned authorities and it was never objected to by the department, an adverse inference has been drawn, of suppression of material facts in the context of the collections made under the consolidated commercial invoices against the assessee, which is wholly unwarranted.

13. It is evident from the impugned order that the learned Commissioner has ignored the nature of the contract and material terms of the Purchase Order which clearly indicated that the assessee was to supply goods and services including the items which were nor to be manufactured in the Palakkad factory of the assessee.

Excise duty could be levied in respect of excisable goods manufactured and removed from the Palakkad factory while assessing that unit and not for the goods not manufactured there and supplied from elsewhere, or those manufactured from the other factory units of the assessee and removed and accounted for by raising proper excise invoices.

13.1 The Bid documents and purchase order which arc on record clearly indicate that the contract was for supply of goods and' services. The word "goods" as defined in the Bid documents meant all the equipment, machinery, and/or other materials which the supplier was required to supply to the purchaser under the contract The expression "contract price" was defined in clause (g) so as to mean the price payable to the supplier under the purchase order for the full and proper performance of its contractual obligations. Though as per clause 6.3 of the genera] conditions, technical assistance for installation, commissioning and monitoring of equipment was to be provided by the bidders at no extra cost during laboratory evaluation, validation/type approval and field trial, if any, and under clause 7.1 the training for installation and maintenance staff of the purchaser was to be free of cost by the bidder where required, Clause 8, in respect of "Incidental Services" indicated that the assessee could charge separately for supervision on per day basis as stipulated thereunder, which obviously had nothing to do with the process of manufacture of the excisable goods.

13.2. Under clause 8.1 of the general commercial conditions of contract it was provided as under: 8.1. The supplier may be required to provide any or all the following services: (a) Performance or supervision of on - site assembly and / or startup of the supplied Goods. The expert charges for supervision of installation shall not exceed Rs. 7000/- per manday and to & fro Airfare or the actual fare may also be paid.

(b) Furnishing of tools required for assembly and /or maintenance of supplied Goods; (c) Performance of supervision of maintenance and/or repair of the supplied Goods, for a period of time agreed to by the parties provided that this service shall not relieve the supplier of any Warranty obligations under this Contract.

13.3. Clause 12 of the Tender Documents relating to prices clearly indicated that the prices were in respect of "goods delivered and services performed", under the contract. Various schedules were prescribed in the Tender Document including price schedules for optional items and services including conventional battery sets, which were relatable to clause 15 and 26 of the special conditions.

13.4. The Purchase Order dated 27.10.97 which related to the period 1997-99 contained a price clause which reads as under: 8.1 The cost has been worked as per DOT letter No. 117-01/MMD/III dated 18.9.97. The total cost of the equipment ordered under this P.O at site basis is Rs. 18,63,84,000 (provisional). This price is inclusive of all taxes and levels. The provisional price will be regularized after the finalisation of the price/itemized price by the Telecom Commission. This total cost and the unit prices are inclusive of all taxes and duties, freight packing, forwarding, transiting insurance etc. for delivery at site. This provisional unit rate shall be for complete exchange equipment including associated equipment accessories, iron works, spares etc. and also shall be inclusive of power plant battery, MDF associated accessories spares, etc. Any increase in taxes/duties and other statutory levies etc. after expiry of the delivery schedule shall be on the contractor's account while benefit of any decrease in these taxes/duties etc. shall be passed on to the purchaser by the contractor.

8.2 (1) Any statutory variation affecting the prices within the scheduled delivery period shall be to purchaser's account. Any increase beyond scheduled delivery period shall be to supplier's account, but the benefit of any downward revision shall be to purchaser's account. The effect of variation shall be allowed by way of adjustment invoice/contract value.

8.2 (2) It has been further stated that due adjustment is to be made for any item in the material list which was not originally quoted in the tender by M/s. ITI The provisional cost works out to Rs. 18,63,84,000/-(Eighteen crores sixty three lakhs eighty four thousand) only. This is subject to fixation of final cost op finalisation of the price/itemized price as per Telecom Commission letter No. 113-223/96 MMD/III dated 15.4.97.

13.5. It is evident from the above price Clause 8 that the total cost indicated thereunder was provisional, and that the provisional price was to be regularized after the finalization of the price/itemized price by the Telecom Commission. The total cost and the unit prices were inclusive of all taxes and its freight, packing, forwarding, transit insurance, etc. for delivery at site, The provisional unit rate was for the complete Exchange equipment including associated equipment accessories, iron works, spares, etc., and was also inclusive of power plant, battery MDF associated accessories, spares, etc. It was clarified that the provisional cost was subject to fixation of final cost on finalization of the price/itemized price as per the Telecom's letter dated 15.4.97.

14. There was, therefore, abundant material on record to alert the revenue authorities about the fact that the consolidated commercial invoices were in respect of several items which may not have been manufactured in the Palakkad unit of the assessee and that the consolidated commercial invoices were issued in the context of the purchase order for the goods and services which were to be supplied and could not have been made the basis for assessing the appellant on the footing as if the entire amount of the consolidated commercial invoices was subject to excise duty irrespective of the fact whether the assessee in its Palakkad factor)' had manufactured the items or they were manufactured elsewhere and supplied to the customer or that certain items were procured and supplied as per the terms of the tender documents, such as batteries. Clause 8 of the general commercial conditions, both in the Tender Documents and the Contract, if considered, would have shown the entitlement of the assessee to raise separate invoices for incidental services which could not be considered for computing the value of the goods manufactured. Services tendered in respect of the excisable goods supplied were not, by themselves, goods manufactured. The learned Commissioner lost sight of the fact that the consolidated commercial invoices were issued in respect of the goods and services supplied under the contract, and not only in respect of the excisable goods manufactured in the Palakkad unit of the assessee, and removed therefrom. The consolidated commercial invoices necessarily included the total purchase price for the exchange unit which were bound to be higher than the separate excise invoices, which were prepared in respect of the excisable goods manufactured in the respective units of the

assesses. Mere comparison of the consolidated commercial invoices showing the total purchase price of the composite unit to be supplied with the excise invoices of the items manufactured and removed from the respective factories, for holding that duly was evaded, was an erroneous short cut adopted, by failing to consider the feet that the consolidated commercial invoices included several items which could not have been subjected to excise duty in the hands of the assessee in respect of its Palakkad unit which did not manufacture them. It was incumbent on the part of the assessing authority to consider the consolidated commercial invoices for the purpose of finding out what was excisable in the hands of the assessee and what was not, in the light of the excise invoices, to work out the duty liability.

15. For the foregoing reasons, the impugned order confirming the duty demand and imposing penalties on the appellants of these appeals cannot be sustained since, the show cause notice was pre-mature, and the assessments continued to be provisional for the period covered by the show cause notice and were required to be finalized under Rule 9B(5), and. the quantification was erroneously made on the total price of the goods and services supplied under the purchase order as reflected from the consolidated commercial invoices without reference to the terms of the contract and without making any effort to find out the duty payable in respect of the goods actually manufactured in the factory of the assessee at Palakkad for which the show cause notice was issued, by excluding the items which were not includible for such computation.

16. All the appeals are, therefore, allowed and the impugned order of the learned Commissioner is hereby set aside with a direction to make final assessments under rule 9B(5) of the said rules for the period covered under the show cause notice in accordance with law and in the light of the Observations made in this judgment. It is stated by the learned Counsel for the appellant that the deposit of Rs. 1 crore (Rupees one crore only) made by the assessee may be retained by the Revenue and be adjusted as per the outcome of the final assessment.

3. The learned Counsel submits that in this case also, the appeal has to be allowed by remand on the above directions.

4. The learned JDR submits that the matter can be remanded to the Original Authority to pass an order in terms of the findings recorded in assessee's own case extracted above from Para 12 to 16.

5. We have carefully considered the submissions and perused the Final order No. 2068 to 2072/2005 dated 10.11.2005 rendered in assessee's own case. The relevant Paragraphs 12 to 16 are already extracted supra.

This matter is also required to be remanded to the Original Authority with the same directions as recorded in the above paragraphs. The Original Authority shall take up this matter with the matter already remanded and finalise the assessment in terms of the directions already given and recorded supra. The appeal is allowed in the above terms.