

Essel Propack Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-14-2007

Reported in : (2008)(127)ECC117

Judge : J Balasundaram, Vice, A T K.K.

Appellant : Essel Propack Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. Vide the impugned order, the Commissioner of Central Excise as confirmed a duty demand of Rs. 19,81,91,800/- together with interest, on three varieties of multilayer plastic laminated web (printed/plain), viz. EPL-1725, EPL-1730 and EPL-1403 manufactured in the Vasind unit of the appellants and removed to their other units for use in the manufacture of excisable final products during the period from October 1997 to June 2000, on the basis of determination of assessable value as per the provisions of Rule 6(i)(a) of the Central Excise (Valuation) Rules, 1975, by adopting the price of Rs. 233.81 per kg. which was the price at which the appellants sold one web variety, i.e. EPL-1725 (unprinted) to M/s. Courtaulds Packaging (India) Pvt. Ltd., Goa, during the period 18.5.1996 to 30.6.1996.

2. The brief facts of the case are that the appellants filed a declaration on 1.7.1997 for different varieties of webs to be cleared to their other units at Wada and Murbad under the provisions of erstwhile Rule 173C of the Central Excise Rules, 1944, adopting the cost construction method under the erstwhile Rule 6(b)(ii) of

the Valuation Rules 1975, varying the value from Rs. 72.64 to Rs. 105.99 per kg. for plain-slitted web. Central excise officers noticed that the Vasind factory of the appellants cleared EPL-1725 to their Wada unit at the assessable value of Rs. 100/- per kg. whereas they sold 16 consignments of the same variety during the period 18.5.1996 to 30.6.1996 to M/s. Courtaulds Packaging (I) Pvt. Ltd., Goa, at Rs. 233.81 per kg. and on this basis show cause notice dated 18.9.1997 was issued to them proposing assessment of webs cleared to their Murbad and Wada units on the basis of comparable prices at which the said goods were cleared to the Goa company, and proposing recovery of differential duty on such clearances on or after 4.9.1997. Vide Order dated 14.8.2000, the Commissioner of Central Excise (Appeals) sustained the demand for the month of September, 1997 but set aside the finding of the adjudicating authority that clearances henceforth should be effected @ Rs. 233/- per kg. for the reason that the June 1997 price can be held to be valid only for a period of six months. The proceedings were remanded to the adjudicating authority with the direction to re-determine the value on the basis of evidence to be submitted by the appellants for allowing deductions. This order was upheld by the Tribunal vide its order dated 15.5.2001, and the proceedings were remanded to the adjudicating authority for verification of the variety which had been sold/captively consumed. The application filed by the appellants for rectification of mistake was allowed vide miscellaneous order dated 10.1.2003 by deletion of the following portion from paragraph 25 of the final order dated 15.5.2001: "As regards the other variety, he shall first determine where the value thereof for the captive consumption could be determined on the basis provided in Clause 1(b) of Rule 6 for which he will have to determine whether various prices enumerated in the price list are "comparable" to each other." The Tribunal's order was challenged by the assessee before the apex court which, vide its order dated 7.7.2003, dismissed the appeal. Vide order dated 26.2.2007, the Assistant Commissioner of Central Excise, pursuant to the Tribunal's order cited supra, held that the variety of web which was cleared for captive consumption and which was sold to the Goa company, was EPL-1725 (imprinted) and the demand was, therefore, confirmed only for this single variety.

3. A show cause notice dated 27.2.1998 was issued to the appellants proposing to adopt the sale price of Courtaulds Packaging (India) Pvt.

Ltd., Goa, for all four varieties of web cleared from Vasind factory to other factories during the period 1.5.1996 to 2.9.1997 and proposing recovery of duty of RS. 7,58,80,402/- on this basis; a demand of Rs. 7,36,50,090/- was confirmed and equal penalty imposed by order dated 30.12.1998 of the Commissioner of Central Excise; vide order No.C-I/3004-06/WZB/1999 dated 30.11.1999, the Tribunal set aside the above mentioned order on the ground of time-bar; the Revenue's appeal against this order was dismissed by the apex court vide its order dated 11.10.2006.

4. In the meanwhile, 10 show cause notices were issued to the appellants for recovery of differential duty in respect of all varieties of webs cleared to their other factories by adopting the assessable value of Rs. 233.81 at which EPL-1725 was sold to the Goa company in May and June 1956. Details of the notices are as under: Two more show cause notices dated 2.5.2003 and 7.8.2003 were also issued to the appellants invoking the extended period under the proviso to Section 11A(1) of the Central Excise Act, covering the period from 1.4.1998 to 30.6.2000 and 1.7.1998 to 30.6.2000 respectively. The ten show cause notices covering the period 1.10.1997 to 30.6.2000 were adjudicated by the present impugned order and the proceedings initiated under show cause notices dated 2.5.2003 and 7.8.2003 were dropped on the ground of limitation. Hence this appeal.

6. It is not open to the appellants to urge that assessable value of the webs should be determined under the provisions of Rule 6(b)(ii) of the Valuation Rules, in the light of Tribunal's order No.C-I/3004-06/WZB/1999 dated 30.11.1999 holding that value of EPL-1725 (plain/unprinted) is required to be determined under the provisions of Rule 6(b)(i). The Tribunal's order has been upheld by the apex court.

The other two varieties, viz. EPL-1043 and EPL-1730, are comparable to EPL-1725 as seen from the fact that these two varieties are stronger than EPL-1725, as they are suited for ultimate packing of products which are more aggressive than those packed in EPL-1725, and would therefore have a higher value than that of EPL-1725, while the value taken into account of these two varieties is the value of EPL-1725.

EPL-1725 is a grade having a barrier thickness of 30 micron aluminium foil barrier, while EPL-1043 has 40 micron barrier and EPL-1730 has 30 micron barrier. Web is a commodity whose value is based on weight per kilogram. The argument of the assesseees that EPL-1730 is superior to that of EPL-1725, does not advance their case for the reason that the value of EPL-1725 has been adopted for the superior variety EPL-1730 and further, these submissions have been considered in detail in order No. 55/98 dated 30.12.1998 of the Commissioner of Central Excise, which has not been set aside on merits, but only on the ground of limitation.

7. The next contention of the appellants is that the sale price of June 1997 should not be applicable to future clearances. We find that vide order-in-appeal dated 14th August 2000, the Commissioner of Central Excise (Appeals) set aside that portion of the order dated 15.10.1997 of the Assistant Commissioner, by which he directed that the sale price of June 1997 should be made applicable to all future clearances. The relevant finding of the Commissioner (Appeals) is reproduced herein below: The second part of the order that the sale price of June, 1997 should be made applicable to all the future clearances, without confirming whether the sales under Section 4(1)(a) were taking place at the relevant time appears to have no legal support and is passed without taking into consideration of the dynamics of sale price as defined under Section 4 read with the provisions of Rule 6(b)(i) of Central Excise (Valuation) Rules, 1975. The order passed by the lower authority that the sale price of June 1997 should be made applicable to all the future clearances is therefore set aside as legally not proper, correct & sustainable and remanded to lower authority with the directions that he should re-determine the assessable value on the basis of evidence to be submitted by the appellants for allowing the extent of deductions as per proviso (i) to Rule 6(b)(i) of Central Excise (Valuation) Rules, 1975.

8. No appeal was filed by the department against the Commissioner (Appeals)'s order and appeal was preferred only by the appellants against that portion of the Commissioner (Appeals)'s order upholding the duty demand in respect of clearances from September 4 to September 29, 1997. The Assistant Commissioner, vide order dated 26.2.2007, confirmed a demand of Rs. 22,10,936/- and appropriated it against payment made by the appellants on 30th

April, 2004 and did not pass any order with regard to future clearances (beyond 29.9.1997) and, therefore, the order dated 14th August, 2000 of the Commissioner (Appeals) became final insofar as it related to non-applicability of sale price of June 1997 to future clearances. In this factual background, we agree with the appellants that the department's stand that Tribunal's order dated 15.5.2001 in appeal filed by the assessee against Commissioner (Appeals)'s order dated 14.8.2000, held that the sale price of June 1997 would be applicable to future clearances, is not correct and tenable. The further submission of the Revenue that it is not open to the appellants to contend that the sale price of June 1997 cannot apply for the period in dispute in the present appeal as they paid differential duty on the different varieties of webs adopting the price of Rs. 233/- per kg. of EPL-1725 is also without any merit as the amount demanded pursuant to the show cause notice (on the basis of the above price), was deposited by the appellants without prejudice to their rights and the differential duty demand was contested by them in this appeal. We are, therefore, of the view that the sale price of June 1997 cannot be made applicable for the entire period in dispute.

9. The question which remains for decision is the sale price to be applied for the period in dispute. The appellants sold EPL-1725 to Colgate Palmolive (India) Ltd. in December 1997 at a price of Rs. 100/- per kg., adopting the price of captive consumption. They have placed on record RG1 extract for the month of December 1997 from which it can be seen that they had cleared 1,293.18 kgs. of EPL-1725 (plain) under three invoices all dated 9.12.1997. Invoice Nos. 2937 and 2939 are for removal to their other factory at Wada and invoice No. 2924 pertains to removal for sale to Colgate Palmolive (India) Ltd. Duty on goods covered by invoice No. 2924 has been paid through PLA as seen from debit entry No. 835. These documents clearly establish the sale of EPL-1725 to Colgate Palmolive (India) Ltd. in December 1997 and, therefore, non-production of triplicate copy of invoice No. 2924 cannot lead to rejection of the comparable sale price of EPL-1725. (The Commissioner has rejected the comparable sale price on the ground that the triplicate copy of invoice No. 2924 was not produced before him).

The other reasoning adopted by the Commissioner for the rejection of the sale price to Colgate Palmolive (India) Ltd. is also erroneous.

Firstly, there was no requirement under the erstwhile Central Excise Rules, 1944 at the relevant time for filing price declaration in respect of sales to independent parties and, therefore, the question of approval by an Assistant Commissioner does not arise. Secondly, the absence of reference to sale to Colgate Palmolive (India) Ltd. in December 1997, in the reply of the assesseees to the show cause notice, cannot be a ground for disputing existence of comparable price, in the face of contemporaneous documents such as RG1 and PLA which show such sale.

10. Once it has been held by the Tribunal that a solitary sale can be applied for captive consumption, on the same principle, comparable price of sale of EPL-1725 (plain) to Colgate Palmolive (India) Ltd. in December 1997 is required to be applied to captive consumption. Duty having been paid on the same value for captive consumption, no differential duty remains to be paid by the assesseees. We, therefore, set aside the duty demand. Penalty is also set aside. Interest levy is also set aside as the duty demand itself has been held to be not sustainable.

11. In the result, we set aside the impugned order and allow the appeal.

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