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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-15-1995

Reported in : (1996)(81)ELT535TriDel

Appellant : Godavari Fertilizers and

Respondent : C.C.

Judgement :

1. In all these appeals common question of law and facts are involved, hence they are taken up together for disposal as per law.

2. The appeals pertaining to M/s. Godavari Fertilizers and Chemicals Ltd. arises from Order-in-appeal dated 30th June, 1992 passed by the Collector of Customs and Central Excise (Appeals), Hyderabad.

3. The appeals pertaining to M/s. SAIL arises from Order-in-Original dated 8-3-1992, passed by the Collector of Customs, Bhubaneswar.

4. In the case of M/s. Godavari Fertilizers and Chemicals Ltd., the appellants had imported Phosphoric Acid Solution in bulk and had filed the Bill of Entry for the quantities indicated in the respective Bills of Entries of various dates. The goods were assessed provisionally, awaiting filing of test/analysis report and documents viz. Bill of Lading, Invoice, Survey Report, Original Certificate of Country of Origin etc. Subsequently, the importer submitted the required documents and requested for finalisation of Bill of Entry. Accordingly, the Bill of Entry was finalised and the

consequential refund of various amounts were paid under Voucher. Later, the department noticed that the service charges paid by the importers to M/s. Minerals and Metals Trading Corporation were not included, while arriving at the assessable value either at P.D. Stage or finalisation stage. Since, the Cargo (Phosphoric Acid Solution) is canalised through M/s. Minerals and Metals Trading Corporation from 1-4-1990, the department took the view that the service charges had to be taken into account while arriving at the assessable value. In the absence of actual service charges paid to the canalising agents, 5% of C & F value was added towards service charge and an ad hoc demand notices were issued to the appellants.

5. In reply to the demand notice, the importers along with their reply enclosed a revised Invoice issued by M/s. MMTC, wherein they had charged at the price of Rs. 7088/ per M.T. of Phosphoric Acid concentration content and stated that the above price covers (1) C & F price (2) Bank Charges (3) Cost of funds BAF/SODF, Exchange fluctuation and (4) service charges at 0.75%. They contended that any importer, who imports goods through canalising agency, or imported directly had to incur expenditure as indicated at Sl. Nos. (1) & (3) above, and in the present case all that they incurred in addition to C & F charges [that] they had paid is service charge at 0.75% only. Therefore, they had stated that they were prepared to pay short collection as per the calculation arrived at by them, which resulted from non-inclusion of service charges alone. They also mentioned in their reply that in case the documentation is done by the canalising agents i.e. M/s. MMTC itself the inclusion of service charges should not have arisen. The importers were called upon to produce the final invoice, if any, issued by M/s. MMTC. In reply they stated that invoice issued by M/s. MMTC, showed the price at Rs. 8098/ per M.T. revising their earlier rate of Rs. 7088/ per M.T. The Assistant Collector after giving them due opportunity of hearing has passed separate orders-in-original. In these orders, he has noted their main arguments that the price negotiated by MMTC with the foreign supplier should only form the assessable value.

That they have to import through M/s. MMTC is only incidental in the sense that it is a pre-condition of the ITC regulation and that the rise in the expenditure on account of a technicality over which they have no control has no actual bearing on

the transaction with the foreign supplier and, therefore, the foreign supplier's invoice should be accepted as final for the purpose of assessment. They also stated that the charges of the canalising agency in the nature of "Buying Commission" and should not be included for the purpose of valuation.

These submissions were rejected by the Assistant Collector and he has held that the question of buying commission may arise when a third party acts as the buying agent in the transaction between the importer and the seller and when this commission is paid separately by the importer and when the expenses on such account does not have any bearing on the price in any way. He has held that in the instant case, the goods imported being canalised, there was no scope for the party to import the goods without a specific licence or without violating ITC restrictions. Since in this case they never had the chance of being a direct importer, employing a buying agent to work on their behalf is out of question. Hence, he has held that the party's theory regarding buying commission cannot be accepted. He further held that in the case of a High-seas sale, the transaction is between the High-seas seller and High-seas buyer. The price negotiated for the purpose of High-seas sale/purchase, therefore, can only be the transaction value. Therefore, he concluded that the Invoice of the M/s. MMTC is only to be accepted for the purpose of valuation. The importer namely, M/s. Godavari Fertilizers and Chemicals Ltd. were aggrieved with the seven orders-in-original and hence they appealed before the Collector (Appeals), who has disposed of these appeals by a common order. In the impugned order the Collector has confirmed the findings of the Assistant Collector. The learned Collector has noted about the sale of the goods by MMTC to Godavari Fertilizers and Chemicals Ltd. on High-seas sale basis and M/s. Godavari Fertilizers and Chemicals Ltd. filing the Bill of Entry on account of M/s. MMTC and cleared the goods.

Therefore, he held that the first transaction between the M/s. MMTC and a foreign supplier is not an international transfer of goods inasmuch as M/s. MMTC had sold the goods on high seas to M/s. Godavari Fertilizers, therefore, that time onwards the international trade is between M/s. MMTC and M/s. Godavari Fertilizers. The transfer of goods between M/s. MMTC and M/s. Godavari Fertilizers constitutes an international transfer of goods. Therefore, he held that the price paid or payable by

M/s. Godavari Fertilizers to M/s. MMTC becomes the transaction value for the purpose of Rule 4 of the Valuation Rules. To this, additions permissible under Rule 9 can be made to arrive at the final transaction value. In the order-inoriginal, the Collector notes that what the Assistant Collector had done is to accept the invoice raised by M/s. Godavari Fertilizers as the transaction value.

Therefore, he agreed with the reasoning given by the Assistant Collector and held that it is perfectly within the provisions of the Valuation Rules to adopt high seas sale price as the transaction value.

He also held that all expenses incurred by high seas seller in connection with the importation of goods will foriy. part of the assessable value as these charges are recovered from the high seas buyer. The service charges collected by the canalising agency in the case of the import of canalised items sold at high seas will form part of the assessable value. In this regard, the Learned Collector held that the "ratio of the judgment in the case of Prabhat Cotton and Silk Mills v. Union of India as reported in 1982 E.L.T. 203 is not applicable to the facts of the case. The Learned Collector further held that only precaution to be taken in case of High sea sales is to exclude such charges preferred by the seller from the buyer which are clearly in the nature of post importation charges. As regards the appellant's contention that M/s. MMTC had collected from M/s. Godavari Fertilizers Indian rupees at the exchange rate for US $ prevailing on a date subsequent to the date of importation, the Learned Collector held that Section 14(1) proviso clearly states that the rate of exchange to be adopted is the rate prevailing on the date on which a Bill of Entry is presented under Section 46 of the Customs Act. Noting the arguments of the appellants, the Learned Collector rejected the same on the ground that all charges incurred by the high seas seller, whether they are in the nature of bank charges or service charges formed a part of the transaction value. He has also held that there is no conflict between Section 14(1) and the rate of exchange adopted by the Customs and has also held that the various items of cost in the invoice raised by M/s. MMTC are the expenditure incurred by M/s. MMTC and therefore, the same are collected from its buyer when the goods are sold in an international trade. Therefore, he has held that the sale between M/s.

MMTC and M/s. Godavari Fertilizers are in the course of international trade.

6. The Learned Collector in the case of M/s. SAIL has also arrived at a similar conclusion. He has held that it has been established beyond doubt that the purchase order was placed by the canalising agency on the over-seas buyer on the basis of the requirement of M/s. SAIL, and as per their own admission, M/s. MMTC of India placed the orders on the foreign seller, on the basis of which M/s. SAIL the end user opened irrecoverable letter of credit in favour of the foreign seller. The foreign seller obtained the bill of lading and informed M/s. MMTC of India and presented the bill of lading before the Bank for which the letter of credit had been opened in their favour by M/s. SAIL. M/s.

SAIL in turn obtained the bills of lading from their banker and brought these to M/s. MMTC of India for endorsing the same in their favour.

M/s. MMTC endorsed the said bills of lading in favour of M/s. SAIL and thereafter authorised M/s. SAIL to present the documents to Customs and take all responsibility with regard to clearance and payment of duty including any demands subsequently raised for customs duty for short levy or non-levy if subsequently noticed by the Customs authorities.

Therefore, the Learned Collector has held that on all admitted facts, evidence and documents on record, clearly proves that the consignments were on over-seas sale basis. For this over-seas sale, M/s. MMTC issued invoices and charged service charges on the CIF value, the amount of which were specified in the said sale invoice. Therefore, the Learned Collector has held that as per the provisions of Section 14 and Valuation rules made thereunder, the high seas sale invoice is relevant for determination of value for the purpose of assessment and collection of duty. M/s. MMTC as a canalising agent have claimed and received the service charges and issued high seas sale invoice which were includible in the assessable value and accordingly, the duty is rightly chargeable on this service charges. It is also recorded that at the time of filing the Bill of Entry, M/s. SAIL neither declared service charges paid by them nor produced the final invoice of M/s. MMTC which were already in their possession and knowledge. Therefore, he has held that M/s. SAIL had undoubtedly violated the provisions of Section 46 of Customs Act, 1962

read with Section 14 and Valuation rules made there under with the sole intention of mis-declaring the value and to evade payment of correct amount of duty. Therefore, he has held that the extended period of 5 years is also applicable in this case, though, it is necessary to mention here that each of the Bill of Entry in this case had been marked as provisional. He has held that contravention of the provisions by M/s. SAIL is also fully established, and therefore they are liable to penal action under Section 112 of the Customs Act,1962. The goods are also liable for confiscation under Section 111(m) of the Customs Act, 1962 as charged in the show cause notice. While confirming the duty amount of Rs. 2,23,372.35, he has also imposed a personal penalty of Rs. 25,000/ under Section 112 of the Customs Act, 1962 in respect of order-in-original dated 8-3-1992.

7. In Order-in-original dated 21-4-1992, the Collector has confirmed the duty amount of Rs. 2,07,281.00 and has imposed a penalty of Rs. 20,000/.

8. In Order-in-original dated 21-3-1992, the Collector has confirmed the duty amount of Rs. 18,50,827/ and has imposed a penalty of Rs. 1,50,000/.

9. In Order-in-original dated 7-4-1993 signed on 25-5-1993, the Collector has confirmed the duty amount of Rs. 2,30,668.00 against the earlier confirmed duty of Rs. 2,07,281.00 confirmed vide the order-in-original dated 21-4-1992.

10. By order dated 7-4-1993, the Learned Collector has confirmed the duty amount of Rs. 27,40,107.00 against the earlier confirmed duty of Rs. 18,50,827.00 confirmed vide order-in-original No.10/Collr/Cus./BBSR/91/3, dated 21-4-1992. The Learned Collector has noted that by his adjudication order dated 21-4-1992 issued on 7-5-1992 is corrected to that extent only and rest of the order dated 21-4-1992 issued on 7-5-1992 remains unchanged. Accordingly, he ordered the party to pay duty of Rs. 27,40,107.00.

11. In all these appeals, the appellants were represented by the Learned Advocate, Shri V. Sridharan for the appellants and the Learned JDR, Shri A. K. Singhal for the Revenue.

12. The Learned Advocate submitted that M/s. MMTC alone were entitled to import the goods as they were the canalising agents as per the import policy. After the importation, the goods were sold to the appellants. In this connection, he pointed out to the agreement entered into by M/s. MMTC and the appellants. The provisions of the agreement discloses that the price has to be paid in terms of Indian rupees. He pointed out to the clause 7 of the agreement dealing with the payments.

The clause stated, inter alia, that, the shipping documents will be transferred in the appellants favour only on receipt of payment.

Interest at 1% over MMTC borrowing rate of interest from State Bank of India prevalent on the date of issue of the sale order was required to be paid by the importer in case the payment is not made as per the terms of the agreement. Further the clause states that post-dated cheques would be accepted from the receivers which will be payable on 6th day from the date of Bill of Lading. In case there is any delay in realisation of money against post-dated cheque beyond due date interest at a rate of 17% per annum would be payable by the consumer for the delayed period. Clause 8 deals about the sales tax and other local taxes which were required to be paid along with sale price. Sales tax collected shall be deposited by MMTC to the Sales Tax department. In case authorities refund sales tax to MMTC, then the same shall be passed on to the appellants after refund is received. Clause 10.2 states that "title and risk to the goods shall pass to the appellants upon endorsement/transfer of the shipping documents including Bill of Lading in appellant's favour and it shall be their responsibility to make all arrangements for stevedoring and clearance of consignments and charges for and incidental to the operations including port charges, would be on the appellants account. The Learned Advocate also pointed out to the Clause 12, which deals about the insurance. The consignment is to be insured individually or jointly by other allottees of Acid from same ship under a comprehensive open insurance policy for 110% of C&F value. This includes cover towards shortage over and above the half per cent of the Bill of Lading quantity and in case of any such shortage, the appellants will forward their claim duly supported by the surveyor's report to underwriters for lodging the claim under intimation to M/s. MMTC. Any

liability arising out of not taking insurance cover in time by the appellants or other allottees from the same ship will be entirely the appellant's responsibility. A copy of open insurance policy obtained in advance shall be made available by the appellants to MMTC. The Learned Advocate also pointed out to the Annexure I of the contract which states that MMTC concludes purchase contracts for arrivals/ shipments in six months and gives unit wise allocations to the seller under intimation to: The clause 2 of the Annexure states that Units furnish/finalise specific shipment/loading schedule with seller and units and seller intimate M/s. MMTC, New Delhi of agreed schedule, who in turn inform concerned ROS. For any subsequent changes rescheduling - same to be followed. The Learned Advocate also pointed out to the clause 5 of the Annexure which states that all claims on quantity, quality, demurrage and for other provisions covered by contract shall be preferred by the customer directly on the seller under intimation to M/s. MMTC CO.Similarly if seller has any issue of claim on customer in India they shall prefer it directly on them under intimation to M/s. MMTC CO. and customer shall confirm its acceptance to M/s. MMTC CO. who in turn will arrange remittance to buyer. In brief while claims can be directly preferred and exchanged between the customer and seller all monetary settlements shall be through M/s. MMTC only. The Learned Counsel pointed out to the Invoice issued by the chemical association to M/s.

MMTC and states that the sale is to the M/s. MMTC as OGL is for M/s.

MMTC and the invoice states that the payment has to be done by M/s.

MMTC within 60 days from the date of Bill of Lading and the unit price is US $ 382 of C & F price. He pointed out to the provisional invoice and final invoice of Rs. 8014/ which also shows 75% of service charges.

He submitted that the bank charges was worked out on 21-6-1990 and any value is to be borne by M/s. MMTC. Therefore, he submitted that the departments claim to take the rate as on the date of payment is not correct. The Learned Advocate submitted that the price should be what is ordinarily sold in international trade. The goods had been transferred after the entry of vessel in respect of three Bills of Entries, and therefore, the benefit has to be extended to those cases.

He submitted that the agreement was merely an agreement of sale and ownership has not passed on to appellants till the endorsement of Bill of Lading and in view of these documents and correspondence and the details pointed out in the agreement as well as from the invoice, the Learned Advocate submitted that the sale was not on high seas basis. He submitted that the LC and the bank charges are based on importation charges and, therefore, it cannot be included in the assessable value.

He submitted that they are paying buying commission as per Rule 9(1)(a)(i). He submitted that high seas sale has to be an international sale. The endorsement on Bill of Lading is therefore, not the criterion. It is his submission that the concept of high seas sale has to be understood in the manner as understood in international trade parlance i.e. there has to be two international parties for concluding high seas sales. When sales takes place between the canalising agent and the actual user such sale cannot be considered as high seas sales.

It is his submission that the international trade would contemplate trade involving two countries. An international trade is a term used in contra to the definition of intra-national trade. The price charged by the foreign supplier for sale to MMTC is certainly a price in the course of international trade. However, the price charged by MMTC for sale to the appellants is in the course of intra national trade and not in the course of international trade. On the other hand, it represents a price wholly alien to and directly contrary to the scheme of Section 14(1) and therefore, is irrelevant for the purposes of Section 14(1).

The Learned Counsel submitted that instead of importing through the canalising agency if the appellants were to buy the goods directly from foreign supplier, the foreign supplier would be supplying the goods to the appellants at the same price at which it was sold to M/s. MMTC.Therefore, it is his submission that the price being charged by the foreign supplier to M/s. MMTC is not any special price but is the price at which he would be selling the goods to any other buyer in India.

Therefore, it is his submission that the price being charged by the foreign supplier in his invoice to M/s. MMTC alone represents the price at which it is ordinarily sold in the international trade to any independent buyer. Hence, it is his submission that

the price alone be the value for levy of duty. He submitted that the sale price of M/s.

MMTC to the appellants cannot be made the assessable value by recourse to Section 14(1A). Firstly, Section 14(1A) begins with the expression "subject to the provisions of subsection (1)". Hence any value being determined under Section 14(1A), in the least, has to be in conformity with the fundamental and core theme of Section 14(1), namely, the price should be an international price. It is his submission that it is settled position that rules are always subject to the provisions sf the Act. Hence, by having recourse to Section 14(1 A), the Revenue cannot convert what cannot be an assessable value under main Section 14(1) into a value for levy of duty by recourse to rules made under Section 14(1A). Further he submitted that a determination under Section 14(1 A) leads to a value higher than the one determined under Section 14(1 A), then value determined under Section 14(1 A) has to give way to value determined under Section 14(1). Therefore, it is his submission that the sale price of MMTC to the appellants is irrelevant for levy of customs duty. He pointed out to Rule 9(1)(a)(i) of the Customs Valuation Rules, 1988 and submitted that this rule specifically provides for inclusion of commission and brokerage to the extent they are incurred by the buyer and not included in the sale price. He submitted that it makes a specific exception in respect of buying commission. Therefore, it is his submission that the Interpretative Notes specifically provides that the 'buyer commission' means fees paid by an importer to his agent for the service of representing him abroad in the purchase of the goods being valued. Therefore, it is his submission that in the present case, M/s. MMTC is representing the appellants abroad and for this purpose renders various services like placing of tender, entering into negotiations with the foreign supplier, arriving at the terms and conditions of the sale, opening of L.C. etc. Service charges is, therefore, being paid by the appellants to M/s. MMTC as a compensation for these charges and is, therefore, covered by expression "buying commission". He submitted that the Interpretative Note specifically refers to "for service of representing him abroad". It is, therefore, immaterial whether the services are being rendered by M/s. MMTC abroad or within the country. Therefore, he submitted that the department's theory that the expenses incurred by M/s. MMTC are in the nature of pre-importation charges is wholly irrelevant.

13. The Learned DR submitted that the goods were imported by M/s. MMTC and sold to the appellants on high seas basis. He submitted that the endorsement of Bill of Lading is not the criterion but the-sale which has taken place on the high seas, and that has been the accepted concept of high seas sales. The sale between the M/s. MMTC and the appellants have to be considered as an international sale and, therefore, on that basis sales tax has also been exempted to the appellants. This has been the accepted concept for decades. The Learned DR submitted that the party itself is not clear in the arguments about the stands taken by them. He submitted that the canalising agent has sold to the local actual user i.e. the appellants and, therefore, foreign supplier is totally out of the picture and has no connection with the appellants. The invoice has been raised on the basis of high seas sale basis. The price paid or payable by the appellants to M/s.

MMTC becomes the transaction value in terms of Rule 4 and Section 14 of the Customs Tariff Act. Therefore, all expenses incurred by M/s. MMTC has to be included in the assessable value. The interest rate is not the criterion in the present case and it is the Indian rupees which has to be taken into consideration. The department was right in accepting the value given in the invoice. He submitted that it is the buyer who is making the arrangements for insurance and the insurance company will not grant the insurance policy unless the party has totally offered the goods as security. He submitted that if the appellants plead that there is no international sale then they cannot argue for considering their payment of 'buying commission'. He submitted that M/s. MMTC is not acting as buying agent but they are acting as canalising agent for a group of actual users. When the appellants are actual users, therefore, question of considering M/s. MMTC as buying agent does not arise.

Therefore, he submitted that the cost of services are required to be included as per Rule 9 of the Customs Valuation Rules and as per GATT agreement. He submitted that Rule 9 deals with cost of service charges.

The appellants being an actual buyer, therefore, brokage is includible.

which is not a buying commission. He further submitted that M/s. MMTC is not an agent of the buyer as M/s. MMTC is designated by the Government of India as a

canalising agent and therefore, M/s. MMTC is not representing any party abroad. The concept of buying agent, therefore, does not exist in the present case. He submitted that the act of importation continued till it is cleared and hence all charges on landing of goods are includible, In this regard, he relied on the ruling rendered in the case of Ashok Traders v. Union of India as reported in 1987 (32) E.L.T. 262 and that of the ruling rendered by the Supreme Court as rendered in the case of N.K. Bapna v. Union of India as reported in 1992 (60) E.L.T. 13. He also submitted that service charges are includible. In this regard, he relied on the ratio in the case of Raymond Woollen Mills v. Collector of Customs, as reported in 1986 (26) E.L.T. 962 and that of the ratio rendered in the case of M/s.

Seshasayee Paper and Board Ltd. v. Collector of Central Excise as reported in 1988 (36) E.L.T. 611.

14. The Learned Advocate countering the arguments of the Learned DR submitted that endorsement on the Bill of Entry is made after the vessel enters the territorial waters of India and therefore, MMTC is required to be considered as the importer. He submitted that the filing of Bill of Entry is the matter of procedure and merely because the appellants had filed the Bill of Entry, it cannot be presumed that there has been a sale on high seas. He submitted that M/s. MMTC rate is the price to be considered and not the price at the time of importation. The post fluctuation price should not be taken into consideration for the purpose of valuation. He submitted that for the purpose of taking out an insurance policy the ownership of the goods is not the criterion. The Learned Advocate also relied on the judgment rendered in the case of M/s. Tata Iron and Steel Co. Ltd. v. Collector of Customs, as reported in 1993 (66) E.L.T. 622 (Trib.). As regards M/s. SAIL, the Learned Advocate submitted that the show cause notice has been issued after a period of six months after importation and no allegation of suppression of facts being brought out, the demands in those cases are not sustainable. The Collector had not held the assessment to be provisional and therefore, he cannot impose penalty and hence the penalty is not at all leviable. He also submitted that the Collector has not indicated as to how the clearances were provisional and hence, he submitted that the demands were required to be set aside.

15. We have carefully considered the submissions made by both the sides and have perused the entire records of these cases. The main questions that has to be considered in these cases are as to whether the appellants have purchased the impugned goods from M/s. MMTC on high seas sale basis and as to whether the assessable value has to be on the basis of invoice of M/s. MMTC or on the basis of invoices of the seller Maroc-phosphore to M/s. MMTC of India by their invoice, wherein the cost of the impugned goods per metric tonne had been declared at US $ 386 The second question is as to whether the service charges as calculated by the department is required to be added to the assessable value? 16. The appellants contention is that the sale has not been on high seas sale basis as sale on high seas basis can occur only between two international parties and both the parties being Indians, hence there has been no high seas sale in this case. It is also their contention that M/s. MMTC of India are canalising agencies, they had acted as buying agent for them and what has been paid is the buying commission which is required to be excluded as per Rule 9(a)(i). It is their further contention that the price is required to be calculated with reference to the rate of exchange as in force on the date on which Bill of Entry is presented under Section 46 and as per Section 14 of the Customs Act, 1962. Therefore, it is their contention that price of the goods as on the date of the representation of the Bill of Entry was US $ 386/ as is reflected from the invoice of the seller to M/s. MMTC of India Ltd., and therefore, the invoice of M/s. MMTC of India Ltd. to the appellants showing Indian rupees 8098/ should not be accepted but the provisional rate of rupee - Rs. 7088/ PMT as per initial invoice M/s. MMTC which is equivalent to US $ 386 is required to be accepted.

17. On a careful consideration of the plea, we notice that the Bill of Entry has been presented in this case by the importers and not by M/s.

MMTC of India Ltd. We note one Bill of Entry No. 150, dated 18-5-1990 presented by M/s. Godavari Fertilizers & Chemicals Ltd. which shows an endorsement "5,000 MT of Phos. Acid solution has been sold to M/s.

Godavari Fertilizers and Chemicals Ltd. on High Seas Basis". The Assistant Manager (Shipping) of M/s. Godavari Fertilizers and Chemicals Ltd. has signed

the declaration. It is noticed that the invoice to M/s.

MMTC of India Ltd. has been raised by M/s. Maroc-phosphore and this invoice clearly indicates that the sale has taken placed directly M/s.

MMTC, who have made the payment through Bank towards the sale price.

The invoice also shows the endorsement "contract NR : MMTC/FERT/005/PHOSACIO/9O" Each of the invoice gives the date of contract etc. Therefore, from the reading of the invoice of the seller to M/s. MMTC of India Ltd. it is very clear that the sale of the product has been directly to M/s. MMTC of India Ltd. on the basis of payment made by them by bank transfer. M/s. MMTC of India Ltd. have inturn invoiced to the appellants and the invoice clearly discloses the quality/particulars/rate of PMT. The particulars column reads in respect of invoice dated 17-7-1990 "sale of 5631.121 MT of Phosphoric Acid on high-seas per vessel m.v. SPIC PEARL (8-6-1990). The rate is shown as Rs. 7088/ Provl. It is seen that all the Bills of Entry and all the invoices drawn by M/s. MMTC on the appellants are in this nature. Subsequently, they have filed revised invoices, one invoice dated 31-3-1991 is taken here as an illustration, it shows quality and in the particulars column of the invoice it is stated "Being the sale value of 5631.121 MT of Phos Acid on high-seas per m.v. "SPIC PEARL" (B/L dated 7-5-1990) Less : Value already invoiced vide our invoice of even number dated 17-7-1990 at Rs. 7088/- PMT". In the rate column PMT has been shown as Rs. 8098/-. Therefore, the final value of the goods of each consignment has been shown as Rs. 8098/- PMT and not the initial provisional value of Rs. 7088/- MT. Therefore, what is evident from these documents is that the appellants had purchased these goods on high-seas basis from M/s. MMTC. This is an admitted position. The transaction value in these cases have to be taken on the basis of the revised invoice value submitted by M/s. MMTC to the appellants. The initial invoice filed along with the Bill of Entry, clearly shows that the same was worked on provisional basis. In view of the provisional value shown in the first invoice, the appellants cannot turn round and say that the provisional value is the transaction value, as at the point of presentation of the Bills of Entry, the exact value had not been arrived at by them. Therefore, the customs department had not assessed the Bills of Entry but had

kept the assessment as provisional, and directed the appellants to produce all the documents for final assessment. On scrutiny of the documents so produced, the department was able to say that the transaction value has to be on the basis of the final invoice submitted by M/s. MMTC. These documents clearly discloses the transaction being on high-seas basis. Therefore, the inclusion of service charges in the transaction value has to be upheld.For further reasons also, that M/s. MMTC of India Ltd. has not represented the appellants abroad as buying agent and also payment made to the M/s. MMTC is not buying commission. The interpretative note to Rule 9(1)(a)(i) defines the term "buying commission", and it states that "the term 'buying commission' means fees paid by an importer to his agent for the service of representing him abroad in the purchase of the goods being valued". The facts in these cases clearly discloses that M/s. MMTC of India Ltd. has not represented the appellants as an agent and that no buying commission has been paid to them and the same is not reflected in any of the correspondents between them. The appellants have not placed any evidence to show that they had appointed M/s. MMTC as their agent and they have paid buying commission and not service charges.

18. It is further seen on scrutiny of the contract dated 20-4-1990 entered into by the appellants with M/s. MMTC of India Ltd. that the subject of the contract has been recorded as "high-seas sale of Phos Acid per vessel GAFSA". The contract begins with the words "this is to offer you Phosporic Acid per above noted vessel on the following terms and conditions of sale". On perusal of the entire terms of the contract, it is clear that this is a mere agreement of sale, which has been negotiated by M/s. MMTC after they purchased the impugned goods, with the foreign buyer. The contract discloses that M/s. MMTC is the seller and the appellants are the buyers. This is the contract of sale on high seas sale basis only and it is not an agency agreement to construe the appellants having appointed M/s. MMTC of India Ltd. to act as their buying agent. Therefore, the sale having been negotiated between M/s. MMTC and the appellant's, as per the terms of the contract and as per the invoices raised by M/s. MMTC with the appellants, hence the contention that the appellants have not purchased the goods on high seas basis and that M/s. MMTC has acted only as buying agent is required to be rejected.

19. The Learned Counsel relied on the ratio of the judgment of M/s.

Tata Iron and Steel Co. Ltd. On perusal of this judgment, it is seen that the appellants therein had appointed M/s. Tata Incorporated, New York and M/s. Tata Ltd., London as buying agents and on facts, the Tribunal held that there is no high seas basis and the payments made by M/s. Tata Iron & Steel Co. Ltd. to M/s. Tata Incorporated, New York and M/s. Tata Ltd., London was considered as buying commission. The facts are totally distinguishable and therefore, the ratio of the cited judgment is not at all applicable to the facts of the present case.

20. The Learned Advocate submitted that the imposition of penalty in respect of M/s. SAIL is not justified nor invoking of larger period in this case in view of the fact that the assessment had not been provisional. The Learned Counsel also submitted that there is no charge of misdeclaration and invoka-tion of larger period in the show cause notice and hence larger period is not invokable. In Appeal No.C/534/93-A, the show cause notice dated 11-12-1992 has been issued under Section 28 of the Customs Act and there is a clear allegation of mis-declaration of the value of the goods under Section 111(m) of the Customs Act. This show cause notice has been issued in respect of 6 Bills of Entry in which 2 Bills of Entry are dated 20-11-1987 and 3 Bills of Entry are dated 24-11-1987 and 1 Bill of Entry is dated 11-12-1987. The Collector has issued this show cause notice and it clearly brings out the facts of mis-declaration and the sale done by M/s. MMTC of India Ltd. to M/s. SAIL on high seas sale basis, which had not been declared in their respective Bills of Entry. The show cause notice states that M/s. SAIL had not revealed about the invoices drawn by M/s. MMTC to M/s. SAIL.

21. The show cause notice in Appeal No. C/1718/92-A, dated 8-4-1991 has also been issued by the Collector of Central Excise and Customs on a similar lines with the same allegations.

22. In Appeal No. C/2185/92-A, the show cause notice dated 4-4-1991 issued by the Collector of Central Excise and Customs on the same set of facts.

23. In Appeal No. C/776/93-A, the show cause notice dated 4-9-1992 issued under Section 28(1)(b) of the Customs Act, 1962 and this show cause notice states that

there has been a mistake/error in calculation of assessable value and the differential duty vide show cause notice C.No.VIII(10)ll/Cus/BBSR/91/10849-A dated 4-4-1991 and the order-in-original dated 21-4-1992 endorsed on 21-5-1992 and rectify the calculation error in differential duty. There is no infirmity in the impugned order as arising from this show cause notice.

24. In Appeal No. C/797/93-A, the show cause notice dated 4-9-1992 issued by the Collector of Central Excise and Customs, Bhubaneswar states that there has been a mistake/error in calculation of assessable value and the differential duty vide show cause notice dated 8-4-1991 and the order-in-original dated 21-4-1992. There is no infirmity in the impugned orders arising from this show cause notice.

25. We have perused these Bills of Entry. The Bills of Entry does not show endorsement of high seas sale basis, as has been found in Bills of Entry filed by M/s. Godavari Fertilizers. M/s. SAIL had showed invoice value of the seller to M/s. MMTC and had not disclosed the sale invoice value of M/s. MMTC to M/s. SAIL. These details pertaining to high seas sale and sale of M/s. MMTC to M/s. SAIL was subsequently revealed on investigation. Therefore, the allegation of mis-declaration and suppression by M/s. SAIL has been proved and in that view of the matter, we uphold the finding given in the impugned order and imposition of penalty in these cases.

26. There is no merit in these appeal and hence all the appeals are rejected.

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