

M/S. Globe Plastics Vs. Commissioner of Central Excise, Mumbai

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-02-2010

Judge : The Honourable Mr. P.G. Chacko, Member (Judicial) & the Honourable Mr. S.K. Gaule, Member (Technical)

Appeal No. : APPEAL NO. E/1644/03-Mum (Arising out of Order-in- Original No.10/Commr.N/2003 dtd. 21.3.03 p

Appellant : M/S. Globe Plastics

Respondent : Commissioner of Central Excise, Mumbai

Advocate for Pet/Ap. : Shri Mayur Shroff, advocate for Appellant. Shri S.S.Katiyar, SDR for Respondent.

Judgement :

Per : P.G. Chacko

This appeal filed by M/s. Globe Plastics (hereinafter referred to as 'the assessee') is against demand of duty of Rs. 34,99,417/- confirmed under sub-section (2) of Section 11A of the Central Excise Act and equal amount of penalty imposed under Sec.11AC of the Act. An amount of Rs. 86,296/- paid by the assessee during the course of investigations has been appropriated towards the demand of duty. The impugned demand of duty is for the period from April 1997 to March, 2001 and the same is confirmed in adjudication of a show-cause notice which was issued on 3.7.02 invoking the extended period of limitation under the proviso to Sec.11A(1)

of the Act. In the present appeal, the demand has been challenged both on merits and on the ground of limitation.

2. The goods in question are acrylic plastic sheets which were allegedly undervalued by the assessee with intent to evade payment of appropriate duty during the aforesaid period. The assessee is a partnership firm, of which one Shri.Nalin Z.Mehta and one Shri. Kumud C.Mehta were partners looking after the business of the firm during the material period. The assessee priced the goods in the range of Rs. 40 - 48/- per kg. in their invoices and paid duty accordingly during the period of dispute. Upon detailed investigations into the valuation of the goods, the department found that the goods were actually sold at approximately double the price shown in their invoices. They found that the price mentioned in their invoices was realized by the assessee from their buyers through cheques while the undisclosed part of the actual price of the goods was recovered in cash. These findings were arrived at by the department on the basis of statements of the aforementioned partners of the firm as well as statements of some of their buyers, recorded under Sec.14 of the Central Excise Act. The department also relied on certain loose sheets which were recovered from one of the partners of the firm, which disclosed certain money transactions pertaining to the subject goods. However, the finding of undervaluation of the goods by the assessee, by and large, was founded on the statements recorded under Sec.14 of the Act. Shri Kumud C.Mehta , in his statements dated 21.12.2000, stated inter alia that he was working partner of M/s. Globe Plastics engaged in the manufacture of acrylic plastic sheets, that Shri Nalin Z.Mehta was another partner, that actual price of acrylic plastic sheets was Rs. 215 per piece and the weight of one piece was 2.7 kg., that the sales of the goods were, however, being effected on kg basis, that the value of the sheet was shown in the sales invoices at Rs. 40/- per kg. whereas the actual price per piece charged from the buyers was Rs. 215 per piece of 2.7 kg, that the difference in price was collected from the buyer in cash, that the price shown in the sales invoices was collected by way of cheque, that the cash collected from the buyer was not accounted for in any of their accounts and the same was always taken by the main partner Shri Nalin Z.Mehta, that they did not sell anything on credit, that all the sales were on 50:50 basis i.e. 50% cheque and 50% cash, that all the cash payments used to be entered on loose sheets by Mr.

Rajan who was handling the marketing of the goods, and that these papers had been handed over to the Central Excise officers. Shri Nalin Z.Mehta in his statement dated 11.01.2001 corroborated all the above depositions of Shri Kumud C.Mehta. He further stated that, prior to April 2000, they had never undervalued the goods as its cost of manufacture was well below Rs.40/-, that they used to invoice the plastic sheets at Rs. 40/- per kg. and to receive Rs. 215/- per piece of 2.7 kg from their dealers, that Rs. 108/- out of Rs. 215/- was collected by cheque and the balance collected in cash from their dealers, that he was very well aware of the undervaluation and was ready to discharge duty liability though under protest, that on account of undervaluation upto 30.08.2000, the differential value worked out to Rs. 31,64,805/-, that the value in excess of Rs. 50 lakhs prescribed as the maximum limit of aggregate value of clearances for SSI exemption till 31.08.2000 was Rs. 13,29,610/- and that the duty payable on this value at the rate of 5% ad valorem worked out to Rs. 66,481/-. Shri Nalin Z.Mehta requested for grant of some time for payment of this duty, which was ultimately paid on 15.01.2001.

3 The above statements of the partners were never retracted until a reply to the show-cause notice was submitted.

4. In answer to queries of the investigators, Shri Kumud C.Mehta had also named some of the buyers viz. M/s. Kiran Plastic Works, Goregaon, M/s. Nakoda Enterprises, M/s. Disha Plast, M/s. R.N.Totla and Company , M/s. Naco Plast ect. The investigators, however, identified some other buyers also and recorded their statements, and these include (1) statements dated 3.1.2001 and 8.5.2001 of Shri Tarun D.Parekh, Manager of M/s. Disha Plast, (2) statement dated 20.4.2002 of Shri Girish Mauji Gada, partner of M/s. Bhavana Engg. (3) statements dated 5.1.2001 and 29.4.2002 of Shri Kiran S.Bafna, partner of M/s. Swastic Plastics (4) statement dated 14.4.2002 of Shri Harish Banwarilal Singhania, proprietor of M/s. PEP Electronics and (5) statement dated 15.5.2002 of Shri Naresh R. Totla, partner of M/s. R.N.Totla.

5. In a subsequent development, the assessee paid a further amount of Rs. 19,815/- on 27.3.2002 towards admitted liability of differential duty.

6. Some of the buyers stated that, as the acrylic plastic sheets required by them were being manufactured in Mumbai only by M/s. Globe Plastic during the material period, they had no option but to meet the demands of M/s. Globe Plastic. They further made clear that the invoiced price of the goods had to be paid through cheque and approximately equal amount to be paid in cash to the assessee. Some of the buyers deposed that, if they refused to pay anything in cash to the assessee, the latter would supply only half quantity of the goods mentioned in the invoice. Some of the buyers also furnished particulars of the purchases made by them from the assessee, including the invoiced price, period of purchase, payments made to the assessee etc.

7. In the reply to the show-cause notice, the assessee retracted the confessional statements and contested the demand of duty on various grounds. At the time of personal hearing, they filed written submissions, wherein they requested the Commissioner for permission 'to cross-examine the customers and all other concerned persons to bring home the factual position that no clearance of any quantity whatsoever had taken place without payment of duty'. The assessee also relied on case law in support of the various points raised by them.

8. In the impugned order, the Id.Commissioner upheld the allegation of undervaluation against the assessee on the strength of their confessional statements as corroborated by some of their buyers. In the result, the demand of duty came to be confirmed against the assessee and penalties were imposed on them and some of their customers.

9. After hearing both sides, we note that 2 partners of the assessee-firm confessed to undervaluation of the goods in categorical terms. The relevant portions of their statements have already been recorded by us. It was admitted that approximately double the invoiced price of the goods was recovered by the assessee from their buyers, the invoiced amount by way of cheque and the undisclosed amount in cash. It was admitted that, where the price of the goods was shown in an invoice was Rs., 40/- per kg., the amount realized from their buyers was to the tune of Rs. 215 per sheet of 2.7 kg. which amounted to approximately Rs. 80/- per kg. It was admitted that the price mentioned in the invoice was collected by way of cheque

and the balance amount in cash. There was no inconsistency between the statements of the two partners. These statements which were recorded towards the end of 2000 or in the beginning of 2001 were not retracted till the assessee filed a reply to the show-cause notice in the month of September/October, 2002. No valid reason was forthcoming in their reply to the show-cause notice as to why they stood by their earlier confessional statements till that point of time. The statements given by some of their buyers were corroborative of the facts admitted by the partners of M/s.Globe Plastics. Among these statements, those given by the partner of M/s. Swastik Plastics and M/s. Kiran Plastic Works as also the statement given by the partner of M/s. R.N.Totla forcefully corroborated the deposition given by the partners of the assessee-firm. The Id.Commissioner heavily relied on these statements and, on that basis, the assessable value of the goods was doubled vis--vis the invoiced price, with the result the differential duty came to be demanded from the assessee. The Id.counsel has raised a few valid objections against the Commissioner's order. He has submitted that, though the Id.Commissioner noted the fact that the acrylic plastic sheets manufactured during the period of dispute had been sold to numerous buyers, he chose to rely on the oral evidence given by some of them regarding the price of the goods. We note that the fact that there were numerous customers apart from those whose statements were recorded was acknowledged by the Commissioner viz. paragraph 42 of the impugned order which reads thus ‘

‘I also find that such payment in cash, over and above the price charged in invoice, has also been admitted by some of the customers, whose statements were recorded during the course of investigations.’

The Id.counsel has also contended that the assessee never admitted undervaluation of goods for any period prior to April, 2000. The admission, if any, was relating to the period from April, 2000. Therefore, the Id.Commissioner has erred in having assumed that the assessee confessed to undervaluation of the goods for the entire period. The Id.counsel has also referred to the cost data produced by the assessee before the adjudicating authority and has submitted that, for each financial year comprised in the period of dispute, the costing of the goods was done in accordance with the normal accounting principles and

accordingly its unit price was determined in the range of Rs. 40 ' 48 per kg. depending on the size of plastic sheet. It is submitted that the assumption made by the Id.Commissioner that the assessee could not have marketed the goods with a reasonable margin of profit at the above prices, considering the actual cost of production, is not based on any good logic. In this context, the Id.counsel has referred to the value cap fixed by DGFT for acrylic sheets for purposes of DEPB rates. In DEPB Rate List, 2001-2002 the value cap for the following items was Rs. 40/- per kg. :

- 1) Acrylic sheet - Diecast
- 2) Acrylic sheet Centrifugal Cast,
- 3) Acrylic sheet Extruded.

The same value cap was fixed in the DEPB Rate List announced on 5.11.08 in respect of the above goods. The endeavour of the Id.counsel is to show that the price of Rs. 40/- per kg. fixed by the assessee for acrylic sheets and mentioned in the sales invoices during the period of dispute was only reasonable and that there is no justification for doubling the price for the purpose of levy of duty of excise.

10. We have heard the Id.SDR also on the above aspects. According to him, the facts admitted by the assessee need not to be proved and, therefore, the demand of duty raised on them cannot be assailed on any ground relatable to the statements of buyers. In this connection, he has relied on the decision in the case of Commissioner of C.Ex. Madras vs. Systems and Components Pvt.Ltd [2004(165) ELT 136(S.C.)], wherein it was held that it was a basic and settled law that what was admitted was not to be proved. The Id.SDR has also argued in support of the view taken by the Id.Commissioner with regard to the prices shown in the assessee's invoices. It is submitted that the assessee cannot be expected to have sold their products at prices much below the cost of manufacture. It is submitted that the assessee had not estimated the cost of manufacture correctly inasmuch as they did not take into account the numerous heads of expenses incurred in connection with the manufacture of the goods. According to the Id.SDR, the value of the goods was correctly estimated by including expenditures

in Annexure B to the show-cause notice.

11. After considering the submissions, we are of the view that the demand of duty quantified by the Commissioner cannot be sustained inasmuch as it is found to be based on the premise that undervaluation as alleged in the show-cause notice was admitted in toto by the assessee. On a perusal of the statements given by the partners of the firm, it appears to us that there was no admission of undervaluation for any period prior to April, 2000. One of the partners clearly stated that they never undervalued the acrylic sheets prior to April, 2000. The said partner even quantified the differential value of the goods on the basis of undervaluation for a period upto 30.8.2000. It would thus appear that the undervaluation as admitted by the assessee was for the limited period from April to August, 2000. The decision taken by the Id.Commissioner on the basis of finding of admission of undervaluation for the entire period of dispute cannot be sustained. As rightly pointed out by the Id.SDR, the assessee never retracted their statements. The first retraction came with the reply to the show-cause notice and the same would hardly be a valid retraction. It is settled law that a retraction made for the first time by a person in his reply to show-cause notice is not a valid retraction. Therefore, the offence of the assessee (undervaluation of goods) to the extent admitted by them stands established even without any evidence inasmuch as, as held by the Hon'ble Supreme Court in the case of Systems and Components Pvt.Ltd. (supra), it is settled law that what is admitted need not be proved. However, this cannot be said about an assessee who has not admitted the alleged offence. The assessee in the present case did not admit undervaluation of goods for any period prior to April, 2000, nor for any period after August, 2000. In other words, for a part of the period of dispute, evidence is required to establish undervaluation of goods against the assessee. Some evidence is available on record in the form of statements of buyers. The question now arises as to whether these statements would be reliable and, if so, to what extent. It is in this context that the assessee's plea for cross -examination of witnesses becomes relevant.

12. The Id.counsel has laid much emphasis on the plea for cross-examination of witnesses. It has been submitted that, though a specific prayer was made by them before the Commissioner, it was not heeded. On the other hand, it has been

contended by the Id.SDR that cross-examination cannot be claimed as a matter of right. A person seeking cross-examination of a witness should identify the person and state the reason for his cross-examination. If these requirements are not met, any plea for cross-examination would be futile, according to the Id.SDR. In this connection, the Id.SDR has usefully referred to the decisions of the Supreme Court in the case of Kanungo and Co. vs CC, Calcutta and others [1983(13)ELT 1486(S.C.)] and Surjeet Singh Chhabra vs Union of India [1997(89)ELT 646(S.C.)]. In the former case, it was held by the apex court that the principles of natural justice did not require that, in matters like the case on hand, the persons who had given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs authorities. In the latter case, it was held to the effect that, where a person had confessed to his guilt, the failure to give him an opportunity to cross-examine the witnesses was not violative of the principles of natural justice. The Id.SDR has also claimed support from Tribunal's Order No. A/695-697/2009 dated 28.10.09 in Appel Nos. C/782, 925 and 934/07. Case law on cross-examination was cited by the Id.counsel also. In the case of Swadeshi Polytex Ltd. vs. CCE, Meerut [2000(122)ELT 641(S.C.)] it was held by the apex court, in the facts and circumstances of that case, that the assessee should be given an opportunity to cross-examine certain witnesses if the Collector intended to rely on the statements of such witnesses. In the case of Laxman Exports Ltd. vs CCE [2002(143)ELT 21 (S.C.)] cited by the Id.counsel, an assessee's plea for cross-examination of witnesses was accepted and the original authority was directed to undertake de novo adjudication of the case after allowing such cross-examination.

13. We have examined the submissions on the point of cross-examination. From the decisions cited before us, it appears that -

- (a) where any offence alleged against a person in a show-cause notice is admitted, such person will not be entitled to cross-examination of witnesses, and
- (b) where there is no such admission of offence, he should be allowed to cross-examine witnesses to establish any fact pleaded by him or to rebut any fact alleged against him.

14. In the instant case, we have already noted that there was no confession to undervaluation of goods pre-April 2000 and post-August 2000 and that, for this part of the period of dispute, evidence is required for the department to establish that the assessee had undervalued the goods. There are statements of buyers, some of them corroborating the facts admitted by the assessee and others stating that they did not pay any cash to the assessee. But the corroboration is only relevant to the period for which the assessee themselves confessed to undervaluation of goods. In other words, the evidentiary value of the buyers' statements would require to be assessed in relation to the period for which the assessee did not admit the offence of undervaluation. This distinction between the two periods - one for which the assessee confessed to the offence of undervaluation and the other for which they did not admit the alleged offence - is not forthcoming in the impugned order. We are of the view that the Id.Commissioner should reconsider the question and decide thereon after proper appraisal of the evidence on record.

15. Yet another grievance raised by the assessee is that they were not allowed to abate duty from the price of the goods so as to arrive at the correct assessable value of the goods. The grievance is that the Id.Commissioner has, on a flimsy ground, denied the benefit of the apex court's judgment in the case of CCE vs Maruti Udyog Ltd.[2002(141) ELT 3(S.C.)] to the assessee. This grievance has also got to be redressed by the Id.Commissioner.

16. It would follow that all ancillary issues relating to interest on duty under Sec.11AB , penalty under Sec.11AC etc. also will have to be considered afresh, depending on the results of the decision on the substantive issue.

17. Before concluding this order, we would like to make it clear that we have affirmed

demand of duty against the assessee for the period April to August, 2000 after noting that undervaluation of goods by them during this period with intent to evade payment of appropriate duty stands established against them and consequently the extended period of limitation is sustainable for recovery of such duty. Liabilities under Sec. 11AB and Sec.11AC would also arise for the assessee for this period.

Except in respect of the demand of duty with interest and the penalty for the period April to August, 2000, the Commissioner's order is set aside and this appeal is allowed by way of remand.

18. The Id.Commissioner is requested to decide on surviving issues afresh in accordance with law and the principles of natural justice. In this context, we make it clear that it will be open to the assessee, if so advised, to make a fresh valid plea for cross-examination before the Commissioner, in which event, the Id.Commissioner shall consider it on merits.

19. The appeal is disposed of in the above terms.

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