(2013) 10 BOM CK 0149

In the Bombay High Court

Case No : Central Excise Appeal (L) No. 264 of 2013

M/s. Bhushan Steel Ltd. APPELLANT

Vs

The Commissioner of Central Excise Raigad Commissionerate RESPONDENT

Date of Decision : 01-10-2013

Acts Referred:

Citation : (2013) 298 ELT 696

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : M.H. Patil and Ms. Aparna Hirandagi, for the Appellant; Pradeep S. Jetly, for the Respondent

Judgement

1. At the instance of the Counsel for the parties, the appeal is taken up for final disposal at the stage of admission. This appeal challenges the order dated 5 August 2013 passed by the Customs Excise & Service Tax Appellate Tribunal (hereinafter called as "Tribunal") directing the appellant in terms of proviso to Section 35F of the Central Excise Act 1944 (in short "the Act") to deposit an amount of Rs. 4 crore. This predeposit was directed out of an amount of Rs. 8.02 crore of excise duty along with interest thereon and equivalent penalty as confirmed and imposed by order dated 26 March 2013 of the Adjudicating Authority. It is only on the above predeposit of Rs. 4 Crore that the appellant''s appeal would be heard by the Tribunal on merits.

2. The basic issue in controversy before the Tribunal is, whether freight charges which are shown separately in the invoices and reimbursed by the Customer are to be included in the assessable value of the goods or not?

3. The appellant during the period relevant to these proceedings i.e. February 2007 to December 2011 sold its manufactured goods in the following manner:-

(a) At the factory gate, where the customer took delivery of the goods;

(b) At the customer''s premises, where excise duty was discharged on the price of the goods and the freight payable for carriage of the goods from the factory to the customer''s premises; and

(c) Where the goods are sold to the customer at its factory gate but agreed to be delivered at the customer''s premises at pre-agreed freight. This freight is separately shown in the invoices issued to the customer. In this case the appellant had paid excise duty only on the price of the goods and not included therein the freight paid which was reimbursed by the customer.

4. The controversy in the appeal before the Tribunal is with regard to goods at (c) above. According to the revenue, the amount of freight though shown separately in the invoice has to be added to the price of the goods to arrive at the assessable value u/s 4 of the Act while the appellant contends that freight cannot be added to the price of the goods to arrive at the assessable value of goods.

5. The Tribunal in the impugned order while directing partial predeposit appears to have been, prima facie, impressed by the following:-

(i) to discharge its VAT liability, the costs of transportation is being included by the appellants to arrive at the assessable value of goods;

(ii) In respect of goods at (b) above, the transportation charges i.e. freight charges are also included in the assessable value of the goods, and

(iii) Board Circular No. 354/81/2000 TRU dated 30 June 2000 to conclude that freight charges is to be included in the assessable value of goods.

In view of the above, the Tribunal held that even in cases of class (c) category of sales above, freight has to be added to the value of goods to arrive at the assessable value.

6. The appellant''s grievance with regard to the impugned order in respect of good at (c) above is that on facts in this case the sale takes place at the factory gate. The freight which is charged to their customers is separately shown over and above the sale price in the invoice. The charging of freight is a separate contact between its customer and itself. Moreover, in this case that is class (c) category of goods the risk in the goods passes to the customer at the factory gate. This fact is to be juxtaposed with goods sold at (b) above where the risk in the goods continues to be with the appellant till the goods are delivered at the customer''s premises and accepted by him. In cases covered by (b) above the appellant is on its own discharging duty on the freight element by including it in the assessable value of goods. Moreover, it is submitted that the issue is covered in their favour by decision of the Tribunal and Court, however, the impugned order does not deal with the same on the ground that the decisions relied upon deals with old Section 4 of the Act and is not applicable to the present period which is covered by new section 4 of the Act.

7. Mr. Pradeep Jetly, learned Counsel appearing for the revenue submits that the

impugned order calls for no interference. In particular, it is submitted that in case of an identical situation in class (b) above, the petitioners are including the cost of transportation in the value of goods and by merely showing it separately in class (c) the cost of freight cannot be excluded from the assessable value. In fact, in service tax proceedings the petitioner had as much as admitted that in some cases the goods are removed at customer''s premises where delivery is given and the risk of goods passes only at customer''s premises.

8. Mr. Patil, learned Counsel for the petitioner submits that it is in case of goods at (b) above, that the sale takes place at customer''s premises and goods could be said to have been removed at the customer''s premises. This is also evident from the fact that the lorry receipt in case of sale of goods at (b) above the petitioner is shown as the consignee while in case of class (c) sale of goods the customer is shown as consignee evidencing that the goods are sold at the appellant''s factory gate where the risk in goods passes to the customer.

9 We have considered the submissions. We find that the Tribunal in the impugned order has relied upon a Circular of the Board dated 30 June 2000, which inter-alia provides as under:-

...However, exclusion of cost of transportation is allowed only if the assessee has shown them separately in the invoice and the exclusion is permissible only for the actual cost so charged from his buyer...

However, the Tribunal has not explained in what manner the aforesaid observations in the Circular reproduced by it would assist the revenue''s contention. The above observations, if at all appear to support the petitioner''s case.

10 Besides, various decisions dealing with the identical issue rendered by the Apex Court as well as by the Tribunal was cited before the Tribunal. However, none of the decisions were discussed in the impugned order on the ground that all of them dealt with decision rendered in the context of old Section 4 of the Act i.e. prior to 1 July 2000. We find that the Tribunal decisions referred to in the impugned order do deal with the period post 1 July 2000 but most of them followed decisions of the Apex Court rendered in the context of old Section 4 of the Act.

11 Our attention was invited to the order of the Tribunal in Commissioner of Central Excise v/s. Bharat Conductors, 2010 (252) E.L.T. 390 wherein the Tribunal dismissed the revenue''s appeal. In the above case, the original authority included the value of freight into assessable value of the goods. On further appeal, the Commissioner(Appeals) allowed the assessee''s appeal and held that where the goods are sold at the factory gate and the freight is incurred for carriage of the goods, which is subsequently reimbursed by the customer under a separate contract is not includable in the assessable value of the goods sold by the assessee to its customers.

12. Further, the impugned order holds that as the freight is included in the value of goods for payment of VAT, it must be included also for arriving at the value of the goods for purposes of the Act is not appropriate. Both the levies are different and the assessable value for purpose of excise must be only in terms of the Act alone and not on the basis of VAT Act. Moreover, the fact that in case of goods falling in category (b) above, the petitioner pay excise duty on freight does not make it necessary that the same would apply even in case of goods falling under category (c) above. The regime under the Act is transaction value and each transaction is to be separately assessed depending upon the terms of the contract and the time the ownership in goods is passed.

13. Therefore, in view of all the above reasons and particularly the decision of the Tribunal in Bharat Conductors (supra), we are of the view that the Tribunal ought to have heard the appellant without insisting on any pre-deposit of duty. Accordingly the impugned order dated 5 August 2013 is modified and the requirement to pre-deposit, as directed by the Tribunal is deleted. The Tribunal is directed to hear the appellant''s appeal on merits without insisting on any pre-deposit.

14. We make it clear that observations made by us in this order are only prima facie observations for the purpose of disposing of the present appeal. The Tribunal would decide the appeal of the appellant on its merits without in any manner being influenced by any observations made herein. Accordingly, the appeal is allowed in above terms.

