(2021) 12 CESTAT CK 0015

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 10 Of 2011

M/s. Jai Balaji Industries Limited — APPELLANT

Vs

Commissioner Of Central Excise, Bolpur — RESPONDENT

Date of Decision : 07-12-2021

Acts Referred:
Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 — Rule 4, 7, 8
Central Excise Act, 1944 — Section 4(1)(a), 11AC

Citation : (2021) 12 CESTAT CK 0015

Hon'ble Judges : P. K. Choudhary, J;Raju, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

Period,"Direct

parties","Consignment

Agents","Sister

Units","Related

parties","Captive

Consumption",Total

2005-06,103281.12,17285.47,328.71,-,43.09,120938.39

2006-07,75764.56,38584.50,3292.06,5272.56,3004.63,125918.31

2007-08,117603.41,70396.99,4206.05,-,2111.13,194317.58

2008-09

(Dec 08)",62334.66,46048.32,1205.83,204.95,601.41,110395.17

Total,358983.74,172315.28,9032.65,5477.51,5760.26,551569.44

charges made in respect of the first show cause notice are unsubstantiated.,,,,,,

10.2 Annexure C to the first Show Cause Notice is unwarranted as there is no separate demand of duty on account of freight charges.,,,,,,

10.3. In respect of the second Show Cause Notice covering the period from January 2009 to August 2009, it may be seen from the Annexures that",,,,,,

only the invoices issued by the appellants have been taken into consideration and there is no mention of the corresponding sale invoices issued by the,,,,,,

consignment agents in respect of the goods transferred to them by the appellants. As an illustration, invoice number 9874 dated 23.01.2009 recorded at",,,,,,

page 56 of the Appeal may be referred to. A copy of the said invoice raised by the appellants may be seen at page 416 of the Appeal. In fact, the",,,,,,

values adopted by the department for sale at the end of the consignment agent is uniform for the whole of the month of January 2009 and has been,,,,,,

taken as Rs 34,663.46 per MT. This is clearly not permissible even as per Rule 7 of the Valuation Rules, 2000.",,,,,,

10.4 Rule 7 of the valuation Rules is not applicable since it can be invoked only if the goods are not sold from the â??place of removalâ?? but from,,,,,,

some other place. As per definition of â??place of removalâ?? the premises of a consignment agent is also a â??place of removalâ??. Thus, if goods",,,,,,

sold from the premises of a consignment agent are goods sold from â??the place of removalâ?? then rule 7 cannot apply. Thus, the whole basis of",,,,,,

the demand is misplaced.,,,,,,

10.5 Rule 4 of the Valuation Rules, 2000, is the appropriate Rule applicable in the instant case since the goods removed to the premises of the",,,,,,

consignment agent are not sold at the â??time of removalâ?? but at a later point of time. As per the definition of â??time of removalâ?? it can only,,,,,,

refer to the time of removal from the factory.,,,,,,

10.6 The starting expressions of Rule 7 and Rule 8 of the Valuation Rules 2000, during the relevant period, are identical. It has already been held by",,,,,,

the Larger Bench of this Tribunal in the case of Ispat Industries Ltd vs Commissioner of Central Excise, Raigad [2007(209)ELT185(Tri-LB)] that if",,,,,,

an assessee does not remove all its goods for captive consumption, Rule 8 will not apply and valuation will have to be done under Rule 4 on the basis",,,,,,

of transaction value of sale of goods at the factory gate to unrelated buyer. On the same analogy, Rule 7 cannot apply if all the goods are not",,,,,,

transferred to consignment agents. Since the appellants have substantial sale at the factory gate to independent buyers, the same value will apply to",,,,,,

goods transferred to consignment agents also. The following judgments may be referred to:-,,,,,,

(a) Steel and Metal Tubes(I) Ltd vs CCE, Meerut-II [2017(358)ELT1193(Tri-All)",,,,,,

(b) Bharat Petroleum Corporation Ltd vs CCE Chennai[2010(261) ELT 695(Tri-Chennai),,,,,,

10.7 By applying Rule 4 of the Valuation Rules, 2000, the appellants have demonstrated in their reply to the show cause notice that they have paid",,,,,,

more duty than that was legally payable.,,,,,,

10.8 In any case, if Rule 7 is not applicable, Rule 4 cannot be invoked now since that was not invoked in the show cause notice.",,,,,,

10.9 Rule 7 of the Valuation Rules, 2000, was introduced in the year 2000 and has remained unchanged since then. Even though the definition of",,,,,,

â??place of removalâ?? was amended with effect from 14.05.2003, no amendment was done to Rule 7 thereby creating an anomaly. In any case,",,,,,,

because of the said anomaly or otherwise, Rule 7 cannot be invoked in the instant case.",,,,,,

10.10 Bulk of the demand is time barred. There is no ground for invoking the extended time limit. The only ground for invoking the extended time limit,,,,,,

is that the appellants did not inform the department of their marketing pattern (para 14 of the impugned order). It is submitted that no provision of,,,,,,

Central Excise law requires an assessee to inform the department of their marketing pattern. [Gammon Far Chems Ltd. Versus Collector Of Central,,,,,,

Excise, Bangalore 1994 (71) E.L.T. 59 (Tribunal) affirmed by the Supreme Court in 2003 (152) E.L.T. 28 (S.C.)]. This aspect is examined by the",,,,,,

department at the time of Audit, which was done in this case.",,,,,,

10.11 The appellantsâ?? premises were subjected to EA-2000 audit as well as CERA audit a number of times during the relevant period and the,,,,,,

pattern of sale or clearance of goods of the appellants was scrutinised and no discrepancies noticed. Sample copies of Audit queries and Audit Memos,,,,,,

have been enclosed as Annexures E to H of the Appeal. As per the Audit manual of the department relating to EA-2000 Audit one of the things done,,,,,, in â??desk reviewâ? is to examine the marketing/sale pattern of an assessee. [Refer Serial Number 10 of Circular No. 514/10/2000-CX, dated 16-2-",,,,,,

2000]. Hence, it cannot be said that the department was unaware of the sale of goods through consignment agents and that the appellants had",,,,,,

deliberately concealed this information from the department.,,,,,,

10.12 The appellants have paid duty as per their bona fide knowledge of law. Everything was recorded in their books. There was no deliberate,,,,,,

attempt to either suppress any facts or to misstate anything with intent to evade duty [Pushpam Pharmaceuticals Company v. Collector of Central,,,,,,

Excise, Bombay -1995 (78) E.L.T. 401 (S.C.), Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut -2005 (188) E.L.T. 149 (S.C.),",,,,,,

Easland Combines, Coimbatore v. The Collector of Central Excise, Coimbatore - 2003 (152) E.L.T. 39 (S.C.), Uniworth Textiles Ltd. v.",,,,,,

Commissioner â?" 2013 (288) E.L.T. 161 (S.C.)]. Hence, the demand, if any, could be raised for the normal period only.",,,,,,

10.13 The show cause notice dated 16.10.2009 was received by the appellants on 03.12.2009. Since there is no ground for invoking the extended time,,,,,,

limit, the normal period of one year from â??the relevant dateâ?? will apply. The ER-1 returns for the month of October 2008 were filed by the",,,,,,

appellants in November, 2008. Hence, demand for the period prior to November 2008, is time barred.",,,,,,

11 The learned Authorized Representative for the Respondent Revenue made the following submissions:-,,,,,,

11.1 The point that the demand and the charges made in the show cause notices have not been substantiated, was not raised by the appellants before",,,,,,

the adjudicating authority and hence, cannot be raised now;",,,,,,

11.2 Rule 7 has been correctly applied to demand duty in respect of goods transferred to the consignment agents;,,,,,,

11.3 Even if there are sales to independent buyers at the factory gate, the goods transferred to the consignment agents will be valued as per Rule 7 of",,,,,,

the Valuation Rules, 2000. He relied on the decision of the Tribunal in the case of Spice Systems Ltd. Vs Commissioner of Cus. & C. Ex., Noida",,,,,,

[2011(272)ELT82(Tri- Del)].,,,,,,

12. Heard both sides through video conferencing and perused the appeal records.,,,,,,

13. At the time of hearing, a query was raised by the Bench to the learned counsel for the appellants as to how he proposes to reconcile his",,,,,,

5.,"How will valuation be done in

cases of captive consumption

(i.e. consumed within the same

factory) including transfer to a

sister unit or another factory of

the same company/firm for

further use in the manufacture of

goods ?","For captive consumption in oneâ??s own factory,

valuation would be done as per rule 8 of the Valuation

Rules i.e. the assessable value will be 115% of the

â??cost of productionâ?? of the goods.

If the same goods are partly sold by the assessee and

partly consumed captively, the goods sold would be

assessed on the basis of â??transaction valueâ? [provided

they meet the conditions of Sec. 4(1)(a)] and the goods

captively consumed would be valued as per Rule 8 of the

Valuation Rules. This is because, as per new Section 4,

transaction value has to be determined for each removal.

Where goods are transferred to a sister unit or another unit

of the same company valuation will be done as per the

proviso to Rule 9.",,,,

for manufacture of other articlesâ?¦â?¦.â??(emphasis supplied),,,,,,

21. This decision of the Larger Bench was relied upon by the Tribunal in the case of Bharat Petroleum Corporation Ltd (supra) to hold that Rule 7 of,,,,,,

the Valuation Rules, 2000, which uses the same expression â??where excisable goods are not sold..â?, can be invoked only where there are no",,,,,,

sales of the goods at the factory gate and all the goods of the assessee are transferred to consignment agents. If the assesseeâ??s excisable goods,,,,,,

are also sold at the factory gate, Rule 7 will not apply.",,,,,,

22. This decision of the Tribunal in the case of Bharat Petroleum Corporation Ltd (supra) was subsequently relied upon by the Tribunal in the case of,,,,,,

Steel and Metal Tubes (I) Ltd vs CCE, Meerut-II (supra) to hold the view that Rule 7 of the Valuation Rules, 2000, will not apply if the assessee has",,,,,,

some sales of their excisable goods at the factory gate. Relevant portion is reproduced below:-,,,,,,

â??3. Heard learned counsel for the appellant Shri Rajesh Chhibber. He submits that in the impugned Order-in-Appeal, it has been",,,,,,

observed that the appellant is selling their product partly at factory gate; and partly through consignment agents by stock transferring the,,,,,,

goods on payment of duty. The learned counsel also submits that he has paid the duty at factory gate and differential duty is also paid by,,,,,,

him as per the assessment Order. He has submitted that provisions of Rule 7 of Central Excise (Valuation) Rules, 2000, are not squarely",,,,,,

applicable in the instant case as Rule 7 is exclusively for the circumstances where all the goods are transferred to a depot and not where the,,,,,,

goods are partly sold at factory gate. Ld. Counsel relied on the ratio laid down in the case of Bharat Petroleum Corporation Ltd. v.,,,,,,

Commissioner of Central Excise, Chennai, 2010 (261) E.L.T. 695 (Tri.-Chennai).",,,,,,

4. On the other hand, learned DR, Rajeev Ranjan, Joint Commissioner, has relied on the impugned order.",,,,,,

5. Having considered the rival contentions, we note that the ratio laid down by the Tribunal in the case of Bharat Petroleum Corporation Ltd.",,,,,,

v. Commissioner of Central Excise, 2010 (261) E.L.T. 695 (Tri.-Chennai) is squarely applicable in the instant case as facts and",,,,,,

circumstances are identical. Accordingly, when the goods are not sold at the factory gate but removed exclusively to a depot, premises of a",,,,,,

consignment agent or any other place or premises from where the excisable goods are to be sold, the Rule 7 is applicable.",,,,,,

6. In the instant case, it is evident that the goods were partly sold at factory gate and duty was paid. Remaining goods were transferred to",,,,,,

the Depot. Therefore, Rule 7 of Central Excise (Valuation) Rules, 2000, is not applicable in the instant case. Hence, we set aside the",,,,,,

impugned order and allow the appeal and with consequential relief, if any, as per law.â??",,,,,,

23. The above decisions of the Tribunal relying on the ratio of the Larger Bench decision in the case of Ispat Industries (supra) have been accepted,,,,,,

by the Government also by prospectively (wef 01.12.2013) amending Rule 8 vide Notification No.14/20017-CE(NT) dated 22.11.2013, as under:-",,,,,,

â??RULE 8. Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in,,,,,,

the production or manufacture of other articles, the value of such goods that are consumed shall be one hundred and ten per cent of the cost",,,,,,

of production or manufacture of such goods.â??,,,,,,

24. We also agree with the learned counsel of the appellants that the expression â??Where the excisable goods are not sold by the assesseeâ?,,,,,,

appearing in both Rule 7 and Rule 8 of the Valuation Rules, 2000, will have the same meaning and the ratio of the decision of the Larger Bench in the",,,,,,

case of Ispat Industries (supra) in the context of Rule 8, will also apply to Rule 7 of the Valuation Rules, 2000, as rightly held by the Tribunal in the",,,,,,

cases of (i) Bharat Petroleum Corporation Ltd (supra) and (ii) Steel and Metal Tubes(I) Ltd vs CCE, Meerut-II (supra).",,,,,,

25. The decision in the case of Spice System (supra) cited by the learned Authorised Representative is clearly distinguishable. The period involved in,,,,,,

the case was July, 1999 to September, 2001. For the period wef 01.07.2000 (i.e after the introduction of new section 4 and the new Valuation Rules,",,,,,,

2000) the Division Bench of Tribunal held that for goods transferred to consignment agents/depots valuation was required to be done under Rule 7 of,,,,,,

the Valuation Rules, 2000, on the ground that the premises of the consignment agent was not considered as a â?? place of removalâ?. However, it is",,,,,,

a matter of record that in the present case the period involved is post 14.05.2003 when the definition of â??place of removalâ?? has been amended to,,,,,,

include the premises of consignment agent/depot also. Therefore, since the decision in the case of Spice System (supra) was delivered in the context",,,,,,

of law prevailing at that point of time its ratio cannot be applied to the present case when the law has changed. Further, the ratio of the Larger Bench",,,,,,

decision in the case of Ispat Industries (supra) [which has been endorsed by Honâ??ble Gujarat High Court in the case of Commissioner of Central,,,,,,

Excise, Bhavnagar vs Ultratech Cement Pvt Ltd], was not brought to the notice of the Bench in the case of Spice Sytems (supra) and hence, it was",,,,,,

not considered.,,,,,,

26. In view of the above, we do not consider it necessary to examine the other issues raised by the appellants.",,,,,,

27. The Appeal is, accordingly, allowed by setting aside the impugned Order.",,,,,,

(Order pronounced in the open court on 07 December 2021.),,,,,,

