
(2023) 09 CESTAT CK 0044

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 52361 Of 2018

M/S Nalwa Steel & Power Ltd

APPELLANT

Vs

Commisioner, Central Excise And Customs, Raipur

RESPONDENT

Date of Decision : 29-09-2023

Acts Referred:

Central Excise Valuation Rules, 1944 — Rule 1, 2, 2(b), 3, 4, 5, 6, 7, 8, 9, 10, 10(a), 10(b), 11
Central Excise Act, 1944 — Section 3, 4, 4(3)(b), 4(3)(b)(ii), 4(3)(b)(iii), 4(3)(b)(iv), 11A, 11AC

Citation : (2023) 09 CESTAT CK 0044

Hon'ble Judges : Dilip Gupta, President; P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : Vishal Agrawal, Tuhina Sinha, Bhagwat Dayal, Rakesh Agarwal

Final Decision : Allowed

Judgement

P. V. Subba Rao, Member (T)

1. M/s Nalwa Steel & Power Limited [the appellant] filed this appeal assailing the order-in-appeal dated 23.04.2018 [Impugned order] passed by the Commissioner (Appeals), Raipur wherein he confirmed a demand of Rs. 1,97,57,985/- as differential central excise duty from the appellant for the period 2011-12 to April, 2015. Of this amount, Rs. 1,96,92,460/- was confirmed for the period 2011-12 up to November 2013 under Rule 11 of the Central Excise Valuation Rules, 1944 [Rules] read with rule 4 and rule 9 and Rs. 65,524/- was confirmed for the period December 2013 to April, 2015 under proviso to rule 9 read with rule 8 of the Valuation Rules. The reason for this differential treatment is that the Valuation Rules were amended from December, 2013.

2. The appellant is a manufacturer of TMT bars of various grades and it sold them to independent buyers as well as to two its inter-connected undertakings, namely, M/s Jindal Steel Power Ltd.[JSPL] And M/s Jindal Power Limited [JPL]. It is undisputed that the appellant and these two entities are inter-connected

undertakings and, therefore, they are related persons as per Section 4 of the Central Excise Act, 1944 [ACT]. M/s JSPL further sold the goods which it had bought from the appellant to independent customers. The appellant paid excise duty on such goods at prices at which JSPL sold the goods to such independent buyers. M/s JPL used the goods purchased from the appellant and the appellant paid service tax on such goods at 110% of the cost of manufacture based on the cost of production as per the CAS-4 certificate issued by the cost auditor.

3. The books and accounts of the appellant were audited by a special audit team of the Department and it was felt that the duty was short paid and, accordingly, a show cause notice [SCN] dated 29.04.2016 was issued to the appellant which culminated in the Order-in-original [OIO] dated 16.02.2017 passed by the Joint Commissioner of Central Excise, confirming the demand of duty as indicated above along with interest and imposing penalty of Rs.98,78,993/- under section 11AC.

4. Aggrieved, the appellant filed an appeal before the Commissioner (Appeals) who, by the impugned order, upheld the decision of the Joint Commissioner. Hence this appeal.

5. The crux of the Department's case is that the value of the goods sold by the appellant to inter-connected undertakings for the period prior to 01.03.2013 ought to have been determined as per rule 11 of the Valuation Rules read with rule 4 and rule 2 (b), i.e., these goods should have been valued at the value at which the greatest aggregate quantity of goods were sold by the appellant to the independent customers. For the subsequent period i.e., December, 2013 onwards, according to the Revenue, the value should be determined as per rule 9 at 110% of the cost of production.

6. On behalf of the appellant learned counsel made the following submissions.

(i) The appellant and JSPL and JPL are inter-connected undertakings and are, therefore, related persons of the appellant in terms of clause (i) of section 4 (3) (b) of the Act.

(ii) Therefore, rule 10 is applicable to the present facts and not rule 11 which can be applied only if none of the other rules applies.

(iii) Rule 10 has two parts 10(a) and 10(b). As per Rule 10 (a), the goods sold to inter- connected undertakings which are also related to the appellant as per clause (ii)(iii)(iv) of section 4(3)(b) or the buyer is the holding or subsidiary company of the assessee, value must be determined as per Rule 9. As per Rule 10(b) goods sold to inter-connected undertakings which are not related to the assessee as per clause (ii) (iii) and (iv) of Section 4(3)(b) must be valued as it they are not related.

7. Learned authorized representative vehemently supported the impugned order and asserted that Rule 10(b) does not apply to this case because not only are the appellant and JSPL and JPL inter-connected undertakings but the appellant

holds equity in JSPL. Further, JPL is a subsidiary of JSPL. Therefore, Rule 10(a) does not apply and the residual rule viz., Rule 11 should be applied.

8. We have considered the submissions on both sides and perused the records.

9. As per section 3 of the Central Excise Act, 1944 [Act], duties of excise are levied on excisable goods manufactured or produced in India at rates set forth in the Schedules to the Central Excise Tariff Act, 1985. These rates can be based on the quantity (specific rate of duty) or value (ad valorem rate of duty). On some goods, duties can be based on the Retail Sale Price or even based on the capacity of production (compounded rate of duty). For vast majority of the goods, the duties are chargeable on the basis of value and such value shall be, as per Section 4, the "transaction value" for each removal of the goods if four conditions are met:

(a) there is a sale;

(b) the sale is for delivery is at the time and place of removal;

(c) the assessee and the buyer of the goods are not related; and

(d) the price is the sole consideration of sale.

10. If any one or more of the above conditions is/ are not met, the value shall be determined as per the Central Excise Valuation Rules, 2000. Of the four conditions for accepting the transaction value as the assessable value to determine excise duty, the one relevant to this case is that 'the buyer and seller are not related'. It is undisputed that the appellant and two of its buyers, viz., JSPL and JPL were related persons. It is also undisputed that the appellant had also sold to independent buyers.

11. According to the appellant, it had sold goods to JSPL and JPL who either further sold them to unrelated buyers or used them captively. When the goods were sold to unrelated buyers, the appellant paid duty on the price at which they were sold by JSPL and JPL to unrelated buyers. When the goods were used by JSPL and JSL, the appellant paid duty on 110% of the cost of production based on the cost of production as per CAS-4 certificate issued by the cost auditor.

12. The case of the Revenue is that the duty should have been paid on the price at which the appellant had sold the goods to independent buyers in the greatest aggregate quantity. Accordingly, the SCN dated 29.04.2016 was issued to appellant proposing to recover under Section 11A the duty allegedly short paid invoking extended period of limitation and proposing to impose penalties. These proposals were confirmed in the OIO and upheld in the impugned order.

13. It is undisputed that the appellant and JSPL and JSL are related persons. The buyer and seller are "related persons? according to clause (b) of sub-section (3) of section 4 if one more of the following conditions are met:

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

14. If they are related persons, value should be determined as per the Valuation Rules. Of these:

(a) Rules 1 and 2 are the preliminary provisions.

(b) Rule 3 mandates that valuation should be done as per the rules.

(c) Rule 4 deals with situations where goods are sold but not at the time of removal.

(d) Rule 5 deals with situations where goods are sold, but not at the place of removal.

(e) Rule 6 deals with situations where there is an additional consideration for sale.

(f) Rule 7 deals with situations where there is no sale and the goods are transferred to the assessee's owned depot not at the premises of the consignment agent.

(g) Rule 8 deals with situations where goods are captively consumed by the assessee or on its behalf in which case, the valuation has to be done at 110% of the cost of production.

(h) Rule 9 deals with the situations where the assessee and the buyer are related persons as per sub-Clauses (ii) (iii) or (iv) of Clause (b) of sub-Section (iii) of Section 4.

(i) Rule 10 (a) deals with situations where sale is to related persons as per sub-Clause (i) of Clause (b) of sub-Section (3) of Section 4 also known as interconnected undertaking where the assessee and the buyer are, in addition, also related persons as per sub-Clause (ii) or (iii) or (iv) or the buyer is the holding company or a subsidiary company of the assessee.

(j) Rule 10 (b) deals with situations where the assessee and the buyer are interconnected undertakings as per sub-Clause (i), but they are not also related persons in terms of sub-Clauses (ii) (iii) or (iv) nor is the buyer a holding company or a subsidiary company of the assessee.

(k) Rule 11 deals with situations which are not covered by any of the above rules.

15. In the impugned order, and the OIO the value was determined as per Rule 11 read with Rule 4. We find that Rule

11 can be applied only when the situation is not covered by any of the previous

valuation rules. It is undisputed that the appellant and JSPL and JPL are related persons. Therefore, it must be examined if they can be covered by Rule 10 (a) or Rule 10(b).

16. If the appellant and JSPL and JPL were related persons only because they were interconnected undertakings and they were not also related in any of the other three ways [clauses (i) (ii) or (iv) of clause (b) of sub-section (iii) of Section 4] or the appellant and JSPL or JPL are the holding or subsidiary companies of each other, then valuation should be done as if they are not related persons.

17. In this case, there is no allegation or evidence that JSPL and JPL are connected to the appellant in any of the other three ways. There is no allegation that the appellant is either the holding or the subsidiary company of either JSPL or JPL. The only allegation is that they are associated companies and hence they are interconnected undertakings. It has also been alleged that JPL is the subsidiary of the JSPL, i.e., one of the buyers is the subsidiary of another buyer. Therefore, this case falls squarely under section 10 (a) of the Valuation Rules and duty was required to be paid as if the appellant and JSPL and JPL were not related persons, i.e., on the transaction value. The appellant was not even required to pay excise duty on the value at which JSPL sold the goods to its customers or on 110% of the cost of production under CAS 4 where the goods were consumed by JPL. Since Rule 10(b) applies to this case, Residual Rule 11 cannot be applied.

18. The demand of duty under Rule 11 of Valuation Rules cannot, therefore, be sustained and needs to be set aside.

19. Learned counsel also made submissions assailing invoking extended period of limitation which need not be examined as we have found in favour of the appellant on merits itself.

20. The impugned order is, accordingly, set aside and the appeal is allowed.