
(2023) 07 CESTAT CK 0012

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 42463, 42464 Of 2013

M/S.Indo Shell Cast Pvt. Ltd. (Unit I) And Others APPELLANT
Vs
Commissioner Of GST & Central Excise RESPONDENT

Date of Decision : 11-07-2023

Acts Referred:

Central Excise Duty, Has To Be Done A Per Rule 8 Of Central Excise Valuation
(Determination Of Price Of Excisable Goods) Rules, 2000 — Rule 8
Central Excise Act, 1944 — Section 4, 4(1), 4(1)(b)

Citation : (2023) 07 CESTAT CK 0012

Hon'ble Judges : Sulekha Beevi C.S., Member (J); Vasa Seshagiri Rao, Member (T)

Bench : Division Bench

Advocate : M.S. Nagaraja, Rudra Pratap Singh

Final Decision : Allowed

Judgement

Sulekha Beevi C.S., Member (J)

1. The issue involved in both these appeal being analogous were heard together and are disposed by this common order.
2. The appellant in E/42463/2013 is Unit-II and is engaged in the manufacture of rough castings. These rough castings are supplied to Unit I for further processing into machined castings. Both Unit I & II are registered separately under Central Excise Rules. Rough castings manufactured in Unit II are in the nature of semi-finished goods which were subsequently consumed captively at Unit I for the manufacture of machined castings. The machined castings are cleared from Unit – I on payment of duty.
3. On verification of records, it was found that appellant (Unit II) transferred their products to Unit I on stock transfer basis by paying duty adopting the value based on their declared cost of production. The value so adopted by the appellant was found to vary with actual cost of production of the castings as per

CAS 4 statement prepared on the basis of the audited accounts of the appellant as certified by Chartered Accountant. From letter dt. 12.08.2008 addressed by the appellant to the Deputy Commissioner of Central Excise (Audit), Coimbatore, it appeared that there is no sale involved on the clearance of castings from Unit II to Unit I and also that they have determined the assessable value based on the cost of production. When the goods are not sold by the manufacturer-assessee but are used captively by them on their behalf in the manufacture of other articles, the valuation of goods for the purpose of Central Excise duty, has to be done as per Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The said Rule 8 states that "where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the manufacture of other articles, the value shall be 110% of the cost of production or manufacture of such goods".

4. It was noted by the department that the value adopted by the appellant for payment of duty was not based on 110% value cost of production arrived at as per the CAS 4 statement certified by the Chartered Accountant. This has resulted in short payment of duty for some financial years where there was excess payment of duty for some financial years.

5. The non-adoption of correct assessable value thus resulted in short payment of duty and also excess payment of duty. The Unit I availed credit on such duties. It appeared to department that by excess duty the appellant has transferred ineligible credit to Unit-I.

6. Show cause notice was issued to the appellant proposing to demand differential duty and also to disallow the cenvat credit availed on the excess duty paid. After due process of law, the original authority vide order dt. 30.08.2013 confirmed the demand of differential duty on Unit II along with interest and imposed penalties. The cenvat credit availed by Unit I on the excess duty paid was disallowed and was ordered for recovery of the same along with interest and imposed penalties. Aggrieved by such order, the appellants are now before the Tribunal.

7. Ld. Counsel Sri M.S. Nagaraja appeared for the appellant and put forward arguments mainly on the ground of limitation. It is submitted that the appellant namely M/s.Indo Shell Cast Pvt. Ltd., Unit I is manufacturer of machined castings and parts for use in automobile industry. In order to achieve high quality precision of the castings, the appellant-company imported machinery and established Unit II in July 2005 at Malumichampatti, Coimbatore for manufacture of rough castings. These rough castings were stock transferred to Unit I situated in Sidco Industrial Estate, Coimbatore for manufacture and clearance of Machined Castings to the Automobile Industries on payment of Excise Duty.

8. Unit II was purchasing raw material and availing cenvat credit of the duty paid. They manufactured rough castings and stock transferred them under excise invoices to Unit I on payment of duty on 110% of the estimated cost of

production. Unit I thus availed CENVAT credit of the duty paid on rough castings. The internal audit party of the Department audited the books of accounts during the period from 18.07.2008 to 21.07.2008 and sought further details on the method of determining the value of the goods manufactured and stock transferred from Unit II to Unit I. The appellant furnished all the details and books of accounts as sought by the department. However, show cause notice dated 02.05.2012 was issued invoking the extended period alleging that the appellant has suppressed facts with intention to evade payment of duty. It is alleged in the SCN that the value adopted for the stock transfer of goods by Unit II to Unit I varies with actual cost of production as per CAS 4 statements prepared on the basis of audited accounts. It is alleged in the SCN that the appellant had not adopted correct assessable value of 110% of the cost of production arrived at on the basis of CAS-4. Thus it is alleged in the SCN that non adoption of the correct assessable value has resulted in short payment of duty for certain periods and excess payment of duty for other periods. It was further alleged that the excess payment of duty has resulted in transfer of excess cenvat credit to Unit I. SCN has proposed to demand differential duty of Rs.61,81,244/- along with interest from Unit II for the period 2007-08, 1.4.2008 to 31.1.2009 and 1.4.2011 to 30.9.2011. The SCN also proposed to disallow and demand cenvat credit of Rs.13,42,860/- on the ground that the excess duty paid by Unit II was not eligible.

9. It is submitted by the Ld. Counsel that the Unit II has manufactured rough castings and stock transferred to Unit I on payment of duty with budgeted / estimated cost of production for captive consumption by Unit I. The actual cost of production of the goods (Rough Castings) for the purpose of payment of duty in terms of Rule 8 of the Valuation Rules, 2000 cannot be determined at the time of clearance of the goods. The actual cost of production can be ascertained only on finalization of accounts for each financial year and certification of CAS 4 by the Cost Auditors. The Rough Castings are "inputs" used by Unit I for manufacture of Machined Castings. Unit I availed cenvat credit of the duty paid by Unit II and utilized the same for payment of duty on finished products (Machined Castings) sold to the customers. Both Unit I & Unit II come under the same company and common Annual Report / Profit and Loss Account. In fact, there is no evasion of duty and the short payment occurred only because the actual cost of production could not be ascertained at the time of clearance of goods.

10. It is submitted by the Ld. Counsel that immediately after the audit, the appellant vide letter dated 12.08.2008 had sought clarification from the department as to the discrepancy in the differential duty calculated by audit as duty short paid. The audit had quantified the differential duty based on the cost of production of the company as a whole including Unit I and Unit II. This was erroneous as the value of finished products (machined castings) cleared from Unit I cannot be taken into consideration for arriving at the assessable value of rough castings stock transferred to Unit I. Even though appellant pointed out this and had sought for clarification from the department vide their letter dt.

12.08.2008, there was no reply in this regard. The appellant further issued letter dt. 21.11.2008 furnishing further documents and also requesting for clarity as to the demand of differential duty pointed out by the internal audit party. Much later, after continued correspondence, show cause notice dated 2.5.2012 has been issued alleging suppression of facts with intent to evade payment of duty. The appellant has not suppressed any facts and all the details were known to the department. In fact, the demand has been raised from the figures available in the accounts of the appellant. It is also pointed out by the Ld. counsel that for some period, there is excess payment of duty. This itself would establish that the appellant had no intention to evade payment of duty and the short payment, if any, has arisen only due to the fact that the cost of production was not available for computation of the assessable value of rough castings at the time of clearance of such goods.

11. Ld. Counsel vehemently argued that the issue being revenue-neutral, the invocation of extended period cannot sustain. The duty if any paid by Unit II would be eligible for availing credit by Unit I. Therefore, there cannot be any mala fide intention to evade payment of duty. To support this argument, Ld. Counsel relied upon the judgement in the case of Nirlon Ltd. Vs CCE Mumbai - 2015 (320) ELT 22 (SC); CCE Chennai Vs Tenneco RC India Pvt. Ltd. 2015 (323) ELT 299 (Mad.). and final order of the Tribunal in the case of Deepak Cables (India) Ltd. Vs CCE Pondicherry - 2018 TIOL-17-CESTAT MAD. The decision in the case of Precot Mills Ltd. Vs CCE Calicut - 2014 (313) ELT 789 (Tri.-Bang.) was also relied.

12 Ld. Counsel pointed out that credit has been denied alleging that excess duty paid by the appellant on the rough castings cannot be considered to be 'duty' and therefore credit is ineligible. There are absolutely no grounds for denying credit to the appellant when the duty has been paid as per Central Excise law.

13. For the subsequent period, show cause notices were issued proposing to deny the cenvat credit alleging that the appellant has availed credit on the excess duty paid by Unit II. The Commissioner (Appeals) vide OIA dt. 06.10.2016 set aside the demand which was confirmed by the original authority for the period April 2014 to March 2015 holding that the credit is eligible. Again, on the same issue of payment of excess payment of duty by adopting higher value of rough castings cleared by Unit II and availing of cenvat credit by Unit I, the Commissioner (Appeals) vide OIA dt. 07.09.2017 has set aside the demand confirmed by the original authority. It is submitted that the department itself has accepted that the credit is eligible. Ld. Counsel prayed that the appeals may be allowed.

14. Ld. A.R. Sri Rudra Pratap Singh appeared and argued for the Department. Ld. A.R. adverted to para-33 of the OIO and submitted that the issue of revenue-neutrality has to be considered taking note of the facts and circumstances of each case. The original authority has concluded that there was non-disclosure of facts which has resulted in short payment of duty. It is the obligation of the

appellant to pay the duty correctly by following the procedure prescribed in law. The appellant has followed their own procedure and thus negated the express provisions of law. Therefore, they cannot escape under the shelter of revenue-neutrality. The appellant has to pay tax first and only then can avail the credit. The judgement relied by the Ld. Counsel for appellant cannot be applied as these are distinguishable on facts.

15. Ld. A.R relied on CBEC circular No.692/08/2003-CX. dated 13.02.2003 and submitted that it has been clarified by the Board that the valuation of goods captively consumed has to be done strictly in accordance with CAS-4. The appellant has to follow Board circular. The CBEC vide circular No.206/01/2017-CX.6 dated 16.12.2017 has issued instructions that an assessee should be directed to furnish CAS-4 certificate of the financial years ending 31st March by 31st December of the next financial year. The short payment of duty has occurred because they did not adopt the value as per CAS 4. It is violation of provisions of law and therefore the demand of duty and denial of credit are legal and proper. Ld. A.R prayed that the appeals may be dismissed.

16. Heard both sides.

17. The Ld. Counsel has put forward arguments mainly on the ground of limitation. The demand of differential duty is for the period from April 2007 to January 2009 and April 2011 to September 2011. The allegation is that the assessable value adopted for payment of duty on rough castings is not based on 110% of the cost of production arrived at based on CAS-4 statement as certified by Chartered Accountant. It is an undisputed fact that for the same reason of not adopting assessable value as per CAS-4 there is indeed excess payment of duty. The details of the value adopted, short and excess payment of duty paid for the years 2007-08 to 2012-2013 is furnished by appellant as under :

Financial Year

Value adopted based on estimated cost of
production

Actual cost of production as per CAS-4 computed after the end of the
financial year

110% of

cost of production as per

Rule 8

Difference (Excess/short)

2007-08

(1.4.2007

to
31.3.2008)
55
55.13
60.64
(-) 5.64
2008-09
(1.4.2008
to
31.1.2009)
55
61.22
67.34
(-) 12.34
2008-09
(February
09 to March
09)
70
61.22
67.34
(+) 2.66
2009-10
70
59.22
65.14
(+) 4.86
2010-11
70
62.94

69.23
 (+) 0.77
 2011-12
 (1.4.2011
 to
 30.9.2011)
 70
 63.7
 70.07
 (+) 0.07
 2011-12
 (Oct-11 to Mar-12)
 90
 78.23
 86.05
 (+) 3.95
 2012-13
 (Apr-12 to Dec-12)
 90
 79.16
 87.07
 (+)2.92

18. It can be seen from the above table that for the periods 2007-08, 2008-09, and 2011-12 there is short payment of duty. There is excess payment of duty during the periods 2008-09, 2009-10, 2010-11, 2011-12 & 2012-13. During conduct of audit in July 2008, the non-payment of duty was noted by the audit party. In August 2008 itself, the appellant has written a letter to the department requesting to clarify in regard to the quantification of short payment of duty. Ld. Counsel has submitted that the audit party had informed them to pay the differential duty which was calculated on the basis of cost of production of the company as a whole including Unit I & II. This being erroneous they had issued a letter dt. 12.08.2008. Relevant part of the said letter is reproduced as under :

"1. The internal audit of the Central Excise Accounts of our Company was

undertaken by the Central Excise Internal Audit Party during the period 18.07.08 to 21.07.08. As a manufacturer of Auto Components, we have a proven and track record in maintenance of Central Excise records and in discharging the statutory obligations under the Central Excise Act and Rules. However, the internal audit party after the completion of the internal audit of our accounts has come out with the demand of differential duty of excise on the inter unit transfer of rough castings manufactured / cleared. We wish to submit the facts of the case as under : -

.....

2. (a) Given the back ground of the manufacturing set up and considering the fact that the orders for the supply of machine castings placed by the Automobile Industries are on our Parent Unit at Sidco Industrial Estate, Coimbatore – Unit No.1, the rough castings manufactured at our Unit No.II at Malumichampatty are cleared to our main unit No. I at Industrial Estate, Sidco, Coimbatore, on payment of duty of excise. Since there is no sale involved on the clearance of castings from Unit No.II to Unit No.I, we have determined the assessable value based on the cost of production. The applicable duty of excise was paid on the basis of the cost of production including profit margin since the commence of the operations in July 2005.

(b) (i) The rough castings so cleared by Unit No.II were duly received and accounted by us at Unit No.1 in their records. We also availed the cenvat credit as per the statutory provisions contained in Cenvat Credit Rules. The cenvat credit availed by us was utilized towards the payment of duty of excise on the final product cleared by us from our unit No.I. Thus it could be noticed that the entire duty of excise paid by us from our Unit No.II on the clearance to Unit I was eligible for set off against the payment of duty of excise from our Unit No.I.

.....

(ii) However, we are of the considered opinion that the cost of production adopted by us is based on the actual cost of various inputs used in the manufacture of the rough castings during the relevant years. As desired by the audit, we are also working on the cost of production of the rough castings cleared from our Unit II to Unit I based on the audited accounts of the respective years.

(iii) However, we understand that the internal audit party has quantified the differential duty due to cost variation based on the cost of production for the Company as a whole including Unit No.I and II, whereas the issue of assessable value is with reference to the rough castings cleared from Unit No.II. Hence the cost of production for the company as a whole cannot be the basis for determining the assessable value of rough castings cleared from our Unit II to Unit I.”

19. Further a letter dated 21.1.2008 was issued to the department. Appellant

has also furnished all the details as and when requested by department. However, the show cause notice has been issued only on 2.5.2012 invoking the extended period of limitation alleging that the appellant has suppressed facts with intention to evade payment of duty. It has to be noted that appellant has paid excess duty for certain periods. This being so, it cannot be alleged that there is any deliberate act on the part of the appellant to suppress facts with intent to evade payment of duty. Further, the entire situation is revenue-neutral as Unit I would be able to take credit of the duty paid by Unit II.

20. The Hon'ble Supreme Court in the case of Nirlon Ltd. (supra) had occasion to consider a similar issue and it was held as under :

"The appellant herein is the manufacturer of Tyre Cord Yarn (TCY) and Tyre Cord Fabric (TCB) falling under Chapters 54 and 59 of the Central Excise Tariff Act respectively. The aforesaid goods TCY and TCB are manufactured by the appellant at its Goregaon factory. The products so manufactured are sold by the appellant at the factory gate as well as removed for captive consumption to its another factory at Tarapur. At Tarapur factory, the said yarn are utilised for manufacturing final products.

2. The dispute has arisen in respect of the valuation of the TCY which are removed for captive consumption and to be used at Tarapur factory of the respondent.

3. The appellant has been filing the price list proforma under Section 4(1) of the Central Excise Act, 1944, (hereinafter referred to as 'Act') declaring the wholesale price of TCY for such goods by showing the same price at which the goods are sold by the appellant at the factory gate to the third parties. Such price list in Proforma Part I under Section 4 of the Act was filed on 1-3-1994 and 28-3-1994. It was again filed on 1-3-1998. The price declaration so made was looked into by the Superintendent of Central Excise and he was not satisfied with this declaration as according to him, the price could not be declared at the same rate at which the goods are sold by the appellant at the factory gate to others. According to him, there was a difference between the goods which were cleared at the factory gate to be sold to the third parties and removed for captive consumption by the appellant itself for its Tarapur factory. This resulted in the appointment of a cost accountant by the Commissioner to go into this issue.

..

8. We may note that Mr. K. Radhakrishnan, learned Senior Counsel appearing for the Revenue, vehemently countered the aforesaid submission of the appellant and argued that there was clear intention to evade the Excise duty. His submission was that the clearance of the goods which were sold at the factory gate were totally different as they differed in technical specifications from those removed for captive consumption which was confirmed by the appellant itself vide its letter dated 21-2-2000 and this would depict clear intention on the part of the appellant to remove the goods by paying lesser duty.

9. We have ourselves indicated that the two types of goods were different in nature. The question is about the intention, namely, whether it was done with bona fide belief or there was some mala fide intentions in doing so. It is here we agree with the contention of the learned Senior Counsel for the appellant, in the circumstances which are explained by him and recorded above. It is stated at the cost of repetition that when the entire exercise was revenue neutral, the appellant could not have achieved any purpose to evade the duty."

21. The Hon'ble Jurisdictional High Court in the case of Tenneco RC India Pvt. Ltd. (supra) has taken a similar view wherein it was observed as under :

"Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the Revenue/appellant is before this Court by filing the present appeal. This Court, vide order dated 16-5-2009 admitted the appeal on the following substantial questions of law :-

"Whether on facts and circumstances of the case, the 2nd respondent Tribunal was right in holding that revenue neutral situation as the reason for allowing the 1st respondent's appeal irrespective of the fact that the 1st respondent has wilfully suppressed the maintenance of dual accounting system and non-inclusion of profit margin in the assessable value of semi-finished goods cleared to their other unit ?"

.... .

5. In view of the said statement made by the learned counsel on either side that the ratio laid down by the Supreme Court in Nirlon Ltd. case cited supra, is applicable to the case on hand, the substantial question of law is answered in favour of the assessee/respondent and against the Revenue/appellant.

6. Accordingly, the civil miscellaneous appeal fails and the same is dismissed. However, in the circumstances of the case, there shall be no order as to costs."

22. The Tribunal in the case of Deepak Cables (India) Ltd. (supra) while considering similar issue observed as under :

"2. The brief facts of the case are that assessee are engaged in manufacture of E.C. Grade Aluminium Wire Rod and are having two more units at Tumkur and Kunigal, Karnataka. Officers visited the premises of the assessee's unit on 24.08.2004. On scrutiny of records, it was noticed that assessee's Chennai unit and Pondicherry units were clearing E.C. Grade Aluminium Wire Rod to their sister units at Tumkur on stock transfer basis. The assessable value in respect of the goods stock transferred should be determined in terms of Section 4 (1) (b) of Central Excise Act, 1944 read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Thus when the goods are used for consumption by the assessee's unit value shall be 110% of the cost of production for manufacture of such goods. Scrutiny of records revealed that the value adopted for stock transfer was not based on CAS-4 read with Rule 8 of Central Excise Valuation Rules, 2000. SCNs were issued alleging undervaluation

of the product while stock transferring to their sister concern and after due process of law, original authority confirmed the duty demand along with interest and imposed equal penalty. In appeal, the Commissioner (Appeals) upheld the duty demand. However, penalty was reduced to Rs.4 lakhs. Thus assessee is in appeal against the confirmation of duty demand, interest and the penalty imposed. The department has filed Appeal No.E/682/2007 against reduction of penalty.

3. On behalf of assessee, Id. counsel Shri M. Karthikeyan submitted that the assessee is not contesting the liability and would like to submit only on the ground that entire transaction would give rise to a revenue-neutral situation. Thus SCN issued beyond the normal period is not sustainable. He submitted that even if the duty has to be paid by appellant as alleged in the SCN, their sister concern would be able to take credit. Id. counsel also relied upon the judgment reported as Commissioner Vs Special Steel Ltd. - 2016 (334) ELT A123 (SC) where the Hon'ble Apex Court had upheld the decision of the Tribunal wherein department appeal was dismissed on the ground of revenue-neutrality since the duty paid on the goods cleared to sister unit was available as modvat credit to it and the allegation that such clearances were made at a lesser value was not relevant and only of academic nature. The para of the judgement in Precot Mills Ltd. Vs CCE Calicut - 2014 (313) ELT 789 (Tri.-Bang.) which is also relevant is reproduced as under :

".....To our mind the reliance placed by the lower authorities on the cost of production of the products i.e. processed yarn seems to be improper as that includes various other expenses which are not to be considered for the purposes of arriving at the cost of production of the processed yarn cleared for captive consumption or on job work basis. In view of this, we are of the considered view that the cost adopted by the assessee based upon CAS-4 certificate of the Cost Accountant is correct and the impugned orders holding otherwise are unsustainable.

7. Before we part with the cases, we note that the duty paid on such processed yarn cleared by appellant is being taken as Cenvat credit, by their own sister concern. This fact is not disputed by the revenue. If that be so, then the question of revenue neutrality arises, as it is an admitted fact that the transaction is mostly between the sister units. If that be so, the demand of duty on the appellant would be of no consequence as it would be revenue neutral. We find that all the case laws cited by the learned counsel support this proposition."

Following the above dictums, we find that confirmation of demand, interest and the imposition of penalty is unsustainable and the impugned order is set aside. Consequently, appeal filed by the department is dismissed. Appeal filed by assessee is allowed with consequential relief, if any, as per law."

23. From the ratio laid down by the above judgements, we have no hesitation to conclude that the facts present is a revenue-neutral situation and therefore the

demand invoking extended period cannot sustain and requires to be set aside which we hereby do. The demand for the normal period is sustained. The appellant succeeds on the ground of limitation.

24. The next issue is with regard to denial of cenvat credit. It is alleged by the original authority that the appellant is not eligible to take credit on the excess duty paid by Unit II. The excess duty happened to be paid because of the same reasons of short payment of duty. When the duty has been paid by Unit II as per the invoices, the credit cannot be denied to the receiving unit. Further in the appellant's own case for different periods, subsequently, the Commissioner (Appeals) has held the issue in favour of the appellant and held that credit is eligible. For these reasons, we find that the denial of credit cannot sustain and requires to be set aside which we hereby do.

25. From the foregoing, the impugned order is set aside. Appeals are allowed with consequential relief, if any, as above.