

In The High Court At Calcutta
Constitutional Writ Jurisdiction
Original Side

WP 299 of 2015
M/s Shyam Steel Industries & Anr.
-Vs.-
Deputy Commissioner of Central Excise and Service Tax,
Durgapur Div-I & Ors.

Before : The Hon'ble Justice Arijit Banerjee

For the Petitioner : Mr. Shounak Mitra, Adv.

For the Respondent : Mr. P. K. Roy, Adv.
Mr. K. K. Maiti, Adv

Heard On : 11/5/15, 14/5/15, 4/6/15 & 11/6/15

CAV On : 11/06/15

Judgment on : 19/06/2015

Arijit Banerjee, J.:

(1) In this writ petition, the petitioner prays for a direction in the nature of mandamus directing the respondents to allow clearance of excisable goods manufactured/to be manufactured by the petitioners under provisional assessment in terms of Rule 7 of the Central Excise Rules, 2002. The facts of the case, in brief are as follows.

(2) The petitioner company is engaged in the business of manufacture and sale of, inter alia, MS Billets and TMT Bars. The TMT Bars cleared from

the company's factory are either supplied directly to the customers or to a network of dealers engaged in re-sale thereof. In accordance with the conventional practice prevailing in the industry, the petitioner company, in order to boost the sale of finished goods through the dealers offers various promotional schemes in the form of turn over/quantity discount, cash discount etc. While these discounts are made known to the dealers even before the clearance of the finished goods from the factory by way of claims notified and published from time to time, quantification thereof is possible only at the end of the notified period. The dealers fulfilling the qualification conditions become eligible to get duty discount at the end of the notified period, processed by way of credit notes.

(3) Central excise duty is leviable on the goods manufactured and cleared by the petitioner company in terms of the provisions of Section 3 of the Central Excise Act, 1944 read with the Central Excise Tariff Act, 1985. The manner of valuation of the excisable goods manufactured by the petitioner for the purpose of charging excise duty thereon is provided for in Section 4 of the 1944 Act. The relevant portion of the Section 4 of the Act is set out hereunder:-

“ S. 4. Valuation of excisable goods for purposes of charging of duty of excise-

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall-

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation - For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) The provisions of this Section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub Section (2) of Section 3.

(3) For the purpose of this section-

(a) “assessee” means the person who is liable to pay the duty of excise under this Act and includes his agent;

.....

(d) “transaction value” means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.”

(4) The petitioners submit that in terms of Section 4 (1)(a) of the 1944 Act value of excisable goods for the purpose of charging excise duty thereon is the transaction value as defined in Section 4(3)(d) of the Act. ‘Transaction value’ is defined to mean the price actually paid or payable for the goods when sold and additional consideration which the buyer is liable to pay to or on behalf of the assessee in connection with the sale. The price ‘actually paid or payable’ for the goods manufactured and sold by the

company is the net price arrived at upon deduction of the discounts offered by the company to its buyers. It is the discounted price which is the transaction value of the subject goods on which central excise duty is required to be paid by the company.

(5) The petitioners further submit that at the time of clearance of the goods, in view of the nature of the trade discounts, it is not possible to arrive at the price actually paid or payable for the goods being sold by the company. Since the quantity/turn over discounts are based on achievement of the target and are allowed on varying rates depending upon the slab which a particular dealer attains in terms of the relevant scheme, it is not possible to quantify the discount at the time of clearance of a particular consignment from the factory. Hence, the petitioner company being unable to determine the correct 'transaction value' of the concerned excisable goods at the time and place of removal thereof, is compelled to take recourse to clearance of the goods under provisional assessment in terms of Rule 7 of the Central Excise Rules, 2002 (in short 'the said Rules').

(6) By a letter dated August 6, 2013, the petitioner company applied to the respondent no. 1 for permission to clear the subject goods upon provisional assessment as per Rule 7 of the said Rules for the period August 1, 2013 to November 30, 2013. By a letter dated October 29, 2013 the

respondent no. 1 rejected the said application of the company. Being aggrieved, the company preferred an appeal before the Commissioner of Central Excise, Calcutta, who by a letter dated May 21, 2014 allowed the appeal holding that there are sufficient reasons for extending the facility of provisional assessment of duty under Rule 7 of the said 2002 Rules. The respondent no. 1 has preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Calcutta (in short the 'said Tribunal') against the Commissioner's order dated May 21, 2014 which is pending. There is, however, no stay of operation of the said order dated May 21, 2014.

(7) The petitioner company by its letter dated July 31, 2014 applied to the respondent no. 1 for permission to clear the manufactured goods on the basis of provisional assessment for the period of August 1, 2014 to November 30, 2014. A similar application was made by the petitioner company by its letter dated December 2, 2014 for the period of December 1, 2014 to March 31, 2015. These applications of the petitioner company have not been responded to by the respondent no. 1. As a result, the petitioner company is being forced to clear the goods manufactured by it on final assessment basis without taking into account the trade discounts made available by it to its

customers, thereby ending up paying excess central excise duty than what is actually payable under the 1944 Act.

(8) The petitioners submit that trade discounts known and understood at the time of removal of goods, whether in the form of year ending discount or target discount or quantity discount are allowable deductions in determining the actual price paid or payable on the manufactured goods for determining the transaction value thereof as per Section 4(1)(a) of the 1944 Act read with Section 4(3)(d) thereof. By reason of their nature, such discounts cannot be shown in the invoice under which the subject excisable goods are manufactured from the factory since the quantum of discounts is known only at the end of the achievement of the target by the respective customers and because of their varying rates depending upon the slab which a particular dealer achieves in terms of the scheme under which such discounts are provided. It is, therefore, impossible for the company to determine the correct transaction value of excisable goods on which central excise duty is payable at the time of removal of the said goods from the factory. The actual price paid or payable for such goods would be a net price after deduction of the trade discounts. The requirement of Rule 7(1) of the 2002 Rules for the subject goods to be allowed to be cleared on provisional assessment basis is duly satisfied. The company being agreeable to comply

with the requirements of Rule 7(2) of the said Rules, there can be no justification on the part of the respondent no. 1 to deny clearance of the subject goods by the petitioner company on provisional basis in terms of Rule 7 of the said Rules.

(9) Ld. Counsel relied on a circular dated 30th June, 2000 issued by the Central Board of Excise and Customs, Ministry of Finance, Department of Revenue wherein at paragraph 9 it is stated as follows:-

“9. As regards discounts, the definition of transaction value does not make any direct reference. In fact, it is not needed by virtue of the fact that the duty is chargeable on the net price paid or payable. Thus if in any transaction a discount is allowed on declared price of any goods and actually passed on to the buyer of goods as per common practice, the question of including the amount of discount in the transaction value does not arise. Discount of any type or description given on any normal price payable for any transaction will, therefore, not form part of the transaction value for the goods, e.g. quantity discount for goods purchased or cash discount for the prompt payment etc. will therefore not form part of the transaction value. What is important is that it must be established that the discount for a given transaction has actually been passed on to the buyer of the goods. The differential discounts extended as per commercial

considerations on different transactions to unrelated buyers if extended cannot be objected to and different actual prices paid or payable for various transactions are to be accepted for working out assessable value. Where assessee claims that the discount of any description for a transaction is not readily known but would be known only subsequently – as for example, year end discount – the assessment for such transactions may be made on a provisional basis. However, the assessee has to disclose the intention of allowing such discount to the department and make a request for provisional assessment.”

(10) Ld. Counsel for the petitioners referred to a decision of the Hon'ble Supreme Court in the case of *Union of India-vs.-Arviva Industries (I) Ltd. reported in 2007 (209) ELT 5* wherein the Hon'ble Supreme Court after referring to several of its earlier decisions, reiterated that circulars issued under Section 119 of the Income Tax Act, 1961 and Section 37B of the Central Excise Act, 1944 are binding on the revenue. In that case, the Hon'ble Supreme Court referred to its earlier decision in the case of *Commissioner of Customs, Calcutta-vs.-Indian Oil Corporation Ltd. reported in (2004) 3 SCC 488* wherein the Hon'ble Apex Court held as follows:-

“ (1) Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this court, the department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show-cause notice and demand contrary to the existing circulars of the Board are *ab initio* bad.

(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.”

(11) Ld. Counsel for the petitioners then relied on a judgment of this Court in the case of *Commissioner of Central Excise, Calcutta-vs.-Black Diamond Beverage Ltd.* reported in 2014 (307) ELT 679 wherein this court also observed that a circular issued by the Board binds the revenue and they cannot take a stand that the circular is contrary to the provisions of the statute.

(12) Ld. Counsel also referred to a decision of the Madras High Court in the case of *Manickam Enterprises-vs.-Commissioner of Customs, Trichy* reported in 2002 (140) ELT 16 wherein the Madras High Court observed

that when a statute provides for provisional assessment the same has to be done in the manner provided in the Act and not according to the whims and fancies of the department.

(13) Ld. Counsel finally relied on a decision of this court in the case of *Pankaj Guljarilal Gupta-vs.-Collector of Customs, Calcutta reported in 1995 (75) ELT 47* wherein this Court, in the context of the Central Excise Act, 1944, held that mere filing of an appeal against the order of the lower forum does not automatically mean stay of operation of the order of the lower forum. The department is bound to comply with the order of the lower forum unless operation thereof is stayed by the appellate forum. He submitted that there is no stay of operation of the order of the Commissioner who permitted the petitioner to clear the goods on the basis of provisional assessment and the order of the Commissioner should be complied with.

(14) Appearing on behalf of the department, Ld. Counsel submitted that the requirements of Rule 7 of the 2002 Rules are not satisfied in the instant case and, as such, the petitioners cannot claim clearance of the goods on the basis of provisional assessment. He further submitted that the writ petitioners have approached this court one year after the department filed appeal against the order of the Commissioner and, such delay disentitles the writ petitioners to any relief. Ld. Counsel finally submitted that if the writ

application is allowed, the department's appeal against the Commissioner's order permitting clearance of goods on the basis of provisional assessment, would be rendered infructuous.

(15) Ld. Counsel for the respondents relied on a decision of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise and Customs, Mumbai-vs.-ITC Ltd. reported in 2006 (203) ELT 532* wherein at paragraph 21 of the judgment it was observed that a provisional assessment is made in terms of Rule 9B of the Central Excise Rules, 1944, inter alia, at the instance of the assessee. Such a recourse is resorted to only when the conditions laid down therein are satisfied, viz, where the assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable goods. Ld. Counsel also referred to a decision of Madras High Court in the case of *Shree Ganesh Steel Rolling Mills Ltd.-vs.-Asstt. Commissioner of Customs, Chennai reported in 2006 (206) ELT 76* wherein at paragraph 28 of the judgment it was observed that Section 18 (1) of the Customs Act does not make it mandatory on the customs officer to make a provisional assessment. The use of the word 'may' in Section 18 (1) indicates that it is the discretion of the customs officer to make a provisional assessment or not, and he is not duty bound to do so. Of course, he cannot

exercise such discretion arbitrarily. In the facts of the case, the Madras High Court held that the customs officer had acted fairly and not arbitrarily.

(16) I have considered the rival contentions of the parties.

(17) The case of the petitioners turns around Rule 7 of the Central Excise Rules, 2002, the relevant portion whereof is set out hereunder:-

“R.7. Provisional assessment. – (1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him.

(2) The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.”

(18) Under the said Rule the Assistant Commissioner or the Deputy Commissioner is empowered to order payment of duty on provisional basis where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto and the assessee makes a request for payment duty on provisional basis giving reasons therefor. This is subject to the assessee executing a bond binding him to pay the difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed. The grievance of the writ petitioners is that the respondent authorities have acted unreasonably in failing to exercise the power under the said Rule and allowing the writ petitioners to pay duty on provisional basis.

(19) It will be seen from what has been stated hereinabove that the petitioner company allows discounts to its buyers. However, since the quantity/turnover discounts are based on and linked to achievement of the target and are allowed on varying rates depending upon the slab which a particular dealer attains in terms of the relevant scheme, it is not possible to quantify the discount at the time of clearance of a particular consignment from the factory or the place of removal. Consequently, the petitioner company is unable to determine the correct transaction value of the concerned excisable goods at the time of and place of removal thereof which

in turn makes it impossible to assess actual excisable duty payable. Hence, it appears to be a fit case where Rule 7 of the Central Excise Rules, 2002 should be invoked and brought into play.

(20) In my opinion, the Commissioner of Central Excise in his order dated 21st May, 2014 rightly held that the value of the goods cannot be determined at the time of removal of such goods from the factory. This is for the reason that the normal transaction value is not available for such removals at that time as the assessee at that time cannot determine the quantity of discount being extended to the buyers. This can be done only at a later stage, precisely at the end of discount scheme period offered to the dealers which is usually after four months. As per paragraph 9 of the Central Board of Excise and Customs circular dated 30th June, 2000 referred to above, discount of any type made known prior to the clearance of the goods but quantified subsequently and passed on to the customers is an admissible deduction from the transaction value and as such the assessment for such transactions may be made on a provisional basis. The said circular is binding on the department and in this connection the decision of the various courts including the Hon'ble Supreme Court discussed above may be referred to.

(21) I am of the clear opinion that no legitimate ground exists for the department to disallow the petitioner company to pay excise duty on provisional basis on the concerned goods as per Rule 7 of the Central Excise Rules, 2002 since the actual transaction value cannot be determined at the time of removal of the goods from the factory. Denying such permission to the petitioner company would result in forcing the petitioner company to pay more excise duty than it is actually liable to pay. In fact, as submitted by Ld. Counsel for the petitioners, for the period August 1, 2013 to November 30, 2013, the petitioner company was compelled to obtain clearance of the goods upon paying excise duty on the basis of full value of the goods without taking into account the trade discounts extended by the petitioner to the dealers. This is, in my opinion, is grossly unfair and is causing undue injustice and prejudice to the petitioners. Since the petitioners are agreeable to execute requisite bond as per Rule 7(2) of the Central Excise Rules, 2002, the interest of the department would be fully protected even if the petitioner is allowed to pay duty on a provisional basis.

(22) The power conferred on a public authority or a statute or Rules framed thereunder is coupled with a duty on the authority to exercise such power in fit and appropriate cases. Refusal to exercise such power in a situation which warrants exercise of the power, would amount to an act of

unreasonableness and arbitrariness on the part of the authority and such act/ommission is not legally sustainable. If the Court finds that an authority has arbitrarily or unreasonably refused to exercise the power which is causing undue prejudice to a party, the courts must interfere and direct the authority to exercise such power.

(23) Furthermore, about one year as elapsed from the date of the order of the Commissioner of Central Excise and there is no order of stay of the Commissioner's order in the appeal which the department claims to have filed before the Tribunal. Hence, it is obligatory on the part of the department to comply with the Commissioner's order and allow the writ petitioners to obtain clearance of the concerned goods upon payment of duty on provisional basis as contemplated by Rule 7 of the Central Excise Rules, 2002. In this connection, the decision of this court in the case of *Pankaj Guljarilal Gupta-vs.-Collector of Customs, Calcutta (Supra)* may be referred.

(24) I am also impelled to observe that the ground on which the Deputy Commissioner of Central Excise turned down the petitioner's request for provisional assessment is not acceptable in law. The ground for refusal was as follows: "In the instance case resorting to provisional assessment may lead to a lot of paper work and impose various statutory obligations on the

assessee/department. In practice, it is seen that, it is very difficult for the assessee to comply with them leading to protracted litigations.”

(25) The aforesaid ground is misconceived. The Deputy Commissioner did not address the proper issues. As such, in my opinion, the Commissioner rightly allowed the appeal against the order of the Deputy Commissioner.

(26) In view of the aforesaid this writ petition succeeds. There will be an order in terms of prayer (a) of the writ petition.

(27) The writ petition is accordingly disposed of without, however, any order as to costs.

(Arijit Banerjee, J.)