CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench - Court – I

CUSTOMS APPEAL No. 2437/2011

(Arising out of Order-in-Appeal No. 02/2011-V.II Cus, dated 29.04.2011 passed by Commissioner of Customs, Central Excise & Service Tax(Appeals), Visakhapatnam)

Commissioner of Customs .. **APPELLANT**
Customs Preventive Commissionerate,
D.No. 55-17-3, 2nd floor, C-14,
Road No.2, Industrial Estate,
VIJAYAWADA – 520 007.
Andhra Pradesh

Vs.

MMTC Limited, .. **RESPONDENT**
MMTC Bhavan,
Port Area,
VISAKHAPATNAM – 530 035.
Andhra Pradesh

APPEARANCE:
Shri V.R. Pavan Kumar, Superintendent/AR for the appellant

Shri G. Prahlad, Advocate for the respondent

CORAM: Hon.'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Hon.'ble Mr. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER No. A/30611/2019

DATE OF HEARING: 16.09.2019
DATE OF DECISION: 16.09.2019

[ORDER PER: Mr. P. VENKATA SUBBA RAO)

1. This appeal is filed by the Revenue against Order-in-Appeal No. 02/2011-V.II Cus, dated 29.04.2011.

2. Heard both sides and perused the records.

3. The respondent herein is a Government of India Undertaking engaged in various businesses including importing and selling coal. M/s NTPC, a Government of India Undertaking engaged in generation of thermal electricity, entered into an agreement with the respondent according to which the respondent would import coal as per the requirements of NTPC and supply it to them. The price at which the respondent would sell the coal to M/s NTPC is not a fixed amount but is decided as per the following formula:

> ***"A. Coal Price (Port based)***
>
> *1. C&F Price (US Dollar rate per metric tonne (PMT) converted to Indian Rupees on the basis of applicable exchange rate) arrived at as detailed in the Pricing Methodology.*
>
> ***B. Fixed Component: (Port based)***
>
> *1. Stevedoring, Handling, Clearing & Forwarding charges.*
> *2. MMTC's Service Charges (Margin) @ Rs. 34/- per MT.*
>
> ***C. As per Actuals:***
>
> *1. Customs Duty.*
> *2. Railway Freight*
> *3. Insurance Charges*
> *4. Sales Tax/VAT and other statutory duties.*
> *5. Port Charges."*

4. As can be seen, the price of the coal depends upon the price at which the respondent imports coal, relevant duties and taxes, freight etc. and a service charge of Rs. 34/- per MT. Revenue was of the opinion that the transaction in question amounts to high sea sales of coal between respondent and M/s NTPC and therefore the service charges of Rs. 34/- per MT received by the respondent should be included in the assessable value under Section 14 of the Customs Act, 1962. Accordingly, a speaking order

dt. 29.11.2010 was issued by the Asst. Commissioner of Customs finalising the assessment of 22 Bills of Entry filed by the respondent by including the value of Rs. 34/- per MT received as Service Charges in the asessable value and he ordered that differential customs duty must be paid along with interest.

5. Aggrieved, the appellant appealed before the first appellate authority who set aside the order of the lower authority and allowed their appeal. Aggrieved by this order of the first appellate authority, Revenue has filed this appeal on the following grounds:

(i) The first appellate authority has wrongly mentioned in his order that the respondents were paid service charges of Rs. 34/- per MT for rendering the services of importing coal, stevedoring, handling, storage, port clearance, arranging railway rakes, loading, transportation and delivery at NTPC stations. In fact all the above charges were paid on actual basis as per the agreement. In addition to that, service charges @ Rs. 34/- per MT have been paid by M/s NTPC to the respondent.

(ii) The transaction between NTPC and the respondent cannot be vivisected as the respondent acted as a canalizing agent importing the impugned goods and therefore the margin paid to NTPC represents the high sea sale profit/pre-importation charges only.

(iii) The respondent called for global tenders for coal for purchase not for themselves but for supply to M/s NTPC only. Since the goods were imported on account of NTPC, it is wrong to say that their ownership rests with the respondent till the coal reached to the plants of NTPC.

(iv) The entire import and supply was effected by the bidder who filed the evaluated lowest bid approved by NTPC and the NTPC paid the bidder for the coal through the respondent and in addition, paid Rs. 34/- per MT to the respondent.

(v) Though the respondent called for global tenders and accepted the bids, it entered into an agreement with NTPC for sale of the same. Thus, it can only be inferred that the service charges paid to the respondent is only a high sea sale margin for pre-importation charges.

(vi) As per Section 2 of the Customs Act, 1962, "importer" in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer. Thus, in the present case, NTPC is the actual importer of the goods.

(vii) By no stretch of imagination can the respondent be called as the importer of the goods and hence the price at which the respondent was paid to the overseas supplier cannot be recorded as transaction value.

(viii) It is a well settled issue that service charges to the canalising agent i.e. M/s MMTC is includable in the assessable value. They relied on the case laws of Hyderabad Industries Limited [2000(115)ELT 593 (S.C.)] and Usha Martin Limited [2007(216)ELT 122 (Tri.-Kolkata)].

6. Ld. DR reiterates the above assertions in the appeal.

7. Ld. Counsel for the respondent submits as follows:

a) Sale of goods by the respondent to NTPC is not executed on high sea sales and the price paid to them by M/s NTPC cannot be considered as transaction value for the purpose of valuation under Section 14 of the Customs Act.

b) The service charges paid to the respondent by M/s NTPC cannot be included for the purpose of evaluation. Rule 10 of the Customs Valuation Rules lists out inclusion which can be made to the price actually paid or payable for the imported goods and this does not include the service charges received by the respondent in the present case.

8. We have considered the arguments on both sides and perused the records. From the facts of the case and the agreement entered into between the respondent and M/s NTPC, it is clear that M/s NTPC required coal and entered into an agreement with the respondent for its import and supply. Nowhere does the agreement mention that the respondent is a

canalizing agent for import of coal. The relevant portion of the agreement is as follows:

> *"**AGREEMENT BETWEEN NTPC & MMTC FOR PROCUREMENT OF 12.5 MMT (+/-2%) OF IMPORTED COAL FOR THE YEAR 2009-10.***
>
> *Ref. No. 01/NTPC/MMTC/IMP/COAL/2009 Dated 12th November, 2009*
>
> *This agreement is made at New Delhi on 12th November, 2009 between NTPC Limited (a Government of India Enterprise) having its Head Office at Core-7, Scope Complex, 7, Institutional Area, Lodhi Road, New Delhi-110003 (hereinafter referred to as NTPC which expression shall, unless excluded by or repugnant to the context, be deemed to include its legal heirs, successors and permitted assigns) on the FIRST PART*
>
> *AND*
>
> *MMTC Ltd. (a Government of India Enterprise) having its Head Office at Core-I, Scope Complex, 7, Institutional Area, Lodhi Road, New Delhi-110003 (hereinafter referred to MMTC, which expression shall, unless excluded by or repugnant to the context, be deemed to include its legal heirs, successors and permitted assigns) on the SECOND PART.*
>
> *WHEREAS, MMTC carries on the business of, amongst others, importing and selling, inter-alia, Coal and Hydrocarbon products, including various types of non-coking steam Coal.*
>
> *AND WHEREAS, NTPC have requirement of 12.5 MMT (+/-2%) imported non-coking steam coal on 'FOR DESTINATION' basis at NTPC power stations through various ports in India, with detailed Technical Specifications including Scope of Work and terms and conditions contained in the NTPC's invitation for BID along with bidding documents, issued vide letter ref. No. 01/CM/IMP COAL/2009 dated 16.03.2009."*

9. As can be seen, the agreement only states that the respondent carries on the business, amongst others, of importing and selling coal. It is true that the respondent has imported coal for supply to NTPC only but they have imported it on their account and in turn sold it to M/s NTPC. It is also

true that the price at which coal was sold to NTPC has been agreed to as per the formula, viz., the cost of coal, taxes, expenses etc. plus Rs.34.00 per MT towards service charges of the respondent. In terms of Section 14 of the Customs Act, 1962, as amended w.e.f. 2007, the transaction value of the goods i.e. the price actually paid or payable for the goods when sold for export to India shall form the assessable value. In this case, such transaction value is the price at which the overseas supplier has supplied the goods to the respondent. There is nothing on record to show that the respondent has passed on Rs. 34.00 per MT which they received as service charges for their services, either directly or indirectly, to the overseas suppliers. In fact, there is no such allegation at all in the order of the original authority. In this factual matrix, we find that there is no evidence in the first place that the respondent had acted as a canalizing agent. In fact, coal is also imported routinely by various private parties also. The agreement only shows that it is a sale deed on principal to principal basis between NTPC and the respondent.

10. There is nothing on record to show that any portion of the service charges have been passed on to the overseas supplier of coal. We find nothing in the submissions made by the revenue which would substantiate that service charges received by the respondent after importation for their services is includable in the assessable value under any provision of Section 14 of the Act or the Customs Valuation Rules. The case law of Hyderabad Industries Limited (supra) relied upon by the department pertains to period prior to the amendment to Section 14 in 2008. Further, there is a clear finding case that M/s MMTC had acted as a Canalizing Agent. M/s MMTC sold

the imported goods in that case to M/s Hyderabad Industries on High Sea sales basis who, in turn, filed the Bill of Entry and cleared the goods.

11. We find no evidence in this case to say that the transaction between M/s NTPC and the respondent is a high sea sales transaction. It is now well settled legal position that high sea sales are those sales which take place before the goods cross the Customs frontiers. Such sales can take place either while the goods are on high seas or in the Port or in the custom bonded warehouses before they are cleared by the Customs. Such transactions are not chargeable to VAT by the State Government or CST because they are deemed to be transactions in the course of International trade. In the present case, the bill of entry has been filed by the respondent and the goods were cleared by them. Thereafter, they were sold to M/s NTPC. Ld. Counsel for the respondent also submits that they have paid the appropriate amount of CST on the coal so imported. To sum up, we do not find any evidence on record to show that MMTC is the canalising agency for import of coal as per the EXIM Policy during the relevant period or that the coal was sold in High Sea Sales basis. The agreement between the MMTC and NTPC is for supply of coal as NTPC requires it and MMTC imports and supplies it. The sale of goods was not a high sea sales which was affected after clearing from the Customs. Otherwise, NTPC, the buyer would have filed the Bill of Entry and cleared the goods. The mere fact that the bids for import were finalised by the respondent (MMTC) after approval of NTPC, would not change the nature of transaction. There is no evidence that there is any privity of contract between the overseas supplier of coal and M/s NTPC. It is true that the definition of "Importer" under Section 2 includes the owner of the goods or anyone who holds himself out to be the importer

but in this case no evidence is brought out that M/s NTPC are either the owner or have held themselves out to be the importer. This contention of the Revenue is completely baseless. The service charges paid to the respondent by M/s NTPC cannot, therefore, be included in the assessable value.

12. In view of the above, we find no force in the arguments of the department in the present appeal and we find that the impugned order is correct and calls for no interference.

13. The impugned order is upheld and the appeal is rejected.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)

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