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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Excise Appeal No. 85063 of 2014

(Arising out of Order-in-Original No. PUN-EXCUS-001-COM-025-13-14 dated 08.10.2013 passed by the Commissioner of Central Excise, Pune I)

M/s. Volkswagen India Pvt. Ltd. .....**Appellant**
E-1 MIDC Indl. Area (Phase III),
Village Nigoje Mhalunge,
Kharabwadi, Chakan, Pune

VERSUS

Commissioner of Central Excise & Service Tax, Pune I .....**Respondent**
ICE House, 41-A Sasson Road,
Opp. Wadia College, Pune

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant
Shri Sunil Kumar Katiyar, (AR) for the respondent

CORAM:
HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/87014/2023

DATE OF HEARING : 24.08.2023
DATE OF DECISION : 18.10.2023

Per: AJAY SHARMA

This appeal has been filed assailing the impugned order dated 08.10.2013 passed by the Commissioner of Central Excise, Pune- I holding that the liquidated damages paid by M/s. Skoda Auto India Pvt. Ltd. to the appellant herein are not penalty but part of price of the cars already sold and in terms of

Section 4(3)(d) of the Central Excise Act, 1944 the liquidated damages paid or payable would form the part of the price of the cars for the purpose of payment of duty and accordingly confirming the demand of Central Excise duty amounting to Rs.24,42,14,061/- on the amount recovered as Liquidated damages during the years 2009-10 to 2011-12 alongwith interest

2. The issue involved herein is whether the liquidated damages paid by M/s. Skoda Auto India Pvt. Ltd. (in short "SAIPL") to M/s. Volkswagen India Pvt. Ltd. (in short "VWIPL") are part of the price of cars sold by M/s. VWIPL to M/s. SAIPL and liable to be included in the transaction value of the cars for the purpose of payment of duty?

3. The facts leading to the filing of the instant appeal are stated in brief as follows. The appellant herein i.e. M/s. VWIPL is engaged in manufacturing of cars bearing the brand name Volkswagen Vento and Volkswagen Polo. They also manufactured Skoda Fabia brand cars on contract manufacturing basis, on the basis of orders placed by M/s. SAIPL and sell those cars exclusively to them. On the basis of intelligence that the appellants were collecting additional amount from M/s. SAIPL under the guise of *liquidated damages* over & above the value but not paying any central excise duty on it, investigation was initiated. During investigation, the appellant had discharged the duty liability of Rs.24,42,14,061/- on the amount of

Rs.2,13,05,28,150/- received by them as liquidated damages from M/s. SAIPL for the cars manufactured and cleared by them during the period 2009 to 2011.

4. After conclusion of investigation, a notice dated 11.12.2012 was issued to the appellant for contravention of Sections 4(1) & 4(3)(d) of Central Excise Act, 1944 and Rules 4,6,8,11 & 12 of Central Excise Rules, 2002, to show cause as to why:-

i) Extended period of limitation as provided under proviso to Section 11A(4) should not be invoked in this case to demand Central Excise duty on the finished excisable goods, not paid by them at the relevant time;

ii) Central Excise duty amount to Rs.24,42,14,061/- on the amount recovered as Liquidated Damages during the period from 2009 to 2011, as shown in Annexure A to this Show-Cause Notice, should not be demanded and recovered from them under section 11A of the Central Excise Act, 1944;

iii) Central Excise duty of Rs.24,42,14,061/- paid by them should not be appropriated against the duty demanded above;

iv) Interest on the amount of duty determined to be payable, should not be recovered from them under section 11AA of the Act. Further, an amount of Rs.2,51,95,331/- paid by them should not be appropriated against the interest so demanded;

v) Penalty should not be imposed on them under section 11AC of the Central Excise Act;

vi) Penalty should not be imposed on them under Rule 25 of the Central Excise Act,2002.

5. The Adjudicating Authority i.e. Commissioner, Central Excise vide impugned order dated 8.10.2013 by holding that the as per the agreement entered into between the appellant and M/s. SAIPL, the *liquidated damages* are not in the nature of penalty but part of price of the cars sold to M/s. SAIPL by the appellant, confirmed the demand of Central Excise Duty on the amount recovered as *liquidated damages* during the years 2009-10 to 2011-12 alongwith interest and penalty and also appropriated the amount already paid by the appellant. The relevant findings recorded in the impugned order are reproduced as under:-

> "37. I therefore find that in the instant case, the manufacture and sale of Fabia cars is governed by the Supplemental Agreement. **The clause relating to liquidated damages have been mentioned in Part 'B' of he said agreement under the heading "Price changes of vehicles to be sold by VWIPL to SAIPL.**" [Para 7(d) refers]. The said agreement provides for volumes and period of cars to be produced along with working of the price of the cars. It also mentions that the agreed upon volumes may exceed or reduce. The sale price of cars is determined on cost plus basis (material cost plus manufacturing cost plus profit). A fixed amount has been appropriated to the various elements of the manufacturing cost i.e. Direct labour, Indirect labour Overheads, depreciation and financing in the price of the car on the basis of planned volumes. The manufacturing cost is not the actual cost but is an agreed upon amount based on the planned volumes. In terms of Supplemental Agreement, during the period of contract M/s VWIPL, on manufacture and sale of cars should recover the material cost and the agree d upon manufacturing cost in respect of the planned volumes. In case of actual volumes being lesser than the planned volumes in the calendar year, the agreed upon manufacturing cost would not

be realized. In such circumstances, M/s VWIPL is recovering the remaining amount of manufacturing costs in two categories i.e. (i) the fixed cost and (ii) the variable cost and the liquidated damages is worked out on the basis of difference between the planned volumes and the sold volumes multiplied with the fixed costs quantum attributable to the car. The fixed cost per car is an agreed upon amount and is part of the agreed upon manufacturing costs. The agreement also stipulates that in case of ordered and manufacturing volumes being more than planned volumes, the price of the cars sold in excess would be reduced by an amount of fixed cost attributable to each car.

38. Further, in the present case, the price of the cars manufactured by M/s VWIPL & supplied to M/s SAIPL was not firm or static, but was dependent on the volumes sold. These volumes were agreed upon in the Supplemental Agreement, executed between M/s VWIPL and M/s SAIPL. In a situation where M/s VWIPL manufacture, and seller lesser quantities than the agreed upon volumes (as per the Supplemental Agreement), they recover an amount over & above the invoice price of the cars sold, under the nomenclature of Liquidated Damages. Conversely, when more number of cars are sold than the agreed upon volumes (as per the Supplemental Agreement), the invoice price of the cars sold in excess was to be reduced by the same amount.

39. Further, both the parties have agreed to sell the cars at a sale price derived under the cost plus markup basis. The price of material part was agreed on actual basis and was therefore variable in nature. Whereas other elements of cost such as labour, overheads, depreciation and finance costs were agreed upon in advance and were therefore fixed in nature. Both, M/s VWIPL and M/s SAIPL therefore knew that in any situation, the agreed upon fixed cost is to be absorbed and recovered in the actual volumes lifted. Therefore, it is obvious that both the parties also knew that certain portion of agreed upon fixed cost would remain unrecovered if agreed upon quantity is not lifted and also that in such a situation, unabsorbed/ unrecovered portion of agreed upon

cost is required to be paid by the end of calendar year. Hence, from the agreement, it is a clear cut case of recovery of estimated costs and not a recovery above costs so as to result in penalty.

40. I further find that the term Liquidated Damages has got nothing to do with penalty but is a part of the price of cars which is evident from the intention of parties in the Agreement as hereinunder:-

(a) On reading of the agreements, it is clear that parties have nowhere agreed for non-production of contractual goods. There is provision to adjust the prices subsequently in different situation. However, this price adjustment mechanism cannot be construed that parties have agreed for non-production. The clause relating to Liquidated Damages in the contract cannot be red in isolation to conclude that the parties have agreed for a compensation for non-production. In fact, this clause is incidental to main contract for supply of goods.

(b) The Supplemental Agreement itself states that M/s VWIPL and M/s SAIPL shall prepare the Planning Round and Forecast plans for production and sale of cars, and due to short or excess orders by M/s SAIPL, the Annual production volumes may vary from the yearly production plan given in Annexure-C.

(c) Parties have agreed for agreed upon cost plus price. Parties know in advance that the agreed upon fixed costs are always recoverable irrespective of volume. And this recovery may be through transfer price arrived at the beginning on the basis of estimated volumes or even through liquidated damages at the end of agreed period, if agreed quantity is not lifted.

(d) The contract deals with certain situations relating to adjustments in prices in certain situations. Recovery of liquidated damages for non-lifting of agreed quantity is one of the same. Parties have themselves placed and agreed for a clause relating to quantity deviations as liquidated damages under the main heading of the price adjustments.

> (e) Even parties also considered this situation in the price adjustment clause under quantity deviations. In respect of additional volumes being manufactured and sold, parties have agreed for transfer price without the fixed agreed costs recovered in full against lifted agreed volume.
>
> 41. I, therefore, find that there is no doubt that the intention of parties in recovery of liquidated damages is to adjust the price of goods already sold. As the contract price was agreed on for cost plus basis, it was obvious that the price arrived at the beginning of accounting period was on the basis of agreed costs for agreed volume and there was no possibility to apportion the provisional even thug the assessments were never provisional. At the end of year, the parties settled the prices on account of unabsorbed costs under description of Liquidated Damages is nothing but recovery of part of price of goods already sold.
>
> 42. Thus it is clear that by way of policy as per the agreement entered into between M/s VWIPL and M/s SAIPL, the Liquidated Damages, in no way are in the nature of penalty, but are part of price of cars sold to M/s SAIPL to M/s VWIPL, and I hold accordingly."

6. We have heard learned counsel for the appellant and learned Authorised Representative on behalf of Revenue and perused the case records including the written submissions/synopsis and case laws placed on record. Learned counsel for the appellant submits that the issue involved herein is settled in favour of the appellant as per the decision of the Tribunal in the matter of *Skoda Auto Volkswagen India Pvt. Ltd. cs. CCE; 2023(2) TMI 658-CESTAT MUMBAI*. We have gone through the said decision and found that identical issue i.e. liquidated damage has been dealt with therein. The relevant paragraphs of the decision (supra) are reproduced hereunder:-

"5. Exposition of the Learned Senior Counsel for the appellant on the nature of the contract between the appellant and the buyers notwithstanding, we are constrained to note that the finding of the original authority is, without saying in so many words, based on 'transaction value' in section 4(1) of Central Excise Act, 1944 not being truly reflected in the invoices and, therefore, to be enhanced to the extent of 'liquidated damages' representing additional consideration. It is clear from section 4 of Central Excise Act, 1944 that several elements enumerated therein combine to designate such price as 'transaction value' on which appropriate rate of duty would, in accordance with section 3 of Central Excise Act, 1944, apply. These are the price to be the sole consideration for sale of goods sold by the manufacturer for delivery at the time and place of removal and to the extent that the assessee and the buyer are not related each other. There is no finding in the impugned order, or unearthing by investigation, that the details of the contract so designated as 'liquidated damages', contingent upon inability of the dealers of the buyers to book the prescribed number of vehicles, for remitting additional consideration. It is clear from section 4 of Central Excise Act, 1944 that any deviation from any of the elements enumerated therein would require treatment prescribed in Central Excise (Determination of Price of Excisable Goods) Rules, 2000. These several rules commence with the declaration that there is no option for determination of value other than by recourse to in Central Excise (Determination of Price of Excisable Goods) Rules, 2000. On a perusal of in Central Excise (Determination of Price of Excisable Goods) Rules, 2000, we find that, in the situation in which the adjudicating authority was compelled to go beyond the

declared price, to arrive at the finding of additional consideration, resort to rule 6 therein is of essence. On perusal of

> *'Rule 6.*
>
> *Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.*
>
> *Explanation 1 - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely:-*
>
> *(i) value of materials, components, parts and similar items relatable to such goods;*
>
> *(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;*
>
> *(iii) value of material consumed, including packaging materials, in the production of such goods;*
>
> *(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.*
>
> *Explanation 2. - Where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the*

> *advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit.*
>
> *Illustration 1. - X, an assessee, sells his goods to Y against full advance payment at Rs. 100 per piece. However, X also sells such goods to Z without any advance payment at the same price of Rs. 100 per piece. No notional interest on the advance received by X is includible in the transaction value.*
>
> *Illustration 2. - A, an assessee, manufactures and supplies certain goods as per design and specification furnished by B at a price of Rs. 10 lakhs. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. There is no evidence available with the Central Excise Officer that the notional interest on such advance has resulted in lowering of the prices. Thus, no notional interest on the advance received shall be added to the transaction value.'*

it is evident that, in the absence of any finding thereof, it would not be appropriate for such value to be loaded on the vehicles already produced.

6. In addition, the residuary provision of

> *'Rule 11.*
>
> *If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act.'*

in the said Rules offers alternative in the event of any of the preceding rules not being applicable. Therefore, in the event of rejection of the invoice value as the transaction value, it was not open to the adjudicating authority to re-determine value without recourse to Central Excise (Determination of Price of Excisable Goods) Rules, 2000.

> 7. As the order is deficient in such finding, and more particularly as the show cause notice leading to the impugned order is also equally silent, the adjudicated demand and the fine and penalties flowing therefrom would not survive. Consequently, the impugned order is set aside and the appeal allowed."

7. The sum and substance of the aforesaid decision is that in the event of rejection of the invoice value as transaction value, it is not open to the adjudicating authority to re-determine value without recourse to *Central Excise (Determination of Price of Excisable Goods) Rules, 2000* and more particularly Rule 6 ibid.

8. In view of the above decision (supra), we are of the opinion that the issue involved herein is no more *res integra* and we see no reason to deviate from view taken by us in the aforesaid decision. From the case records it is clear that the said Rule has not been invoked either in the show cause notice or in the order under challenge. Therefore on this ground alone the impugned order is liable to be set aside. Accordingly the appeal filed by the appellant is allowed.

(Pronounced in open Court on 18.10.2023)

(C J MATHEW)
MEMBER (TECHNICAL)

(AJAY SHARMA)
MEMBER (JUDICIAL)

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