

CASE NO.:
Appeal (civil) 4472 of 2001

PETITIONER:
Commissioner of Central Excise, Bhubaneswar-II

RESPONDENT:
M/s IFGL Refractories Limited

DATE OF JUDGMENT: 09/08/2005

BENCH:
S. N. Variava & Dr. AR. Lakshmanan

JUDGMENT:
J U D G M E N T

S. N. VARIAVA, J.

This Appeal is against the Judgment dated 28th July 2000 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT). Briefly stated the facts are as follows:

The Respondents manufacture, amongst other things, refractories. They sold refractories to one M/s Visakhapatnam Steel Plant under a contract entered into in 1992 at a particular price. They thereafter entered into four contracts dated 9th September 1993, 11th July 1994, 24th February 1995 and 16th June 1995 to supply refractories to the said M/s Visakhapatnam Steel Plant. For the supply of refractories under these four contracts the Respondents availed of the "Duty Exemption Scheme" contained in Chapter VII of the Export and Import Policy, 1992. It must be mentioned that in order to enable the Respondents to avail of the Duty Exemption Scheme M/s Visakhapatnam Steel Plant surrendered the Advance Licences they held for import of refractories. Against such surrender the Respondents were issued Advance Intermediate Licences for import of inputs. The Respondents could thus import the inputs without payment of customs duty as well as get them at a lower price than what they would have paid had they purchased the same in India. The Department claimed that the benefit derived by the Respondents under the Advance Intermediate Licence, issued to them as a result of surrender of licence by M/s Visakhapatnam Steel Plant, was "additional consideration" towards the value of the goods and that this "additional consideration" formed part of the price for purposes of excise duty.

The Tribunal has allowed the Appeal of the Respondents by *inter alia* holding as follows:-

"..... In the instant case the appellant have availed the benefit from the customs duty under the advanced intermediate licences issued to them by the statutory authorities in accordance with the relevant provisions of the import policy. Such benefits are under the duty exemption scheme and have to be treated as statutory benefits allowed by the statutory authorities. The same can never be placed upon the platform of 'additional consideration' flowing to the manufacturer from the buyer, directly or indirectly. It has so happened that because of the benefit of the customs duty in terms of the said advanced licences, the appellants have

been able to import the inputs without corresponding payment of customs duty which has resulted in lower cost of their final product. As the appellants could afford to sell their goods at a lower price they have offered the same to VSP, which was accepted by them and the contracts finalized. In these circumstances it cannot be said that any additional consideration has flown from VSP to the appellant, which is a condition essential for discarding the contract price between the buyer and the seller."

Before the Tribunal there was also a controversy regarding the granting of deductions on account of central excise duty and central sales tax. There also the Tribunal has held in favour of the Respondents. Before us the Appellants have not made any submissions on those points.

Thus, the only question for consideration is whether the benefit gained by the Respondents by reason of M/s Visakhapatnam Steel Plant surrendering its licences and on such surrender the Respondents being issued licences, is additional consideration for the contract.

It is an admitted position that, at the relevant time, the Rules provided that "price" would be actual price paid by the buyer plus the money value of additional consideration flowing directly or indirectly from the buyer to the seller in connection with the sale of goods. Such a provision has now been incorporated in Section 4 itself.

Thus, if any additional consideration is received from the buyer in connection with the sale of goods, then that additional consideration forms part of the price for purposes of excise duty. Undoubtedly, the Government had a "Duty Exemption Scheme". But the Respondents did not have any Advance Intermediate Licences of their own under the Scheme. If they had had their own Licences, the reasoning of the Tribunal may have been correct. It is only because of the Contract of Sale that M/s Visakhapatnam Steel Plant surrendered their Advance Licences to enable Respondents to get Advance Intermediate Licences for purposes of meeting their obligations under the contract. That the Respondents have received an additional consideration is clear from the letters written by the Respondents to M/s Visakhapatnam Steel Plant in pursuance of the tender floated. The Respondents first offered, by their letter dated 9th September, 1992 to sell at the following prices:

Monoblock Stopper	@ Rs. 5,650/- each
Submerged Nozzle	@ Rs. 4,060/- each
Tundish Nozzle	@ Rs. 3,080/- each
Jointing and Sealing Compound	@ Rs.56,000/- per MT

Thereafter, by a letter dated 2nd March 1993 the Respondents made a revised proposal wherein it is, inter alia, stated as follows:-

"As per the Export & Import Policy for 1992-97 under Chapter 10, you can procure the goods against your Advance Licence from domestic suppliers. If you utilize your Advance Licence for this purpose, no Excise Duty and Sales Tax will be charged to you. For the domestic company the sales against your Advance Licence will be treated as 'Deemed Export'.

Keeping this in mind, we now propose that

instead of selling Advance Licence to us you place your order on us against your Advance Licence for which applicable rates will be as follows."

Monoblock Stopper	@ Rs.3,085/- per pc.
Submerged Entry Nozzle	@ Rs.2,048/- per pc.
Tundish Nozzle	@ Rs.1,264/- per pc.
Jointing and Sealing Compound	Free of cost (for proportionate quantity against order for item Nos.1, 2 and 3 placed on us)"

Ultimately it was agreed that M/s. Vishakapatnam will surrender its Advance Licences and in lieu thereof the Respondents get the Advance Intermediate Licences. Thus, without the Advance Licences of M/s Visakhapatnam Steel Plant, being made available to the Respondents, the prices would have been as were quoted earlier. It is only because of the Advance Licences being surrendered by M/s Visakhapatnam Steel Plant and in lieu thereof Advance Intermediate Licences being made available to the Respondents that the Respondents could offer lower prices. The surrendering of Licences by M/s Visakhapatnam Steel Plant and as a result thereof the Respondents getting the Licences had nothing to do with any import and export policy. It was directly a matter of contract between the two parties. This resulted in additional consideration by way of "Advance Intermediate Licence" flowing from M/s Visakhapatnam Steel Plant to the Respondents. The value received therefrom is includable in the price. The Tribunal was wrong in stating that such an arrangement can never be placed upon the platform of additional consideration. In so stating the Tribunal has ignored and/or lost sight of the fact that it was in pursuance of the contract of sale between Respondents and M/s Visakhapatnam Steel Plant that the Licences were made available to Respondents. The Export and Import Policy had nothing to do with the arrangement/contract under which the Licences flowed from the buyer to the seller. At the costs of repetition it must be mentioned that had the Respondents had Advance Intermediate Licence on their own i.e. without M/s. Vishakapatname Steel Plant having to surrender its Licences for the purposes of the contract, then the reasoning of the Tribunal may have been correct. But here, in pursuance of the Contract of Sale, there is directly a flow of additional consideration from the buyer to seller. The value thereof has to be added to the price. We are thus unable to accept the broad submission that where parties take advantage of policies of the Government and the benefits flowing therefrom, then such benefit cannot be said to be an "additional consideration".

The question then arises as to how the "additional consideration" is to be computed. In this case the benefit accrued to the Respondents is clearly ascertainable by virtue of the two letters of the Respondents. Had this additional benefit not flown to the Respondents, they would have sold the items as per their offer dated 9th September 1992. As the additional consideration was to flow to them, they have sold at the rates mentioned in the letter of 2nd March 1993. The "additional consideration" is the difference in prices between these two. The Commissioner had thus correctly worked out this difference.

It may also be mentioned that the Respondents had also taken up a contention of limitation. The Tribunal has not considered this aspect in view of the fact that it has allowed the Appeal on merits. We were requested that the matter be sent back to the Tribunal so that

the Tribunal can consider the question of limitation. We are agreeable to that. We, therefore, remit the matter back to the Tribunal. The Tribunal is, therefore, directed to only consider whether or not the extended period of limitation was available to the Department.

With these directions, the Appeal stands disposed of with no order as to costs.

JUDIS