

CASE NO.:
Appeal (civil) 2884-2892 of 1999

PETITIONER:
Commissioner of Central Excise, Mumbai III

RESPONDENT:
M/s.I.S.P.L. Industries Ltd.

DATE OF JUDGMENT: 21/04/2003

BENCH:
S.N.Variava & Brijesh Kumar.

JUDGMENT:

JUDGMENT

WITH

C.A.Nos.6600-6607/1999, 3635/2000, 798/2000, 410/2000,
787-788/2000, 868/2002 and 864/2002

BRIJESH KUMAR, J.

All the above noted appeals have been preferred by the Revenue under Section 35 L (b) of the Central Excise and Salt Act, 1944 (for short 'the Act') against the orders passed by the Customs, Excise and Gold (Control) Appellate Tribunal (for short 'CEGAT'), allowing the appeals of the assesseees and holding that notional interest on the advances taken by the assesseees, from the buyers is not liable to be added in the assessable value of the goods. With minor variations in the facts of each case, the main question involved in all these appeals is the same viz. the notional interest is liable to be included or not in the assessable value of goods. This question has been differently framed in different appeals but crux of the matter for consideration remains the same, hence all these appeals have been heard together and they are being disposed of by one common order. In Appeal No.410 of 2000, it was also indicated on behalf of the respondent that major part of the demand had become time barred. If necessary, we would advert to that question. No other question, in any appeal has been raised or pressed before us by either party.

For the sake of convenience, we refer to the documents on the record of the Civil Appeals Nos.2884-2892 of 1999, Commissioner of Central Excise Vs. M/s.ISPL Industries Ltd. The show cause cum demand notice dated 3.7.1995 is a long notice calling upon to show cause in respect of different matters under the Central Excise Act, besides one relating to inclusion of the notional interest in the assessable value, on the interest free advances taken by the assesseees from customers. It reads as under :-

"Whereas it appears that M/s.ISPL Industries Limited, Kolshet ..

1) They have not included the interest accrued on the advance received from the customers in the assessable value on the goods cleared during the period from Jan.95 to Mar (details shown in the Annexure enclosed in the SCN).

The interest payable/paid in the advance made by the customers includible in the assessable value because the assessee would have incurred the expenditure for the said interest had they borrowed taken loans from Banks. The advance are similar to bank loans or money borrowed from banks and hence the interest on said advances is includable in the assessable value in view of Section 4 of the C.Ex. and Salt Act 1944 read with rule 5 of C.Ex. valuation rules 1975 and charged approximate C.Ex. duty, which they have failed to do at the time of clearance of excisable goods (details given in the Annexure to this show cause notice).

1)

2) ..

Now therefore the assessee are hereby required to show cause to the Dy. Commissioner, C.Ex. Bombay-III having his office at 4th floor, Navprabhat Chambers, Ranade Road, Dadar, Bombay 28 to why :

a) The interest accrued on the advances received from their customers should not be included in the assessable value, the interest being calculated at the rate of 18% (Normal Bank rate of interest) from the date of receipt of advances/deposits till the date of final dispatch of material and

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Superintendent C.Ex.

Range IV Div. Thane III"

As it would be evident, the main plank of the demand is that the advances taken from their customers are similar to bank loans or money borrowed from banks on which interest would normally be payable by the assessee, hence the interest on such advances is liable to be included in the assessable value as per the provisions under Section 4 of the Central Excise & Salt Act, 1944 read with Rule 5 of the Central Excise (Valuation) Rules, 1975.

The assessing authorities and the appellate authority did not accept the explanations of the assessees and added the notional interest accrued on advances made to the manufacturers, in the assessable value. The CEGAT, however, set aside those orders holding that it was not liable to be included in the assessable value. The Revenue has preferred appeals against the orders of the CEGAT.

The respondent-manufacturers had resisted the demand on various grounds. Some of the manufacturers, who manufacture the tailor made goods i.e. as per the requirement of the buyer, they have to ensure that the goods manufactured, which are generally heavy machines, are taken delivery of failing which it may result in very heavy losses, as such machines would not be of any use for others nor it would be possible to get buyers for such tailor made goods. In such cases the advance taken is nothing else than mere security for the due performance of the contract. In some cases, it is submitted that advance of only a part of the amount is taken rest of which, for example, upto 90% is paid on delivery of the goods and the balance of 10% or

whatever amount as per agreement it may be, is paid after the period fixed for watching the proper performance of the machinery. Therefore, sometimes the amount which remains in balance is paid much after the delivery of the goods. Their case is that it all depends on the terms and conditions of contract to contract on which advance is made in full or in part. Yet another submission which has been advanced is that it is not necessary that amount taken in advance must necessarily be used for manufacture of the item. There may be units which may carry out the manufacturing and supplies without any need of having utilized such amount. It might have sufficient resources of liquid finances of its own to carry out the manufacturing. That is to say for such units there may not be any necessity to take loans from the banks or other institutions.

We may at this stage peruse the relevant provision under the law which has been pressed into service by the revenue for the purposes of adding the amount of notional interest in the assessable value. Section 4 of the Central Excise Act reads as under :

"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 value, such value, shall, subject to the other provisions of this section, be deemed to be

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ia) where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

xxx xxx xxx

(4) For the purposes of this section, -

xxx xxx xxx

(d) "value:, in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Xxx xxx xxx"

Rule 5 of Central Excise (Valuation) Rules, 1975 falling in Chapter II reads as under :

"Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except that the price is not the sole consideration, the value of such goods shall be based on the aggregate of such price and the amount of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee".

Shri R.P.Bhat, learned senior counsel appearing for the Revenue submits that amount of advance taken by a manufacturer from its customers free of interest and such money being utilized for the purposes of manufacture of the goods, entails profit to the manufacturer to the extent of interest which would have been paid by the manufacturer to the bank. The benefit which accrues to the manufacturer amounts to profit to him, liable to be added in the assessable value of goods. Such buyers advancing money are favoured buyers, enjoying special concession or benefits at the hands of the manufacturer to the detriment of the revenue. He has taken us through the order passed by the Commissioner of Central Excise where it has been observed that price charged from a favoured buyer would not be a normal price. Therefore, notional interest on the interest free advance taken from the favoured buyer would justifiably be added to the assessable value. We find that reliance has been heavily placed upon the decision reported in 1995 (75) ELT P.499 = 1995 (2) SCC P.90, M/s.Metal Box India Ltd. Vs. Collector of Central Excise, Madras. The facts in the case of the Metal Box are that Ponds (India) Ltd. has been buying about 90% of the total production of metal containers manufactured by the assessee. For the said purpose huge amounts were being advanced by Ponds (India) Ltd. free of interest to M/s.Metal Box. In its turn the assessee gave 50% discount in price, as compared to the normal price, to Ponds (India) Ltd. This Court while dealing with the question observed "when Ponds (I) Limited was given 50 per cent discount from normal price then the material aspect that Ponds (I) Limited had advanced large amounts free of interest had necessarily entered into consideration between the parties. Therefore, special treatment was given by the assessee to Ponds (I) Limited. " It is further observed, had Ponds (I) Limited not given the advance, the assessee would have borrowed the same for purchasing the raw materials etc. from banks on which large amount of interest would obviously have been paid which in turn would have got

reflected in the purchase price to be charged from the buyers as amount of interest payable to the banks on the loan would be part of cost of production passed on to the customers of the assessee. It has been held :

"Section 4(1)(a) that normal price would be price which must be the sole consideration for the sale of goods and only under such a situation sub-section (1)(a) would come into play. If the price in a particular transaction is not the sole consideration flowing directly or indirectly from the buyer to the assessee-manufacturer, either in cash or any other form, the additional consideration quantified in terms of money value is to be added to the price declared by the assessee for determining the normal price of the goods."

We therefore, find that the main basis of adding the notional interest in assessable value of goods was on account of interest free loan which factor was responsible for determination of price between the parties namely, discount of 50% i.e. the price other than the normal price. There came to be two prices one for those who may not have advanced any interest free loan to the manufacturer and the other for Ponds (I) Limited which was a bulk purchaser to the extent of nearly 90% of the production for which purpose advance was also made available to the manufacturer without interest. The fact of interest free loan, has direct nexus with price fixation at a lower amount than the normal price.

The other case on the point which has been relied upon by the learned counsel for the respondents is reported in 1998(2) SCC 24, VST Industries Ltd. Vs. Collector of Central Excise, Hyderabad. The appellant in that case carried on business of manufacture and sale of cigarettes exigable to excise duty. The goods manufactured by them were sold in wholesale. The main dealers would sell the cigarettes to the wholesalers. The appellants sold the goods on cash-and-carry basis as well as by extending credit facility to some of its main dealers. Since it was felt that there was delay in remittances of the amount on account of sale on credit, the manufacturers introduced a credit facility scheme under which such main dealers were to make interest free security deposit equivalent to about 21 days of their normal monthly purchases. They could also purchase the goods on cash basis as well, if they so desired. The other dealers who were not availing of the credit facility as well as those availing of such facility, the goods were sold to both at the same price. That is to say no special concession or discount was given to those who deposited interest free security for credit facility. The revenue, however, served a notice under Rule 5 of the Valuation Rules, 1975 for adding the notional interest on the security amount advanced interest free, so as to arrive at the normal price of the goods. This Court negated the case of the revenue for reloading the assessable value by adding notional interest on the amount of interest free advance deposited as security by some of the dealers. One of the main considerations was that uniform price was being charged by the manufacturer from all its dealers. That is to say the price was not influenced by the fact of interest free security deposit made by dealers availing the credit facility. This Court also observed that the case of Metal Box (supra) is clearly distinguishable since in that case lesser price was being charged from M/s.Ponds (I) Limited as compared to other buyers. Therefore, one of the relevant factors would be as to whether the price is affected by the

fact of interest free advance or remains uniform for all. If the price is not influenced by the fact of interest free advance, there would be no occasion to contend that the price charged uniformly from both sets of the buyers would still not be a normal price.

Learned counsel for the respondents in one of the appeals, has drawn our attention to a circular of Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi dated 22.6.1998. The circular was issued on the subject of liability of duty on notional interest on advance deposits taken by manufacturers, particularly in view of the decisions in the case of Metal Box (supra), Union of India Vs. Lakshmi Machine Works Limited, 1995 (77) E.L.T. 799 (Madras) and M/s.VST Industries Ltd. (supra). On consideration of the decisions indicated above, the circular notifies the opinion of the Law Ministry as follows :

"(i) The notional interest on advances deposited by the wholesale buyers would be included for the purpose of determination of assessable value if the deposit influences the fixation of sale price either by way of charging a less price from or by offering a special discount to the buyer who has given the deposit.

(ii) If two different price exist, one for the wholesale buyer who has deposited the advance and the other for the wholesale buyer who has not deposited the advance, they would form two different classes of buyers and two different assessable values can be arrived at. For the wholesale buyer depositing the advance, the notional interest on advance deposit should be added for the purpose of determination of the assessable value.

(iii) If there is no difference in the selling price for both categories of the wholesale buyers and there is also no proof that on account of advance deposits taken from some buyers, the price charged from all buyers has been reduced, then element of notional interest on advance deposits cannot be added.

(iv) If the interest earned/saved on such advanced deposits is credited to the buyer calculated at a rate lower than the normal bank rate, the difference in both interest rates should be equivalent to the extent of benefit derived by the manufacturer. The money value of the extent of benefit should be quantified and added for the purpose of determination of the assessable value.

This supersedes the Board's Circular No.215/49/96 (F.No.6/1/91-CX.1), dated 27-5-1996."
(Emphasis supplied)

The above circular leaves no room to doubt that where price is not influenced by fact of interest free advance made by the buyer to the manufacturer, there would be no occasion to add notional interest to the assessable value of the goods.

Learned counsel appearing for the respondents in one of the appeals has also brought to our notice another

Notification dated March 1, 2003 amending the Rules by the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2003. Clause 3 reads as under :
"In the said rules, in rule 6, the Explanation shall be renumbered as Explanation 1, and after the Explanation so renumbered the following shall be inserted, namely :-

"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 An, 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 submitted that besides illustration 1, the illustration 2 covers the cases of all such respondents who manufacture the goods as per design and specification given by the buyer. It has, however, been rightly pointed out on behalf of the appellant the above noted notification dated March 1, 2003 would not be applicable to the present appeals since the appeals relate to the period prior to 2003 but there is no dispute that the cases in appeal are covered by the other circular of 1998 referred to earlier. Nonetheless, the notification dated 1.3.2003 has been issued, though not applicable in the present cases, on the principle that in case interest free advance does not influence the price by making it lower than the normal price, notional interest is not to be added. We may like to clarify that the view taken by us is not based on the notification dated 1.3.2003, but it certainly lends strength to the submissions made by the learned counsel for the respondents, since that principle is found to be adhered to in the above noted notification issued subsequently too in the year 2003.

It is clear that the mere fact of making an interest free advance by a buyer to the manufacturer, by itself will not be a sufficient ground to reload the assessable value with notional interest. It would be necessary for the revenue to show that such advance has influenced in the lowering of the price and that it is not depicting the normal price of the

goods. There may be different reasons for taking advances, as indicated above in the earlier part of this judgment. Learned counsel for the appellant submits that all that the revenue has to show is that interest free advance has been made by the buyer to the manufacturer which would lead to a presumption that it is to the advantage of the manufacturer having influenced the fixation of price as well. We, however, fail to appreciate the submission made on behalf of the revenue for drawing a presumption that fixation of price is influenced by such an advance. In this connection, we may refer to the Board's circular of 1998 quoted earlier, clause (iii) of which clearly provides that if there is no difference in the selling price for both categories of the wholesale buyers and there is also "no proof" that on account of advance deposits taken from some buyers, the price charged from all buyers has been reduced, then element of notional interest on advance deposits, cannot be added. Obviously, where there are two prices, one for those who have made the advance and the other who have not, it would require no further proof of the lower price having been influenced by the interest free advance made by the buyer. But otherwise it would require proof and the proof for the purposes of holding that interest free advance has influenced the price would obviously be provided by the revenue. There is no scope for any such presumption as canvassed on behalf of the appellant. We find the same position to be continued in the later amendment in the Rules of 2003 referred to above. As in illustration 2, it talks of evidence to show that interest free advance has resulted in lowering of the prices. The departmental circulars and the amendments in the Rules at the relevant time and subsequently too, do not envisage of any presumption to be drawn by mere fact of interest free advance by the buyer to the manufacturer. It requires proof and evidence to show that fixation of price has been influenced on the lower side by such a transaction of interest free advance.

In the appeals before us, neither there is any evidence or proof on the record nor it is the case of the appellant on facts, that the interest free advance has influenced the price and the price lower than the normal price had been charged by the respondents. We do not think it necessary to deal with facts of each case separately since it is not in dispute that interest free advances were made by the buyers but at the same time it is also not in dispute that such advances had never influenced the price charged by the manufacturers from buyers.

In view of the discussion held above and the reasons indicated, we find no force in the appeals and all the appeals are dismissed with costs.