

CASE NO.:
Appeal (civil) 8350-8354 of 2002

PETITIONER:
Commissioner of Central Excise, New Delhi

RESPONDENT:
India Thermit Corporation Ltd. & Others

DATE OF JUDGMENT: 01/05/2008

BENCH:
ASHOK BHAN & DALVEER BHANDARI

JUDGMENT:
JUDGMENT

O R D E R
REPORTABLE

ASHOK BHAN, J.

Revenue has filed these appeals under Section 35-L of the Central Excise Act, 1944 (for short 'the Act') against the final order Nos.155-159 of 2002 dated 29.4.2002 passed by Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (for short 'the Tribunal') in Appeal Nos.E/1484-1485/2000-B, E/1895-1896/2000-B, E/1869/2000-B whereby the Tribunal allowed the appeals filed by the respondents herein and set aside the order-in-original passed by the Commissioner, Central Excise(Adj.), New Delhi.

Facts in the case of M/s. India Thermit Corporation Ltd.:

M/s India Thermit Corporation Ltd., respondent No.1 herein, (for short 'ITCL') is engaged in the manufacture of 'Thermit Portion' and 'Thermit Welding Equipments'. Respondent was classifying these products under Chapter Heading 3810.00 and under various sub-headings of Chapter 84 respectively. The main product of the respondent is 'Thermit Portion' used in jointing of rails of Indian Railways. 'Thermit Portion' manufactured by the respondents are cleared by two methods:

(a) Outright sales to Indian Railways which is around 20% of the production along with consumables such as thimbles, ignition matches, asbestos powder, etc.

(b) respondents undertake rail jointing work of the Indian Railways on contract basis and consume the balance 80% of Thermit Portion in the jointing work.

ITCL was issued a show cause notice dated 18.1.1999 demanding differential excise duty of Rs.62,60,022.42 under proviso to sub-section (1) of Section 11A of the Act on the ground that it has willfully and deliberately indulged in mis-classification of various excisable goods through mis-declaration of their nature, description, suppression of facts and under-valuation of excisable goods cleared to self for rail jointing at different sites of India in an attempt to beguile the department with an intent to evade payment of excise duty. Mr. Alok Nagory, Managing Director of ITCL was also required to show cause as to why penalty should not be imposed upon him under Rule 209-A of the Central Excise Rules, 1944 (for short 'the Rules'). A detailed reply dated 10.11.1999 was filed by the respondents along with copies of the

documents in support of their contentions.

The Commissioner of Central Excise(Adjudication), authority in original, by his order dated 31.1.2000 confirmed the demand for differential duty of Rs.62,60,022/- on ITCL and imposed penalty of equivalent amount under Rule 9(2), 226 and 173Q of the Rules along with Section 11AC of the Act. Penalty of Rs.1,00,000/- (rupees one lac) was also imposed on Shri Alok Nagory, Managing Director of ITCL under Rule 209A of the Rules.

Feeling aggrieved against the order-in-original passed by the Commissioner, ITCL and its Managing Director filed appeals before the Tribunal.

Facts in the case of M/s.Asiatic Thermics Ltd.

M/s Asiatic Thermics Ltd., respondent No.3 herein, (for short 'ATL') is engaged in the manufacture of dry moulds and thermit welding equipments and classifying its products under Chapter Heading 8479.00.

A show cause notice dated 18.1.1999 was issued to ATL for demanding differential duty of Rs.33,80,585 during the period 1993-94 to 11.9.1996 on the ground that ITCL is the "holding company" and ATL is the "subsidiary company". ATL is solely dependent upon ITCL for supply orders and all the goods manufactured by ATL has to be sold to ITCL for further marketing by them. ATL under-valued the goods resulting in non-payment of differential duty of Rs.14,61,392/- by ATL. Apart that, ATL mis-declaration of the nature and composition and suppression of the usage of goods, mis-classified its products and wilfully evaded excise duty to the tune of Rs.19,19,193/- totalling to Rs.33,80,585. Shri R.S.Maheshwari, Director of ATL and Shri Alok Nagory, Managing Director of ITCL were also asked to show cause as to why penal action be not taken against them under Rule 209A of the Rules.

Detailed reply was given to the show cause notice as also the written submissions at the time of personal hearing. Respondents contested the issue on merits as well as on limitation on the ground that earlier also a show cause notice dated 17.1.1996 was issued involving the period from July 1995 to December, 1995 on the same issue.

The Commissioner of Central Excise(Adjudication), authority in original, by his order dated 28.2.2000 confirmed the demand for differential duty of Rs.33,80,585/- on ATL and imposed penalty of equivalent amount under Rule 9(2), 226 and 173Q of the Rules along with Section 11AC of the Act. Penalty of Rs.1,00,000/- (rupees one lac) was also imposed on Shri R.S.Maheshwari and Shri Alok Nagory, Managing Director of ITCL under Rule 209A of the Rules.

Feeling aggrieved against the order-in-original passed by the Commissioner, ATL, Director of ATL and Shri Alok Nagory, Managing Director of ITCL filed appeals before the Tribunal.

Tribunal by its common impugned order, being the first appellate authority, considered the matter elaborately and by recording detailed reasons allowed the appeals filed by the respondents both on merits as also on limitation. In the case of ITCL, on the issue of valuation, it held that the highest of the price for bulk sale to railways is comparable price and department cannot take price for the small quantities sold to railways for assessing the products used captively. On the issue of limitation, it held that several show cause notices were issued between 27.11.1995 to 3.6.1996 demanding differential duty on valuation of 'Thermit Portions' cleared for self use covering the period from May, 1995 to November, 1995.

Although, these show cause notices are not on record, counsel for the respondents has given the details of the show cause notices which are given below:

- a) C.No.R-III/ITC/Val/95/1595 dated 27.11.95 \026 May and June '95
- b) C.No.V(3)6-Demand/96/533 dated 30.1.96 \026 July '95
- c) C.No.V(3)15-Demand/96/1229 dated 4.3.96 -August '95
- d) C.No.V(03)27-Demand/96/1740 dated 29.3.96 \026 Sep. '95
- e) C.No.V(3)39-Demand/96/2112 dated 23.4.96 -Oct. '95
- f) C.No.V(3)49-Demand/96/2716 dated 3.6.96 \026 Nov. '95

In the aforesaid six show cause notices, orders-in-original were passed between 22.1.1996 and 31.1.1997, which are as under:

- a) O-I-O No.14/Demand/Ack-1/96 dated 22.1.1996
- b) O-I-O No.15/Demand/Ack-1/96 dated 26.1.1996
- c) O-I-O No.06/Demand/Ack-1/97 dated 31.1.1997
- d) O-I-O No.08/Demand/Ack-1/97 dated 31.1.1997
- e) O-I-O No.09/Demand/Ack-1/97 dated 31.1.1997
- f) O-I-O No.10/Demand/Ack-1/97 dated 31.1.1997
- g) O-I-O No.11/Demand/Ack-1/97 dated 31.1.1997

In all these orders, there was a common issue of valuation of thermit portions cleared for self use. These orders have become final and not been challenged by the department. The present show cause notice dated 18.1.1999 has been issued more than three years after the first show cause notice dated 27.11.1995 was issued covering the same issues to twelve clearances of thermit portions and valuation of dry moulds. It was further held by the Tribunal that the impugned order overlaps the earlier adjudication orders in respect of period from 7.3.1995 to 31.3.1995. We agree with the findings recorded by the Tribunal.

Since, the department has accepted the earlier adjudications on the same issue for part of the period, revenue cannot be permitted to re-agitate the same point for a part of the remaining period. There cannot be second proceedings raising the demand for the same period.

For the reasons stated above, appeals filed by the revenue are dismissed. Parties shall bear their own costs.

In the case of ATL, on merits, the Tribunal held that even if ATL and ITCL are related persons, there is no material evidence that the transaction between them was not at arm's length. The dry moulds manufactured by ATL were supplied to ITCL in naked condition since no packing material was used. ATL has entered into a contract with railways and the price charged to railways after deducting the cost of packing was the same as charged to ITCL. In other words, the transaction to ITCL was at or about the same price as to the railways. Thus, there is no undervaluation.

We agree with the view taken by the Tribunal that even if ATL & ITCL are taken to be related persons [we are not holding so], it has not influenced the price. There is no undervaluation. ATL has been selling the product to ITCL and Indian Railways at or about the same price.

For the reasons stated above, appeals filed by the revenue are dismissed leaving the parties to bear their own costs.