

A COMMISSIONER OF CENTRAL EXCISE, BHUBANESHWAR-II
v.
M/S IFGT REFRACTORIES LTD.

AUGUST 9, 2005

B [S.N. VARIAVA AND DR. AR. LAKSHMANAN, JJ.]

Central Excise Act, 1944/Export and Import Policy, 1992; Duty Exemption Scheme :

C *Valuation—Refractories—Contract of sale between assessee-vendor and vendee—Vendee surrendering Advance Licence for import in terms of the contract—In lieu thereof the assessee availing benefit under Duty Exemption Scheme—Revenue holding it is additional consideration forming part of the purpose of levy of excise duty—Reversed by the Tribunal—On appeal, Held : Price includes money value of additional consideration flowing either directly or indirectly from buyer to seller in a contract of sale of goods—Assessee did not have any advance licence of their own for availing benefit under the Scheme—Assessee received the benefit under the Scheme only due to surrender of the Import Licence by the vendee—The benefit so received by the assessee could be termed as additional consideration—Since there was a direct flow of additional consideration from buyer to seller—the assessee, tribunal was wrong in reversing the order of the Revenue—Since Tribunal did not consider the aspect of limitation, the matter is remitted to Tribunal to decide only on the issue of extended period of limitation—Sale of Goods Act.*

F **Respondent-manufacturer of refractories entered into contract with M/s. Vishakapatnam Steel Plant-vendee for selling its product at certain price. In lieu of the contract, vendee surrendered the Advance Licence to enable the assessee to avail of benefit under the Duty Exemption Scheme in terms of the Export and Import Policy, 1992. Revenue claimed that the benefit accrued to the assessee was an additional consideration towards the value of the goods and formed part of the price for the purpose of excise duty. The Tribunal allowed the appeal of the assesseees. Hence the present appeal.**

H **Disposing of the appeal, the Court**

HELD : 1.1. 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 of the Central Excise Act itself. Thus, if any additional consideration is received from the buyer in connection with the sale of goods, then the additional consideration forms part of the price for purposes of excise duty. [483-G-H; 484-A-B]

1.2. It is only because of the Contract of Sale that the Vendee surrendered their Advance Licences to enable assessee to get Advance Intermediate Licences for purposes of meeting their obligations under the contract. That the assessee have received an additional consideration/benefit is clear from the letters written by the Respondents to the vendee in pursuance of the tender floated. Had this additional benefit not flown to the Respondents, they would have sold the items as per their earlier offer. As the additional consideration was to flow to them, they have sold at the rates offered subsequently. The “additional consideration” is the difference in prices between these two. The Commissioner had thus correctly worked out this difference. [484-B-C; 485-G-H]

1.3. It is only because of the Advance Licences being surrendered by the vendee and in lieu thereof Advance Intermediate Licences having been made available to the assessee that the assessee could offer lower prices to vendee. This resulted in additional consideration by way of “Advance Intermediate Licence” flowing from the vendee to the assessee. The value received therefrom is includable in the price. [485-A-C]

1.4. 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 had ignored and/or lost sight of the fact that it was in pursuance of the contract of sale that the Licences were made available to the assessee. The Export and Import Policy had nothing to do with the arrangement/contract under which the Licences flowed from the buyer to the seller. [485-A-C]

2. Since the Tribunal has not considered the limitation aspect in view of the fact that it has allowed the appeal on merits, the matter is remitted back to the Tribunal. The Tribunal is directed to only consider whether

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A or not the extended period of limitation was available to the Revenue.
[486-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4472 of 2001.

B From the Judgment and Order dated 29.7.2000 of the Central Excise, Customs and Gold (Control) Appellate Tribunal E.Z.B., Calcutta in F.O. No. A-1138/CAL/2000 in A. No. E/V/74/1998.

Harish Chander, A. Subba Rao, A.T. Rao and P. Parameshwaran for the Appellant.

C S.K. Bagaria, Pratik Jalan, A.T. Patra and Nipun Malhotra for M/s. O.P. Khaitan & Co. for the Respondent.

The Judgment of the Court was delivered by

D **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:

E 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

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H 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 appellants 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.

A 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.

B 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

C their letter dated 9th September, 1992 to sell at the following prices:

	Monoblock Stopper	@ Rs. 5,650 each
	Submerged Nozzle	@ Rs. 4,060 each
D	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:-

E "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

F 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."

G	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)"
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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. Vishakapatnama 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.

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

- C** S.K.S. Appeal disposed of.