2014 (1) ECS (132) (Tri – Ahd.)

Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench, Ahmedabad

Date of Decision: 3.12.2013

M/s LEAR AUTOMOTIVE INDIA PVT LTD.

Vs.

CCE & S.T., VADODARA II

Appeal No.:E/48/2007 – DB

Arising out of OIO No: 06/Commr/VDR-II/MP/06-07 dated 28.09.2006 passed by the Commissioner of C.E.C & S.T. Vadodara II

Appearance:
Shri Anand Nainavati (Adv.) For the Appellant
Shri S.K. Mall (AR) For the Respondent

CORAM:
Mr. H.K. Thakur, Hon'ble Member (Technical)
Mr. M.V. Ravindran, Hon'ble Member (Judicial)

(FINAL Order No. A/11625/2013 dated 03.12.13)

"It is irrelevant as to how appellant gets the parts/components developed and manufactured but what is appropriately relevant is that such amount received is a consideration with respect to the finished manufactured seats required by M/s GMI. Accordingly, it is required to be held that appropriate element of cost, enhancing the value of the component/ parts, will also required to be added to the assessable value of the seats." (Para 6)

Per: H. K. Thakur, Mr. :
This appeal has been filed by the appellant against OIO No. 06/Commr/ VDR II/MP/06-07 dated 28.09.2006 under which duty demand of Rs. 15,06,559/- has been confirmed against the appellant and also appropriated against the payments already made by the appellant. Interest under Section 11 AB and penalty under Section 11 AC has also been confirmed/imposed upon the appellant with respect to the confirmed demands.

2. Brief facts of the case are that appellant in their factory at Halol manufacture the Seats and Interiors of automobiles for M/s General Motors India Pvt. Ltd. (GMI), Halol. For the manufacture of the above products appellant is required to get several components purchased/manufactured from other vendors. The manufactures of such components/parts had to develop certain tools and moulds for the manufacture of such parts. For the development of such

tools/moulds, M/s GMI has given an advance of Rs. 1,85,65,000/- to the appellant as 'tooling advance'. Appellant instead of developing the tools/moulds developed themselves got the same outsourced through its vendors, who used the same for the purpose of manufacture of various parts/components which are brought back to the appellant's factory and used in the manufacture of Seats etc., and cleared to M/s GMI on payment of duty. In the process an amount of Rs. 1,52,35,971/- is paid to the vendors out of total tooling advance of Rs. 1,85,65,000/- received by the appellant from M/s GMI and the remaining amount of Rs. 32,29,029/- is retained by the appellant. It is the case of the Revenue that entire amount of Rs. 1,85,65,000/- is required to be added to the assessable value of the seats manufactured by the appellant on amortized basis while discharging duty liability on the finished seats.

3. Shri Anand Nainavati (Advocate) appearing on behalf of the appellant argued that the entire amount of tooling advance is received by the appellant for developing tools/moulds for the parts which are got manufactured by the appellant from the vendors. Addition of this element of consideration on amortized basis, if any, has to be done only by the vendors who are the manufacturer of the parts, as was done by one of the vendors M/s Tractor and Farm Equipment Ltd. (TAFE). It was also his argument that if such amortized cost has not been added by the other job worker vendors than the same element can not be added while arriving at the assessable value of the seats manufactured by the appellant. Learned Advocate made us go through the provision of Rule 6 of the Central Excise [Determination of Excisable Goods] Rules 2000 and Explanation – 1 to this Rule. He emphasized that as per Explanation – 1 (ii) of Rule 6, the amortized cost has to be added only in that product for which developed tools/moulds are used. He relied upon the judgment of CESTAT, Mumbai in the case of M/s Lear Automotive India Pvt. Ltd., vs. C.C.E., Nashik [2012 (286) ELT 558 (Tri. Mumbai)] to drive home the point that Rule 6 of the Valuation Rules is not applicable and that such element is not includible in the assessable value of the seats as per Section 4 (3) (b) of the Central Excise Act 1944 read with Rule 11 of the Valuation Rules. It was his case that Show Cause Notice has not been issued invoking the provision of Rule 11 of the Valuation Rules and Section 4 (3) (b) of the Central Excise Act.

4. Shri S.K. Mall (AR) appearing on behalf of the Revenue on the other hand also relied upon the judgment of M/s Lear Automotive India Pvt. Ltd., vs. CCE., Nashik (Supra) in support of the fact that this judgment on majority order has decided the issue against the appellant. He also relied upon the following judgments of Apex Court and jurisdictional High Court of Gujarat to the effect that a

wrong rule quoted in the Show Cause Notice will not invalidate the notice: -

(i) *N.B. Sanjana, AC., Central Excise, Bombay and others vs. the Elphinstone Spinning & Weaving Mills Co. Ltd. [1978 (2) ELT (J399)] (S.C)].*

(ii) *Petlad Bukhidas Mills Co. Ltd. vs UOI [200(126)ELT 269 (Guj.)]*

5. Heard both sides and perused the case records. The issue involved in the present appeal is whether the element of cost incurred for developing tools and moulds for manufacturing components and further used in the manufacture of seats manufactured by the appellant, is required to be added to the assessable value of seats and cleared by the appellant to M/s GMI. Appellant argued that such an element on amortized basis was required to be added to the assessable value of the parts/components manufactured by the vendors, as done by TAFE, under Rule 6 of the Valuation Rules 2000 and can not be added to the assessable value of the finished seats. Appellant's argument could be true to that extent if duty was proposed by Revenue to be collected from the appellant with respect to parts/components manufactured by vendors. If the vendors have escaped non payment of appropriate duty, by not including the amortized cost of tools/moulds, it does not mean that the said element of amortized cost will not enhance the cost of the components used by the appellant in the manufacture of the finished goods (seats). Accordingly, all such elements of amortized cost, required to be added to the assessable value of the components but was not so included, will enhance the value of the seats cleared by the appellant to M/s GMI on payment of duty. In this regard, para 4.1 and 4.2.1 of the OIO dated 29.9.2006 passed by the Adjudicating Authority are relevant and are reproduce below:

"4.1. The first allegation against the Assessee company is that the tooling advance of Rs. 33,29, 029/- received by the Assessee company from M/s GMI, which was retained by them as such, is to be treated as additional consideration which has influenced the price at which they sold the automobile seats and other interiors to M/s GMI and therefore the Assessee company should have paid duty on this amount also in accordance with the provisions of Rule 6 of the Central Excise (Valuation) Rules, 2000. As per the provisions of Rule 6 of the Central Excise (Valuation) Rules, 2000 where excisable goods are sold in the circumstance specified in clause (a) of sub – section (1) of the Section 4 except the circumstances where the price is not the sole consideration for sale, the value of such goods shall be deemed to be aggregate of such transaction value and the amount of monetary value of such consideration flown directly or indirectly from the buyers to the Assessee. Since the assessee in addition to the price of the goods sold by

them to M/s GMI have also received an amount of Rs. 33,29,029/- as part of tooling advance, which has been retained by them as such, this amount is to be treated as additional consideration and the same would be part of the Assessable Value of the goods sold by the Assessee company to M/s GMI and therefore the Assessee company would be liable to pay central excise duty on this amount. In fact, this point has been conceded by the Assessee themselves in their written reply to the Show Cause Notice as well as at the time of personal hearing and they have already paid the duty amounting to Rs. 5,32,645/- chargeable on this amount even prior to the issue of the show cause notice. However, it is pleaded that there was no intention on the part of the Assessee to evade this payment of duty as the Cenvat credit or duty paid by them would be available to M/s GMI and as such the valuation matter is revenue neutral and hence longer limitation period under proviso to Section 11 A (1) is not applicable to this case and since the Assessee have voluntarily paid the amount even prior to the issue of the show cause notice, the Assessee should not be asked to pay any interest on this duty as per the provisions of Section 11 AB of the Central Excise Act, 1944 and are also not liable for any penalty under Section 11 AC of Central Excise Act 1944 or under Rule 25 (1) of Central Excise Rules, 1944. This plea of the assessee is not acceptable as firstly revenue neutrality cannot be the ground for observance of mensrea and secondly the receipt of tooling advance of Rs. 1,85,65000/- from M/s GMI for developing tools/moulds for M/s GMI for manufacture of components of the automobile seats/other interiors for M/s GMI was never disclosed by the Assessee in the ER-1 returns filed by them or in any other communication from them to the Department and if this matter had not been detected by the officers of the DGCEI, the same would have remained unknown. Thus, the Assessee Company is guilty of not disclosing the vital information to the department and, therefore, longer limitation period of 5 years under proviso to Section 11 A (1) would be available to the department for recovery of short paid duty and for the same reason the Assessee would also be liable for penalty under Section 11 AC of the Central Excise Act, 1944 on this account. Besides this the Assessee would also be liable to pay interest at the applicable rate on this duty as per the provisions of Section 11 AB of the Central Excise Act, 1944.

4.2 Out of tooling advance of Rs. 1,86,65,000/- received by the Assessee by M/s GMI, an amount of Rs. 1,52,35,971/- was transferred by the Assessee to their vendors for development of tools/moulds for M/s GMI to be used in to the manufacture of components for automobile seats/other interiors sold by them to M/s GMI. The department's contention is that since the tools/moulds required for manufacture of the parts of automobile seats/ other interiors had been supplied by M/s GMI to the Assessee company free of cost, he amortized value of these tools/moulds must also be treated as additional consideration and must be included in the Assessable Value of the goods sold by the Assessee company to M/s GMI. The duty demanded

from the Assessee on this account is Rs. 9,73,914/-.

The Assessee have not disputed that the amortized value of tools/moulds developed of M/s GMI for manufacture of correspondents of the automobile seats/other interiors must be included in the Assessable value as the same is additional consideration. However, their contention is that since an amount of Rs. 1,52,35,941/- out of the total amount of Rs. 1,85,65,000/- received from M/s GMI as tooling advance, had been transferred by them to their vendors for development of tools/moulds for M/s GMI, this amount is to be treated as additional consideration in the hand of their vendors and not in their hands and therefore, the amortized value of tools/moulds must be included in the Assessable value of the components cleared by their vendors to them and as such the demand of differential duty on this account must be directed against their vendors and not against them. The contention of the Assessee is totally wrong and unacceptable as it is they who had entered into a contract with M/s GMI for manufacture and supply automobile seats/other interiors as per the specifications of M/s GMI and it is they (the Assessee Company) who had received the tooling advance of Rs. 1,85,65,000/- from M/s GMI for development of tools/moulds for manufacture of various components for use in the manufacture of automobile seats/other interiors. From the point of view of M/s GMI, it is immaterial whether the Assessee company developed the tools/moulds and manufacture all the components and thereafter assemble the automobile seats/other interiors or the Assessee company got the tools/moulds manufactured through those vendors. It was, therefore, the responsibility of the Assessee Company to ensure that the amortized value of the tools/machines got developed through their vendor for M/s GMI is included in the value of the automobile seat/other interiors cleared by them to M/s GMI. If the tooling advance had not been given by M/s GMI to the Assessee Company for the manufacture of the tools/moulds for use in the manufacture of components of the automobile seats/other interiors, it is the Assessee Company which would have had to make the required investment for the development of such tools/moulds and this would have been reflected in the price of the automobile seats / other interiors being supplied by them to M/s GMI. The Assessee Company obviously have been charging a lower price from M/s GMI for automobile seats/other interiors in view of the tooling advance provided by M/s GMI. Thus, the tooling advance of Rs. 1,52,35,971/- used for development of tools/moulds has influenced the price of the automobile seats/other interiors supplied by the Assessee to M/s GMI and therefore, as per the provisions of Rule 6 of the Central Excise Valuation Rules, 2000 the amortized value of the cost of tools/moulds would be includible in the Assessable Value of the automobile seats/interiors sold by the Assessee to M/s GMI. I, therefore, hold that the differential duty of Rs. 9,73,914/- chargeable on the amortized value of the tools/moulds developed for M/s GMI out of the tooling advance

provided by M/s GMI is recoverable from the Assessee under Section 11 A (1) of the Central Excise Act, 1944 not from the vendor. Since as discussed above, the Assessee never disclosed to the department about the tooling advance received from M/s GMI either in their ER-1 returns or in any other communication to the department, the longer limitation period under proviso to Section 11 A (1) of the Central Excise Act, 1944 would be avoidable to the department for recovery of this amount also and for the same reason the Assessee would also be liable for penalty under Section 11 AC of the Central Excise Act, 1944 on this account. Besides this, the Assessee would also be liable to pay interest on this short paid duty under the provisions of Section 11 AB of the Central Excise Act, 1944."

6. In view of the exhaustive reasoning given by the adjudicating authority, it is evident that M/s GMI has given a contract to the appellant to supply him a manufactured product and for that purpose an amount is given for developing the tools/moulds required for parts/components which are used in the manufacture of seats supplied to M/s GMI. It is irrelevant as to how appellant gets the parts/components developed and manufactured but what is appropriately relevant is that such amount received is a consideration with respect to the finished manufactured seats required by M/s GMI. Accordingly, it is required to be held that appropriate element of cost, enhancing the value of the component/ parts, will also required to be added to the assessable value of the seats. Our views are also fortified by the observations made by the dissenting Member (T) in para 16.6 and observations made by Third Member (T) made in Para 29.2 and 29.3 of judgment in the case of M/s Lear Automotive India Pvt. Ltd., vs. CCE., Nashik [2012 (286) ELT 558 (Tri.-Mumbai)]. These Paras are reproduced below:

"16.6. From the Explanation to Rule 6, it is seen that this rule applies to all the 4 clauses of the Explanation and to each entry in the Explanation. The enumerated list includes only money value of any additional consideration, which is not the same as money. Thus the additional consideration by way of money cannot be aggregated with the transaction value under Rule 6. Secondly, in the facts of this case, the Rule 11 read with Section 4(3) (d) of the Central Excise Act, 1944 seems to be more appropriate. In this connection, "transaction value" in Section 4 (3) (d) may also be noticed. Section 4(3) (d) reads as follows :-

"transaction value means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing

and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter, but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

29.2 The next question is under what provision of law the tool advance has to be included in the assessable value, whether under Rule 6 of the Central Excise Valuation Rules as held by Member (Judicial) or under Rule 11 of the said Rules read with Section 4 (3) (d) of the Central Excise Act, as held by Member (Technical). On perusal of the order recorded by the Member (Judicial), I find that the Hon'ble Member (Judicial) has referred to the buyer of the goods (M/s Mahindra & Mahindra) as Principal Manufacturer and this is factually incorrect. The agreement between M/s. Mahindra and Mahindra, the buyer and M/s. Lear Automotive India Pvt. Ltd. (appellant in the case), the manufacturer and seller, is on principal to principal basis. There is no principal – sub-ordinate relationship involved in these transactions. Ld. Member (Judicial) has come to the conclusion that since the advance has been used for making tools for the goods manufactured by them to be supplied to their principal manufacturer and hence, the appropriate rule for valuation is Rule 6. Since the demand has been made under Rule 11, there is no suppression.

29.3. Rule 6 of the Central Excise Valuation Rules deals with a situation where the price is not the sole consideration for sale and there is additional consideration flowing directly or indirectly from the buyers to the assessee. The Explanation to the rule clarifies and enumerates 4 situations where the additional consideration flows directly and indirectly. A reading of the rule read with the explanation thereto clearly indicates that the additional consideration is received either by way of supply of goods or by way of supply of services. In such a situation, the money value of additional consideration has to be quantified and added to the price to arrive at the transaction value. When the consideration it self is received in money as advance, the question of quantification of money value does not arise. The definition of transaction value under Section 4 (3) (d) includes all amounts charged by reason of or in connection with the sale, whether payable at the time of sale or at any other points of time. In the instant case, there is no doubt that the tool advance was received in money for the supply and sale of goods by the appellant to the buyer. Therefore, such advance/consideration received, irrespective of the purpose for which it has been used, will be includible in the transaction value on which excise duty liability has to be discharged."

7. So far as not quoting the provisions of Rule 11 of the Valuation Rules 2000 and Section 4 (3) (d) of the Central Excise Act 1944 in the Show Cause Notice is concerned, Appellant argued that on this ground also demands and penalties are required to be set aside.

It is observed from the judgment of Apex Court in the case M/s N B Sanjana & Others vs. Elphinstone Spinning & Weaving Mills Co Ltd., [1978 (2) ELT (J399) (SC)], followed by Gujarat High Court judgment in the case of M/s Petled Bulkhidas Mills Co Ltd. [2000 (126) ELT 269(Guj.)], that quoting of a wrong provision of Law in the Show Cause Notice, does not vitiate the proceedings. In para 14 of Supreme Court's judgment in the case of M/s N B Sanjana & Others vs. the Elphinestome Spinning and Weaving Mills Co Ltd (Supra) following Law has been laid down: -

"14. We are not inclined to accept the contention of Dr. Syed Mohammed that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3 (l) specifically says "There shall be levied and collected in such a manner as may be prescribed the duty of excise……..". It is to be noted that sub-section (1) uses both the expressions "levied and collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection. Dr. Syed Mohammad is, no doubt, well founded in his contention that if the appellants have power to issue notice either under Rule 10 – A or Rule 9 (2) the fact that the notice refers specifically to a particular rule, which may not be applicable, will not make the notice invalid on that ground as has been held by this Court in J.K. Steel Ltd. v. Union of India, (1969) 2 SCR 418 (AIR 1970 SC 1173):

"If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under different power does not vitiate the exercise of the power in question. This is a well settled proposition of law, in this connection reference may usefully be made to the decisions of this court in B Balakotalah v. Union of India, (1958) SCR 1052 = (AIR 1958 SC 232); Afzal Ullah v. State of U.P., (1964) 4 SCR 1991 – (AIR) 1964 SC 264)."

8. In the light of the above observations made OIO dated 28.09.2006 passed by the Adjudicating Authority is required to be upheld. Appeal filed by the appellant is accordingly rejected.

(Pronounced in the Court on 3.12.2013).