

M/S. UTC FIRE AND SECURITY INDIA LTD.

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v.

COMMISSIONER OF CENTRAL EXCISE, BELAPUR

(Civil Appeal Nos. 4977-4978 of 2004)

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APRIL 10, 2015

**[A.K. SIKRI AND R. F. NARIMAN, JJ.]**

*Central Excise Act, 1944: s.4(1)(a),(b) – Valuation of certain goods used captively by the appellant in the turnkey contracts – Manufacture of smoke detectors and parts thereof and sold by assessee in two distinct streams; in loose condition and as part of turnkey projects – In the instant matters, work contract for turnkey project undertaken by assessee for setting up of fire fighting system in the building wherein smoke detectors and parts used – Basis of valuation of smoke detectors and parts thereof – Held: The case is not covered u/s.4(1)(a) and is covered u/s.4(1)(b) – In view thereof, it is 1975 Rules which is applicable – r.4 would be applicable only in those cases where value of “such goods” which are sold by assessee for delivery at any other time nearest to the time of the removal of the goods under the assessment appears to be reasonable to the concerned officer – Here, goods cannot be treated as same or would fall within the description “such goods” as sold to the other buyers in loose form when they are used captively by appellant in turnkey projects – r.7 which deals with ‘best judgment assessment’ is applicable – Central Excise (valuation) Rules, 1975 – r. 7.*

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**Allowing the appeals, the court**

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**A HELD: It is not a case where Section 4(1) (a) of the Act is applicable. That is the common case of the parties. As per Section 4(1)(a) of the Act, normal prices of the goods, viz., the prices at which such goods are ordinarily sold by the Assessee to a buyer, is to be**

**B taken into consideration, subject, of course, to the condition that the buyer is not a related person and the price is the sole consideration for the sale. In this case, even the Assistant Commissioner in his final order, accepted that the case was covered by Section 4(1)(b)**

**C of the Act meaning thereby, he accepted the position that normal price of the goods in question was not ascertainable. It is only in such a situation that Section 4(1)(b) of the Act gets attracted. This provision further mentions that in such an eventuality, where the normal**

**D price of the goods is not ascertainable for the reasons given in the said provision, the criteria to ascertain the price mentioned is the “nearest ascertainable equivalent thereof”. This is to be determined in such manner as may be prescribed. Manner is prescribed in**

**E the Valuation Rules, 1975. Rule 4 would be applicable only in those cases where value of “such goods” which are sold by the assessee for delivery at any other time nearest to the time of the removal of the**

**F goods under the assessment, appears to be reasonable to the concerned officer. Here, the goods cannot be treated as same or would fall within the description “such goods” as sold to the other buyers in loose form when they are used captively by the**

**G appellant in the turnkey projects. The only mistake which is committed by the Commissioner is to refer to Rule 6(b) inasmuch as in the present case, the goods are not consumed by the appellant/assessee itself but used in the turnkey projects/contracts meant for the**

**H third party. Thus, it was Rule 7 which should have**

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been referred to by the Commissioner (Appeals) as A  
none of the proceeding rules would apply. To put it  
otherwise, it is the case of 'best judgment assessment'.  
However, that is the exercise otherwise undertaken by  
the Commissioner (Appeals) in accepting the costing of B  
the goods which was placed by the assessee/appellant  
before the assessing officer and it was taken into  
consideration by the Commissioner (Appeals).  
[Paras12, 13] [403-E,F; 408-F-H; 409-A-C]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. C  
4977-4978 of 2004

From the Judgment and Order No. C-A/148/WZB/04-C-  
II and M/76/WZB/04-C-II dated 05.05.2004 of the Customs  
Excise and Service Tax Appellate Tribunal, West Regional D  
Bench at Mumbai in Appeal No. E/2727/98 and E/CO-230/  
98.

Somnath Shukla, Alok Yadav, Praveen Kumar for the  
Appellant.

K. Radhakrishnan, Shweta Garg, Rupesh Kumar, B.  
Krishna Prasad for the Respondent. E

The Judgment of the Court was delivered by

**A. K. SIKRI, J.** 1. The instant appeals are filed against F  
the final judgment and order dated 05.05.2004 passed by  
the Customs, Excise and Service Tax Appellate Tribunal  
(hereinafter referred to as 'CESTAT'), whereby the appeal of  
the Revenue against the order of the Commissioner  
(Appeals) was allowed. The dispute pertains to the valuation G  
of certain goods used captively by the appellant in the  
turnkey contracts, in the following circumstances.

2. The appellant, *inter alia*, manufactures smoke H  
detectors and parts thereof. These goods are sold in two

A distinct streams as under: -

(a) sales in loose condition; and

B (b) sales as part of turnkey projects where no separate values are recovered for the sale of these goods but the price of the goods forms part of an overall consideration mentioned for such turnkey contracts.

C 3. Insofar as the turnkey projects are concerned, the appellant takes the works contracts which are awarded by certain buyers for setting up of the fire fighting system in the buildings. In executing these turnkey projects to set up the fire fighting system, the aforesaid smoke detectors and parts thereof are also used. It is the valuation of these smoke detectors and parts thereof for the purpose of payment of excise duty which is bone of contention.

D 4. The Assessing Officer had issued six Show Cause Notices dated 29.09.1995, 28.03.1996, 03.06.1996, E 02.09.1996, 03.03.1997, 17.7.1997. It was alleged in these Show Cause Notices that since the aforesaid smoke detectors and parts thereof are captively used by the appellant, insofar as the turnkey contracts are concerned, for the purpose of their valuation, the price at which the same smoke detectors and parts thereof are sold by the assessee F in loose condition will be treated as price and the excise duty shall be paid accordingly. The perusal of these Show Cause Notices further demonstrates that in order to apply the aforesaid principle, the assessing officer mentioned that this G was as per Section 4(1)(a) of the Central Excise Tariff Act (hereinafter referred to as 'Act' for short).

H 5. The appellant submitted his reply. At that stage, the appellant even filed his written submissions before the

assessing officer. The case pleaded by the appellant was that the matter would not be covered under Section 4(1)(a) and was covered under Section 4(1)(b). He further submitted that in view thereof, it is the Central Excise (Valuation) Rules, 1975 (hereinafter referred to as 'Valuation Rules, 1975') which were to be applied in the given case. According to him, none other Rule than Rule 7 which deals with 'best judgment assessment', should be made applicable.

6. After hearing the appellant, the Assessing Officer passed the orders and applied Rule 4 of the aforesaid Valuation Rules, 1975. On the application of this Rule, he took the value of the goods in question at the same rate at which the appellant has been supplying smoke detectors and parts thereof in loose condition.

7. The appellant preferred the appeal against the order of the Assessing Authority before the Commissioner (Appeals). The Commissioner (Appeal) decided the said appeal in favour of the appellant by examining all the aspects in detail. In his opinion, it was not a case where the provisions of Section 4(1)(a) will be applied. He also recorded his finding that even Rule 4 of the Valuation Rules, 1975, had no application. Thereafter, he referred to Rule 6(b) and came to the conclusion that it is this Rule that shall be applicable.

8. We may point out at this stage that the appellant had submitted cost analysis of the aforesaid inputs which are captively used for the turnkey projects and added a margin of 10 per cent thereupon as its profits. This cost analysis submitted by the appellant was duly certified by the Chartered Accountant even before the dispute had arisen. It is also relevant to mention here that the margin of profit otherwise charged by the appellant in respect of entire turnkey project was restricted to 4 to 5 per cent. The

A Commissioner, therefore, accepted the cost so arrived at and held that it is that cost which would be treated as value for the purpose of excise duty. Para 11 of the order of the Commissioner which deals with this aspect in detail is reproduced hereunder: -

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“The appellants have worked out the details of costing in respect of the said items under dispute duly certified by Chartered Accountants even prior to the period of dispute. These prices are also inclusive of margin of 10%, whereas appellants claim is that the margin of profit in

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respect of the entirely turnkey projects is restricted from 4% to 5%. However, this question is not entirely relevant to the issue. The only relevance is in respect of the question whether the prices

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determined on costing method for the individual disputed parts as prescribed under Rule 6(b) of the Valuation Rules, can be accepted under the law in cases of turnkey projects. I, accept the merits in the claim of the appellants that the class of buyers,

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sought to be compared by the Assistant Commissioner, are two different classes. Also, that there is no determination of a single normal price in respect of disputed parts, also supplied for

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commissioning to turnkey projects at site. Therefore, the only legal acceptable method under the present facts would be to resort to the provisions of the Central Excise Valuation Rules prescribed under

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Section 4(1)(b) of the Act. While it can be accepted that the subject goods supplied to individual buyer under an invoice, and those sent for commissioning of

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turnkey projects without any support invoice for this parts, are comparable goods, this fact would only have been utilised for determination of assessable

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value in requirement of Rule 6(b)(1) of the Valuation Rules. However, there is no liberty to the authorities under this Rule to charge duties on the highest value as supplied to individual buyers, but the law required that necessary adjustment in prices shall be made taking into the facts for adjustment for price in under relevant existing factors. In the present case, the requirement for adjustment would be difficult as these are two different class of buyers, and therefore two different consideration shall prevail in establishment of the prices. Therefore, a better and more acceptable method would be to resort to the costing method under Rule 6(b)(ii) of the Central Excise Rules.

In the present case, the appellants have also earlier informed to the Department the costing in respect of the subject disputed items in their letter dated 11.03.1994, supported by certificate from Chartered Accountant. This rejects around 10% margin of profit, from other costing details. I find that the details claimed to be reported to the Central Excise authorities has not been in specific term acknowledged in the impugned order, which reflects only the rejection of the appellants claim for pricing on costing under Section 4(1)(b) of the Act. Therefore, is the same is filed with the authorities, along with the costing certificate by the Chartered Accountant, the same should not be accepted as the basis for regulation of the assessable value for the disputed goods supplied under turnkey projects.”

9. The Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') while setting aside the aforesaid order held that as the case is covered by Section 4(1)(b) of the Excise Act, 1944, it is the Valuation Rules 1975 which would be applicable. However, according

A to the CESTAT, it is Rule 4 which is applicable in the present case. The order of the CESTAT reveals that while holding so, no reasons were given in a short one page order. The aforesaid aspect is dealt with, in one paragraph, i.e., paragraph (c), which is as under: -

B “Applying the Rules, it is found Rule 4 stipulates that ‘value’ shall be based on value fill goods sold with adjustments. The respondents are contesting that identical goods are not sold. They have not produced any evidence to substantiate the same. The lower authority has fixed the value under rule 4 and no reasons are brought out, before us in this appeal to set aside that fixation. The valuation arrived at as rule 4 is upheld along with consequential duty demands.”

10. The only observations which is made in the aforesaid paragraph is that the contention of appellant herein that the goods sold in the loose form are not the same or identical goods which are used in the turnkey projects, is brushed aside with the observations that the appellant-assessee had not been able to produce any evidence to substantiate this. Apart from making this remark, there is no other discussion in the impugned order. It appears that the CESTAT did not even care to read the order of the Commissioner where this aspect was considered in great detail while coming to the conclusion that Rule 4 would not be applicable in the instant case. This can be discerned from the following passage contained in the order of the Commissioner (Appeals):

H “Accordingly, it is claimed that the Assistant Commissioner has erred in seeking to apply the price for loose sales of items to individual buyers, and the

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highest this respect the only method by each of the assessable value in respect of the limited dutiable items, supplied along with a large number of other bought-out items, can be the costing method. The costing in respect of each of these individual items have been already determined by the appellants and informed to the Department in their letter dated 11.03.94. It is their claim that the same costing is also considered by the appellants while determining the total costing of the turnkey project. Shri P.R. Sahoy, Director of the appellants firm, stated that the normal margin of profit for turnkey projects is around 4 to 5%, after taxation. However, in several contracts, because of subsequent need to supply a larger number of items than usually required in the commissioning of the project effectively, the appellants some time also do not earn any profit at all. In any case, the margin of profit reflected for each of the individual dutiable items on the basis of costing stated to the Department in their letter dated 11.3.94, a consistent profit at the rate of 10% has been shown. According to the representative, this higher margin of profit was accepted for by the appellants after receiving direction from the Department that the normal acceptance for profit on costing basis will be 10%. It is therefore their claim that the said price for individual dutiable items, worked out by the appellants and informed to the Department, should be the basis for chargeability to duty in respect of turnkey project supply, as the appellants have also worked out their costing of the project by taking their price and also that this is a different class of buyer. Even in case where the appellants have entered into contract for erection of fire

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A protection system at site under a consolidated price,  
but with a stipulation that the progressive payment  
shall be received on the break-up price, it is their  
claim that the break-up price (for obtaining progressive  
payments) are not indicative of the correct price  
B for the items but is only a loose estimation made  
for obtaining periodic payments during erection  
period. It is therefore that even if the contract stipulated  
this break up price for realization of payments, these  
shall only be for relevant for realization of progressive  
C payment from the contracting positing, and shall not be  
construed for any other purpose.”

11. What emerges from the aforesaid discussion is that  
though in the Show Cause Notice the Assistant  
D Commissioner had mentioned the applicability of Section  
4(1)(a) of the Act, even he abandoned that course of action  
while passing the order. In the final order passed by him, he  
accepted that the case was covered by Section 4(1)(b) of  
the Act and therefore, applied the Valuation Rules, 1975.  
E Further, as per him, it is the Rule 4 which was applicable. On  
the other hand, as per the Commissioner (Appeals), Rule 4  
was not applicable and he invoked Rule 6 of the Valuation  
Rules, 1975.

F 12. Thus, one thing is clear. It is not a case where  
Section 4(1)(a) of the Act is applicable. That is the common  
case of the parties. As per Section 4(1)(a) of the Act, normal  
prices of the goods, viz., the prices at which such goods are  
ordinarily sold by the Assessee to a buyer, is to be  
G taken into consideration, subject, of course, to the condition  
that the buyer is not a related person and the price is the  
sole consideration for the sale. In this case, as mentioned  
above, even the Assistant Commissioner in his final order,  
accepted that the case was covered by Section 4(1)(b) of  
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the Act meaning thereby, he accepted the position that A  
normal price of the goods in question was not ascertainable.  
It is only in such a situation that Section 4(1)(b) of the Act  
gets attracted. This provision further mentions that in such an  
eventuality, where the normal price of the goods is not B  
ascertainable for the reasons given in the said provision, the  
criteria to ascertain the price mentioned is the "nearest  
ascertainable equivalent thereof". This is to be determined in  
such manner as may be prescribed. Manner is prescribed in  
the Valuation Rules, 1975. Therefore, we have to consider as C  
to which Rules of the Central Excise (Valuation) Rules, 1975  
is applicable. Since there is a dispute between the  
applicability of Rule 4 and Rule 6, we will like to reproduce  
these two Rules along with Rule 3 and Rule 7 as well in  
order to present the complete picture. D

"RULE 3. The value of any excisable goods shall,  
for the purposes of clause (b) of sub-section (1) of  
Section 4 of the Act, be determined by the proper  
officer in accordance with these rules. E

RULE 4. The value of the excisable goods shall be  
based on the value of such goods sold by the  
assessee for delivery at any other time nearest to the  
time of the removal of goods under assessment, F  
subject, if necessary, to such adjustment on  
account of the different in the dates of delivery of  
such goods and of the excisable goods under  
assessment, as may appear reasonable to the proper  
officer. G

RULE 6. If the value of the excisable goods  
under assessment cannot be determined under rule 4  
or rule 5, and -

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A (a) where such goods are sold by the assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a person other than a related person:

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C Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other relevant factors;

D (b) where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based - comparable goods (i) on the value of the produced or manufactured by the assessee or by any other assessee:

E Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

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G (ii) if the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods;

H (c) where the assessee so arranges that the excisable goods are generally not sold by him in the course of wholesale trade except to or through a related person

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and the value cannot be determined under clause A

(iii) of the proviso to clause (a) of sub-section (1) of Section 4 of the Act, the value of the goods so sold shall be determined - sells the

(i) in a case where the assessee goods to a related person who sells such goods in retail, in the manner specified in clause (a) of this rule; B

(ii) in a case where a related person does not sell the goods but uses or consumes such goods in the production or manufacture of other articles, in the manner specified in clause (b) of this rule; C

(iii) in a case where a related person sells the goods in the course of wholesale trade to buyers, other than dealers and related persons, and the class to which such buyers belong is known at the time of removal, on the basis of the price at which the goods are ordinarily sold by the related person to such class of buyers. D

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RULE 7. If the value of excisable goods cannot be determined under the foregoing rules, the proper officer shall determine the value of such goods according to the best of his judgment, and for this purpose he may have regard, among other things, to any one or more of the methods provided for in the foregoing rules." F

13. Rule 4 would be applicable only in those cases where value of "such goods" which are sold by the assessee for delivery at any other time nearest to the time of the removal of the goods under the assessment, appears to be reasonable to the concerned officer. Here, as already noted above, from the detailed discussion in the order of G

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A Commissioner (Appeals), the goods cannot be treated as same or would fall within the description "such goods" as sold to the other buyers in loose form when they are used captively by the appellant in the turnkey projects. We find that the only mistake which is committed by the Commissioner is to refer to Rule 6(b) inasmuch as in the present case, the goods are not consumed by the appellant/ assessee itself but used in the turnkey projects/ contracts meant for the third party. Thus, it was Rule 7 which should have been referred to by the Commissioner (Appeals) as none of the preceding rules would apply. To put it otherwise, it is the case of 'best judgment assessment'. However, we find that, that is the exercise otherwise undertaken by the Commissioner (Appeals) in accepting the costing of the goods which was placed by the assessee / appellant before the assessing officer and it was taken into consideration by the Commissioner (Appeals). We have already reproduced para 11 of the said order.

E 14. The offshoot of the aforesaid discussion would be to set aside the order of the CESTAT and restore the order of the Commissioner (Appeals) with the modification that the same result is arrived at as concluded by the Commissioner (Appeals) with reference to Rule 7 of the Valuation Rules, 1975, instead of Rule 6. The appeals are, accordingly, allowed with no orders as to costs.

Devika Gujral

Appeals allowed.