

CHAPTER III VALUATION OF EXCISABLE GOODS

Duty at ad valorem rates is charged on a wide range of excisable commodities. Valuation of such goods is governed by section 4 of the Central Excise Act, 1944, read with the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Valuation with reference to the retail sale price in respect of specified excisable goods is governed by section 4A of the above Act. A few cases of short levy of duty due to incorrect valuation involving revenue of Rs. 12.42 crore, are illustrated in the following paragraphs. These observations were communicated to the Ministry through 23 draft audit paragraphs. The Ministry/department has accepted (till December 2009) the audit observations in 15 draft audit paragraphs with a revenue implication of Rs. 7.65 crore, of which Rs. 3.33 crore has been recovered.

3.1 Incorrect determination of cost of excisable goods

Rule 8 read with proviso to rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 envisages that where excisable goods are not sold by the assessee but are consumed by it or by a related person of the assessee in the manufacture of other articles, the assessable value of such goods shall be one hundred and ten per cent of the cost of production or manufacture of such goods. Further, the Board had clarified (13 February 2003) that the value of goods consumed captively should be determined in accordance with the Cost Accounting Standard (CAS-4) method only.

3.1.1 M/s BSNL (Telecom factory), in Kolkata V commissionerate, engaged in the manufacture of telecom tower, SS drop-wire etc., cleared goods to its different telecom circles paying duty on the assessable value arrived at on 'cost basis'. Scrutiny of records indicated that the assessable value was determined by adopting value of raw materials which was lower than the actual value. This resulted in short levy of duty of Rs. 20.40 lakh during the period from May 2005 to March 2006.

On this being pointed out (January 2007), the department accepted the audit observation and reported (August 2008) that a show cause cum demand notice for Rs. 1.43 crore for the period 2003-04 to 2006-07 had been issued out of which Rs. 1.17 crore had also been recovered. The recovery particulars of balance amount of Rs. 0.26 crore were awaited (October 2009).

The reply of the Ministry has not been received (December 2009).

3.1.2 M/s IFB Industries Ltd., in Kolkata VI commissionerate, engaged in the manufacture of auto parts, cleared goods to related company paying duty on assessable value arrived at on 'cost basis'. Audit noticed that the assessee had failed to consider a few cost elements while determining the assessable value of the goods which resulted in short levy of duty of Rs. 34.79 lakh during the period from April 2005 to June 2006.

On this being pointed out (July 2006), the department accepted the audit observation and intimated (January 2009) that a show cause notice for Rs. 1.04 crore covering the period April 2005 to December 2007 had been issued.

The reply of the Ministry has not been received (December 2009).

3.1.3 M/s Pearl Industries Barotiwala, in Chandigarh I commissionerate, engaged in the manufacture of additive mixture flavoured 'kiwam', cleared the goods to its sister concern on invoice value (transaction value) instead of assessable value arrived at on cost basis. The value was re-determined by the department under the Valuation Rules and the differential duty was recovered in August 2001. Audit observed that the assessable value adopted by the department was undervalued approximately by ten per cent. Moreover, value determined at one hundred and fifteen per cent of the cost of production was incorrectly adopted as cum-duty-price. This resulted in short levy of duty of Rs. 87.82 lakh during the period between January 2001 and September 2001 which was recoverable with interest.

On this being pointed out (May 2003), the department stated (December 2003 and November 2008) that the question of valuation under rule 8 did not arise as the case was covered under section 4(3)(b)(i) of the Central Excise Act, 1944 and not under section 4(3)(b)(ii).

The reply is not tenable as valuation was to be done by invoking provisions of rule 8 of the Valuation Rules in view of rule 10(a) read with the proviso to rule 9 of the Valuation Rules, as the firm was owned by the husband and wife as partners and the husband was the Managing Director in the buyer unit. Thus, by virtue of explanation (ii) below section 4(3)(b) of the Central Excise Act, 1944, both the seller and buyer were related. Besides, even after re-determination of the transaction value by the department under Valuation Rules, the goods still remained undervalued by approximately 10 per cent because one hundred and fifteen per cent of the cost of production was adopted as cum duty price.

The reply of the Ministry has not been received (December 2009).

3.1.4 M/s Paharpur Cooling Towers Ltd., in Kolkata VI commissionerate, engaged in manufacture of fabricated steel components, PVC fill sheet etc., cleared goods during the period from April 2005 to January 2007 to its sister units. The duty was paid on assessable value arrived at on comparable price of similar goods for the year 2002 which was lower than the value as determined on the cost of production basis. As a result, there was short levy of duty of Rs. 70.40 lakh for the period from April 2005 to January 2007.

On this being pointed out (February 2007), the Ministry while admitting the audit observation intimated (November 2009) confirmation of demand of Rs. 68.83 lakh, levy of penalty of equal amount and appropriation of duty of Rs. 46.44 lakh paid by the assessee. It was further stated that the assessee has obtained a stay from CESTAT in June 2009.

3.1.5 M/s Super Cassettes Industries Ltd., in Noida commissionerate, engaged in the manufacture of unrecorded and recorded audio cassettes cleared a few unrecorded audio cassettes for sale in the open market on payment of duty. Audit observed that the assessee had valued for captive consumption 11.36 lakh unrecorded cassettes at Rs. 7.25 per cassette and

27.16 lakh unrecorded cassettes at Rs. 7.50 per cassette for payment of duty, while similar unrecorded cassettes cleared in the open market were valued at Rs. 15 per cassette for payment of duty. Adoption of lower assessable value resulted in undervaluation of cassettes by Rs. 2.92 crore and consequential short levy of duty of Rs. 48.60 lakh on captive consumption of 38.52 lakh unrecorded cassettes during the year 2007-08. The duty short paid was recoverable with interest of Rs. 1.11 lakh (calculated till June 2008).

On the matter being pointed out (June 2008), the department issued show cause notice (October 2008) demanding duty of Rs. 12.84 crore for the period from October 2003 to March 2008. The reply of the Ministry has not been received (December 2009).

3.2 Undervaluation on account of sales tax collected but not paid

Section 4(3)(d) of the Central Excise Act, 1944 stipulates that transaction value of goods chargeable to central excise duty would not include the amount of duty of excise, sales tax and other taxes, actually paid or actually payable on such goods.

The Board had clarified (30 June 2000) that tax deferred at the time of transaction and subsequently held as not payable was not deductible from the assessable value. The CEGAT, in the case of M/s. Andhra Oxygen Pvt. Ltd. v/s CCE (Tribunal-Kolkata) {2003 (156) 239} held that sales tax collected from buyers and not paid to the sales tax department when it was exempted under the Sales Tax Act, shall be considered as additional consideration flowing to the assessee. Rule 6 of the Central Excise Valuation Rules, 2000 stipulates that in cases where price is not the sole consideration, the assessable value shall be based on the aggregate of the price and money value of the additional consideration flowing directly or indirectly from the buyer to the assessee.

3.2.1 The Government of Maharashtra introduced the package incentive scheme for deferred payment of sales tax whereby the assessee was allowed to collect sales tax from the buyer and retain it and repay it after the prescribed period of deferral. The Government of Maharashtra further amended the provisions of Sales Tax Act and issued a notification in November 2002 providing additional incentive for premature repayment of sales tax liability.

M/s Balkrishna Industries Ltd., in Aurangabad, M/s Caprihans India Ltd. and M/s Legrand India Ltd., in Nasik and M/s Visen Industries Ltd. in Thane II commissionerates, engaged in the manufacture of various excisable goods, opted for premature payment of sales tax during the years 2004-07 under the aforesaid scheme. The records of the assessee indicated that they had received cumulative discount of Rs. 11.90 crore due to premature/prepayment of sales tax liability accrued at net present value. Sales tax amount collected but not paid to the Government was an additional income and was liable to be added to the assessable value. Non-inclusion of this additional income resulted in short levy of duty of Rs. 1.94 crore which was recoverable with interest.

On the matter being pointed out (February 2008 and November 2008), the Ministry admitted the audit observations in two cases and intimated

(November 2009) that show cause notice for Rs. 99.05 lakh had been issued to M/s Balkrishna Industries Ltd. and another show cause notice was under issue to M/s Caprihans India Ltd. Reply in the remaining cases has not been received (December 2009).

3.2.2 The Government of Goa introduced Goa Sales Tax Deferment-cum Net Present Value (DNPV) Compulsory Payment Scheme, 2005 to charge sales tax at applicable rate and pay to the Government at 25 per cent of tax payable and retain the balance tax of 75 per cent.

M/s Nebula Home Products Pvt. Ltd., M/s Power Engineering Pvt. Ltd., and M/s Ellenabad Steel Pvt. Ltd., in Goa commissionerate, availed of the DNPV scheme benefit. The assessee collected sales tax of Rs. 10.30 crore during the years 2005-06 to 2007-08 and paid Rs. 2.57 crore under the scheme retaining the balance sales tax of Rs. 7.73 crore being 75 per cent of the total collection and credited it to the head 'other income'. Such income became part of the assessable value, as it was an additional consideration received and duty of Rs. 1.27 crore was recoverable with interest.

The observations were communicated to the department between August 2007 and September 2008 and to the Ministry in October 2009; its replies are awaited (December 2009).

3.2.3 M/s Aarti Industries Ltd., in Surat II commissionerate, engaged in the production of excisable goods, cleared goods on payment of duty on transaction value excluding sales tax. Audit observed that the assessee had availed of the benefit of retaining sales tax as per 'Remission of Tax Scheme' under the Gujarat Value Added Tax Act, 2003. Accordingly, the assessee collected sales tax of Rs. 5.71 crore during the period from 1 April 2006 to 21 April 2007 and retained it under the scheme. The sales tax collected and not paid to the Government, was not excludible from the assessable value. Its non-inclusion in the assessable value resulted in short levy of duty of Rs. 93.26 lakh.

On this being pointed out (November 2007), the department reported (March 2009) issue of show cause notice for Rs. 93.91 lakh in February 2009.

The reply of the Ministry has not been received (December 2009).

3.3 Non-inclusion of additional consideration in value

The Supreme Court in the case of Commissioner of Central Excise v/s M/s I.F.G.L. Refractories Ltd., {2005 (186) ELT 529 (SC)} held that the benefit of duty free import on surrendering of advance licence by buyers was an additional consideration flowing from buyer to seller. Further, the Board had clarified (14 September 2005) that the benefit occurring on transferring/surrendering of advance licence by buyer in favour of seller of goods, enabling him to import duty free material and bringing down cost of procurement, would be treated as an additional consideration and is valid under the provisions of section 4 of the Central Excise Act.

M/s Hiran Orgochem Ltd. Panoli and M/s Cheminova India Pvt. Ltd. Panoli, in Surat II commissionerate, charged lower prices from buyer who surrendered advance licenses in favour of the assessee, but charged higher prices from

other buyers. The assesseees were liable to pay duty of Rs. 57.59 lakh on the additional consideration of difference in prices charged from the buyers who surrendered the advance licences and that charged from other buyers.

On this being pointed out (September 2007), the Ministry admitted (February 2009) the audit observation and reported issue of show cause notices to the assesseees in September 2008.

3.4 Adoption of lower assessable value

3.4.1 Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with section 4 of the Central Excise Act, 1944 stipulates that 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 removal of goods under assessment, subject to such adjustment on account of the difference in the dates of delivery of such goods and the excisable goods under assessment, as may appear reasonable. The concept of transaction value as provided under section 4(1)(a) of the Act seeks to accept different value for each removal of goods to different buyers but adopting different values for the same product on the same day to the same customer defies reasonable commercial practice under which transaction value can be accepted as assessable value.

M/s Uni Products India Ltd., Rewari in Delhi III commissionerate, engaged in the manufacture of car carpet/matting and automobile parts, cleared automobile parts to M/s Maruti Udyog Ltd. Gurgaon at different values, i.e. the same automobile parts sold as original equipment at lower price and as spare parts at higher price, on the same dates during the year 2006-07. There was substantial difference between these two prices. The adoption of different values of the same products to the same customer on the same dates resulted in undervaluation of goods amounting to Rs. 2.62 crore and short levy of excise duty of Rs. 42.79 lakh. Besides, interest and penalty was also leviable.

On this being pointed out (August 2007), the department stated (February 2008) that show cause notice for Rs. 42.79 lakh had been issued in November 2007.

The reply of the Ministry has not been received (December 2009).

3.4.2 CESTAT decided that the telephone sets supplied to the Department of Telecommunications/Mahanagar Telephone Nigam Ltd., were assessable to duty under section 4A (MRP basis) of the Central Excise Act {ITEL Industries Pvt. Ltd. (2004 (163) ELT 219}. This decision was also upheld by the Supreme Court in August 2007.

M/s Himachal Exicom Communications Ltd. Chambaghat, in Chandigarh commissionerate, cleared telephone instruments to the Department of Telecommunications/Mahanagar Telephone Nigam Ltd., on contract price of Rs. 160 per set, which was lower by Rs. 89 per set as compared to the assessable value (after abatement) under section 4A (MRP based assessment) of the Act. The assessments done under section 4 resulted in short levy of duty of Rs. 36.62 lakh on clearance of 2.55 lakh telephone instruments during

April 2004 to July 2005. Besides, interest of Rs. 11.87 lakh up to March 2008 and equivalent penalty of Rs. 36.62 lakh were also leviable.

On the matter being pointed out (April 2007 and January 2008), the department stated (March 2008) that valuation under section 4 was resorted to as per Board's clarification dated 28 February 2002 and since the assessable value under section 4 was more than the value under section 4A of the Act, there was no loss of revenue.

The reply of the department is not tenable as Board's clarification of 28 February 2002 has not been found acceptable by CESTAT and has no legal validity after the aforesaid decision of the CESTAT which has been upheld by the Supreme Court in August 2007. Further, the reply of the department that valuation under section 4 was more than that under section 4A is also not correct as the value under section 4A was more. Moreover, the department cannot make assessments in contravention of the court decision.

The reply of the Ministry has not been received (December 2009).

3.5 Other cases

In 22 other cases of valuation of excisable goods involving short levy of duty of Rs. 2.36 crore, the Ministry/department has accepted all audit observations and has reported (till December 2009) recovery of Rs. 1.70 crore.