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Valuation under Central Excise – Snapshot of Key Judicial Pronouncements

Business is quite dynamic and keeps evolving with change in time. Central Excise Laws which were introduced in 1944, would have become redundant if the same were not subjected to suitable amendments to keep pace with changing times. However, Law is still unable to match the speed of the Business dynamism. The result is litigation. It becomes relevant to understand the important principles laid down by the Courts and relevant meanings assigned to statutory interpretations, especially with reference to Valuation.

There are thousands of decisions on Valuation aspect out of which, only select cases have been discussed hereunder:

1. Guru Nanak Refrigeration Corporation vs. CCE (1996) 81 ELT 290 (Tri.-Del.)

The issue under consideration was whether valuation can ever be below manufacturing cost. The Tribunal observed that the value of excisable goods shall be the price at which the goods were sold by the appellants since all conditions specified in Section 4 of the Central Excise Act, 1944 were satisfied. On the sole ground that the price was less than manufacturing cost, valuation adopted by the appellants cannot be rejected.

It may be noted that this case was, thereafter, affirmed by *Hon'ble Supreme Court in (2003) 153 ELT 249 (SC).* However, interestingly, in the case of *Commissioner of Central Excise, Mumbai vs. Fiat India Pvt. Ltd. (2012) 283 ELT 161 (SC),* the landmark decision delivered in 2003 has been dissented. In the case of Fiat India, it was held that no prudent business person is expected to incur losses on perpetual basis. Even though the buyers were not related persons, the transaction price below the cost of manufacturing was not accepted as assessable value.

2. Commissioner of Central Excise, Pondicherry vs. Acer India Ltd. (2004) 172 ELT 289 (SC)

The assessee was manufacturing computers which were loaded with operational software. The issue to be decided was whether the value of operational softwares should be included in the transaction value of computers. The Hon'ble Supreme Court observed that computers and softwares were different and distinct goods. Accordingly, transaction value of only excisable goods shall only be chargeable to excise. Further, software does not lose its character even after the same is installed in the hardware system and there was an exemption available to softwares. Therefore, value of operational software was held to be not included in transaction value of computers.

This Hon'ble Supreme Court's ruling was differed by Hon'ble Supreme Court in case of *Commissioner*

of Central Excise, Indore vs. Grasim Industries Ltd. (2009) 241 ELT 321 (SC). In Grasim Industries (Supra), Hon'ble Supreme Court held that Interpretation given in Acer is not in conformity with scheme of Central Excise Act, 1944 and the matter is referred to larger bench to decide if Section 4 and Section 3 operate in their independent fields though there may be a link between the two.

3. Maruti Suzuki India Ltd. vs. Commissioner of C. Ex., Delhi – III (2010) 257 ELT 226 (Tri.-LB)

Normally, it is a settled position in the Central Excise Law that post removal expenditure is not includible in the assessable value. The reason being, Central excise is on the event of "manufacture" and therefore, post manufacturing expenses do not form of assessable value for levy Central Excise.

However, in the present case which got affirmed by *Supreme Court in (2013) 291 ELT A81 (SC)* it was held that Pre-delivery Inspection Charges and After Sales Service Charges were includible in transaction value. It was held that all elements integrally connected with sale of excisable goods were liable to Central Excise Duty. Accordingly, not only direct but all indirect benefit resulting from payment by buyer to dealer in connection with or by reason of sale, are includible in transaction value under Central Excise Laws i.e. all that the buyer is liable to pay or incur by reason of sale or in connection therewith is liable to Central Excise Duty and the transaction value is a wider connotation which includes present as well as future consideration towards discharge of sales obligation.

4. MRF Ltd. vs. Collector of Central Excise, Madras (1997) 92 ELT 309 (SC)

This is an old judgment but is important and still holds good.

The appellants were engaged in manufacturing of tyres. The price of the tyres was reduced retrospectively subsequent to clearance of goods on payment of Central Excise Duty as per Government's direction. The appellants claimed that since the price was reduced, the transaction value has been affected which would impact the Central Excise Duty liability. Accordingly, the appellants claimed refund of excess Central Excise Duty paid. Hon'ble Supreme Court held that the price prevalent on the date of removal is relevant unless there was an agreement with Government to refund back Central Excise Duty to the extent of reduced prices.

This case was followed in a recent judgment in case of *Commissioner vs. Indian Oil Corporation Ltd. (2012) 281 ELT A85 (SC).* However, in the following case, Supreme Court has taken a different view.

5. Commissioner of Central Excise vs. International Auto Ltd. (2010) 250 ELT 3 (SC)

The assessee had cleared certain goods, price of which was raised after the date of removal. On the date of clearance of goods, the assessee cleared the goods at value considering the old price. Later, there was a price difference and the assessee raised a supplementary invoice to recover enhanced price at which the goods were ultimately sold. The department contended that such price differential should be leviable to Central Excise Duty along with interest.

Hon'ble Supreme Court observed that interest under Section 11AB of the Central Excise Act, 1944, was leviable for loss of revenue on any count. The accrual of price differential was not disputed by the assessee. Further, differential price signified that value on the date of removal was not correct and there was a short payment on date of removal which calls for interest liability.

6. Government of India vs. Madras Rubber Factory Ltd. (1995) 77 ELT 433 (SC)

The decision highlighted Hon'ble Supreme Court's decision in Bombay Tyre International (supra) on several issues and held that Bombay Tyre International, though old decision, was applicable to old Section 4 as well as new Section 4 of the Central

Excise Act, 1944. One of the pertinent aspects dealt was, with respect to trade discounts. Hon'ble Supreme Court observed that trade discounts are allowed as per normal trade practice and are known and understood at the time of removal of goods, though the trade discounts may be quantified later. Accordingly, it should be an eligible deduction since it is known prior to removal of goods. Further, this decision also provided the method to compute assessable value in case of cum-duty price at a factory gate sale. Hon'ble Supreme Court held that first the permissible deductions shall be reduced from cum-duty price and then Central Excise Duty element should be calculated.

7. Commissioner of Central Excise, Delhi vs. Maruti Udyog Ltd. (2002) 141 ELT 3 (SC)

Hon'ble Supreme Court in this landmark decision pronounced that whenever the assessee charges its customers on cum-duty price, the Central Excise Duty shall be excluded to arrive at the excisable value of the goods *vide* Section 4 of the Central Excise Act, 1944. Further, elements of taxes such as Central Excise Duty, Sales tax and other taxes included in the wholesale price shall be excluded to arrive at the assessable value under Central Excise Laws.

The above decision was maintained by Hon'ble Supreme Court in the year 2005 in 179 ELT A102 (SC). However, Hon'ble Supreme Court had in case of *Amrit Agro Industries vs. CCE (2007) 210 ELT 183 (SC)* held that there is no general implication that wholesale price would always mean cum-duty price and unless the manufacturer shows that the price of the goods included the duty element, duty element should not be excluded from the price.

8. Pepsi Foods Ltd. vs. Collector of C. Ex., Chandigarh (2003) 158 ELT 552 (SC)

Pepsi was supplying concentrates along with use of trademark of Pepsi to the bottlers. Further, the bottlers were obliged to follow instructions of Pepsi with respect to manufacture, sale and distribution of soft drink beverages. For use of trademark on soft drink beverages, Pepsi was charging royalty to bottlers. The question came up before Hon'ble Supreme Court whether such royalties should form part of assessable value or not. Hon'ble Supreme Court observed that the agreement between Pepsi and bottlers was indicating that all these are integral operations and therefore, sales price was not the sole consideration for sale. Therefore, the royalties were held to be includible in assessable value of the soft drink beverages.

9. Commissioner of Central Excise, Meerut – II vs. Prabhat Zarda Factory Ltd. (2000) 119 ELT 191 (Tri.-LB)

The issue under consideration was when the ownership of the goods remained with the manufacturer up to the place of buyer, what should be the 'place of removal'. It was observed by the Larger Bench of Tribunal that sale of goods is material to decide what is the place of removal. Under Central Excise Laws, transfer of possession of goods is the essence of sales. Therefore, the place, where the possession of goods was transferred, was decided to be the place of removal.

10. Escorts JCB Ltd. vs. Commissioner of Central Excise, Delhi – II (2002) 146 ELT 31 (SC)

The freight and insurance during the transit of goods were, though, arranged by the appellants and charged to the customer, the risk was on buyer once the goods left the factory gate. These sales were held to be ex-factory and the place of removal was held to be factory premises. Therefore, it was held that these charges were not includible in assessable value.

11. Gangotri Electrocastings Ltd. vs. Commissioner of C. Ex. & S. T., Patna (2013) 293 ELT 395 (Tri.-Kolkata)

In this case, the appellants were engaged in manufacture of ingots, part of which were sold to

their related company for captive consumption by the related company to manufacture MS bars. The appellants claimed that they were selling these ingots at a similar price at which these goods were sold to independent buyers. Department was of the view that since the goods were cleared to a related party for their consumption, assessable value should be determined @ 115% or 110% of the cost of production of such goods (Rule 8 of Valuation Rules). Whereas, the appellants pleaded that their sales to the related parties must be valued on the basis of sales price charged to independent buyers (Rule 4 of Valuation Rules).

Following the larger bench's decision in case of *Ispat Industries Ltd. (2007) 209 ELT 185 (Tri.-LB),* the Tribunal held that provisions of Rule 8 does not apply when part of the goods are sold to independent buyers and that where both the provisions i.e. Rule 4 and Rule 8 are applicable, the provisions which occur first in the sequential order should be applicable. Further, in such cases, Rule 4 would be more appropriate in view of Section 4 of the Central Excise Act, 1944.

12. Commissioner of Central Excise, Nashik vs. Kirloskar Oil Engines Ltd. (2013) 293 ELT 319 (Tri.-Mum.)

The assessees were engaged in manufacture of D. G. Sets which were cleared in CKD Condition. The assessees had a separate contract for erection and commissioning of the D. G. Sets at customer's site. The department contended that the total transaction value should be taken into consideration which would include consideration for erection and commissioning as well.

The Tribunal held that since there were two separate contracts, one for supply of D. G. Sets and another for installation, the consideration charged for the installation, cannot form part of the assessable value of D. G. Sets.

13. Ennar Cements Pvt. Ltd. vs. Commissioner of C. Ex., Bengaluru (2013) 292 ELT 245 (Tri.-Bang.)

There were two Private Limited Companies owned by same family. The appellants were one of those Private Limited Companies, which had claimed Small Scale Industries (SSI) exemption. The department contended that the clearances of both the Private Limited Companies should be clubbed for the purposes of claim of SSI exemption. The Tribunal observed that if the one company was dummy, it should have been identified by the Central Excise Department which was not done. Further, in view of Circular No. 6/92 dated 29-5-1992, it was held that there cannot be clubbing of clearances of two independent Private Limited Companies registered separately under Central Excise specifically when there was no flow back of money, just because there existed a mutual interest.

14. Lifelong India Pvt. Ltd. vs. Commissioner of Central Excise, Delhi – III (2013) 292 ELT 88 (Tri.-Del.)

The appellants were collecting sales tax from their customers. However, in view of a benefit under Haryana General Sales Tax Act, 1973, the appellants were required to deposit 50% of such sales tax collected. The question under consideration was, whether 50% sales tax retained by the appellants, should be included in assessable value under Central Excise.

Delhi Tribunal analysed one of the decision of Delhi Tribunal itself in case of *Maruti Udyog Ltd. (2004) 166 ELT 360 (Tri.-Del.)* whereinit was observed that 50% sales tax retained by the appellants were by way of adjustment between the appellants and the State Government towards release of a capital subsidy by the State Government. Therefore, in effect, the adjustment did not alter the nature of sales tax payable. It may be noted that the revenue had filed an appeal against the decision of Maruti Udyog Ltd. (supra) and the same is admitted by *Hon'ble Supreme Court in (2004) 172 ELT A137 (SC).*

Following the decision of Maruti Udyog Ltd. (supra), it was held that in the present case, 100% sales tax is deemed to be paid to the State Government.

15. Commissioner of C. Ex., Bengaluru vs. Ontop Pharmaceuticals Ltd. (2013) 290 ELT 725 (Tri.-Bang.)

The assessees had manufactured certain goods on job work basis. They had paid product development and consultant charges to the principal manufacturer. The issue was whether the same should be included in assessable value under Central Excise. The Tribunal observed that unless such expenses were part of cost of conversion of raw material to finished product, the same cannot be included in assessable value. Further, the assessees were paying Service tax on such product development and consultant charges and therefore, the same charges cannot be levied to Central Excise Duty.

16. Commr. of C. Ex. vs. Textile Corpn. of Marathwada Ltd. (2013) 290 ELT 696 (Tri.-Mum.)

The assessee was engaged in the manufacture of goods on job work basis. The assessee was clearing goods at assessable value which was calculated as cost of raw material and job charges following the Hon'ble Supreme Court's decision in case of *Ujagar Prints vs. Union of India (1988) 38 ELT 535 (SC).* On a conservative basis, the assessee also added *ad-hoc* amount as trader's profit. The department contended that transportation charges, loading/unloading charges, marketing expenses and interest should be included in assessable value.

The Tribunal held that trader's profits are not includible in assessable value *vide* Circular No. 619/10/2002-CX dated 19-2-2002. Further, the *ad-hoc* amount was already added following Ujagar Prints case (supra) and therefore, other charges,in any case, should not be included in assessable value.

17. Hotline Electronics Ltd. vs. Commissioner of Central Excise, Noida (2013) 288 ELT 110 (Tri.-Del.)

The appellants were manufacturing VCD players and CTVs. Both these goods were sold as combo pack and VCD players were supplied free of cost with CTVs. Both these products were leviable to Central Excise Duty on RSP based valuation. Since the MRP of VCD players was NIL, the appellants did not charge any Central Excise Duty. The Tribunal held that Central Excise Duty should be charged separately on VCD players. VCD players can be valued by adopting reasonable criteria.

18. Bihar Sponge Iron Ltd. vs. Union of India (2012) 286 ELT 513 (Jhar.)

The department relied on a Trade Notice No. 19/96 which stated that in case of depot sales, Central Excise Duty shall be levied at the time of clearance of goods from factory gate but at the price at Depot. However, as per amendment through Finance Act, 1996, where price at which goods were ordinarily sold was different places of removal, each price was deemed to be normal with respect to each place of removal.

Hon'ble High Court held that the Trade Notice was contrary to statutory provisions as contained in Section 4(2) of the Central Excise Act, 1944. Following the decision of *VIP Industries Ltd. (2003) 155 ELT 8 (SC),* it was held that freight, insurance etc. expenses incurred from factory gate up to depot were not includible in assessable value.

19. Sarvotham Care Ltd. vs. Commissioner of Cus. & C. Ex., Hyderabad (2012) 286 ELT 357 (Tri.-Bang.)

The appellants were packing various goods such as shampoo, dish drops, lotion, etc. in individual sachets and then these individual sachets were packed in mono-cartons containing 20 or 30 sachets with marking as wholesale pack. These multi-piece packs were sold in wholesale to a multi-level marketing company whose business was based on sponsorship and sale through distributors. The Retail Sale Price (RSP) was declared on each individual sachets voluntarily though there was no such requirement as per Standard of Weights and Measures Laws.

The Tribunal held that for valuation under Section 4A of the Central Excise Act, 1944, following factors should be satisfied simultaneously:

a) Goods should be excisable

b) Goods should be sold in package

c) There should be a requirement to declare retail price on package either under Standard of Weights and Measures Laws or any other law and

d) The goods should be notified under Central Excise Laws under Section 4A of the Central Excise Act, 1944.

The Tribunal further held that even if a commodity is notified under Section 4A of the Central Excise Act, 1944, if statutorily, it is not required to declare RSP, assessment should be done on the basis of transaction value and not on the basis of RSP.

20. Commr. of Cus. & Central Excise vs. Aquamall Water Solutions Ltd. (2012) 284 ELT 481 (Uttarakhand)

The issue under consideration was in case of depot sales, whether freight and insurance charges can be deducted from retail sale price. Hon'ble High Court held that though Rule 6 of erstwhile Central Excise (Valuation) Rules, 1975, does not prescribe any such deduction, there is no bar in reducing such charges. Hon'ble High Court further held that reasonable carrying cost for shifting the goods from factory to depot should be allowed as deduction vide Section 4 of the Central Excise Act, 1944.

21. Tata Motors Ltd. vs. Union of India (2012) 286 ELT 161 (Bom.)

The appellants were manufacturing cars and were supplying the same to dealers. As per the dealership agreement, pre-delivery inspection charges and free after sales services were required to be provided by the dealer to buyer. As per the agreement, the manufacturer or dealer, were not required to pay any amounts to each other once the car was sold. The issue under consideration was whether cost of such services should form part of assessable value.

Hon'ble High Court observed that these services were rendered by the dealer as their legitimate activity and the labour cost was borne by the dealer who was earning profit by selling cars. Therefore, these expenses were not covered in the term "servicing" as mentioned in the definition of transaction value. Hon'ble High Court held that manufacturer sold the car to dealer with price as sole consideration for such sale and therefore, since all conditions under Section 4 (1) (a) of the Central Excise Act, 1944 were satisfied, transaction value should be the assessable value for the purpose of Central Excise Laws and Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 were not applicable.

However recently, Supreme Court dismissed appeal of Maruti Suzuki India Ltd. *Maruti Suzuki India Ltd. vs. Commissioner - 2013 (291) E.L.T. A81 (S.C.)].* The appeal was filed against larger bench and Tribunal Decision reported in *2010 (257) E.L.T. 226 (Tri.-LB).* The Appellate Tribunal in its impugned order had held that every indirect benefit resulting from payment made by buyer to dealer in connection with or by reason of sale transaction is includible. The amount collected by dealer towards pre-delivery inspection or after sales service from buyer having understanding between manufacturer and dealer or forming part of sales promotion would be payment on behalf of assessee to dealer by buyer and same is includible.

22. Commissioner vs. Gujarat Borosil Ltd. (2012) 284 ELT A163 (SC)

The issue under consideration was whether transit risk insurance was required to be added to assessable value when the same was not charged separately. In case of delivery at buyer's premises, the assessee was charging 7% for special packing. However, the sale was made at factory gate and special packing, transit insurance were optional. Therefore, it was held that these were not includible in assessable value specifically when there was segregation between the two.

Further, another issue was whether discounts, passed on by way of Credit Note and not shown in invoice, are eligible for deduction. Since the duty was payable on transaction value, discount passed on by way of Credit Note was admissible *vide* Section 4 of the Central Excise Act, 1944.

23. Essel Propack Ltd. vs. Commissioner of Central Excise, Mumbai – III (2011) 274 ELT 3 (SC)

The appellants were manufacturing tubes. Plastic caps for such tubes were supplied by their buyers. Hon'ble Supreme Court held that if the tubes were supplied free of cost, the assessable value of tubes should not include the value of caps.

24. Royal Enfield vs. Commissioner of Central Excise, Chennai (2011) 270 ELT 637 (SC)

The appellants were clearing motor cycles in packed condition from factory to depot and the packing charges were passed on to the buyers. The question for consideration was, whether such packing charges should be included in assessable value.

Hon'ble Supreme Court held that as per Section 4(d)(i) of the Central Excise Act, 1944, if the goods are delivered at the time of removal from factory date in a packed condition, value would include cost of packing except cost of durable and returnable packing. Further, Hon'ble Supreme Court followed the decision of *Madras Rubber Factory (1995) 77 ELT 433 (SC)* wherein it was held that the cost of packing which is necessary for putting the excisable article in the condition in which it is generally sold in wholesale market at the factory gate, is includible in value of the goods. Madras Rubber Factory (supra) noted earlier decisions of B*ombay Tyre International Ltd. (1983) 14 ELT 1896 (SC)* and *Godfrey Philips India Ltd. (1985) 22 ELT 306 (SC).*

Accordingly, Hon'ble Supreme Court held that the packing done by appellants to the motorcycles was necessary for putting the goods in the condition in which it was generally sold in the wholesale market at the factory gate and therefore, the same were includible in value of the goods.

25. Commissioner of C. Ex., Chandigarh vs. Kwality Ice Cream Co. (2010) 260 ELT 327 (SC)

The assessee was engaged in manufacture of ice creams. It entered into an agreement for sale of entire production to another party. The department contended that the transaction was not on principal-to-principal basis and therefore, these were related parties and therefore, the assessee should pay Excise Duty on price at which goods were sold from depot of such another party.

Hon'ble Supreme Court observed that the transaction between the assessee and the other party was on principal-to-principal basis since the assessee was not under the control of such another party even though some financial assistance was provided by another party. Further, the relationship was one sided and both of them did not had direct or indirect interest in the business of each other. Hon'ble Supreme Court held that interdependence is a must to hold the parties related and in the present case, the parties were not related and price was the sole consideration for sale.

26. Commissioner vs. P. R. Rolling Mills Pvt. Ltd. (2010) 260 ELT A84 (SC)

The short question arose in the appeal was whether the value of scrap retained by the job worker was includible in assessable value of bars/section cleared by job worker on payment of appropriate duty. Hon'ble Supreme Court dismissed the departmental appeal and maintained the decision of *Bangalore Tribunal in (2010) 249 ELT 232 (Tri.-Bang.).* Bangalore Tribunal followed decision of *International Auto Ltd. (2005) 183 ELT 239 (SC)* and held that value of scrap was not includible in value of bars/section cleared by job worker.

27. Commissioner vs. Elgi Tread (India) Ltd. (2010) 257 ELT A21 (SC)

The assessees were importing raw material and were debiting DEPB for customs duty, surcharge and Special Additional Duty. The assessees were manufacturers of chemical compound which was cleared to a job worker for manufacture of further products. The job worker was supplying the further products to the Assessees. The assessees were not including the customs duty, surcharge and Special Additional Duty debited through DEPB in value of goods cleared to job worker.

Hon'ble Supreme Court held that in case of debit through DEPB, the customs duty was exempted and therefore, the assessee had not paid customs duty, surcharge and Special Additional Duty and accordingly, availment of such benefits cannot be considered to be a cost to be included in assessable value of imported goods cleared to job worker.

28. Commissioner of Central Excise, Ahmedabad vs. Xerographic Ltd. (2010) 257 ELT 11 (SC)

The assessee was transacting with two distributor companies. Department contested that these distributor companies were related to the assessee and therefore, the assessee should pay Central Excise Duty on value adopted by these companies.

Hon'ble Supreme Court observed that before invoking related party concept; following 3 conditions should be satisfied cumulatively:

a) Mutuality of interest

b) Related person as defined in statutory provisions and

c) Price charged from related person should be lower than normal value due to extra commercial consideration.

Hon'ble Supreme Court further observed that, in the present case, though it was found that these were related parties, the department did not prove that there was any extra commercial consideration. Further, the assessee had contended that sale to these distributors was on retail basis which was not rebutted by the department. Department also did not prove that the price at which goods were sold to related persons was not a normal price at which goods were sold to others. Therefore, it was held that there was no undervaluation of goods by the assessee and the assessee need not pay Central Excise Duty on the value adopted by distributors.

29. Commissioner vs. Nestle (India) Ltd. (2008) 226 ELT A183 (SC)

The assessee had claimed following deductions while calculating assessable value of the goods manufactured by him which was disallowed by the department:

a) Non-recoverable taxes

b) Interest on receivable

c) Trade discount

d) Special price given to specified parties

e) Regional discounts

f) Temporary price promotion discount and

g) Price equalisation discount.

In view of Section 4 (4)(d)(ii) of the Central Excise Act, 1944, it was held that any tax payable shall be allowed as deduction. For calculating the tax payable, one should have regard to the charging section and not on contract of manufacturers. Even though the tax is no recoverable, tax payable should be still available as deduction. Referring the decision of *Bombay Tyre International Pvt. Ltd. (1984) 17 ELT 329 (SC)*, it was observed that if the discounts are known to trade and if these are known prior to the removal of the goods, the same are deductible from assessable value. The nomenclature of discounts was not pertinent. Therefore, trade discounts, on-going discounts, special discounts given to independent parties, regional discounts, temporary price promotion discount and price equalisation discount, actually given to dealers were allowed to be deducted from assessable value.

Conclusion

These decisions have tried to analyse and rationalise the concept of assessable value to a greater extent. However, as can be seen, the settled laws at a particular date have faced challenges later. The answer to one question can change number of times. Therefore, even after thousands of judgments on valuation aspect, the subject still remains a mystery.