HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

C.E.A.No.176 of 2018

JUDGMENT: {Per Hon'ble Sri Justice Ramesh Ranganathan}

This appeal, under Section 35-G of the Central Excise Act (for short "the Act'), is preferred against the order passed by the CESTAT in Appeal Nos.31216-31217 dated 15.06.2017.

Both the appeals, preferred by the revenue and the assessee, were dismissed by the CESTAT by the order under appeal confirming the order in original passed by the Commissioner of Central Excise. An elaborate order was passed by the Commissioner dealing with three issues. Suffice it to refer to the relevant portion of the order of the Commissioner in so far as these three issues are concerned:

> "69. The manufacturer as well as the six customers in their statements had stated that the difference in amounts between the invoice price and the actual payments received/made are towads spares/paerts supplied along with the rigs, other incidental charges etc. this version of the manufacturer and the customers has neither been rebutted with concrete evidence nor any evidence has been produced to show that the differential amounts relates to the cost of the rig. It is also not on record whether there are any agreements with the customers for this alleged higher prices or any sales at higher prices made to any other customers.
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> 70. In this connection the judgment of the Hon'ble CESTAT, Nortern Bench in the case of **LARSEN & TOURBO LTD. VS. CCE, BOMBAY** reported in 1998 (1030) ELT 305 (Tri.) is referred, wherein it was clearly held that the value of spares cannot form part of the value of the rig. The relevant portion of the judgment is extracted below.
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>> "2. Appellant filed Price List No.14/85-86 in Part II in respect of Rotary Drilling Rig Trailer Mounted along with purchaser order dated 12-2-1996 issued by Central Mine Planning & Design Institute Ltd, to the appellant and declaring assessable value as Rs.7,09,625.00 though the total amount of the contract was Rs.28,11,125.00. Price list was approved provisionally subject to bond under rule 9B of the Central Excise Rules, 1944 and the goods were cleared on that basis. Show cause notice dated 10-12-1986 was issued proposing demand of differential duty on the entire amount of the contract less the value declared on the ground that all the equipments covered by the contract were essential parts of the Rotary Drilling Rig Trailer Mounted. Appellant resisted the notice contending that the items of which the value was not declared in the price list were only optional accessories and not essential parts of the equipment and therefore, the value thereof cannot be included in the assessable value of the Drilling Rig. Overruling this contention, the Assistant Collector confirmed the demand. Appeal filed before the Collector (Appeals) having been dismissed, the present appeal has been filed.
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>> 3. The break-up of the total value of the contract is as follows:-
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>> Admitted Assessable value : Rs.7,09,625.00

Value of Kelly and Weight Indicator : Rs.6,00,000.00
Value of Operating Equipment and Accessories : Rs.3,15,500.00
Value of additional spare parts : Rs.2,11,125.00

4. The purchase order breaks up the total amount of the contract as follows:

Model L&T 2500 direct circulation trailer mounted drilling rig…. complete as per the specification in Annexure-X : Rs.22,84, 625.00
Operating equipment & accessories as per specification: Rs.3,15,500.00
One set of fast moving spares as per specification : Rs.2,11,000.00
Total : Rs.28,11,125.00

7. The contract itself shows the value of operating equipment and accessories as Rs.3,15,500.00. The lower authorities have not given any reason for holding that the value has to be added. According to the appellant, operating equipment cannot be regarded as an essential part of drilling rig and accessories are optional accessories which are not necessary for the functioning of the drilling rig. These aspects have not been considered by the lower authorities. In our opinion the adjudicating authority should consider the contentions of the appellant with reference to this amount.

8. While upholding the finding that the value of Kelly, weight indicator and rotary table ahs to be included in the assessable value of the drilling rig, we set aside the finding that the value of spares, operating equipment and accessories has to be added and remand the case to the jurisdictional adjudicating authority for deciding afresh whether the amount of Rs.3,15,500.00 shown as the value of operating equipment is required in law to be added to the assessable value and to pass a fresh order."

71. In view of the above and, in the absence of any concrete evidence supporting the allegation that the excess payments were part of the sale price of the rigs, I feel the benefit of doubt should go to the assessee.

86. From the foregoing discussion, it clearly merges that i) though in respect of a few customers, KLR had received some amounts over and above the invoice prices, it has not been proved beyond doubt that those extra amounts either form part of the cost of the rigs supplied to them or towards the cost of spares manufactured and supplied by KLR, ii) though KLR misdeclared the model of rigs in a few cases as seen from the relevant test certificates, here also it has not been conclusively proved that to what extent the assessable value shown in the invoices fro KLR-250 model is undervalued and what exactly is the cost price or assessable value of the R-1000 model, iii) in respect of other clearances of the rigs during the material period either it has not been proved that the mdoel cleared is other than KLR-205 or there exist any evidence that KLR had received any extra amounts representing the price of the rigs cleared and iv) no proof has been brought on record that KLR had indulged in clandestine manufactures and removal of some spares and optional items along with the rigs. IN cases of clandestine manufacture and clearance or undervaluation, the burden of proof squarely lies on the Department. The data contained in private records or the statements recorded at the most may create suspicion with regard to the activities of the assessee. But these are to be corroborated by irrefutable evidence. In the absence of any corroboration as in the present case, any demand must fail. It has been time and again held in a catena of judgments of different judicial fora that suspicion however great cannot take the place of truth. In view of the above, I hold that, as the Department had not adduced clear evidence, it is not possible to hold that KLR had undervalued the rigs cleared during the material period. In this regard an extract from

the Hon'ble Tribunal's order in the case of **K.HARINATH GUPTA Vs. CCE, HYDERABAD** reported in 1994(71) ELT 980 (Tri.) is reproduced below:

> "Therefore on consideration of entire evidence on record, we are inclined to think that evidence on record does not bring home the charge of clandestine removal levelled against the appellant in the Show Cause Notice. We should indeed confess that the circumstances appearing in evidence on record do engender in our minds a very grave suspicion and the proceedings being penal in nature it is well settled that suspicion however grave it might be, can scarcely take the place of proof. It is laos equally well established that onus of proof of clandestine removal is on the Department, proceedings being penal in nature. Since the evidence available on record is hardly sufficient to sustain the charge set out int eh Show Cause Notice, we are inclined to think that the appellant should be given the benefit of doubt in the facts and circumstances of the case particularly when the proceedings are penal in nature"

101. In fine, I would also like to make some observations in so far as the allegation of undervaluation in the instant case is concerned. The goods manufactured in the instant case are of such nature that they are tailor made to the specifications of individual customers. Thus it is seen that the activity of manufacturing rigs involving mounting of required parts/components on a chassis is totally different from the activity of manufacture of consumer goods. In case of allegations of undervaluation with respect to consumer goods it may be possible to identify the various costs which might not have formed part of assessable value or which are sought to be suppressed by a manufacturer. As already observed above, by their very nature, the methodology adopted for determining the cost of manufacturing a rig would vary from customer to customer, as is evident form the costing sheets recovered from KLR. Thus, the onus will be one the Department to produce concrete evidence regarding the cost of rigs manufactured to individual customers. As no such costing has bene done an authenticated by concrete evidence, the allegation of undervaluation cannot be sustained."

In the appeals preferred before it, the CESTAT held that the adjudicating authority had analysed and addressed all these three issues in the impugned order; it had also accepted the request of the assessee for cross-examination of the persons whose statements were relied upon in the show cause notice; details of such cross-examination were given in paras 32 to 43 of the impugned order; these paras indicated that the persons who were cross-examined had, in the depositions given by them in cross-examination, mostly given averments contrary to what had been purportedly given by them earlier in the statements recorded from them by the department; they had retracted their earlier statement; and it found no infirmity in the conclusions of the adjudicating authority.

While a feeble submission is made by Sri B.Narasimha Sarma, learned Senior Standing Counsel for Commercial Taxes, that the findings recorded by the adjudicating authority and CESTAT suffer from perversity, a finding of fact can be said to be perverse only if it is either based on no evidence or is such that no reasonable person would have arrived at such a finding. The Tribunal is the final Court of fact and an appeal against the order of the Tribunal would lie to this Court only on a substantial question of law. While a perverse finding would undoubtedly give rise to a substantial question of law, we are satisfied, in the present case, that the concurrent findings of fact recorded by both the original adjudicating authority, and the CESTAT affirming the order of the adjudicating authority, do not suffer from any such infirmity. The order of the adjudicating authority is a reasoned and well considered order analysing the evidence adduced before him. This order of the Commissioner has been affirmed by the CESTAT in appeal. The concurrent findings of fact by both the authorities, which do not suffer from perversity, do not necessitate interference in an appeal under Section 35-G of the Act.

The CEA fails and is, accordingly, dismissed. Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

(RAMESH RANGANATHAN, J)

(KONGARA VIJAYA LAKSHMI, J)

26th September, 2018
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HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

C.E.A.No.176 of 2018

Date: 26.09.2018

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