

Herbertsons Limited Vs. Collector of Central Excise

Herbertsons Limited Vs. Collector of Central Excise

SooperKanoon Citation : sooperkanoon.com/10059

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-18-1996

Reported in : (1997)(89)ELT553TriDel

Appellant : Herbertsons Limited

Respondent : Collector of Central Excise

Judgement :

1. Appellants manufacture aerated waters which are sold through net-work of dealers. They had filed price list in the required proforma for flavoured drinks as well as for Soda which was approved by the jurisdictional Officer. Subsequently, the Departmental Officers found that certain other charges were collected by the appellants from wholesale dealers which charges were not disclosed in the price list filed by them. After conducting investigation and recording statements of certain dealers and factory officials, show cause notice dated 17-1-1985 was issued alleging that differential duty amounting to Rs. 16,54,137.52 was payable by the appellants. After hearing the assessee, Collector confirmed the demand amounting to Rs. 15,73,132.17. He imposed penalty of Rs. 2,00,000/-on the assessee under Rule 173Q of the Central Excise Rules, 1944. He ordered confiscation of the Plant and machinery of the assessee but permitted its redemption on payment of fine of Rs. 2 lakhs. The present appeal is directed against this order.

2. We have heard Shri V. Sridharan, Advocate with S/Shri Anil Wani and Arvind Kumar, Advocates for the appellants and Shri M. Haja Mohideen, JDR for the

Revenue.

3. Components of the demands made and confirmed by the Collector are shown in para 5 of the show cause notice. Calculation of the demand based on these various items is shown in Annexure-A to the impugned order. We will take up these components for examination.

4. Appellants collect Rs. 3,100/- per month per lorry as hire charges from the dealers. These trucks are not owned by the assessee but are hired by them at the rate of Rs. 8400/- per month per lorry. As per Table-II in Annexure A to the Order-in-Original, demand raised on this count was calculated on the total charges collected from the dealers amounting to Rs. 8,73,602/-. Collector in his discussions observed that filled bottles cleared from the factory were taken to the Distributors' godown and from there to the dealers where sometimes unsold filled bottles were returned to the Distributor's godown. Empty bottles were brought back to the factory. Collector held that cost of transportation of empty bottles brought back to the factory as well as cost of transportation of the filled bottles from the factory to the dealers' premises where dealer had not taken delivery, were includible in the assessable value. On this ground he confirmed the demand of Rs. 1,34,947.51.

5. Arguing on this finding Shri Sridharan, Advocate drew our attention to the Tribunal's judgment in the case of Spring Fresh Drinks v. CCE -1991 (54) E.L.T. 333. In this judgment (paragraph 18) Tribunal held that delivery and collection charges had nothing to do with the manufacture of products as they were charges for delivery of filled bottles and collection of empty bottles. Therefore, these charges had to be excluded from the assessable value. Following the ratio of this judgment we hold that duty liability arrived at on this count does not sustain.

6. Second ground is the amount collected by the appellants at the rate of Rs. 30/- per crate as deposit. On such deposit the appellants were paying interest at the rate of 12%. Collector in paragraph 14 of his order observed that normal rate of interest chargeable on loans by the banks in similar cases is 18%. He, therefore, held that difference of 6% amounts to flow back to the assessee and confirmed duty amounting to Rs. 4,13,109.30. He cited judgment of the Supreme Court in the

case of Punjab Distilling Industries v. C.I.T. - AIR 1969 SC 346 in support of his findings.

7. Shri Sridharan, Advocate submitted that judgment did not apply to the facts of this case since in the case cited by the Collector deposit was taken from the customers as a normal trading receipt. He submits that ratio of the decision of the Supreme Court in the case of Indian Oxygen Ltd. v. CCE. -1988 (36) E.L.T. 730 (SC) squarely applies in this case. In this case, the issue was whether interest earned on deposit made by the buyers for safe return of gas cylinders was includible in the assessable value or not. In the cited judgment Hon'ble Supreme Court held that such interest was not includible even if it represented profit or gain of an ancillary or allied venture. Following the ratio of this judgment, we hold that amount of duty confirmed on this count i.e., Rs. 4,13,109.30 does not sustain.

8. The third charge relates to the collection of hire charges for bottles and crates supplied by the assessee to the dealers. The amount of duty confirmed on this count is Rs. 1,34,599.27. Collector in his discussions observed that although cost of bottle and crates could not be included in the assessable value because these were durable and returnable, no deduction could be made on account of hire charges for such returnable containers. In this connection, Shri Sridharan refers to the judgment of the Supreme Court in the case of Indian Oxygen Ltd. In that judgment it has been held by the Supreme Court that rental for cylinders were charges made were for ancillary and allied venture and had no relation with the activity of manufacture. It was held that on this ground such charges were not includible in the assessable value.

We, therefore, hold that confirmation made on this count also does not sustain.

9. Last item covers service charges levied at the rate of Rs. 6.66 Paise per crate. It is claimed by Shri Sridharan that this charges is for transportation of filled bottled and is, therefore, deductible from the normal price for arriving at the assessable value. He stated that it would merely be a redundant exercise of adding these charges and of subtracting the same. He relied upon the certificate of the Chartered Accountant and urged that expenditure made by the appellants on transportation of filled bottles to the dealers exceeds the amount collected from

them as service charges. He also submitted that about 16% of the Dealers for flavoured drinks and about 20% of the Soda Water, brought the goods at factory gate and were not required to pay these service charges. Since transportation charges were deductible, this part of demand also did not survive. On this issue, Shri Mohindeen, JDR drew our attention to the statement of Shri A.V.D'Silva, Sales Manager of the Appellant's unit in which he had deposed that service charges were collected towards additional facility provided to the dealers which was in addition to subsidised service of trucks include advertisement support resulting in consumer demand, sales promotional material and activities, selling assistance by marketing field force and other similar supportive activities. Shri Mohideen claims that although costs towards transportation were deductible, cost incurred towards advertising and sales promotional activities which enhanced the marketability of the products were definitely inciudible in the assessable value. He also referred to show cause notice and stated that at Annexure thereto statements of some dealers were referred to. He stated that these statements were not available in the appeal memorandum. He submitted that Collector has taken cognizance of the contents of these statements as is evident from his discussions in paragraph 9 of the impugned order. Shri Sridharan referred to the impugned order and also to the show cause notice and claimed that dealers' statements merely show that there was no written agreement between the company and the Dealers. In the absence of the copies of the statements, we are not able to determine whether the contents of the statements have any direct bearing on any aspect of the case. The claim made by the learned JDR about the service charges being other than transportation charges, however, must be considered seriously. This aspect will have to be gone into by the Collector by examining the statements of the dealers and documents relating to itemwise expenditure. Collector will also have to examine the statements that a substantial part of the goods cleared is at a factory gate by the buyers themselves.

10. To sum up we hold that interest on deposits for crates supplied and hire charges for bottles and crates supplied by the appellants are not inciudible in the assessable value. Charges on transportation of filled bottles and empty bottles are not inciudible in the assessable value.

For determination of in-cludibility or otherwise of the service charges or any components, thereof we remit the proceedings to the Collector who in de novo proceedings will go into the issue at length keeping in mind the observations made by us and after giving an opportunity to the appellants to be heard, pass a reasoned order.

11. As regards the submissions of Shri Sridharan that order of confiscation of Plant and Machinery and imposition of penalty are required to be set aside, in view of our findings that substantial portion of duty confirmed is not sustainable, and since the matter is being remanded back to the Collector, we set aside the order of confiscation of plant and machinery. As regards penalty, since the matter is being remanded to the Collector, he is at liberty to redeter-mine the quantum of penalty to be imposed in de novo proceedings depending upon his findings as to the includibility or otherwise of the service charges collected by the appellants. We make it clear that de novo proceedings would be undertaken by the jurisdictional Commissioner.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com