

Shree Ram Engineering Works Vs. Collector of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-04-1997

Reported in : (1997)(94)ELT120TriDel

Appellant : Shree Ram Engineering Works

Respondent : Collector of C. Ex.

Judgement :

1. This appeal is directed against Order-in-Appeal dated 31-10-1988 passed by the Collector (Appeals), Bombay confirming the order passed by the Assistant Collector, Rajkot.
2. Appellant is engaged in the manufacture of parts of textile machinery falling under erstwhile Tariff Item 68 and desirous of availing the benefit of Notification No. 120/75 and submitted an application to that effect. Assistant Collector passed an order rejecting the claim for benefit of notification and this order has been confirmed by the Collector (Appeals). Hence the present appeal by the manufacturer.
3. There is no dispute regarding basic facts which are that the parts of textile machinery falling under Tariff Item 68 manufactured by the appellant, a partnership firm, were being sold entirely to M/s. Shree Ramakrishna Industries and Sales Corporation another partnership, with a few of the partners common and the duties charged to the sole buyer for different kinds of parts were less than the list prices for consumers by the percentages ranging from 17% to 21%. The

sole buyer was in turn effecting sales to the consuming mills allowing discount of 13%. Appellant was issued show cause notice stating that the entire production is sold to the sole buyer as per verbal arrangement, that the sole buyer is a favoured buyer inasmuch as sale to the sole buyer was at a low price and no sale at such price was made to any other independent buyers and therefore the price charged to the sole buyer cannot be considered as normal price under Section 4(1)(a) of the Act.

The notice further alleged that there are some common partners in the two firms who are related and these common partners have business interest in both the units and invoice price was influenced commercially or by other relationship between the two concerns and as such proviso (iv) to Notification No. 120/75 will be attracted and hence Notification No. 120/75 will not apply and appellant manufacturer should have filed price lists in Part IV showing the price charged by sole buyer to their customers.

4. The manufacturer sent reply to the show cause notice alleging that the fact that all the goods are sold to one buyer will not negate the benefit of notification as long as the transactions amounts to sale and are on principal to principal basis, that the manufacturer sells the products to sole buyer at the ex-factory price allowing trade discount/commission at 17.5% of the factory price and sole buyer sells these products to their distributors allowing commission of 13% and the goods are ultimately sold to the consumers at ex-factory price and the price charged by the manufacturer is the normal price and commonality of few of the partners is not sufficient to create any relationship between the two concerns. It is also contended that proviso (iv) to the notification was not attracted.

5. The Assistant Collector passed an order denying the appellant the benefit of notification on the ground that the notice issued did not refer to any trade discount passed on to the sole buyer or deduction of any discount and the consignments had been invoiced on orders received from various parties, the invoices issued by the sole buyer make no reference to trade discount and the contention that appellant was granting 17.5% discount to sole buyer who was granting 13% discount to customers was not correct. He also held that prices charged to the sole

buyer were reduced to the tune of 17.5% to 21% compared to the prices charged by the sole buyer to their customers and low price had been deliberately shown to evade excise duty. Accordingly he held that the sole buyer concept was created only for taking benefit of increased price as mentioned above. There was no evidence of physical transfer of the goods from manufacturer to the sole buyer and the invoices issued show that the goods had been sold directly to customers mentioned in the sole buyer's invoices. According to the order there was, in fact, no sale by the manufacturer to the sole buyer. Since the benefit of low price charged would go to the common partners of the sole buyer, the price can be said to have been influenced by commercial relationship of common partners of both firms [which is covered by clause (iv) of the notification]. The Assistant Collector also held commonality of partners and the comparatively low price charged to the sole buyer and other circumstances relied on would show that the two concerns are related persons within the meaning of Section 4(4)(c) of the Central Excise Act, 1944. He denied the appellant the benefit of notification on the ground that the conditions in clauses (iii), (iv) and (v) of the notification have not been fulfilled.

6. In the appellate order stress was laid on the circumstances that the entire production was sold to sole buyer at allegedly low price, three partners of the two concerns were common and had the benefit of the price factor and the sole buyer is created only to obtain benefit of invoice value. Collector (Appeals) considering the above circumstances and other factors relied on by the Assistant Collector held that the price charged by the manufacturer to the sole buyer was not the normal price and the price was not the sole consideration for sale [evidently as per clause (iii) of the notification]. These orders are now challenged.

7. At the outset, it has to be noticed that many of the factual circumstances relied on in the impugned orders did not find a place in the show cause notice which had a simple framework. The notice refers to sole buyer being a favoured buyer, the price to the sole buyer being low price could not be regarded as normal price, commonality of three partners who are related and the invoice price being influenced commercially or by other relationship between the two concerns and the applicability of clause (iv) to the notification. The show cause notice does not contain an allegation that sole buyer was dummy concern created for the purpose

of wrongfully taking advantage of Notification 120/75 or the absence of any discount granted by the manufacturer to the sole buyer or by the sole buyer to their customers, etc. relied on in the impugned orders. To that extent the impugned orders are defective. One may, on a liberal interpretation of the show cause notice, read the notice as having invoked clauses (iii) and (iv) of the notification. According to clause (iii), the benefit of the notification would be admissible only if the manufacturer certifies that the price referred to in the invoice represents the price actually charged by him for the relevant sale and the price is the sole consideration for sale. According to clause (iv), benefit would be admissible only if the invoice price is not influenced by any commercial, financial or other relationship whether by contract or otherwise between the manufacturer or any person associated in business with the manufacturer and the buyer or any person associated in business with the buyer other than the relationship created by sale of the aforesaid goods. Lower authorities appear to have borrowed the concept of "relationship" as defined in Section 4(4)(c) of the Act. A reading of the notification would make it clear that Section 4(4)(c) concept of relationship has not been incorporated therein. The relationship referred to in clause (iv) is "commercial, financial or other relationship whether by contract or otherwise" not only between manufacturer and the buyer but also between any person associated in business with the manufacturer and the buyer and between the manufacturer and any person associated in business with the buyer. The fact that some partners of the two firms are common by itself may not be decisive without examining who the remaining partners are and who is in control of the affairs of the firm. "Relationship" indicated in clause (iv) is commercial, financial or other relationship. The lower authorities should have examined carefully the amplitude of the clause (iv) before holding the same applicable. They have failed to do so. The Collector (Appeals) invoked clause (v) of the notification, which was not relied on in the show cause notice and which also did not contain relevant averments and therefore this clause cannot be looked into. In so far as clause (iii) is concerned, lower authorities should have adverted to the allegation in the show cause notice, if any, indicating that the price was not the sole consideration. If there is no such allegation in the show cause notice, no amount of data in that behalf could be looked into.

8. Infirmary is attached to the impugned order, on account of various circumstances referred to above. Therefore, the matter deserves fresh consideration at the hands of the adjudicating authority.

9. For the reasons indicated above, we set aside the impugned order and remand the case to the jurisdictional adjudicating authority for decision afresh after giving the opportunity of personal hearing to the appellant.

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