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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-26-1998

Reported in : (1998)(61)ECC507

Appellant : Kothari Detergents (P) Ltd.

Respondent : Collector of C. Ex.

Judgement :

1. These appeals are directed against the common order-in-appeal dated 25-6-1992 passed by the Collector (Appeals), Allahabad, confirming the two separate orders passed by the Assistant Collector, Kanpur approving certain price lists for two different factories and directing appellant to pay duty on the basis of approval order.

2. Appellant, engaged in the manufacture of washing powder and detergent cakes, filed price lists with reference to the two factories showing excisable goods as washing powder, tariff classification as 3402.90, the wholesale prices for different States, the unit of sale as "1 bag (50 plastic pouch of 1 kg. each plus 1 kg. detergent cake (125 gm. X 8 = 1 kg.)), the trade discount as 8 detergent cakes of 1 kg.

under Chapter Heading 3481.20 as free gift and claiming the declared value as the value for approval. The Proper Officer approved the price lists after disallowing deduction of the value of 8 detergent cakes. He also directed duty to be paid on this basis. The short question is whether the value of 8 detergent cakes (1 kg.)

claimed as free gift or trade discount is admissible for deduction from the wholesale price declared. It is seen that the Proper Officer struck off all references to detergent cakes and free gift. According to the learned Counsel for the appellant, there was no wholesale sale of only detergent powder and 50 pouches of detergent powder along with 8 detergent cakes, all packed in a bag was the unit of sale and such bag or bags only were being sold to wholesalers at the prices indicated in the price lists, that as a matter of fact the prices did not include any price on account of detergent cakes as the cakes were being given as gift or trade discount to the wholesalers. He also contended that there was no obligation on the wholesaler to pass on the detergent cakes or any part thereof to the retailers or the ultimate consumers, though it was open to him to do as he pleased, that the cakes were intended to be part of the margin of the wholesaler and therefore, the value thereof should be treated as trade discount. Shri M. Ali, JDR rebutted these contentions and stated that while trade discount could be in cash or in kind, trade discount by way of goods could be allowed only if the goods are of the same kind declared and if different goods also manufactured by the same manufacturer are given as gift to the wholesaler, that cannot be regarded as trade discount by way of quantity discount. According to him, quantity discount is admissible only if a higher quantity is delivered for the price of lower quantity. Both sides placed reliance on certain decisions.

2. Shri M. Ali, JDR placed reliance on two decisions of the Tribunal, namely, Glaxo India Ltd. - 1995 (76) E.L.T. 451 (Tribunal) and Hindustan Cocoa Products - 1996 (17) RLT 846 (Tribunal). In Glaxo India Ltd. consumers purchasing packets of mango complan and glucon D manufactured by the appellant were being given gift of plastic shaker and spoon. Appellant filed a price list claiming deduction of one shaker and spoon as free gift to customers. The statutory authorities disallowed deduction and the Tribunal upheld this order. The two Member Bench which decided the case held that trade discount may be in cash or in kind and that the quantity discount is a form of trade discount which is permissible if it is allowed in the form of goods. The Bench indicated that quantity discount is where purchaser gets excess quantity for a price contracted in respect of a lower price. It was thought that giving gifts other than manufactured articles would be an incentive to sale promotion and cannot be considered as trade discount.

It was noticed that gifts were to be delivered to the consumers by the wholesale buyers and not to be appropriated by the wholesale buyer.

Even if it is assumed that gifts were given to the wholesale buyer, the gift was with the condition that the same has to be passed on to the customer. The intention behind giving a free gift to the unknown and unrelated buyer and linking the same with the sale would only be sale promotion, particularly since the gift articles supplied bear the name of the main product (Complan Mango Shake) and gift carried this advertisement about the excisable goods and should be regarded as means of publicity in addition to sale promotion. For these reasons, it was held that the cost of the gift articles cannot be deducted. The Bench also referred to the decisions in Queen Chemist Manufacturing Department -1979 (4) E.L.T. (J 454) (Bom.) Burlington's Export -1981 (8) E.L.T. 856 (C.B.E.C), Kalpi Stores, Bombay - 1981 (8) E.L.T. 807 (GOI) and Bombay Latex & Dispersions Pvt. Ltd. -1985 (19) E.L.T. 527 (Tribunal). In Hindustan Coca Products -1996 (17) RLT 846 (Tribunal).

We applied the ratio of the above decision in a case where manufacturer of Bournvita supplied plastic mug free of cost to the consumer and held that the cost of the gift cannot be treated as trade discount admissible for deduction.

3. Queen Chemist Manufacturing Department - 1979 (4) E.L.T. (J 454) (Bom.) the manufacturer of pharmaceutical product known as "Queen Balm" was giving a cash discount to distributors and giving gifts in kind to dealers. The sole distributor was also giving quantity discount to dealers. The question was whether deduction of these items were admissible. It was held that quantity discount i.e. delivery of more articles for the price of less number of articles would be admissible but the cost of gift to dealers would not be admissible since it was the distributor who decides what gifts are to be given to various dealers.

4. In Kalpi Stores, Bombay -1981 (8) E.L.T. 807 (GOI) the question arose in relation to the supply of 13 pieces of talcum powder for price of 12 pieces. It was held that the cost of the additional piece would be trade discount admissible for deduction. Similar was the decision of the CBEC in Burlington's Export -1981 (8) E.L.T. 856 (CBEC).

5. In *Bombay Latex and Dispersions Pvt. Ltd.* - 1985 (19) E.L.T. 527 (Tribunal) the manufacturer of baby products and rubber goods was manufacturing nipples, feeders, water bags and giving the same as bonus articles to wholesalers but clearing the same without separate payment of duty. This was held to be admissible trade discount following the earlier decisions referred to above. Shri S. Venketesan, Senior Vice President in a separate order observed as follows :- "It is quite evident that,... the bonus pieces are not really given away free but their price is distributed over the price of other goods which are charged for. This is nothing but a sales gimmick. As an analogy, when goods (especially books) are ordered by post, the supplier very often offers that if goods worth say Rs. 100 are ordered, packing and postage will be 'free'. Obviously this does not mean that such expenses will be borne by the supplier from his own pocket, but only that it is in the nature of a quantity discount for a sizeable order. Therefore, on this issue, the appeal deserves to be allowed." 6. Going by the facts and the decision of the three Member Bench of the Tribunal in *Bombay Latex & Dispersions Pvt. Ltd.* the real question is whether the gift or delivery was really in the nature of trade discount for the benefit of the wholesaler. The decision does not make any distinction between a case where the gift articles are bought-out items or items different from the excisable goods and the case where the gift articles or the additional articles supplied are of the same kind as excisable goods. The ultimate question is what exactly is the price which the wholesale dealer is required to pay to the manufacturer. If 13 units of excisable goods are supplied to a wholesaler who would pay on the price of only 12 units, it is in the nature of trade discount by way of quantity discount. Trade discount may be in cash or in kind.

There is nothing in principle to suggest any differentiation between trade discount in kind of goods identical to excisable goods or of goods different from excisable goods. Where the additional goods supplied are identical to the excisable goods, one may call the same quantity discount in kind. Where the articles are dis-similar, nevertheless, it would be an instance of discount in kind though not quantity discount. The delivery of the additional number of article or a different kind of article for which separate price is not charged would go to the benefit of the wholesaler and constitute wholesaler's margin. Any amount or equivalent given to a wholesaler as margin would be a trade discount admissible for deduction as long

as it satisfied the other conditions, such as being known at the time of removal and being available to all wholesalers. When a manufacturer who supplies a particular number of units of excisable goods supplies those goods along with certain articles stated to be gift articles or bonus articles without charging a separate price therefore, the manufacturer would not meet the cost of such articles from his own pocket. He would have spread the cost of the gift or bonus articles in the cost structure of excisable goods delivered to the wholesaler. In principle we find it difficult to draw any differentiation between a case where a manufacturer supplies 13 units for the price of 12 units and the case where a manufacturer supplies 12 units and another article of some value for the price of 12 units of excisable goods. Both are instances where the wholesaler parts with an article of some value in favour of the manufacturer, without receiving the price thereof. We are supported in this view by the decision of the three Member Bench of the Tribunal in Bombay Latex & Dispersions Ltd. The decision of the two Member Bench in Glaxo (I) Ltd. could rest entirely on the principle that the gift in that case was given not to the wholesaler dealer but to the ultimate consumer. The additional reason cited, namely, that the article gifted was quite different from the excisable goods in question was not necessary for the decision of the case and therefore, could be regarded as obiter dictum particularly in light of decision of Bombay Latex & Dispersions Pvt. Ltd. 7. We are free to accept that the appellant did not proceed with his task in the proper manner. Appellant should have filed a price list declaring two varieties of excisable goods, namely, detergent powder and detergent cakes and should have declared separate prices for the two varieties of goods indicating the classification and the Tariff Rate of Duty, the assessable value and the like and as against detergent powder should have claimed abatement of trade discount equal to the value of 8 detergent cakes to be supplied free of cost to the wholesale dealer. In such a case, we have no doubt that the lower authorities would have accepted the claim without any hesitation.

Instead of doing so, the appellant filed a price list referring only to detergent powder as excisable goods, indicating a bag containing 50 kgs. of detergent powder and 8 detergent cakes as one unit of sale and also indicating the 8 detergent cakes as free gift to the wholesaler.

On a proper analysis of this data contained in the price list, it would be clear that the price declared which is the price for 50 kgs. of detergent powder as well as 8 detergent cakes and since the goods declared are only detergent powder, the appellant chose to regard detergent cakes as gift articles. It is not possible to accept that the appellant intended to meet the price of gift articles from his own pocket. The cost of the articles must necessarily be in the price declared in the price list. The benefit of the gift articles and the value thereof would go to the wholesaler and the wholesaler is not required to pass on the benefit of the gift to the retailer or to the ultimate consumer and therefore, so far as the manufacturer is concerned, the value of the gift article would be the margin or part of the margin of the wholesaler. This is precisely what is meant by trade discount. In our view, the same is admissible following the principle laid down in *Bombay Latex & Dispersions Pvt. Ltd.*

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