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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-18-1998

Reported in : (1999)(105)ELT930TriDel

Appellant : Garware Polyester Ltd.

Respondent : Collector of Central Excise

Judgement :

1. Common appellant in these appeals has made a request for adjournment on the ground that a similar matter is pending in appeal before the Supreme Court. Pendency of a matter in Supreme Court may not invariably be a justifiable ground for adjournment of an appeal pending before the Tribunal; this is particularly so in these cases. There is already a decision of the Supreme Court which may be helpful in deciding the legal controversy in these cases. Appellant is not represented. The request for adjournment is refused. We have heard Shri K. Srivastava, SDR and perused the papers.

2. Appeal E/765/90-A has been filed by the appellant challenging the Order-in-Appeal No. SKM-2131/89-B.L. dated 20-10-1989 passed by the Collector of Central Excise (Appeals) Bombay, setting aside the Order-in-Original No. K-II/202/88, dated 12-9-1988 passed by the Assistant Collector of Central Excise, Bombay. The Assistant Collector passed order on approval of the price list in Part-I filed by the common appellant in respect of recorded video tapes. Appellant has been manufacturing blank video tapes and after obtaining licence under copyright law from the copyright holders in respect of some feature films for recording the

same on blank video tapes and selling the recorded video tapes. In respect of goods to be sold in the Union Territory of Delhi and State of West Bengal, the goods were being cleared to the depots at Delhi and Calcutta and thereafter sold to wholesalers. There was ex-factory price in respect of other parts of the country. Three sets of price lists in Part-I were filed, one declaring the ex-factory price in respect of areas except Delhi and West Bengal, the second relating to goods cleared to Delhi depots for sale in Delhi and the third relating to goods cleared to the Calcutta depots for sale in West Bengal. Appellant claimed deductions on account of Sales Tax, Turnover Tax, Additional Tax, Central Excise Duty, Octroi, Post Clearance Expenses etc. Different price lists were justified on the ground that goods were intended to be sold to wholesale dealers in different regions and the wholesale dealers fell into different classes. The Assistant Collector accepted this contention and approved the price lists allowing deduction on account of Government levies actually paid, interest on bad debts and finished goods, transit insurance, equalised freight, loading and unloading expenses at the depot and disallowing royalty charges. Department challenged this order before the Collector (Appeals) who held that since factory gate price to wholesalers is available, that price should govern the clearances to depots also and set aside the orders passed by the Assistant Collector and directed deduction of only the tax element.

This order is being challenged in Appeal E/765/90-A.3. Appellant has filed E/4055/90-A against Order-in-Appeal No.SKM-552/90-B.L, dated 25-4-1990 passed by the Collector of Central Excise (Appeals), Bombay confirming the Order-in-original dated 12-9-1988 passed by the Assistant Collector, Bombay. The order passed by the Assistant Collector also related to price lists in Part-I filed by the appellant. The Assistant Collector passed an order similar to the one passed by his counterpart in the earlier appeal. He also allowed certain deductions but disallowed deduction of royalty charges.

Collector (Appeals) sustained the order passed by the Assistant Collector disallowing deduction of royalty charges. This order is being challenged in Appeal E/4055/90-A. In respect of some price lists the Assistant Collector passed similar order disallowing deduction of royalty charges and this order was confirmed by the Collector (Appeals) following his earlier order. This order is being challenged in

Appeal E/4082/90-A.4. The legal question raised before us relates to the excisability of recorded video tapes. In an earlier case of the same appellant, the Tribunal held that process of recording of blank video tapes is an activity of manufacture. This order is reported in 1993 (67) E.L.T. 670 (T). Apparently, appeal filed by the appellant against this order is pending before the Supreme Court.

5. Appellant seeks to rely on the decision of the Supreme Court in Prabhat Sound Studios reported in 1996 (88) E.L.T. 635 (S.C.). In that case, customer was supplying blank magnetic cassette tapes to the appellant for recording sound on job work basis. The question was whether the process of recording sound on blank magnetic cassette tapes amounted to manufacture and recorded cassette tape can be regarded as a new excisable article. Department relied on the circumstance that blank tapes as well as recorded tapes fell under erstwhile T.I. 59 though under different sub-items. Supreme Court held as follows :- "The manufacturer of tapes may manufacture and sell blank tapes upon which the purchaser would be free to record such sound as he chose.

The manufacturer may go one step forward and record sound itself and sell such tapes. It is to cover both eventualities that Tariff Item 59 is categorised as it is. But it is altogether different to say that by reason thereof the recording of sound on blank tapes as done by the appellant on job work basis is a manufacturing process. As the Tribunal in M. Basheer Ahammed's case has rightly pointed out, even such a pre-recorded tape can have the sound erased from it and it can be used again for recording other sound.

We are in agreement with the view taken by the dissenting Member (in the case under appeal) and in M. Basheer Ahammed's case, that no process of manufacture is involved as aforestated...".

6. It is thus clear that mere process or activity of recording a blank audio tape does not amount to manufacture as it does not bring forth a new product. Therefore a person who receives or buys blank audio tape, records sound on the tape and sells the recorded tape, is not liable to pay Central Excise duty as recorded tape is not a new excisable product. Duty of course would have to be paid on the blank audio tape.

What is true of audio tape is also true of video tape. Sub-items (3) and (4) of erstwhile T.I. 59 read as follows :-(3) Cassette tapes for sound recording 25% ad valorem (4) Sound recorded cassette tapes 25% ad valorem' Blank and recorded video tapes were covered by sub-items (5) and (6) which read as follows :-(5) Prepared media for television image and 25% ad valorem sound recording such as video tapes and(6) Television image and sound recorded media 25% ad valorem." such as video tapes and video discs Under the new tariff which came into effect in 1986 unrecorded and recorded media are placed in two different headings; but this would not make any difference in view of the decision of the Supreme Court referred to above.

7. However, the facts of the present cases are not very clear.

Apparently blank tapes were also being manufactured by the appellant and recordings were also made by the appellant. If the same manufacturer manufactures blank tapes, records sound or sound and image and clears the recorded tapes from the factory for sale, there is only one excisable product, namely, recorded tape and the assessable value of the recorded tape should include all elements which contribute to the value of the tape. If, on the other hand, a person buys duty paid blank tapes, records sound or image and sound and sells such recorded tapes, he does not manufacture a new excisable product is held by the Supreme Court and is not required to pay duty on such recorded tapes.

The factual situation requires examination.

8. Collector (Appeals) in the order challenged in E/765/90 held that the factory gate price will apply to the clearances effected to the depots at Delhi and Calcutta. This view is not tenable. The three points from which sales are effected to wholesale dealers are intended to cater to wholesale dealers situated in different regions. Tapes were cleared to Delhi depot exclusively for sale to wholesalers in Delhi.

Tapes were cleared to the Calcutta depot for sales exclusively to wholesales in West Bengal. Tapes were delivered at factory gate to wholesale dealers in the rest of the country. Thus there were three classes of buyers, classification being based

on region. This classification is legal particularly in view of the sharp difference in local tax incidence on tapes in different regions. Since dealers at three points fell into three different classes of buyers, factory gate price will not apply to goods cleared to the depots at Calcutta and Delhi. The Assistant Collector was right in the view taken by him.

Depot prices worked backwards to arrive at the notional factory gate price for the two classes of buyers would apply to goods cleared to the depots. Therefore, the direction of the Collector (Appeals) challenged in E/765/90 disallowing deductions for converting depot price into factory gate price is also not sustainable.

9. The last controversy relates to refusal of the lower authorities to allow deduction of royalty charges from the assessable value of recorded tapes. If appellant is manufacturing unrecorded tapes and thereafter recording image and sound on the tapes and selling such recorded tapes, there is only one excisable product, namely, the product in the form in which it is cleared. Appellant has paid royalty charges for obtaining permission to record particular films. Royalty charges are naturally required to be taken into consideration in fixing the price of the recorded tapes. The act of recording has enhanced the value of the unrecorded tapes and the tapes in the form in which they are cleared from the factory have been enriched by the recording.

Therefore, royalty charges should be an element in the assessable value and cannot be deducted.

(2) The question whether article cleared by the appellant in respect of which price lists were filed was by itself a new excisable article is to be decided in the light of the decision of the Supreme Court.

(3) If the appellant manufactured blank video tapes and recorded image and sound on the tapes and the price lists relate to such tapes, since they are excisable products, duty has to be paid.

(4) Deduction originally granted by the Assistant Collector is sustainable.

Impugned orders are set aside and the cases are remanded to the jurisdictional adjudicating authority for passing fresh orders in accordance with our findings and observations in this order.

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