i.T.C. Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-22-1999

Reported in : (1999)(85)LC634Tri(Delhi)

Judge : A Unni, N T C.N.B.

Appellant : i.T.C. Ltd.

Respondent : Cce

Judgement :

1. By show cause notice dated 27.7.1988, the Department alleged that the appellants had falsely and fraudulently declared lower assessable value in the price lists in Part I for the period 1.10.1975 to 31.3.1980 with intent to evade payment of duty and had wilfully suppressed the fact that the values declared in the price list during the period were incorrect. They were therefore, called upon to show cause why the amounts realised on account of advertisement expenses, security and administrative charges should not be added to the assessable value and differential duty between the duty already paid and on the basis of revised assessable values for various brands of cigarettes should not be demanded and why penalty should not be imposed. The show cause notice also referred to an earlier show cause notice dated 26.3.1987 demanding administrative charges for the period 1.11.1979 to 28.2.1983 and another show cause notice dated 7.10.1987 relating to differential duty required to be paid on administrative charges, for purposes of avoiding any possible overlapping. The matter was adjudicated by order-in-original No. 3/1991 by the Collector which is now being

impugned in the present appeal. By the impugned order, the Collector imposed a penalty of Rs. 5 lakhs on the appellant Company.

2. Arguing the appeal filed by M/s. ITC Ltd. (hereinafter referred to as appellant), Shri Ravinder Narain, Id. advocate submitted that the only prayer sought in their appeal is for setting aside of the penalty of Rs. 5 lakhs imposed on the appellant. He submitted that the penalty has been imposed on the basis of facts which had allegedly come to light subsequently as a result of searches conducted by Department officials on 17.2.1987 during which voluminous records of the appellants were seized. Further, the show cause notice related to the production of cigarettes in the appellant's Kidderpore factory for the period 1.10.1975 to 31.3.1980, and similar allegations had been made with regard to clearances for the same period from four other factories of the appellants. Ld. counsel submitted that the demand raised related to advertisement expenses which were based on the records seized on 17.2.1987. However, there was no mention of such records or the information gathered therefrom in the show cause notice issued on 27.7.1988. Therefore, ld. counsel contended that in the absence of any reference to such material in the show cause notice, the Collector could not refer to such information or give a finding based thereon by reason of the mere fact that they were the subject matter of certain other show cause notices. As regards deduction of advertisement expenses, ld. counsel submitted that there were a number of decisions of various High Courts in the case of appellant themselves, as well as others in which such expenses had been allowed as post manufacturing expenses. On the question of imposition of penalty under Rule 173Q, Counsel submitted that the goods had been cleared on the basis of price list provisionally approved by the Department and on payment of duty as per the provisional assessment. It was on that basis that the goods were cleared under valid gate passes prepared under Rule 52A. Further, the gate passes were also duly authenticated. It cannot therefore, be held that there was a violation of Rule 9(1) or Rule 52A. As regards penalty under Rule 173Q, the finding in the impugned order that the particulars entered in the gate passes were false and therefore Rule 52A had been contravened, it was submitted that the particulars in the gate passes were entered on the basis of price list which had already been provisionally approved. There was nothing wrong in computing the assessable value on that

basis or in the methodology followed since it was in accordance with the law prevalent at the relevant time. Ld.

counsel also submitted that since the provisional assessments were finalised by determining the differential duty after a meeting with the concerned officers of various Collectorates and with the co-operation of the assessee and since no notice for imposing penalty had been issued before such determination, the imposition of penalty at the time of final determination of duty was impermissible. In other words, if no penalty was sought to be levied while determining the differential duty, none could be imposed subsequent to such determination. Ld.

Counsel also submitted that the alleged discovery of certain facts on the basis of search conducted on 17.2.1987 was the subject matter of other show cause notices, relating to several other factories of the appellant for the subsequent periods in relation to which proceedings were pending. Inasmuch as the Collector has taken cognisance of those facts while considering the allegation in the instant show cause notice, he had proceeded without jurisdiction and had pre-judged the issues in the show cause notices for the subsequent period. As such, the findings in the impugned order and the penalty imposed on that basis were without jurisdiction and beyond the allegations contained in the show cause notice. As regards the allegation of wilful suppression relating to advertisement charges, ld. counsel referred to various judgments in the appellants' own case where advertising expenses were held to be deductible as post-manufacturing expenses (PME). He referred to the following: (1) ITC Ltd. v. UOI 1975 TLR 1644 - Karnataka High Court 1979 ELT J 49 (4) ITC v. UOI 1978 ELT J 137 - Patna High Court 1978 Cen-Cus 207D (Patna) Having regard to the legal position emerging from the above judgments, ld. counsel submitted that the appellants had bonafide believed that such expenses if incurred by the wholesale dealers would not affect the validity of the prices shown by the appellants in their price lists. He further referred to a more recent decision of Apex Court in Phillips India Ltd. v. CCE, Pune in which the Apex Court had held that advertising of a product by the wholesaler was one of the well known methods by which wholesaler attracted the customers and as a result increased its business, the demand for the product increased and the manufacture also increased. The advertisement by the

wholesaler could not therefore be said to be advertising for and on behalf of the manufacturer. He also drew attention to Tribunal's decision in Escorts Ltd. v. CCE, New Delhi followed the Apex Court judgment in Philips India Ltd. case (supra) and held that there was no justification to hold that the share of advertisement expenses borne by the dealers should be added to the assessable value of the manufacturer. As regards the bonafide belief as a defence against allegations of suppression for invoking the larger period of limitation and penalty, Id. Counsel relied on the following Supreme Court decisions namely, Cosmic Dye Chemicals v. CCE, Bombay and Tamil Nadu Housing Board . Further, in support of his contention that there can be no penalty where assessments were provisional, reliance was placed on Vijay Tanks and Vessels Pvt. Ltd. v. CCE Counsel further submitted that the finding of the Collector relating to Rule 5 of Central Excise (Valuation) Rules to the effect that additional consideration is to be added directly to the assessable value, was wholly incorrect. He submitted that the Tribunal had in the V.S.T. case held that the extra provision should be added to the wholesale price and the assessable value worked backwards after allowing the allowable deductions. This had also been confirmed by the' Supreme Court.

3. Shri Prabat Kumar, Ld. SDR defending the impugned order reiterated the findings of the Collector. He submitted that the PGI had specifically directed the appellants that the additional money value shall be added in the assessable value on which duty was paid. Contrary to such direction, additional consideration relating to advertisement expenses had not been added by the appellants to the cum duty price.

The loading of the advertisement expenses incurred b; the wholesale dealers to the cum duty price was therefore, in accordance with the order passed by the DGI after meeting with the representative of the Department and the appellants on 10.4.1986.

3.1. However, since the said order did not cover calculation of differential duty in respect of Kidderpore factory, the show cause notice dated 27.7.1988 relating to extra amount released on account of advertisement charges of Kidderpore factory was legal and justified.

Inasmuch as the appellants had not disclosed in their price list relating to clearances from Kidderpore factory that expenses on advertisement were being incurred by wholesale dealers, there was J suppression of facts. As regards provisional assessment in relation to Kidderpore factory which were finalised subsequently adding advertising expenses incurred by the wholesale dealers, Ld. SDR submitted that demand notice dated 16.7.1986 had clearly mentioned that the demand was without prejudice to the calculations of final differential duty after settlement of post manufacturing expenses as also subsequent calculations of differential duty arrived at on any other account.

Since the assessments were provisional, demand for differential duty could be raised periodically under administrative orders subject to final assessment. As regards appellants plea of bonafide belief, there was sufficient material on record collected after the search on 17.2.1986 that sales promotion and advertisement expenses were being incurred by the wholesale dealers for promoting sales of various brands of cigarettes by the appellants during the period November, 1976 to 1983 and the appellants had accepted and paid such amount of differential duty. As regards interpretation of Rule 5 of Valuation Rules, ld. SDR referred to the finding of the Collector that value of the excisable goods sold in the circumstances specified in Section 4(1)(a) the value of such goods shall be based on the aggregate of such price and the amount of money value of any additional consideration flowing directly or indirectly from the buyers to the appellants. Value -f of such goods would therefore be based on the aggregate value of such price and the amount of money value of the additional consideration. The expression "value of such goods" under Rule 5 did not mean cum duty price but the value of the goods without duty, plus value of additional consideration.

4. Regarding the imposition of penalty, ld. SDR submitted that inasmuch as the appellants had removed the excisable goods without paying the full excise duty leviable thereon, Rule 9(1) had been contravened and inasmuch as they had not entered in the gate passes the particulars about the assessable value and the current duty payable, Rule 52A had been contravened and penalty was rightly imposed. In the facts of the case, the quantum of penalty was also very reasonable.

5. We have given due consideration to the submissions and have perused the records. As regards the question whether advertisement expenses would be deductible as post manufacturing expenses, we find that the position is now well settled that advertisement expenses borne by dealers cannot be added to the assessable value Escorts Ltd. v. CCE . We also agree with their contention that the appellant could bonafide believe that in the light of the decisions in their own cases, advertisement expenses incurred by wholesale dealers would be deductible from the wholesale price and the price list prepared on that basis would not amount to suppression of facts. We also find that the more recent decision of the Apex Court in Phillips India Ltd. v. CCE (supra) has held that the advertising expenses incurred by the wholesaler cannot be considered to be advertising for and on behalf of the manufacturer. Reliance placed by the appellants on the decisions of the Supreme Court in Cosmic Dye Chemical case and Tamil Nadu Housing Board case (supra) is also' well placed inasmuch as the appellant could validly claim the defence of bona fide belief about deductibility of advertising charges from assessable value at the relevant time having regard to number of decisions of various High Courts in their favour. We also find that inasmuch as the impugned order has relied on information collected from records which were not referred to in the show cause notice, the impugned order has travelled beyond the show cause notice dated 27.7.1988.

6. In the above view of the matter, we are of the opinion that the appeal deserves to be allowed and the impugned order set aside. We do so accordingly. Consequential relief, if any, will be allowable to the appellants.