

Parle Beverages Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-16-1999

Reported in : (1999)(85)LC604Tri(Mum.)bai

Judge : J T J.H., G Srinivasan

Appellant : Parle Beverages Ltd.

Respondent : Cce

Judgement :

1. In these four appeals the question involved is whether plastic crates used in relation to manufacture of aerated waters is eligible for modvat credit or not.

2. In the above appeals, appeal No. E/1307 and E/1308-V/97 relate to the period respectively from June, 1994 to September, 1994 and October, 1994 to December, 1994. In respect of appeal Nos. E/777 and 2545/96 the period relates to respectively January, 1992 to December, 1992 and October, 1993 to November, 1993. In these cases, appeal Nos. 777/94 and 2545/96 are against the captioned order in-Appeals dated 23.11.1994 and 24.9.1996. The other two appeals are against the Order-in-Originals passed by the Commissioner of Central Excise dated 27.1.1997.

2.1. The facts of the case are that the appellants are the manufacturers of aerated waters. When the aerated waters are sold at the wholesale market it is being filled in bottles and transported by placing it in the plastic crates. Each plastic crate

consists of 24 bottles duly filled with aerated waters and the same are filled at the factory gate with the bottles placing in the crate itself. The question involved in these appeals are, whether the crates used by the manufacturer in transporting the aerated waters will be eligible for modvat credit or not. Before the authorities below, it was contended by the appellants that they are eligible for modvat credit as the crates are used in or in relation to the manufacture of aerated waters which is contained in Rule 57A of the Central Excise Rules. It is contended by the department that the credit cannot be given because crates are not packaging materials and the cost of which was not included during the preceding financial year. The lower authorities did not agree with the contention raised by the assesseees. Hence, the present appeals before us. As stated earlier, two appeals have been filed against the order passed by the Collector (Appeals) and the other two appeals have been filed against the orders-in-original passed by the Collector of Central Excise.

3. Shri Rohan Shah, advocate along with Shri Mohan Salian, advocate appeared for the assesseees and Shri V.K. Suman, JDR appeared for the Revenue.

4. Shri Rohan Shah arguing for the assesseees states that the period in dispute is prior to 17.11.1995. The rate of taxation upto 1.3.1994 was on specific rate on aerated waters and after 1.3.1994 it was ad valorem and invoice based price. Shri Rohan Shah contended that whether crate is capable of being used as packing material or not has come up for consideration before the Tribunal in several cases. He cited the following judgments.

Shri Rohan Shah stated that if we go through the cited judgments, it will be clear whether the term 'packing materials' should be used in restricted way or in a general way as decided in *G. Claridge & Company Ltd. v. CCE* . He further stated that except the lone judgment of the Northern Bench in the case of *Amritsar Beverages Pvt.*

Ltd. where the Id. Single Member had held against the assessee, in all other cases the question has been decided in favour of the assesseees.

He particularly invited our attention to the observation of the Tribunal in paragraphs 4.4. and 4.6 in the case of CCE v. Black Diamond Beverages Ltd. . He invited our attention to the judgment of the East Regional Bench in the case of Black Diamond Beverages Ltd. in paragraphs 7.1.2 and 7.1.3 where the Tribunal dealt with the question of use of crates. He emphasised the fact that the observations of the Tribunal in all the judgments are completely in favour of the assessee. He also invited our attention to the judgment in the case of Delhi Bottling Company where in paragraph 8, the Tribunal had followed the observations of the Tribunal in the case of Black Diamond Beverages Ltd. by extracting the same in it. He also stated that for valuation purposes he has given the Cost Accountant certificate. The observation that it is an afterthought is very unfortunate. He says that before passing the impugned order he had given the Cost Accountant certificate and without putting the Cost Accountant certificate to examination by the adjudicating authority itself it was wrong on the part of the Collector to brush aside the Cost Accountant certificate given by him.

5. As against this Shri Suman, the Id. DR while adopting the reasonings given by the lower authorities, he specifically laid emphasise on the fact that in terms of Rule 57A, where the packing material, the cost of which was not included during the preceding financial year in the assessable value of the final product viz., aerated waters, the appellants could not have legitimate claim over it. He specifically invited our attention to the observations of the Collector where he has observed that in the price list, in col. No. 5, nature of packing has been shown as "packing material returnable" and the same was not included in the wholesale price/assessable value and in col. No. 6 the cost of packing is shown as nil. He says that in view of the specific fact, the claims of the assessee made in these appeals are not sustainable.

6. We have considered the rival submissions. The question whether the packing material is eligible for modvat credit or not has been debated for a long time. The Tribunal in their earliest of the judgment in the case of Black Diamond Beverages Ltd. had considered this aspect. While considering the same, the Tribunal in paragraph 4.3 of the judgment referred to the judgment of the Supreme Court in the case of G. Claridge and Co. Ltd. (Paragraph 9 of the Supreme Court

judgment). In paragraph 4.4 of the said Tribunal judgment, the Tribunal observed as follows: Case of a plastic crate is stronger than that of an egg tray considered by the Court. Plastic crates are also admittedly used for transporting aerated waters bottles whereas egg trays were not used for transporting eggs. An egg tray was not considered as 'container' because the expression "packing containers" was used in conjunction with the words "cartons, boxes". Cartons and boxes are containers with lids. In that view, an egg tray was not considered to be covered by the expression 'other packing containers'. No such conjunction of such words occurs while considering the terms "packaging material" used in Central Excise Rule 57A. Therefore, term 'packaging material' referred to in Rule 57A while being included specifically as an input (along with paints) under Explanation to the said rule will mean containers of all types - whether with lids or without lids.

7. In paragraph 4.6, the Tribunal held that the plea of the Revenue viz. durable and returnable packing, would have been considered by the Tribunal if the final product aerated waters been liable to ad valorem duty because it is only in that circumstance, the assessable value of final product aerated waters is liable to be determined under Section 4 of the Act. The Tribunal considered the matter to what has happened prior to 1.3.1994. They have specifically followed the C.B.E.C.'s circular No. 148/59/95-CX. dated 13.9.1995. Another judgment rendered was East Regional Bench judgment in the case of Black Diamond Beverages Ltd. . That was the judgment in respect of the period after 1.3.1994 where the duty was on the basis of ad valorem as well as of invoice issued by the assessees. In the said judgment at paragraph 1.3 the period is indicated as April, 1994 to May, 1994. After discussing various case laws, the Tribunal in paragraph 7.1.1 to paragraph 7.1.5 clearly held in favour of the assessees. As far as the difference between the cost and valuation, they have been consistently held in favour of the assessee. In paragraph 7.2 it stated that cost of an article which is repeatedly used for several times before it is exhausted has to be necessarily arrived at on pro rata basis for a single use depending upon the number of uses to which it is put generally. That is a standard costing practice and duly certified by a Chartered Accountant. To adopt any other method would be an impractical proposition and would lead to ridiculous results.

8. What will happen in cases where the assessee had submitted invoices as well as the Cost Accountant certificate? The adjudicating authority did not accept it. The authority simply says that it is an afterthought. We do not understand this. The Cost Accountant certificate as well as the invoices were on the basis of the Tribunal judgment as well as on the basis of the Rules prevalent therein viz.

invoice was based on assessment. We cannot say that the basis adopted by the assessee is wrong in this case.

9. The next case taken up for consideration is the Delhi Bottling Co.

v. CCE , where the two Members of the Tribunal, after referring to the judgment in the case of Black Diamond Beverages Ltd. extracted paragraphs 7.1.1. to 7.1.4. thereof. In fact, in this case, the question was similar to the facts arising in these cases. There also the question of provisions of Section 4(4)(d)(i) was considered. In considering the question, the Tribunal upheld the assessee's contention. In paragraph 12 of the said judgment, the Tribunal held that the modvat credit of duty shall be admissible to the appellants wherever the cost of packing material even on instalment basis, is included in the assessable value. In all the appeals, the appellants submitted that the cost of glass bottles and plastic crates was included in the cost of aerated water. Here also the assessee has submitted Cost Accountant certificate. Amritsar Beverages Pvt.

Ltd. v. CCE, Chandigarh has held the question against the assessee. In our view, the said judgment has been considered by the Tribunal in Delhi Bottling Co. v. CCE where the two Members of the Tribunal has referred to the same in paras 6, 9 & 10 of its order. In that order at para 10, they have held that the decision in the case of Mis. Black Diamond Beverages Ltd. was of a Bench consists of two Members and, therefore, shall prevail over the decision in Mis. Amritsar Beverages Pvt. Ltd. Hence, we follow, the judgment of the Tribunal in the case of Delhi Bottling Company and uphold the contentions raised by the assessee and allow the appeals of the assessee with consequential relief, if any.

Separate order Sd/- (J.H. Joglekar) (G.N. Srinivasan) Member (T) Member (J) Dt. 14.6.1999 11. In the several judgments relied upon by the appellants in this group

of cases, it has been held that plastic crates used for carriage of bottles of aerated waters are packaging materials in terms of Rule 57A of the Central Excise Rules. In these judgments, cognizance had been taken of the Single Member judgment to the contrary in the case of *Mis. Amritsar Beverages Pvt. Ltd.* . Since I had written the judgment sitting singly, it is appropriate that the said judgment is to be considered in this order.

12. In the said judgment, in holding that such plastic crates were not packing materials covered by Rule 57A, I had held as follows: Packing materials are starting points for manufacture of boxes or containers. As such a wider purport cannot be given this term. It is clear that the crates which are the containers for transportation did not fall within the ambit of packaging materials and as such would not qualify for the benefit of modvat credit.

13. In dealing with this judgment, the two Member Bench in the case of *Black Diamond Beverages Ltd.* had observed as follows: In *Amritsar Beverages v. Collector of Central Excise, Chandigarh* it has been held that plastic crates used for transportation of aerated waters will not qualify for benefit of Modvat credit. This judgment of a Id. Single Member denies Modvat credit on crates on the ground that the expression 'packaging materials' does not cover containers, boxes etc. We state, with respect, that it is contrary to the submissions of the Id. SDR and findings of the Commissioner (Appeals) as also against Madras High Court's *Pond's India* judgment .

14. There are two ways in which the author of the judgment could act, when the ratio of his judgment is not upheld by a Larger Bench. The first way is to accept the Larger Bench judgment as was done by the Id.

Single Judge of the Bombay High Court in the case of *Music India and Another*. In dealing with the deductability of cash discount at the time of filing of the price list, the Id. Judge had observed that he had certain reservation about the principles laid down by the Division Bench but observed that judicial discipline demanded that he must follow the decision of the Division Bench. But there is another way also and that is to critically examine the judgment with reference to other judgments on that issue.

15. In the Pond's India judgment of the Madras High Court cognizance was taken of the two Member judgment in the case of Rasoi Ltd. as well as F.D.C. Ltd. . In the Rasoi Ltd. case, the issue was whether the tin sheet used for manufacturing the containers for packaging the products made by the assesseees were packaging materials or not. In holding in favour of the assesseees, the Tribunal had observed that packaging material was an expression different from a package in the same manner that a dress material was different from a dress. The Tribunal in referring to the provisions of Section 4 had also observed that there existed a possibility that expression 'packaging material' was used to refer to packages themselves.

16. A similar situation existed in the cited case of F.D.C. Ltd. where the issue was whether the printed aluminium foils for packing medicament was packaging materials. In holding for the assesseees, the Tribunal observed that the term packaging material had a wider connotation and meaning. The Tribunal observed that the term did not only cover 'ready to use containers' but that it covered the basic material also. This was cited with approval in the Pond's India judgment by the Madras High Court. In the said judgment, the High Court gave caution in interpreting these words. It was held that the inclusive definition of the term 'inputs' should be taken as denoting extension and not distinction.

17. The judgment of the Tribunal in the case of Shreeram Mills had been referred to in the several judgments cited in the proceedings. The ratio of these judgments is most relevant to the question before us today. In the judgment, it was held that the words 'packaging material' would cover not only the material from which all the packaging is made but that it would cover the ready to use packages or containers also.

18. I find that, in fact, before the Madras High Court, it was contended citing the Board's instruction that what was intended to be covered was actually containers and not raw materials. The Board in holding so, followed the view of the two Member Bench in the case of Shreeram Mills .

19. These judgments and specially the judgment in the case of Shreeram Mills was not cited when the judgment in the case of Amritsar Beverages Pvt. Ltd. was given. On perusal of these judgments it becomes clear that the terms 'packaging

material' has to be interpreted giving it a most wide connotation bringing under its ambit and coverage not only materials for making containers but the containers themselves.

20. With this observation, I agree with my Id. Brother in his findings.

Consequently, the appeals are allowed.

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