

A.K.G. Acoustics (India) Ltd. and Vs. C.C.E. and anr.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-03-1999

Reported in : (2000)(67)ECC139

Judge : S T G.R., a Unni

Appellant : A.K.G. Acoustics (India) Ltd. and

Respondent : C.C.E. and anr.

Judgement :

1. These are two interconnected appeals which are heard together since common issues have been raised in both the appeals.

2. We have heard Shri V. Lakshmi Kumaran, Ld. advocate for the appellants and Shri P.K. Jain, Ld. SDR for the respondent Collector.

Appeal No. E/742/98-A A.K.G. Acoustics (India) Ltd. v. C.C.E., Allahabad 3. M/s. AKG Acoustics (India) Ltd. are engaged in the manufacture of microphones, microphone capsules and telephone capsules. They import the components for the manufacture of microphone capsules. Certain other parts are procured locally. AKG Acoustics (AKG for short) had also entered into an agreement with M/s. Versat Electronics Pvt. Ltd. (Versat for short), an independent manufacturer, for the manufacture and supply of microphones with the brand name of AKG. The purchase of the microphones, according to the appellants, is on outright price at mutually agreed upon prices. Versat placed a bulk order for purchase of more than

10,000 pieces of microphone capsules from AKG at a negotiated price including 10% profit margin. AKG accordingly, filed a price list in Part II for the sale of microphone capsules to Versat alongwith the purchase order. The price list indicated Versat as industrial consumer under the column 'Class of buyers'. The price list was approved by the Department. Versat thereafter sold microphones manufactured by them back to AKG. AKG were also concurrently transferring microphone capsules manufactured by them to their Spare Parts Division for catering to the Spare Parts/ Replacement market. In respect of such sales AKG filed price list under Part I and paid excise duty on the basis of ex-depot price to the distributors. The ex-depot price meant for such dealers/distributor was at a much higher rate than the rate at which the microphone capsules were sold to Versat.

4. By show cause notice dated 2.5.97, the Department alleged that the microphone capsules sold to Versat was much lower when compared to the sale price of capsules sold from the depots and accordingly Deptt.

sought to adopt the said price for arriving at assessable value of sales made to Versat. AKG filed their reply and made submissions during the course of personal hearing before the Commissioner resisting the duty demand. The Commissioner by the impugned Order rejected their submissions and confirmed the demand raised in the Show Cause Notice and imposed an equivalent amount as penalty under Section 11 AC of the Central Excise Act and a penalty of Rs. 5 lakhs under Rule 173Q of Central Excise Rules.

5. Ld. Counsel submitted that the entire basis on which the duty has been demanded is illegal and not sustainable since the sales made to Versat, who constituted a different class of buyers and since the sales were made at the factory gate, such sales are not comparable to sales made from depots to dealers/distributors, who constituted another class of buyers. Further, the sales made from the depots were retail sales.

There was no allegation against the appellants that AKG and Versat were related persons or that there was any financial arrangement between them. Adopting the sale price of one class of buyers to sales to another class of buyers was contrary

to the law laid down by the Supreme Court in MRF case . The Department could not ignore the price at which the capsules were sold to Versat. The reliance placed on the sales made to M/s. Pieco Electronics was not correct since sales to Pieco was for use as spares. The allegation of the Department that the appellant (AKG) had suppressed their agreement with Versat was also not tenable since there was no requirement under law to the effect that such agreement should also be filed with the Department especially when RT12 returns had been filed both by AKG and Versat which had been approved finally. Imposition of penalty on that ground was therefore, totally unwarranted. As regards imposition of penalty under Section 11 AC, Ld. Counsel submitted that the said section was inserted by the Finance Act, 1996 with effect from 28.9.96.

It was settled legal position that penal provisions cannot be applied retrospectively. In their case the demand relates to a period prior to the enactment of the said provision and therefore the new penalty provisions cannot be invoked. In the facts of the case, penalty under Rule 173 Q was also not imposable on the appellant, according to the Ld.

Counsel. Ld. Counsel relied on the Supreme Court decision in Metal Box case 1995 (75) ELT 499 as well as the Final Order of the Tribunal Nos.

473-478/99-NB dated 21.6.99 in support of his contentions on merits.

6. Shri P.K. Jain, Ld. SDR opposing the above contentions submitted that AKG were manufacturing microphone capsules which was an essential component for microphones. They were getting microphones manufactured by Versat by supplying the microphone capsules to them. Price arrived at between AKG and Versat were indicated in the price list submitted in Part II. The microphones manufactured by Versat were, under the agreement between the parties, not to be sold outside and were subject to quality control as also control on production by AKG. In fact the goods manufactured by Versat were the goods which were manufactured by Versat on behalf of AKG. It was not disputed by the appellants that there was a huge difference in the price of microphone capsules which they were selling to their dealers/distributors and the microphone capsules sold to Versat. The price at which microphone capsules were sold to dealers/distributors

was nearly five times more than the price at which the same goods were sold to Versat. Ld. SDR pointed out that Versat was not permitted to sell microphones to any other customers and the microphones manufactured by Versat was to bear the brand name of AKG. It was also quite evident that the entire manufacturing activity of Versat was under the control of AKG and was being done on behalf of the AKG. He submitted that the filing of different price lists in Part I and Part II did not by themselves justify the difference in price in the absence of adequate explanation for charging different price for the same goods. In the facts of the case, it cannot be said that Versat was an independent buyer and hence the sale effected to Versat could not be considered as a normal sale in the course of wholesale trading. It cannot be said that Versat and AKG had interest in each other. This would show that the sales were not effected in accordance with the provisions of Section 4 of the Central Excise Act and the price charged by AKG cannot therefore, be deemed to be the normal price. As regards the plea of limitation, Ld. SDR submitted that it was incumbent on the appellants to file a copy of the agreement entered into between AKG and Versat which gave details of the terms under which manufacture of microphones with the brand name of AKG was undertaken by Versat. Since this was a material fact for arriving at the normal price, suppression thereof clearly attracted the provisions of Section 11A(1) proviso.

7. Considered the submissions. We find force in the contention of the appellants that the price charged to one class of buyers cannot automatically be adopted as the price in respect of all classes of buyers *Government of India v. MFR Ltd.* 1997 (77) ELT 433. It is also correctly contended by the appellants that for purposes of Section 4 (I)(a) the price to be charged should be such at which goods are ordinarily sold in the course of wholesale trade for delivery at the time and place of removal and not a favoured price based on any extra commercial consideration *Shriram Fabric Ltd. v. CCE* .

In the facts of the case, having regard to the fact that sales to Versat constituted a very high percentage of the total sales (well over 90% according to Ld. Counsel), Versat has to be considered as an industrial consumer of Original Equipment (OE). They would, in these circumstances, form a class of buyers different from

buyers of goods in retail. However, we note that unlike in the case of the earlier cases relied on by the appellants, Versat were also selling microphones exclusively to AKG from the microphone capsules sold by AKG to Versat.

The Department had argued that Versat was infact actually manufacturing microphones for and on behalf of AKG. From the evidence on record, it is not possible to say that they were related persons and on that ground the price at which AKG sold microphone capsules to Versat, was not normal price. We are also not in a position to accept the contention of the Departmental Representative that the price at which microphones were sold to M/s. Pieco Electronics (who according to Department were also industrial consumers) would be a comparable price.

Ld. Counsel had drawn our attention in this connection to the fact that the sales to Pieco Electronics were only 10 pieces of microphone capsules when compared to 9155 pieces sold to Versat Electronics. In view of this factual position, sale price to Pieco Electronics and sale price to Versat would not be comparable. As regards the imposition of penalty under Section 11 AC, we find that demand pertains to the period 1992-1993 to 1995-1996 and the major portion of the demand relates to the period before the enactment of Section 11 AC which is undoubtedly a penal provision. It is a settled proposition that penal provisions cannot be given retrospective effect. As regards limitation also, we find that it is not possible to hold that failure on the part of AKG to attach copy of their agreement with Versat can amount to suppression with intent to evade duty especially when the price list of both AKG and Versat had been approved.

8. In the light of the above, we are of the view that the appeal filed by AKG deserves to be allowed. The appeal is accordingly allowed after setting aside the impugned order. Appellants to be allowed consequential benefits, if any, under law. Versat Electronics Pvt. Ltd. v. CCE, New Delhi 9. The main facts of this Appeal (which is interconnected with the Appeal filed by AKG) has already been referred to above. The Department by Show Cause Notice dated 5.8.97 issued to Versat had alleged that Versat had supplied microphones to AKG at depressed value since AKG had supplied microphone capsules to Versat at a depressed

value. Reliance was placed on the sale of microphone capsules sold by AKG to M/s. Pieco Electronics. Show Cause Notice had demanded duty from Versat on the basis of sale price of microphones by AKG to their other customers.

Penalty under Section 11 AC as well as Rule 173 Q was also sought to be imposed.

10. By impugned Order-in-Original dated 24.3.98, Commissioner had confirmed a duty demand of Rs. 51,62,008.43 and an equal amount as penalty under Section 11 AC and penalty of Rs. 5 lakhs under Rule 173 Q. Extended period had also been invoked for raising the duty demand.

11. Ld. Counsel for appellants submitted that the Department's allegation about the sale of the microphone capsules by AKG to the appellants at depressed value on the basis of comparison with price of capsules sold by AKG to M/s. Pieco Electronics was untenable because the number of pieces sold to Pieco Electronics were only 10 when compared to around 10,000 numbers to the appellants. Appellants being bulk buyers were industrial consumers of Original Equipment and they formed a different class from stray buyers of the said goods from the retail market since the two sales were at different commercial levels.

The other allegation against the appellants was that since the appellants had undervalued the microphones sold to AKG, the selling price at which AKG sold the microphones to other customers would form the basis for arriving at the assessable value in respect of sales made by appellants to AKG. Appellant's contention is that the method adopted by the Department for enhancing the value of the microphones sold by them to AKG had to be restricted, if at all, to the extent of the amount by which the value of the capsules were depressed by AKG. As per Show Cause Notice issued to AKG, the price of the two types of capsules sold by AKG to appellants was Rs. 255. However, appellants were purchasing one type of capsules at Rs. 55 (Model DKC 29/02) and another at Rs. 64 (Model DKC 29/04). This apart, the microphones manufactured by the appellants out of capsules purchased from AKG were inputs eligible for Modvat credit. If the duty demand on AKG is confirmed and paid by AKG the said amount will be available for the appellants as Modvat credit. No duty demand can, therefore, arise against the

appellants. Appellants also contended that duty demand from appellants was not maintainable since the demand has been made from the appellants on the basis of the price at which the microphones had been sold by the brand name owner, viz., AKG. It is contended that this would be contrary to the decision of the Apex Court in the case of *Sidhos Sons v. Union of India*. Ld. Counsel also contended that the bar of limitation applied to the appellant's case since no suppression can be alleged in their case as there was no requirement of law that they should file their agreement with AKG. Further, RT 12 Returns filed by both the sellers and buyers had been approved by the same Assistant Commissioner within whose jurisdiction both were operating. As regards penalty under Section 11 AC, he submitted that the same could not be sustained as the said section had no retrospective effect. Penalty under Rule 173Q was also not attracted since there was no contravention of any provision of law by the appellants.

12. Ld. Departmental Representative reiterated the findings of the Commissioner in the impugned order.

13. Considered the submissions. The duty demand in the present case is closely related to the demands made in the case of AKG. We have already held in the said case that Versat's claim to be treated as a different class of buyers, being industrial bulk consumers of Original Equipment (OE), is fully sustainable. The price at which AKG sold the microphone capsules to the appellants cannot therefore, be considered to be a depressed price. There is, therefore, no basis for treating the price at which appellants sold microphones to AKG as a depressed price. Duty demand made on that basis will therefore, have to be set aside. The contention of the appellants that even in a case where such duty has become payable by AKG, the same would become eligible to Modvat credit in the hands of the appellants, has also force. In the facts of the case, appellants can also derive support from the decision of the Supreme Court in the case of *Sidhos Sons v. Union of India* (supra). On the question of penalty, both under Section 11AC and Rule 173Q, we uphold the plea of the appellants on the same grounds as allowed in the case of Appeal filed by M/s. AKG Acoustics India Ltd. above.

14. As a result the present Appeal filed by M/s. Versat Electronics Pvt. Ltd. is allowed. Impugned Order is set aside. Consequential benefits, if any, under law will be admissible to the appellants.

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