

Vespa Car Co. Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-06-1999

Reported in : (2000)(67)ECC130

Judge : G B Deva, a T V.K.

Appellant : Vespa Car Co.

Respondent : C.C.E.

Judgement :

1. This appeal has been filed by M/s Vespa Car Co. Ltd. against the Order dated 31.5.96 passed by the Commissioner (Appeals), Allahabad.

2. Briefly stated the facts are that the appellants manufacture scooters. They are selling their scooters in Uttar Pradesh through dealers and outside U.P. through authorised representatives. The Asstt.

Collector under order dated 30.11.1994, disallowed Rs. 325 and Rs. 225 claimed as deduction in the price lists, ordered that duty be charged on the amount collected in excess of the actual freight and insurance incurred by them, holding that these amounts were remuneration paid to dealers and authorised representatives for discharging their responsibility in terms of agreement including post delivery services to the customers; that dealers and authorised representatives were promoters of the business of the appellants as they were required to maintain a proper show room and service station, undertake

advertisement/publicity and collect amount from customers. The Asstt.

Collector relied upon the judgment in Bombay Tyre International case . He also mentioned that the appellants intimated under letter dated 5.5.93 that the initial price list effective from 25.8.86 in which the dealer's discount of Rs. 325 was shown in column 8 had been withdrawn; that they filed another price list wherein no amount in the name of deduction had been mentioned. He also ordered that Rs. 25 per scooter charged as handling charges is also to be included in the assessable value. On appeal, the Commissioner (Appeals), under the impugned order dated 31.5.96, rejected the appeal holding that in view of the Supreme Court's decision in Bombay Tyre International and MRF case 1995 (77) ELT 443 (SC), after sales services marketing and selling organisation expenses including advertisement expenses cannot be deducted from the assessable value as they promote the marketability; that perusal of agreement dated 25.5.86 with the authorised representative reveals that he is mainly selling and promoting agent who works for and under full direction and control of the appellants and has no freedom to sell the scooter and is liable for penal action in case of default; that GPI and other documents are released in the name of the customers who had booked the scooter, that even the Chasis No. and Engine number of scooter are allotted by the appellants and the wholesale dealer and authorised representative only coordinate the delivery and collect the pending amount and deposit the same in the account of the appellants, that they are to maintain service, Centre for providing free after sale service during the warranty period and advertise the scooter within their territory; that for all these services they are getting a fixed amount of Rs. 325 and Rs. 225 scooter which is actually remuneration and cannot be termed as dealer's discount.

3. Shri R. Santhanam, learned Advocate, submitted that the appellants have filed price lists in Part-1 for sale of scooters in wholesale to the dealers within the State of U.P.; that the sales within U.P. commenced right from the beginning of production in 1986; that in 1987 they started selling outside U.P. through authorised representative (ARs) to the buyers in terms of booking already made; that they had also filed price lists for sale in retail outside U.P. which later on were withdrawn as there was no need for separate price list to be filed for retail sale

when the wholesale price at the factory gate was known.

He further submitted that the distinction between a wholesale dealer and ARs is evident from the terms and condition of the agreement entered into with dealers and ARs; that dealer purchases the scooter from the appellants on principal to principal basis and sells the same to retail customers on his own account; he can sell any scooter to any customer in the priority list provided by the appellants and if customer refuses to take delivery, dealer can offer the same to the next person on the waiting list; dealer can sell the scooter at a price lower than the recommended retail price whereas the AR does not purchase the scooters whose ownership remains with the appellants; AR receives the payment in the name of appellant; he has to deliver scooter to the specific customer and in case of refusal, AR has to send back to the scooter and he has no right to sell the scooter at a lower price. The learned Advocate also mentioned that as dealer invests his own capital in stocks he is permitted a margin of Rs. 325 whereas AR does not invest any capital in stocks and he is paid a commission of Rs. 225.

4. The learned Advocate further submitted that identical agreements were entered into by M/s L.M.L. with dealers for sales of scooters in wholesale within the State of U.P. and corresponding agreements with ARs for sale of scooters in retail outside the State of U.P.; that in L.M.L. case the issue regarding nature of the sale to ARs was settled by the Tribunal vide Final Order No. 736 to 739/89A dated 27.11.89 (C.C.E, Kanpur v. L.M.L. Ltd.). The Appellate Tribunal held that sales through ARs should be treated as retail sale and once the value in terms of Section 4(1)(a) of the Central Excise Act is determinable at the factory gate, that price should govern all clearances. The learned Counsel also relied upon the decision in the case of C.C.E. v. L.M.L.

Ltd. 1998 (77) ECR 323 wherein it was held that the wholesale dealers in U.P. State were allowed discount of Rs. 250 per vehicle by the assessee; that as per Tribunal's decision vide Final Order No.736-739/89-A, the wholesale price available for U.P. State should be the wholesale price in regard to the clearances effected outside U.P.State. The Tribunal further held that "According to the department, the extent of the deduction has to be stated and established before

deduction can be allowed. We are concerned in this appeal with deduction of discount for the purpose of converting retail price into wholesale price. In this context, the question of stating particulars and approving them would not arise, particularly because we are adopting the wholesale price available in U.P. State, for the rest of the country also." The learned Counsel also mentioned that the Tribunal for sale prior to 4.10.85 when there were no wholesale transaction, held that the deduction of Rs. 325 given to dealers in U.P. from 4.10.83 should be deducted for conversion of retail price into wholesale price in respect of transaction outside U.P. State.

5. The learned Counsel contended that the entire issue for consideration in the present appeal stands, therefore, decided by the Tribunal in both the decisions, referred to above; that the lower authorities must be directed to treat the sales outside U.P. as retail sales and to allow the difference between the wholesale price for sales in U.P. and the retail price for sale outside U.P. as the deduction admissible to arrive at the assessable value even in respect of the retail sale or, alternatively, to adopt the wholesale cash price at the factory gate for sales in U.P. as the only basis for levy of duty on sale throughout India. He also mentioned that the lower authorities had ignored the questionnaire in regard to pattern of sale; that a perusal thereof would show that they had specifically stated that the advertisement expenditure is exclusively met by LML and the advertisement also is handled by LML only and, therefore, neither they nor the dealers or AR, had incurred any expenditure on account of advertisement; that further, no sharing of expenses is involved even in regard to the warranty expenses which also include three free after sale services for which the remuneration of the AR is reimbursed/paid by them in addition to Rs. 325 or Rs. 250, as the case may be. He relied upon the decision in the case of Mahendra & Mahendra Ltd. v.CCE, Bombay . Finally he mentioned that Rs. 25 per scooter towards pre-registration check up which is given to wholesale dealers is deductible in view of the decision of the Tribunal in Eicher Motors Ltd. v. CCE 6. Shri Prabhat Kumar, learned SDR reiterated the findings as contained in the impugned order passed by Commissioner (Appeals) and the Adjudication order passed by the Assistant Collector.

7. We have considered the submissions of both the sides. The first issue to be decided is whether the sales made to the customers through authorised representatives are wholesale or sale in retail. This issue has been settled by the Tribunal in the case of CCE v. LML, Final Order Nos. 736-739/89-A which was followed in CCE, Kanpur v. LML Ltd. and Vice-versa 1998 (77) ECR 323 (T). In view of these decisions, there is no reason to treat the sales of scooter outside U.P. through authorised representative as a wholesale sale. It was also held by the Tribunal that once the value in terms of Section 4(1)(a) is determinable at the factory gate that price has to govern all the clearances. It was held by the Supreme Court in Indian Oxygen Ltd. v. CCE 1998 (36) ELT 723 (SC) that "The value has to be computed under Section 4(1)(a) read with Section 4(4)(d)(i) of the Act, where the wholesale price is ascertainable at the factory gate, the question of transportation charges becomes entirely irrelevant. Similar views were expressed by the Apex Court in MRF case wherein it was observed that "only where the goods are not sold and, therefore, the price of such goods is not ascertainable or in a situation where the normal price of such goods is not ascertainable for some other reason that Clause (b) is attracted, where under the nearest ascertainable equivalent price is ascertained in accordance with the rules framed in that behalf. Clause (b) is in the nature of a residuary clause which should be resorted to where the normal price cannot be ascertained for the reason mentioned therein. In other words, where the normal price is ascertainable, resort to Clause (b) is not permissible." Respectfully following the ratio of these judgments/decisions, we agree with the appellants that wholesale cash price at the factory gate for sales in U.P. has to be adopted for levy of duty on sale outside U.P. also. As far as the question of inclusion of Rs. 25 paid as pre-delivery inspection charges (PDI) is concerned, the matter has been finally settled by the Tribunal in the case of Escorts Ltd. v. CCE . The Tribunal held that Pre-delivery inspection charge is an activity subsequent to the clearance at the factory gate and delivery to dealers, "It cannot be said that inspection is carried out by dealers as agents of the manufacturer. It is an activity undertaken after title passes to the dealers. It cannot be regarded as having direct nexus with manufacturer or marketability or warranty. In this view, we hold that PDI charges cannot be included in the assessable value. Accordingly pre-delivery inspection charges are not includible in the assessable

value.

8. The Assistant Collector has denied the deduction of Rs. 325 and Rs. 225 to dealer and AR, respectively as both dealers and AR were held to be business promoters. The Commissioner (Appeals) had given his finding that dealers and AR had to maintain show room for advertising and provide after-sales-service. Appellants have contended that this allegation was never made in the show cause notice nor anything has been done by department to substantiate the allegation; the perusal of the first price list would show that they had clearly and specifically indicated therein that the dealer's margin was maximum of Rs. 325 which was for the dealers to realize or not to realize from the customers.

The money which they realise from the wholesale buyer is only limited to the price shown in column No. 11 plus the amount of excise duty, cess, transportation and insurance charges. It has also been contended by them that dealer's margin is not part of the price which an assessee can charge from the dealer nor does it constitute a discount or concession by the assessee to the dealer. They have also referred to the answer to questionnaire according to which advertisement expenditure was exclusively met by LML and no sharing of expenditure was involved in regard to warranty expenses. There is substantial force in the submissions of the appellants. Rs. 325 represents the maximum dealers' margin of profit and it cannot be included in the assessable value. It is not the case of the department that dealers are related persons. It was held by the Supreme Court in *Moped India Ltd. v. Asst.*

Collector, Central Excise that "Since the dealers are not related persons, hence the excise duty on the Mopeds was liable to be determined only on the basis of the wholesale price charged by the manufacturers to such dealers" though the dealers were required to maintain show room, service station, repair shop, etc., to get mechanics trained and to give three free services to every vehicle sold by them. In view of these facts and circumstances, the appeal filed by the appellants is allowed.