

Essel Packaging Ltd. Vs. Commissioner of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-30-1999

Reported in : (2000)(68)ECC405

Appellant : Essel Packaging Ltd.

Respondent : Commissioner of C. Ex.

Judgement :

1. Appellant manufacture in its factory at Vasind in Thane District thin laminated sheets of plastic (apparently called webs). These are cleared to its factories at Wada and Murbad where they are converted into tubes which are used for packing such articles as toothpaste and cosmetics. Since all three factories were owned by the same person the assessable value of the goods cleared from Vasind to the other two factories was determined on the basis of cost of production by applying Rule 6(b)(ii) of the Valuation Rules. During the period between May, 1996 and June, 1997 appellant sold 16 consignments of the web to M/s.

Courtaulds Packaging (I) Pvt. Ltd., Goa (CPPL for short). The goods were sold at Rs. 17.16 per sq. metre and the assessable value derived from this sale price is Rs. 233.81 per kg. This figure is considerably higher than the assessable value determined for its clearance to other factories of Rs. 123/- per kg. The department issued notice dated 27-2-1998 proposing to apply this value for the clearances of the goods made by the appellant during this period to its own factories at Murbad and Wada. In the order impugned in the appeal the Commissioner has confirmed the applicability of this higher assessable value and therefore demanded duty of

Rs. 7.36 crores and imposed penalty of equal amount under Section 11 AC read with Rule 173Q(1).

2. The first contention of the appellant that the sale to M/s.

Courtaulds Packaging, Goa would not be of goods which can be considered to be goods ordinarily sold and therefore the provisions of Section 4(i)(a) of the Act will not apply. We are unable to see the significance of this point. Section 4(i)(a) defines normal price of goods as the price at which the goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade; the term 'ordinarily' used in the rule, obviously means to be accepted as in the normal course; where no special circumstances prevail. In a situation where there is no special relationship alleged between the two parties or no factors other than that of purchase and sale for the transaction it is not possible to agree that they were not sales in the ordinary course of trade or not ordinarily sold. The observation of the learned single judge of the Delhi High Court in *Somany-Pilkington's Ltd. v. B.P. Varma*, 1995 (76) E.L.T. 281 that the word ordinarily has been interpreted to mean in majority of the cases but not invariably does not help the assessee's case. The goods were sold, in every case at some price. The fact that there were clearances of the same goods is not relevant; they there not by way of sale.

3. In that event it will then follow, no other reason being shown for not applying the value to the clearances of the goods to the appellant's own factory, the value at which they were cleared to M/s.

Courtaulds Packaging would be assessable value for the relevant period.

However, the argument advanced that in that situation Modvat credit of the duty paid in the factory at Vasind would be available to the two factories of the appellant for utilisation towards payment of duty has to be accepted. The Commissioner had dealt with this argument by saying that this was a different issue. However, the fact remains that by application of Rule 57E the enhanced duty payable on the goods would be available as credit in the factory where these are used towards manufacture of finished products. Since the duty payable and credit available are identical the demand for duty, although legally sustainable,

would in effect work out to nil.

4. The next issue is the imposition of penalty. Here the contention is that since the appellant would have got, and now has in fact been availed, the differential duty by way of credit, it had nothing to gain by paying lower duty on the webs at the factory of their production and therefore would have no intention to evade duty. The Supreme Court's judgement in Tamil Nadu Housing Board v. CCE, 1994 (74) E.L.T. 9 is cited in support. We examined with interest the departmental representative's answer that the increase in the duty payable on the web would enhance the assessable value of the finished product, produced from the two factories and that therefore the appellant could have an interest in paying a lower duty. This argument does not withstand scrutiny. As the representative of the appellant argues, in determining the sale price of the finished product it is the cost of production which is taken into account and not the assessable value based on sales to different buyers where the intention is only profit making. It is not unreasonable to conclude that, in determining the sale price of its products the manufacturer will take into account its cost in such manufacture although he could seek to maximize his profit by reaching the highest product price.

5. The second course is what the appellant seems to be done in the case of sales to M/s. Courtaulds Packaging. Hence by applying to its product a price based on sale price where manufacture has made in order derive huge profit the manufacturer's product could be priced out of market.

There is in any event no material in the impugned order or in the show cause notice to demonstrate that the effect of higher assessable value determined could have the effect of increasing of the value of the finished product. So far as the web itself is concerned it will be clear that, even if its value is determined on the basis of the sale price given to M/s. Courtaulds Packaging, as have done, the duty would be available to the appellant as Modvat credit and therefore it had no incentive to evade duty. In these circumstances, we are satisfied that no intention to evade duty had been shown to be present. The judgment of the Supreme Court in the case cited by the appellant to the effect that intent to evade payment of duty must be shown and in the absence of it there is no justification to invoke proviso to

Section 11A would apply to the facts of this case. It is one of the ingredients to Section 11 AC that there must be intent to evade payment of duty. The contention of the departmental representative that penalty has been imposed by the Commissioner under Section 11 AC read with Rule 173Q and the further contention that mens rea is not required in the case of penalty under Rule 173Q is not relevant. The notice to show cause notice does not refer to penalty under Rule 173Q. The further contention that it could have been penalty under Rule 173Q where there is no mens rea required to be shown, is therefore not required to be considered by us. The fact remains that Section 11 AC requires the existence of intent to evade duty. It can be possible as the departmental representative argues that this requirement is not present in Rule 173Q. This, however, cannot lead to the conclusion when we read Section 11 AC that the ingredient of intent to evade duty was not present in that section.

6. The further contention that the phrase 'intent to evade' duty occurring in Section 11 AC qualifies the phrase "contravention of any of the provisions of this Act or rules" and does not apply to the earlier stated wilful mis-statement, omission, etc is not borne out by the judgement of the Supreme Court in the case cited by the appellant and is contrary to the judgment of the Supreme Court in *Cosmic Dye Chemical v. Collector of Central Excise-1995 (75) E.L.T. 721*. In that judgment the Court has found that without intent to evade payment of duty the extended period in the proviso to Section 11A could not be invoked, applies to facts of this case. It has therefore to be concluded that penalty under Section 11AC was not imposable. Whether penalty could have been imposed under Rule 173Q is not a matter that needs consideration.

7. On limitation too the appellant has a good case. Extended period under Section 11A has been invoked on the ground that appellant wilfully mis-stated and suppressed the facts. The departmental representative does not dispute that appellant had declared to the department the variety of the goods, and the price of Rs. 68/- per sq.

mtr. for party of the period and Rs. 76.16 per sq. mtr. for the remaining period. It is also not disputed that the prices declared invoiced for the subsequent period to its

own factory were in the range of Rs. 77 to 139 kgs. The departmental representative's contention is that there has been mis-statement by indicating the unit for invoicing to M/s Courtaulds Packaging in terms of sq. mtr., whereas unit for invoicing to its own factory was in kilograms. For us to accept this contention would be to say that the departmental officers, up to the rank of Assistant Commissioner, to whom the declaration was filed, are incapable of converting the price per kilogram to price per sq. mtr.

Surely such a simple exercise is not beyond the capability of Assistant Commissioner. In view of the finding that we have recorded that in the absence of intent to evade payment of duty, it will then follow that demand for duty is barred by limitation.

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