

Commissioner of C. Ex. Vs. Universal Luggage Mfg. Co. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-10-2000

Reported in : (2000)(120)ELT161Tri(Mum.)bai

Appellant : Commissioner of C. Ex.

Respondent : Universal Luggage Mfg. Co. Ltd.

Judgement :

1. Respondent to this appeal by the Commissioner is M/s. Universal Luggage Manufacturing Co. Ltd. (ULM for short). These proceedings have arisen out of the notice issued to ULM by the department. The notice alleges that with effect from June, 1987 onwards the multi luggage manufactured by ULM substantially cleared through their wholesale subsidiary, named Aristocrat Marketing Ltd (AML for short). The notice says that ULM was a sham company only existing on paper and says that it is a separate juristic entity. Different stands are taken at different places in the notice. It alleges that the subsidiary was formed in order to evade duty; ULM after the AML was formed reduced the assessable value of the luggage sold to AML which thereafter sold it to dealers at substantially higher prices. There was a supporting allegation made in the notice that advertising expenses were hived off to AML from ULM; staff in both companies were same; trading pattern of ULM so as to increase the sale from AML. The notice was based on some sales of goods manufactured by ULM to AML and hence the price at which AML sold the goods to be the assessable value. It also contains an alternative proposal that in the event that it was not accepted AML is a sham, it was a related company and

therefore by application of the proviso (iii) to Section 4 (1)(a) of the Act, it is the price at which AML sold the goods, that would form the basis for the assessable value.

2. The assessee contended before the adjudicating Collector that it was in fact a distinct corporate entity. It pointed out that it makes substantial sales to the Canteen Stores Department (CSD for short) of the Government of India; that other dealers indirectly and also exported some of the goods. The total of these clearances come about 35% of the total clearances. Therefore, it was contended the prices at which the goods were sold by AML to its dealer should not be applied.

3. The Collector accepted these contentions. He found the following position to hold true as regards the sale pattern: "From the sales pattern of M/s. ULM, it can be observed that M/s.

ULM had effected a total sales of Rs 29,88,30,105.00 to M/s. AML and to others a total sales of Rs 16,75,50,718.64 (i.e. to dealers, CSD, DGS&D and Exports) during the period January, 1987 to May, 1988.

Similarly, the sales effected during the period June, 1988 to March, 1989 were Rs 1,841.86 lakhs to M/s. AML and to other were Rs 1,369.39 lakhs (i.e. to Dealers, CSD). All the sales had been effected at the price filed by the assessee in Proforma-I. It is, thus, evident that no special consideration had been extended to M/s. AML, which is a subsidiary concern of M/s. UML; further the sales effected to CSD, Exports, DGS&D are covered within the meaning of Section 4(1)(a) as discussed hereinbefore." He was of the view that in any event the sales to CSD and Director General Supplies and Disposal (DGS&D for short) of the Government of India are sales within the meaning of Section 4(1)(a) of the Act and are to be taken into consideration in the term "pattern of sales". He made some observation as to the juristic independence of AML. He therefore vacated the show cause notice. This is being challenged in this appeal by the Collector.

4. The appeal continues the contradictions with regard to the nature of the AML which we have found existed in the show cause notice. The first ground of appeal

emphasises the reduced prices at which ULM sold the goods to its "subsidiary company". The next ground contends that AML was existing only on paper. The departmental representative, despite his best efforts, was unable to resolve these significant contradictions.

5. Advocate for the respondent contends that the factors which are relied upon in the notice cannot lead to the conclusion that AML did not exist. He does not dispute that it was a wholly owned subsidiary of ULM and that they are therefore related persons within the meaning of Explanation below Section 4(4) (c) of the Act. He however contends that this itself presupposed the existence of the company. It was incorporated under the Company's Act, had its balance-sheet and otherwise carried out statutory obligations imposed on him by law. The fact of it having several persons who were earlier working for ULM or sharing warehouses with it at various places, themselves lead to the conclusion that it did exist in fact. He contends that the allegation that there was only a transfer of stock from ULM to AML made in the show cause notice is not in fact substantiated. The statements of the managers of the various branches which are relied upon in the notice only show that they were store transfers between factory of UML and its warehouses and that there was in fact an actual sale (often without the goods themselves being removed since they were in the warehouse commonly shared by the two) from UML to AML.

6. We accept these submissions. As we have seen, the notice itself suffers from a significant contradictions. It is first alleged that AML is not in existence, and only shows to exist on paper. At the same time at various places, had specifically alleged that AML is a separate company. The following observations are illustrative: "On the whole, it therefore appears that the company carries out its normal wholesale trade through their subsidiary company." (page 10 of the notice). "The fact that M/s. AML incurs advertisement expenses for the product of M/s. UML shows the mutual interest between the two companies". (page 13 of the notice). "This shows that M/s. UML have deliberately reduced the assessable value and shifted an expenditure which is a taxable component to the expenditure of M/s. AML merely to evade payment of duty", (page 14 of the notice 7. In addition to these statements and similar others, the finding of the Collector that

AML is a distinct juristic entity is not questioned in the appeal by leading any evidence. It has therefore to be concluded that AML did exist as a juristic person in reality.

8. There being no dispute that ULM and AML are related, it has to be seen, whether the provisions of the proviso (iii) to Clause (a) of Sub-section (4) of Section 4 would apply. In other words, were the goods manufactured by ULM generally sold to or through AML, so as to justify the view that the assessable value should be based on the price at which AML sold the goods? The correctness of the Collector's findings (which we have reproduced above) with regard to the pattern of sales is not questioned. That being so, this shows that roughly one-third of the sales by ULM were being made to persons other than AML. Advocate for the respondent explains this further. The period of the notice is June, 1987 to March, 1989. For the period June, 1987 to May, 1988, sales to AML accounted for 64.07%, sales to dealers 7%, sales to CSD 28.5% and exports and others 5%. For the remaining period June, 1988 to March, 1989 sales to AML accounted for 57.36%, sales to dealers 5.46% and sales to CSD 37.18%.

9. The appeal however contends that the sales to CSD and the Director General Supplies and Disposal of the Government of India and exports are not to be taken into account in computing the general pattern of sales. The argument is that the CSD and DGS&D are different class of buyers, as are the persons to buy the goods exported. The price at which the goods are sold to them is not a normal price within the meaning of Section 4(1)(a).

10. Clause (i) to the proviso to Section 4(1)(a) provides that where, in accordance with the normal practice, goods are sold by the assessee at different classes of buyers is such price, shall be deemed to be the normal price of such goods in relation to each classes of buyers. In other words, it provides for a situation in which there can be more than one assessable value for a commodity, if sold to different classes of buyers. That seems to be the objective of the proviso. The class of buyers are indicated by reference to dealers, industrial consumers, local authorities contained in Explanation (e). These categories have been considered by the Supreme Court in Govt. of India v. MRF Ltd. - 1995 (77) E.L.T. 433 to be

different classes of buyers.

11. It is the contention of the advocate for the respondent that the fact of there being sales to different classes of buyers should not justify a separate consideration of the figure of sales to each class of buyer (in order to arrive at the applicability or otherwise of proviso (iii) to Section 4(1)(a). It does not appear necessary for us to examine this argument in isolation from the facts of this case. It was, and is the stand of the respondent, and not disputed by the department, that the price at which the goods are sold to different classes of buyers is the same price at which it sold the goods to AML.

We would agree that the clearance for export would not perhaps the sale within the meaning of Section 4(1)(a). Exports are however insignificant being less than 5% for one period and there being no export in the remaining period. If the sales to various classes of buyers, the dealers, CSD and DGS&D are at the same price, there is no reason why they should not be taken into account in deciding how the respondent generally sells these goods. As far as we can see, the object of the proviso (iii) to Section 4(1)(a) is to ensure that a manufacturer does not escape from paying the duty that would be payable by so arranging his affairs that he sells the goods at lower prices to or through a related person who would in turn sell them at the real value. In the face of the relationship between the two it would be difficult or impossible to establish financial flowback from the buyer of the goods to their manufacturer. The use of the term "generally" in the Explanation underlines this point that a manufacturer should not get away by creating a nominal market at the factory gate at which the goods are sold at their true value to escape the provisions of this proviso. *Cosmos India Rubber Works v. Union of India* 1988 (38) E.L.T. 102 cited by the advocate for the respondent to say that proviso (iii) would only be attracted where the assessee sells all the goods manufactured by him to or through a related person. This is explicitly what the learned single judge of the Court in this judgment. He says "This proviso (iii) clearly shows that it applies where all the goods are sold to a related person. If some of the goods goes to persons other than related person, naturally this proviso would not come into operation." It is tempting to ask what the position would be if, for example, a manufacturer sells 0.25% of his goods at the factory gate and the remainder to or

through a related person. He has in that case, not sold all the goods manufactured by it, to or through any related persons, would the proviso (iii) attract or not? 13. Without going into this aspect, the principle enunciated in the judgment that the goods must generally be sold to or through a related person would apply. In the case before us 35% of the goods were not sold to or through a related person. In CCE v. Enfield India 1988 (34) E.L.T. 654, the Tribunal observes that, where 20% of the sales were made by it in India to persons other than related person, other 80% being to the related person, the proviso (iii) would not be attracted.

It noted that 20% is not an insignificant quantity. There was nothing to show that if the persons, dealers who accounted for this 20% wanted more goods they would have been denied such goods. In other words, where there is a sale, even if relatively small, of goods to or through persons at the factory gate, that sale, if bona fide and genuine, would be a sale at the price specified in Section 4(1)(a) and that price would have to be applied to the goods sold by the assessee even if the remainder of the goods are sold by it to related persons. The figures that we are concerned are substantially higher almost double the figure under consideration by En-field India. No contrary decision has been cited before us.

14. We therefore see no reason to interfere with the order of the Collector and dismiss the appeal.

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