

**Polyformalln (P) Ltd. Vs. Collector of Central Excise**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Aug-22-1984

**Reported in :** (1985)LC35Tri(Delhi)

**Appellant :** Polyformalln (P) Ltd.

**Respondent :** Collector of Central Excise

**Judgement :**

1. The captioned appeal was originally filed as a revision application before the Central Government which, under Section 35P of the Central Excises and Salt Act, 1944, has come as transferred proceedings to this Tribunal for disposal as if it were an appeal filed before it.

2. The appellants are manufacturers of resins falling under Item No.15A(1) of the First Schedule to the Central Excises and Salt Act, 1944 (CET). Resins were in the list of goods to which Central Excise Notification No. 198/76, dated 16-6-1976 applied. In terms of the notification, manufacturers whose clearances of the listed goods in the financial year excluded the base clearance fixed by the Assistant Collector in the manner laid down in the notification were eligible for exemption from duty to the extent of 25% of the duty leviable on the excess clearances. The base clearance of the appellants was fixed as 114.151 M.T. by the Assistant Collector on 22-12-1978. The appellants had crossed the base clearance figure on 26-5-1978 and consequently were eligible for the duty relief on the excess clearances effected by them during the year 1978-79. On 12-1-1979, the Assistant Collector received a claim for refund of the excess duty paid by the appellants

during the period 26-5-1978 to December, 1978 amounting to Rs. 1,46,143.12. The Assistant Collector considered the claim with reference to the Cochin Collectorate Trade Notice No. 54/77, dated 9-3-1977 which provided that in the event of the duty concession not being passed on to consumers, the assessable value of the goods would have to be recalculated in accordance with a formula. Further, the claim for the period 26-5-1978 to 9-7-1978 was, according to the Assistant Collector, hit by limitation under Central Excise Rule 11. An amount of Rs. 23,444.11 on this ground and an amount of Rs. 35,006.88 on the basis of the recalculated assessable value was held by the Assistant Collector to be inadmissible. The balance amount of Rs. 87,691.13 was paid to the appellants. After issue of a show cause notice and holding adjudication proceedings, the Assistant Collector, on being satisfied that the refund claim had in fact been filed on 21-1-1978 and not 12-1-1979, held that no part of the claim was hit by limitation under Rule 11. However, in so far as redetermination of the assessable value and duty liability was concerned, he held that it had to be done as per the Trade Notice No. 54/77, dated 9-3-1977 since the benefit of duty relief was not passed on to the consumer. Consequently, he rejected the claim for the amount of Rs. 35,006.68, being the difference between the amount claimed and the amount refundable on the basis of the redetermined assessable value. The matter was pursued in appeal. Holding that the formula adopted by the Assistant Collector for redetermination of the assessable value and the duty liability was nothing more than an arithmetic principle for application of the provisions of Section 4 of the Central Excises and Salt Act, the Appellate Collector rejected the appeal. It is this order that is now under challenge before us.

3. The learned Counsel's submissions before us during the course of the hearing, on behalf of the appellants, may be summarised thus- (a) The selling prices of the appellants' products were ex-duty and not cum-duty prices. The formula contained in Trade Notice No. 54/77 and the method adopted for the redetermination of the assessable value were with reference to cum-duty selling prices. This fact had been brought to the notice of the lower authorities, who had, however, not touched on it in their orders. *Modi Rubber Ltd., Modinagar v. Union of India and Ors.*-1918 E.L.T. (J 127), has held that Notification No. 198/76 did not stipulate that the benefit of the duty concession should be passed on to the consumer. The

notification is law and its scope cannot be circumscribed by administrative directions, guidelines, press notes, trade notices etc. The Court had, therefore, held that Government's press note was ultra vires of the provisions of the exemption notification and that there was no question of redetermination of the assessable value and duty liability on the ground that the duty relief was not passed on to the consumer. The same view was reiterated by Delhi High Court in *Indian Aluminium Co. Ltd. v. Union of India* in CWP No. 1006 of 1978 1983 E.L.T. 349 (Del.). The Appellate Collector, however, did not follow these decisions though there was no contrary decision, but chose to decide the matter in the light of his interpretation of Section 4 of the Central Excises and Salt Act (called the Act hereafter) though the Assistant Collector had only relied on Trade Notice 54/77 and not on Section 4. The impugned order, therefore, deserves to be set aside for it disregards the aforesaid decisions, it relied on a trade notice which was struck down by the Court and it overlooked the fact that the trade notice deals with cum-duty prices and has no application to ex-duty prices as in the appellants' case.

(c) The Delhi High Court in *Apollo Tyres Ltd. and Ors. v. Union of India and Ors.*-1980 E.L.T. 428 (Del.) reiterated the decision in the *Modi Rubber* case. Moreover, it quashed Trade Notice No. 54/77. The decision in 1978 E.L.T. (J 127) was followed by the Andhra Pradesh High Court in *Andhra Pradesh Paper Mills Ltd. v. Assistant Collector of Central Excise*-E.L.T. (d) A trade notice is not law and has no statutory force. The Bombay High Court decision in *Union of India and Ors. v. The Elphinstone Spinning & Weaving Mills Co. Ltd.*-1978 E.L.T. (J 680) was cited in support. The Collectorate Trade Notice was, therefore, of no assistance to the Department. Contrariwise, a notification is law and has to be given full effect to. In this context, the decision reported in *Kailash Nath and Anr. v. State of U.P.* Ors. & AIR 195: S.C. 790 was relied upon.

(e) The Tribunal is bound by the decision of the Delhi High Court in the *Modi Rubber Ltd.* case and *Apollo Tyres Ltd.* case. In this context, the decision reported in 1978 E.L.T. 624 was cited.

(f) The amendment effected to Section 4(4)(d)(ii) of the Act by clause 47 of the Finance Bill, 1982 would not make any difference to the present case, for the

reason that the explanation inserted by the amendment read with Section 4(4)(d)(ii) had relevance to cum-duty price situations and not ex-duty price situations as in the present case where the normal price or the price at which the goods are contracted for sale and the other elements like duty are shown separately in the price list. Ex-duty price, in this case, is normal price, i.e. the assessable value. Duty was paid to Government and recovered from the customer at the full rate. In the recent decision of the Supreme Court also, the ex-duty price is arrived, by knocking off from the cum-duty price all the deductible elements such as duty. Therefore, if the normal price itself is exclusive of these elements and inclusive of duty, there would be no question having to arrive at the normal price by the deduction method.

4. On behalf of the Respondent, it was submitted by the learned Departmental Representative that the appellants had charged from his customers an amount in excess of what was actually payable by way of duty. In excess amount was not duty and was rightly deductible from the selling price to arrive at the correct assessable value. In this connection, two decisions the Tribunal were relied upon- (i) Union Carbide of India Ltd., Calcutta v, CCE Hyderabad-E.L.T. 548; C Travancore-Cochin Chemicals Ltd. v. Collector of Central Excise, Cochin.

5. In reply, the Counsel for the appellants submitted that in the case covered by the Tribunal's Order No. 441/84-C, the assessee charged excise duty at the full rate from his customers even after the base-clearance was exceeded and further, the selling price was inclusive of duty. The decision in that case was ex parte and cannot be taken as a binding precedent. The Bench had not, in that case, noticed that the explanation to Section 4(4)(d)(ii) inserted by the 1982 amendment spoke of the amount of the duty of excise payable and not the rate of duty.

6. We have given our careful consideration to the submissions before us. The issue arising for determination in the present case is whether the redetermination of the assessable value and of the duty liability of the appellants' products and the resultant denial of a part of the amount claimed as refund in terms of Notification No. 198/76 was warranted and correct or not. The appellant has vehemently contended it is not and has cited judicial pronouncements in support. The

Assistant Collector supported this action on the basis of Trade Notice 54/77, dated 9-3-1977. Let us straightaway say that the Assistant Collector, functioning as a quasi-judicial authority, should not have founded his decision on the Collector's trade notice which, as the Counsel for the appellants has pointed out, is not law and has no statutory effect-See 1978 E.L.T. 680. The Appellate Collector, however, has examined the issue with reference to the provisions of Section 4 of the Act and concluded that the method adopted for the aforesaid re-determination was sanctioned by Section 4 quite apart from the trade notice. We have, therefore, to consider whether the action of the lower authorities is supported by the provisions of Section 4, keeping in view the case law cited before us.

7. This very question came up for consideration before the Delhi High Court in the Modi Rubber case-1978 E.L.T 127, and in the Apollo Tyres case- 1980 E.L.T. 428. In both these decisions, the Court held that since Notification No. 198/76 did not have a condition that the duty relief should be passed on to the consumer, such a condition cannot be imposed by administrative directions, guide-lines or press notes. It should be mentioned here that, as seen from that judgment, Government had filed a counter-affidavit in the Modi Rubber case to the effect that under Section 4 of the Act, the specific method of determination of assessable value for the purpose of payment of central excise duty provides that the assessable value has to be so assessed that the benefit of the relief has to be passed on to the consumer. In this context, the Court observed that if the object of the Government in granting exemption is to benefit the consumer by the reduction of the selling price of the goods, then the exemption notification itself should say so as was the case in Notification G.S.R. 1089 dated 29-4-1969. The Court held that notification is law and conditions contrary to the statutory notifications cannot be imposed by administrative directions, guide-lines or press notes. This decision was followed by the same High Court in the Indian Aluminium case-and the Apollo Tyre case-1980 E.L.T. 428 and by the Andhra Pradesh High Court in the Andhra Pradesh Paper Mills case-1980 E.L.T. 210 (A.P.).

8. At this stage, it is expedient to take note of the amendment brought about by the Finance Bill, 1982 to Section 4(4)(d)(ii) of the Act.

Section 4(1) provides that "4. (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this Section, be deemed to be- (a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee s to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale : (d) 'value', in relation to any excisable goods, - \* \* \* (ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale; \* \* \* \* Explanation.- For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of - (a) the effective duty of excise payable on such goods under this Act; and (b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods, and the effective duty of excise on such goods under each Act referred to in Clause (a) or Clause (b) shall be,- - (i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise on such goods equal to, any duty of excise already paid on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and (ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods." (the above explanation was inserted by clause 47 of the Finance Bill, 1982 to take effect from 1-10-1975, the date of enforcement of Section 4 of the Act).

It may be seen that for the purpose of arriving at the assessable value, the amount of duty of excise and other taxes, if any, payable on such goods have to be excluded. The effect of the explanation is to precise the meaning of the expression "the amount of the duty of excise payable". According to the explanation, it is only

the effective duty of excise payable on excisable goods under the Act (and other Central Acts, if any) and "the effective duty of excise" has been denned to be, in a case where an exemption notification under the Acts is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of the goods as reduced so as to give full and complete effect to such exemption To put it simply, if the Schedule to the Act prescribes a duty of 100% ad valorem, and an exemption notification under Rule 8 of the Central Excise Rules exempts the goods from duty in excess of 75% ad valorem, then, the amount of duty computed with reference to the rate of 75% and not 100% is the amount to be excluded in arriving at the assessable value of the goods.

The reason for this stipulation is not far to seek.

If the duty payable on the goods is only that calculated at the rate of 75% ad valorem, then any amount included in the selling price purported to be duty calculated at the rate of 100% ad valorem, would not represent the correct amount of duty payable on the goods. The difference between the two amounts would not be duty and unless this difference is shown to be on account of some element which is, by law, required to be excluded from the computation of the assessable value, it should form part of the assessable value. The Supreme Court in its recent judgment in the Union of India and Ors. v. Bombay Tyres International Ltd. etc. - 1983 E.L.T. 1896, considered at length the question whether any post-manufacturing expenses are deductible from the price when determining the "value" of excisable goods. The Court held that the expenses incurred on account of the different factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included.

The Court further held that where the sale is effected at the factory gate, the expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventory (stocks carried by the manufacturers after clearances), charges for other services after delivery to the buyer, namely after-sale service and marketing and selling organisation expenses, including advertisement expenses, cannot be deducted. Reading the Supreme Court's judgment as a whole, it is clear that the assessable value has to be arrived

at from the selling price at the factory gate (in cases where sales are effected at the factory gate) and apart from duty, other taxes and freight and cost of packing under certain circumstances are the other deductible elements. The selling price, whatever be the method in which the contract of sale is drawn up, is the price at which goods change hands and no element comprised in this price would be deductible for arriving at the assessable value unless it is shown to be a deductible element. The selling price would naturally include the duty element which is a deductible element.

However, what is deductible under this head is, by virtue of the explanation to Section 4(4)(d)(ii) of the Act inserted by the Finance Bill, 1982, is only the amount of duty calculated with reference to 75% ad valorem in the example given earlier and not 100% ad valorem. This is in fact what has happened in the present case. The decisions of the Delhi High Court and the Andhra Pradesh High Court relied upon by the Counsel or the appellants were given before the 1982 amendment of Section 4 and, with great respect, we have to consider the present matter in the right of Section 4 as it stands today and as it is deemed to have stood from 1-10-1975 by virtue of the retrospective amendment and in the light of the latest decision of the Supreme Court. Viewed in this light, we have, no doubt, that the method adopted by the Revenue for arriving at the assessable value and the liability to duty and the consequent denial of a portion of the amount claimed as refund were correct and in accordance with the law. The argument that the appellants' prices were ex -duty prices, is of no avail. Because according to Section 4(1) of the Act, the basis for arriving at the assessable value is the normal price, that is, the price at which the goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale. Evidently, the normal price contemplated is the price at which the goods change hands and not some of the components thereof. The selling price in the present case is admittedly comprised of ex-duty price, an amount towards duty worked out at 100% ad valorem, and the sales tax. This is the normal price from which the assessable value has to be worked out in accordance with the principles laid down in the Section and in the light of the Supreme Court judgment. If this were not so, the difference between 100% ad valorem and 75% ad valorem which



is neither the duty payable nor is shown to be a deductible element would escape charge to duty despite its being part of the normal price.

9. We are in agreement with the Counsel for the appellants that a statutory notification is law and cannot be circumscribed by administrative instructions, guide-lines, press notes or trade notices.

However, in the present case what is involved is not so much a question of the applicability of a trade notice, which, in terms, was struck down by the Delhi High Court, but the proper application of Section 4 of the Act to the facts of the case which is what the Appellate Collector has done. Our attention has been drawn by the Departmental Representative to two decisions of this Tribunal, one, reported in 1983 E.L.T. 548 and the other contained in Order No. C-441/84, dated 28-6-1984 in Appeal No. ED(SB)(T)235/81-C. Our decision in this case is in line with the said two decisions.

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