

Ma Care and anr. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-29-2000

Reported in : (2000)(70)ECC803

Judge : S T Gowri, J S Murthy

Appellant : Ma Care and anr.

Respondent : Commissioner of Central Excise

Judgement :

1. The application for modification raises two points. The first is that while the Tribunal had itself noted that the applicant had a good case on limitation, this is not reflected in the amounts to be deposited. The second is that the department itself has been taking contradictory stand after the impugned order was passed with regard to the identity of the manufacture. It was contended that in the letter dated 3.11.98 of the Asst. Commissioner, MA Care to be the manufacturer. The order of 3.4.99 has held both TTK and MA Care to be the manufacturers. The demand notice dated 30.11.98 alleged MA Care to be manufacturer while notice dated 22.1.99 holds both to be the manufacturers.

2. By our order dated 16.12.99 we had required the Commissioner to take a specific stand as to whom he considers as the manufacture. After several adjournment at the departmental representative's request, we have today been shown the letter dated 7.2.2000, which the departmental representative relies upon.

3. This letter contends that the department has all along been holding TTK to be the manufacturer. However, it is unable to explain the notice dated 15.5.98 and order dated 3.11.98 of the Asst. Commissioner, in which he has held MA Care to be the manufacturer. The explanation that it related to misclassification of the product in fact goes against the department. If the Asst. Commissioner holds that the misclassification was done by MA Care, classification is to be determined by the manufacturer. It would thus follow the Asst. Commissioner in holding MA Care guilty of misclassification has held it to be the manufacturer.

The contention in the impugned order dated 3.4.99 the Asst.

Commissioner has not held both to be manufacturer completely ignores the final part of the order, in which he demanded duty "from the assessee M/s. MAC (short for Ma Care) and TTK (short for TTK Pharma)".

He has also held the assessable value to be the price charged by MA Care to TTK. If TTK were held to be the manufacturer, one would expect that it will be the price of TTK that would apply. We are therefore of the prima facie view the department is not clear to its own mind as evident from the conduct of passing of the order as to who is the manufacturer, at least at this stage.

4. The question as to whether the proviso under Section 11A(1) could be invoked to get over the order of the Commissioner (Appeals) dated 29.5.92 in which he has held MA Care and TTK to be independent and found MA Care to be the manufacturer, is again doubtful. If, as is contended, wrong and misleading statements were made before the Commissioner (Appeals), the department had every right to rebut these statements before the Commissioner to pass the final order. Assuming that he did not refer to the department or did not accept this contention, it was still open to the department to set aside its order by appeal. It is firmly contended by the representative of the applicant that this is not done.

5. It is noted that if this proposition were to be accepted there would be no finality in the judgment of any court since it would be said that party has been misleading the concerned court. We are therefore satisfied that in our earlier order, we have not taken into account considered to the extent required contention of limitation.

The Advocate for the applicant explains that subsequent to our order Rs. 20 lakhs has been deposited by TTK and offers to make further deposit Rs. 20 lakhs. He offers to deposit by MA Care Rs. 3 lakhs towards penalty.

He reiterates the request made for out of turn hearing having regard to the value of the goods and continuing nature of the dispute.

6. In the light of our consideration, we are satisfied that the above amount is sufficient and direct these to be made within a month from the receipt of this order. We accept in principle for early hearing, the date for which will be set on receipt of compliance on 6th June 2000.

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