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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-23-2000

Reported in : (2000)(119)ELT56TriDel

Appellant : Vikram Detergents Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. The reference required to be considered by this Bench in these appeals.

"Whether in the facts and circumstances the appellants transaction satisfied the requirement for returnability of the packing by the buyer to the assessee for entitlement of deduction of cost in terms of Section 4(4)(d)(i) of the Central Excises Act, or transaction does not satisfy the requirement for returnability of the packing, and not eligible for deduction".

2. The brief facts of the case are that the appellants are engaged in the manufacture of detergent powder and they have an arrangement with M/s Hindustan Lever Ltd. for repacking of bulk detergent powder received by them into small consumer packs which are thereafter delivered "in HDPE bags" on payment of duty on the basis of assessable value derived from Hindustan Lever's (hereinafter referred to as trader) sale price. Admitted position is that there is no buyer at the time when goods are removed from the assessee (appellant) factory. The issue involved is the claim of deduction of the cost of HDPE bags under Section 4(4)(d)(i). The invoices issued by the traders from their depot to their

customers bear following remarks :- "Deliveries of Detergent Powder, and scourer powder will be made in High Density Polythelene HDPE bags. The HDPE bags being durable in nature are capable of being reused by us. On return of these bags to us in old but reusable condition the cost thereof recovered as part of the price of the goods sold to you will be reimbursed by us to you".

3. We have heard both the sides. The ld. Advocate for the Appellants submitted :- (a) Relying upon K. Radha Krishaniah case 1987 (27) E.L.T. (598) (SC) and Mahalaxmi Glass, 1908 (36) E.L.T. 727 (SC), Bombay High Court decision in Ajit Glass Works, 1987 (31) E.L.T. (615) and Mysore Cement 1988 (37) E.L.T. 556, Birla Jute Manufacturing Co., 1980 (6) E.L.T. 593 (MP), J.K. Cement Works, 1994 (73) E.L.T. 276, Associated Cement, 1987 27 E.L.T. 746 (5 Member Bench) of Tribunal it was pleaded that packing must be returnable under an arrangement and there need not be a formal contract and an implied agreement is enough, therefore the clause on the sale invoice of the Trader of the goods on subsequent sales to its own customers should be sufficient to grant the eligibility of deduction under Section 4(4)(d) (i) when goods are being removed from the manufacturer (present appellants) to the depot of Traders who had got the excisable goods manufactured from them. However, no invoice agreement or arrangement between the manufacturer and the trader was produced.

(b) The following judgments where the Hon'ble High Court and this Tribunal were relied to hold that the "Terms" reproduced herein above in para 2 on the invoices of the Trader to their customers as printed on the invoice, satisfy the criteria of 'Returnability' as under Section 4(4)(d)(1) of the act.Jayant Paper Mills Ltd. v. Collector of Central Excise, Vadodara, 1996 (88) E.L.T. 545 (Tribunal). "Paper cores or wooden plugs were of durable nature and returnable and the cost of packing material would be refunded to the customer who choose to return them without causing any damage".Collector of Central Excise, Ahmedabad v. Maize Products 1996 (85) E.L.T. 64 (Tribunal). "Drum deposit will be refunded if the drum is returned intact back to the plant".Maharashtra Vegetable Products Ltd. v. Collector of Central Excise 1992 (57) E.L.T. 173 (Tribunal). "Container should be returned to the factory in good and sound condition at buyers cost whereupon the cost of the container will be returned to the buyer".

(iv) J.K Cement Works v. Union of India, 1994 (73) E.L.T. 276 (Delhi High Court). "Please preserve empty cement bags in serviceable condition and return them to the factory of origin or its collecting agent on payment".Associated Cement Companies Ltd. v. CCE, Indore, 1987 (27) E.L.T. 746 (Five Member Bench Tribunal). "Please preserve empty cement bags in serviceable condition and return them to the factory of origin or its collecting agent on payment".Birla Jute Mfg. Company Ltd. v. Union of India, 1988 E.L.T. 593 (M.P High Court). "Please preserve empty cement bags in serviceable condition and return them to the factory of origin or its collecting agent on payment".Guljag Chemicals & Plastics (P) Ltd. v. CCE, 1993 (63) E.L.T. 710 (Tri). "Deliveries of wheel detergent powder, sunlight detergent powder, Vim and Surf 500 gms. carry bag will be made in High Density Polyethylene (HDPE) Bags. The HDPE Bags being durable in nature are capable of being returned to us if therefore, these bags are returned to us in old but reusable condition, the cost thereof recovered as part of the price of the goods sold to you will be reimbursed by us to wholesaler".

(viii) How the returnability has been interpreted by the Hon'ble Supreme Court/High Courts and Tribunals:- Jayant Paper Mills Ltd. v. Collector Central Excise, Vadodara, 1996 (88) E.L.T. 545. The Show Cause Notices did not propound a case that the invoices or the rubber stamp endorsement on the invoices were the result of a subsequent manipulation, nor do the impugned orders contain any such suggestion. We, therefore, take it that the invoices with the endorsements are genuine documents. If that be so, they reflect an agreement between the parties regarding the returnability of the containers. Hence, the packing material in these cases would attract the exclusion clause of Section 4(4)(d)(i) of the Act.Collector of Central Excise, Ahmedabad v. Maize Products 1996 (85) E.L.T. 64 (Tribunal) has held as follows :- What is necessary, is that if the buyer choses to return the packing, the seller should be obliged to accept and refund the stipulated amount. In the present case the sample of invoices clearly bear an undertaking by the respondents that drum deposit will be refunded if the drum is refurned intact back to the plant on freight pre-paid basis. The Assistant Collector in his order has found as a fact that as and when buyer chose to return the packing, the Respondents accept the same and return the deposit money. In such situation, both the Assistant Collector and the Collector (Appeals) had

considered the right criteria as laid down by the Supreme Court in this regard to hold that the drums in this case fall under the category of durable and returnable packing and the drums deposit in the circumstances of this case cannot form part of the assessable value in terms of Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944. There is thus no reason to interfere with the order passed by the lower authorities. The appeal is accordingly rejected.Maharashtra Vegetable Products Ltd. v. Collector of Central Excise, 1992 (57) E.L.T. 173 (Tribunal) observed "Apart from the aforesaid, I notice that packing cost has been shown separately at the rate of Rs. 13.50 in the invoice, mentioned in the order proposed by my learned sister. The endorsement and the separate packing cost shown in the invoice taken together makes it very clear that the containers were returnable to the appellants in good and sound condition at the customers cost whereupon the cost of the container i.e. the packing cost would be returned. The cost of packing has been shown separately as mentioned above. Therefore, I do not feel that there is any vagueness in the arrangement or agreement between the appellants and their customers.

(xi) The Hon'ble High Court in the case of J.K Cement Works v. Union of India, 1994 (73) E.L.T. 276 (Delhi) has held as follows :- A combined reading of the aforementioned documents clearly shows that the purchasers, if they so choose, can return the cement bags and the assessee on the return of such bags are obliged to purchase these bags at the rates specified. This clearly establishes an arrangement between the assessee and the purchasers of Cement, under which the gunny bags can be returned by the purchasers to the assessee. Further, in case the buyer choose to return the packing the assessee will be obliged to accept the case and refund the stipulated amount. In order to attract the provisions of Section 4(4)(d)(i) of the Act, it is not necessary to show that the gunny bag packing has actually been returned, and that it is only necessary to show that the packing is returnable by the purchasers to the assessee.

(xii) The Hon'ble Bombay High Court in the case of Sathe Biscuits and Chocolate Company Ltd. and Anr. v. Union of India and Ors., 1984 (17) E.L.T. 39 (Bom.) has held as follows :- "The proposition at first sight appears to be quite attractive. But as already pointed out, in the context in which the word "returnable" is used and is

preceded by the word "is" it positively indicates that there has to be a term of the contract which makes it obligatory on the manufacturer to accept the container of the packing when the same is returned if it is of a durable nature and is returnable by the buyer, the Legislature was clearly giving effect to the principle that no excise duty would be leviable on a packing which was capable of being reused because this would mean that the value of the same packing would be subject to excise duty more than once. We are therefore, of the view that the cost of only such packing which is of a durable nature and is returnable under the terms of the contract between the manufacturer and the wholesaler is excludable from the value for the purpose of excise duty".

(c) Reliance was placed upon 1993 (63) E.L.T. 710 and Tribunal Final Order No. 847/97 A dated 13-5-97, No. 671-673/97-A, dated 21-5-99 to submit that HDPE bags are 'Durable & Returnable1 and to submit that the judgments cover the same clearly about 'Returnability' as printed in the invoices in this case which should be held to satisfy the requirement of Section 4(4)(d)(i) and the unreported decision in the case GOM Industries does not lay the correct law as it had not considered decision relied upon herein.

(d) Relying upon Gavt. of India v. MRF, 1995 (77) E.L.T. 433 (SC) it was submitted that for 'Durable & Returnable' deduction it is irrelevant whether packing is primary or secondary.

4. The DR took the stand that printing of the clause on the Traders invoice is not relevant and there exist no agreement at the time of removal of goods from the factory. Agreement at subsequent Transfer/Sale is not stipulated and permissible under the law. The declaration on invoices of Trader are not sufficient as per law laid down in Radhakrishaiah case 1987 (27) E.L.T. 598 (SC). In this case no time limit was prescribed or grounds specified. He relied on Section 29 of the Indian Contract Act to submit that there is no agreement and if it exists, it is void for uncertainty. The decision in Guljag Chemicals & Plastics, 1993 (63) E.L.T. 710 (Tri) was based on the facts in that case where on the invoice it was categorically stated that the bags HDPE are durable and returnable containers and if the buyers returns the same, the cost of the bags would be reimbursed by the manufacturer.

5. Considering the submissions made and the material on record it is found : - (i) Where the goods are delivered at the time of removal in a packed condition includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee".

This would admit the coverage to all kinds of packing material which is of a durable nature and which is returnable, the exact actual return is not envisaged. However the return should be from the buyer of such packed excisable goods to the assessee by such buyer at the time of removal of the goods. In the present case, there is no arrangement or an agreement for actual return from the buyer at the time of removal to the assessee. The arrangement or agreement is only between the 'trader' who had got the goods manufactured from another processor and such trader's buyer (customer) and the assessee's buyer is not returning the goods. Therefore, the benefit of coverage under Section 4(4)(d)(i) and subsequent deduction of amount on account of HDPE bags returned/returnable by the buyer (customer) of the Trader to the Trader as per the Terms' on the invoice of a contract between them (Traders and his customers) will not be covered by the provisions of Section 4(4)(d)(i) : Since Time of Removal' in the Section would determine the nature of buyer and would therefore exclude 'any subsequent buyer' as in this case.

(b) The manufacturer (appellants in this case) are receiving the bulk powder and packing material, and after Repacking into smaller packets is sending the goods back to the trader (Hindustan Lever). There is no buyer at the time of removal of the goods from the assessees manufacturing (Appellants) premises. No invoice/document indicating the terms of an arrangement/agreement/contract were produced except the Invoices of the Trader. Therefore, it can be determined that in this case, there is no stipulation of returnability at the time of removal of the goods from the assessee (appellants) premises. Therefore Section 4(4)(d)(i) deduction is not available.

(c) Since there is no sale at the 'time of removal' there cannot be a buyer of the goods envisaged in Section 4(4)(d)(i). When there is no buyer of the goods, there is no cause, probability and or possibility of return of the packing material in the

facts of this case. Supreme Court in the case of Ujjager Prints 1989 (39) E.L.T. 493 (S.C.) in case where goods are got manufactured by a Trader by supply of Raw Materials to/by a processor, held such a processor as a manufacturer and on valuation of such goods classified :- "2. If the trader, who entrusts cotton or man-made fabric to the processor for processing on job work basis, would give a declaration to the processor as to what would be the price at which he would be selling the processed goods in the market, that would be taken by the Excise authorities as the assessable value of the processed fabric and excise duty would be charged to the processor on that basis provided that the declaration as to the price at which he would be selling the processed goods in the market, would include only the price or deemed price at which the processed fabric would leave the processors factory plus his profit. Rule 174 of the Central Excise Rules, 1944 enjoins that when goods owned by one person are manufactured by another the information is required relating to the price at which the said manufacturer is selling the said goods and the person so authorised agrees to discharge all the liabilities under the said Act and the rules made thereunder. The price at which he is selling the goods must be the value of the grey-cloth or fabric plus the value of the job work done plus the manufacturing profit and the manufacturing expenses but not any other subsequent profit or expenses. It is necessary to include the processor's expenses, cost and charges plus profit, but it is not necessary to include the trader's profit who gets the fabrics processed, because those would be post manufacturing profits".

Therefore, deductions only on account of traders profit would be only eligible. No other deductions would be permissible, if value is to worked out from the Traders Sale price, as in this case. Any deduction given on account of refund of cost of HDPE bags to a buyer (customer) by a Trader would be eating into the Traders' profit as it would be a cost. Any deduction allowed on this account would be granting deductions of cost of manufacture of excisable goods in such cases.

Since the goods at the factory gate are always, admitted to delivered, packed in HDPE bags this packing is essential packing where cost, whatever they may be, have to be added, to arrive at the value at the time of removal by a processor will have to be included. Thus the deductions on the account of HDPE bags costs are

not permissible.

6. In view of the findings herein above, the reference is answered as follows:- The cost of HDPE bags, in the facts of this case, are not deductible in terms of Section 4(4)(d)(i) of the Central Excise Act, 1994.

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