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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-01-1985

Reported in : (1991)(33)LC759Tri(Delhi)

Judge : L T D.N., M Santhanam, V T K.S.

Appellant : Collector of Central Excise

Respondent : T.i. Millers Ltd. and T.i. Diamond

Judgement :

1. In these two cases, the Government of India sought to review the Orders-in-Appeal No. 99/82 and 100/82 dated 15.3.1982 passed by the Appellate Collector of Central Excise, Madras, by an issue of review show cause notice dated 8.9.1982 to M/s T I. Millers Ltd., Madras and T.I. Diamond Chain Ltd., Madras. These have since been transferred to this Tribunal for disposal as appeals.

2. The facts of the case are that M/s. T.I. Millers Ltd. manufacture cycle lumps and M/s. T. I. Diamond Chain make automotive chains Both these goods are assessable under Item 68 CET. They initially filed price lists for the sale of the goods through (heir distributors, namely, M/s. T.I. & M, Sales Ltd., M/s. Charmvel Agencies and M/s.

Ambadi Enterprises Pvt. Ltd. quoting their price to the distributors as assessable value. However, subsequently following a Madras High Court decision in a valuation case, they required that the price charged by them from buyers at the

factory gate should be accepted as the assessable value and not the price to distributors. The Assistant Collector found from the sales pattern of the respondents that the distributors were related persons as per Section 4 of the Central Excises and Salt Act and the price at which the distributors sold the goods should, therefore, form the assessable value. The respondents preferred appeal against the Assistant Collector's orders before the Appellate Collector, Central Excise, Madras, The Appellate Collector observed that he had decided an identical issue in his earlier order dated 27.4.1981 and that though this order had been quoted before the Assistant Collector, it had not been given due consideration, He held that the earlier order was applicable in the case of the respondents and that in order to establish mutuality of business interests, direct and indirect between manufacturer and buyer, it should be shown that they have been promoting the business of each other in their own interest, and that in the absence of such a finding in the Assistant Collector's order, they cannot be held to be related persons. In the notice issued by the Central Government seeking to review the Appellate Collector's Order, the Central Government observed that there is an agreement existing between the respondents and their distributors according to which they are the company's distributors for the sale of their goods. Major portion of the sales are effected through M/s T I. & M. Sales Ltd. who are the main distributors of M/s. Tube Investments of India Ltd. and its subsidiary companies and rest of the sales through the other two distributors. M/s. Tube Investment of India are the holding company of M/s. T.I. Millers Ltd. The agreement between the assessee and the T. I. & M. Sales Ltd. are registered under the MRTP Act. The Government of India also found that there was a territorial earmarking for the operation of the distributors, who also undertook advertisements and helped the sub-dealers for maintaining show rooms in dealer's premises. The distributors did not deal with competitor's goods. The Government of India also observed that the assessee granted mark-up to the distributors to cover their establishment expenses, travelling expenses, advertisement and sundry expenses. On these grounds, the Government of India tentatively considered it a fit case for reversing the order of the Appellate Collector who had held that the distributors were not related persons under Section 4 of the Central Excises and Salt Act.

3. The learned SDR, Shri A.K. Jain, appeared for the appellants during the hearing of the appeal before the Tribunal referred to Section 4(4)(c) of the Act in which it is stated that 'related person' means a person who is so associated with the assessee that they have interest directly and indirectly in the business of each other and argued that this is a case in which there is definite indirect relationship that exists between the manufacturer and his distributors. He referred to the Supreme Court judgment reported in 1983 ELT 1896 SC : 1983 ECR 1627D (SC) : ECR C 663 (SC) (Union of India v. Bombay Tyre International Co. Ltd) which lays down the elements that should go into assessable value. He stated that it is clear from the letter of IO.9 1981 that the respondents M/s. T.I. Diamond Chain Ltd. to the Assistant Collector that the 'mark up' allowed to the distributors is to cover their establishment expenses, advertisement: travelling expenses, and he pointed out that this 'mark up' includes certain elements which have to be included in the assessable value. According to the Supreme Court judgment, (supra) where the sale is effected at their factory gate, expenses incurred on account of charges for services after delivery to the buyer, namely, after sales service and marketing and selling organisation expenses, including advertisement expenses cannot be deducted from the assessable value. He further argued that the other features in this case like division of territory amongst the distributors, and the marginal quantity of direct sales otherwise, as well as the fact that the distributors do not deal in competitors' goods, clearly indicate that these are related persons. Shri Jain also drew our attention to the meaning of the term 'ordinarily' given in K.G. Iyer's Judicial Dictionary at page 704 and explained that it meant 'habitually', or 'usually', or normally. In this case, ordinarily sales are only through distributors and the sales are made by them on behalf of the manufacturer. Shri Jain, therefore, pointed out that here was a case where it was an extension of the manufacturer's self to the point of sale by the distributor. The learned SDR also pointed out that the Supreme Court decision regarding related persons was in the context of direct relationship whereas here it was a case of indirect relationship. According to him, there was enough material in this case to show extra commercial consideration between the two parties having mutual interest in each other's business.

4. Shri Jain pointed out that in this case the manufacturer had interest in the buyer who were their distributors and the distributors were only charging limited

commission, maintained show rooms, and did not deal in the products of competitors of the manufacturer. He also contended that sales of their products as original equipment, cannot be considered as sales in the ordinary course of wholesale trade. It is also significant, according to him, that their agreement required registration under MRTP Act as it indicated special relations.

5. Shri Narasimhan, the learned Counsel for the respondents submitted that the Appellate Collector's order which was sought to be reviewed by the Government of India, was based on his earlier orders, where he had spelt out the interpretation of the term 'related persons' occurring in Section 4 of the Central Excises and Salt Act. He stated that there was nothing on record to show whether this earlier order of the Collector itself had been reviewed or not, if it was not in consonance with the department's interpretation, and to that extent, according to him, the Government of India's review notice is vitiated. He further submitted that the arguments addressed by the department should be necessarily confined to the issues raised in the review show cause notice and cannot go beyond. Dealing with the points raised in the show cause notice, he stated that there has not been any registration of the agreements under MRTP Act in their case. When the firm made enquiries whether it would be necessary to register them, they were informed by the authorities that it was not so required. He also submitted that the norm of inter-connected undertakings found in MRTP Act is not relevant to decide 'related persons' in Central Excise Act. In regard to the restriction alleged in the jurisdiction of the distributors, he referred to the decision reported in 1981 ELT 284 : 1980 Cen-Cus 656D- Jay Engg. v. Union of India-to the effect that mere area restriction is not relevant for proving mutuality interests, but it has to be shown that the sale is not at an arm's length and not a principal-to-principal transaction. Dealing with the allegation that the distributors maintained show rooms for dealers and undertook advertisement on behalf of the manufacturer. Shri Narasimhan drew our attention to the letter dated 10.9.1981 from the appellates addressed to the Department, which shows that the distributors paid for their own advertisements. He stated that in some cases, the manufacturer may release advertisements through the distributors. He also argued that even a sole distributor can be an independent buyer depending on the terms of the agreement on behalf of the manufacturer and the distributor and in this connection, he cited 1977 ELT 177 (SC) : ECR C 412

SC; 1975 Cen-Cus 104 C-A.K. Roy case decided by the Supreme Court.

Further, according to the counsel, after sales service undertaken by the distributors was more in the nature of replacement of defective goods sold, which any manufacturer was bound to do and the Courts have held that this is a normal essential service of a distributor.

Referring to the 'mark up' mentioned by the SDR allowed by the manufacturer to the distributor as indicating special relationship, the counsel contended that it was provided for in the context of the requirement to indicate maximum selling price to be marked on the goods and in fact, it was in this context that the appellants had made a reference to the MRTP Commission, who informed the appellants that no registration of the agreement was necessary. The counsel further urged that all the three companies are limited concerns. The counsel finally drew our attention to the fact that the issue has been well-settled by the decision of the Supreme Court in Union of India and Ors. v. Atic Industries Limited 1984 ELT 323 : ECR C 710 (SC); 1984 ECR 1437 (SC).

The Supreme Court had held that it is essential to attract the applicability of the definition of the term in Section 4 of the Act, that the assessee and the person alleged to be related person must have interest direct or indirect in the business of each other. In the absence of mutuality of interest in the business of each other the Court held that the two cannot be considered to be 'related persons'. ' 6. Replying to these contentions, the learned SDR, Shri A K Jain argued that mutuality of interest has to be seen in the totality of the circumstances. In this case, the assessable value is artificially reduced by not including certain elements like advertisements, commission, after sales service, which should form part of assessable value. The buyer is paying for it and the assessee is compensating for it. These elements as above constituted assessable value according to the Supreme Court's decision in the Bombay Tyre International Limited case. It was, therefore, clear in these transactions that the price was not the sole consideration and there were extra commercial interests.

7. We have given careful consideration to the arguments put forth by the learned SDR and the counsel. We find that the issue relating interpretation of the term

'related person' occurring in Section 4(4)(c) of the Central Excises and Salt Act, has since been well-settled by the judgment of the Supreme Court in the case of Union of India and Ors. v. Atic Industries reported in 1984 ELT 323 (SC) : ECR C 710 (SC); 1984 ECR 1437 (SC). The following passage from this judgment is important and relevant to the issues raised in this case: It is not enough that the assessee has an interest, direct or indirect, in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have business of each other. Each of them must have interest direct or indirect in the business of each other.

The quality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect. That would not make any difference, so long as each has got some interest, direct or indirect, in the business of the other.

If we were to examine the issue in the light of the definition of the term in Section 4(4)(c) of the Act, one has to see whether the buyer is holding company or subsidiary company or relative of the manufacturer.

From the explanation of the relationship furnished in the case records, such is not the case. The link between the Respondent T.I. Miller Ltd. company and T.I. & M. Sales Ltd., it is said that the latter is the main distributors of M/s. Tube Investments of India Limited, who are the holding company of the Respondents M/s. T.I. Millers Limited. This relationship does not satisfy the criteria for establishing the related persons concept, as interpreted by the Supreme Court. Moreover, these were limited companies at the material time, and, as observed by the Supreme Court, it will be difficult to say that a limited company has any interest direct or indirect in the business carried on by one of its shareholders. The provisions of MR TP Act may not also help the department, because it is well-settled that the definition given in one statute is for effectuating the provisions of the statute, and not for

effectuating the provisions of another statute. It is, therefore, risky, as observed by the Gujarat High Court in the case of *Cibatul Limited v. Union of India* 1979 ELT 407 : 1979 Cen-Cus 404 D, to rely upon the definition given in one Act for the purpose of applying the provisions of another Act. The respondents further explained that the 'mark up' in the price was allowed in connection with the requirement to display the maximum sale price. Further their sales pattern shows also sales to other than distributors and it is not restricted only to the appointed distributors of T.I. India Limited. We also find in this connection that this Tribunal had largely followed the Supreme Court's decision in *Atic Industries cave (supra)* in deciding a similar issue in the case of *Mafatlal Fine Spg. and Mfg. Company Limited v. Collector of Central Excise, Bombay* 1985 ELT 474 : 1985 ECR 546 (Cegat). There is, thus, a lot of force in the contentions of the respondents which are largely based on the Supreme Court's decision (*supra*) and in the result, we see no reason to interfere with the orders passed by the Appellate Collector of Central Excise, Madras. The appeals are therefore rejected.

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