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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-05-2002

Reported in : (2002)(81)ECC554

Judge : B T K.K., K Kumar

Appellant : Kothari Products and Deepak

Respondent : Cce

Judgement :

1. The appellants M/s. Kothari Products Limited hereinafter referred to as M/s. KPL manufacture Pan Masala falling under Chapter sub-heading 2106.00. The Central Excise duty on these goods was chargeable on the basis of the value to be determined under Section 4 of Central Excise Act, 1944. They were issued a show cause notice dated 4.2.2000 and the proceedings initiated under this notice culminated in the Commissioner of Central Excise, Kanpur passing an order dated 13.6.2001 in which he confirmed a Central Excise duty of Rs. 1,93,83,911 on M/s. KPL under Section 11A of the Central Excise Act, 1944. He further imposed a penalty of an equal amount on them under Rule 173Q of the Central Excise Rules, 1944. He also imposed a penalty of 1 lakh on Shri Deepak Kothari, Managing Director of M/s. KPL under Rule 209A. The Commissioner in his impugned order has broadly summed up the allegations levelled against the noticee-parties in the show cause notice as follows- (i) That in respect of the sale effected by them for delivery at Hyderabad between the period from 1.1.95 to 27.9.95, at Bombay between the period from 1.1.95 to 21.8.95 and at Trichy between the period from

1.1.95 to 29.9.95 there was no 'factory gate price'; that the price in relation to the goods cleared to these places for delivery was not known at the factory gate and therefore, the value of the goods was to be determined with reference to the delivery price at these places; (ii) That M/s. KPL had been selling the goods at Hyderabad, Bombay and Trichy through their C & F Agents only whereas in the rest of the country the goods were being sold direct to the dealers appointed by the company; (iii) That it was observed during the course of inquiry that there was a substantial difference in sale price of the goods as per invoices issued by the C & F Agents at these places in comparison to the prices of the goods as declared in the invoices issued by M/s.

KPL under Rule 52A at the time of removal of the goods from the factory to these places and thus the price as declared on the invoices issued under Rule 52A was not the normal value/price of the goods; (iv) That the only price available for these places, viz. Hyderabad, Bombay and Trichy was the sale price of the goods sold by the C & F Agents on behalf of M/s. KPL and since C & F Agents were selling the goods at the price higher than price declared on the invoices issued under Rule 52A, there was suppression of the value of such goods; (v) That from the agreements entered into by M/s. KPL with their C & F Agents, it was noticed that such C & F Agents were responsible for various services to be provided by them to the principal M/s. KPL and in lieu of these services they were entitled to commission at the rates varying from 1% to 4% during different periods and that the agreements were essentially Agency Agreements and the C & F Agents were appointed for sale and distribution of the goods of M/s.

KPL on the basis of terms & conditions stipulated in the agreements; (vi) That the Commission was being paid by M/s. KPL to the C & F Agents in consideration of services rendered by them and as such the commission so paid did not qualify for deduction while determining the assessable value of the goods; (vii) That in August-September, 1995 M/s. KPL started direct sale to these regions in addition to stock transfers to their C & F Agents and that the inquiries revealed that the firms to whom the goods were sold directly by M/s. KPL were none other than their C & F Agents at these places and that the direct sale to these firms were effected only with a view to creating a subterfuge so as to claim the assessment of the

stock transferred goods to C & F Agents, at lower values; (viii) That M/s. KPL allowed a dealer's commission to the C & F Agents to whom the goods were directly sold from the factory, in addition to the dealer's margin which was not allowed to any other dealer throughout the country; that the amount of the dealer's commission was equal to the C & F Agent's commission and that the said commission was not in the nature of trade discount but was paid to them only in consideration of services rendered by them to the company; (ix) That the Agents to whom the goods were sold at these places were allowed to retain commission of 3% of landed cost and the said commission had been added to the basic value for the purpose of calculation of State tax liability while leaving aside the dealer's margin which was not included for the purpose of calculation of State tax liability and thus the nature of dealer's margin is different from dealer's commission; (x) That M/s. KPL had devised a practice of fixing the wholesale price of the goods by their dealers and the sale price of the goods from the company was being worked out on the basis of the said wholesale price by their dealers by allowing discount deductions over the wholesale price to maintain the uniform price all over the country; (xi) That the entire sale proceeds including the amount of commission to be paid to the C & F Agents are received by the company and accounted for as sale proceeds of the goods in their accounts and then the amount of commission is separately calculated and paid to the Agents out of sale proceeds. Thus, the value of the goods declared on the invoices issued under Rule 52A was not correct and (xii) That the wholesale cash price has to be ascertained only on the basis of transaction at arms length and if there happens to be a special or favoured buyer to whom specially determined price is charged because of extra considerations, the price charged for this sale would not be wholesale cash price under Section 4 and that the prices declared on the invoices were not fair and normal price inasmuch as M/s. KPL allowed the commission in addition to the normal dealer's margin to such buyers which is not applicable and allowable to any other dealer.

2. Consequent to the above allegations, M/s. KPL were called upon to show cause why the Central Excise duty of Rs. 1,93,83,911 should not be demanded from them under the proviso to Section 11A(1) and why a penalty of an equal amount to duty should not be imposed on them under Section 11AC read with Rule 173Q.

Shri Deepak Kothari is also called upon to show cause why a penalty should not be imposed on him under Rule 209A.3. On considering the defence of the noticee parties, the Commissioner of Central Excise, Kanpur, vide his impugned order dated 13.6.2001 confirmed the demand of duty and imposed penalty as aforesaid on M/s.

KPL and further imposed a penalty of Rs. 1 lakh on Shri Deepak Kothari, MD of the party.

4. In the present appeals against the above order, we have heard S/Shri R. Swaminathan, consultant and Nand Kishore, Advocate for the appellants and Shri P.K. Jain, SDR for the respondents. The Ld.

Consultant for the appellants submits that the duty in this case is confirmed for the period from 1.1.95 to 28.9.96 whereas the show cause notice is issued on 4.2.2000. It is submitted that the show cause notice invokes the extended period of time for the demand of duty in terms of the proviso to Section 11A(1). The duty in this case is demanded in respect of the sales made by the appellants to their C & F Agents in the regions of Bombay, Trichy and Hyderabad. It is submitted that the goods manufactured by them were stock transferred to their depots located in these regions and sold through their C & F Agents. It is contended that since the factory gate sales were also effected by them to the independent dealers in these regions during the impugned period, the appellants paid duty by adopting the assessable value of the sales to the independent dealers in these regions. The departmental authorities, however, have not accepted these submissions. They have viewed the sales made to the independent dealers as sham sales and have held that the value for the purpose of the assessment in these regions should be the one arrived at by including the commission paid by the appellants to their agents. In respect of the sales made by the appellants in the Trichy region, however, it is admitted by the Commissioner in his order (para Nos. 56 to 58) that there are indeed sales made to the independent dealers in the State of Tamil Nadu in addition to the sales made to their C & F Agents viz. M/s. Shree Samy Marketing Agency and M/s. S.S. Marketing Agency and as such the transaction with the other dealers have to be treated as independent sales, yet the

adjudicating authority has held that the assessable value should be the sale price of these agents (including their commission) for all transactions in these regions since these agents are a class of buyers in themselves. It is held that in Tamil Nadu the assessee sells the goods to different classes of buyers and adopts different wholesale factory gate price with reference to each such class of buyers. It is observed that with reference to each one of them, the manufacturer can adopt different wholesale price which would constitute the normal price in terms of first proviso to Section 4(1)(a) of Central Excise Act, 1944. The Ld. Consultant for the appellant submits that these aspects of valuation of the goods sold by them in different regions are already covered by an earlier proceedings in which seven show cause notices dt, 4.3.94, 25.3.94, 3.5.94, 27.10.94, 30.12.94, 30.5.95 and 5.10.95 covering the total period from August 1993 to June 1995 for demanding a duty of Rs. 6,09,75,357.23 were issued to them. The earlier proceedings initiated against the appellants finally settled in the Tribunal passing the Final Order No.271/2000-A, dt. 5.5.2000. As stated above, in the earlier proceedings seven show cause-cum-demand notices were issued to them. In these notices a total demand of duty of Rs. 6,09,75,357.23 for the period from August 1993 to June 1995 was made on them. The notices sought to disallow deduction of different regional discounts from the different wholesale prices to arrive at the assessable value for determination of Central Excise duty. The finding arrived at by the original authority as per these averments were set aside and their appeal was allowed by the Commissioner of Central Excise (Appeals), Allahabad vide his order dated 28.11.97. The findings arrived at by the Commissioner (Appeals) in his order as follows are brought to our notice by the Ld. Counsel of the appellants: It is very clear from the submissions made by the appellants and the price list, invoices and gate passes shown during the hearing that they are not recovering any additional amount from the buyer on account of Regional discount which consist of local sales tax and other taxes imposed by the respective States plus dealers margin of 4%. Thus the appellants have been determining the basic price taking into account the incidence of such local taxes like sales tax, octroi etc. and a uniform dealers margin. The various cases referred to in the submission made during the personal hearing permitted deductions for regional trade discount from the assessable value.

5. It is submitted that the Commissioner of Central Excise Kanpur filed an appeal against the above order of the Commissioner (Appeals) but the same is dismissed by the Tribunal vide its order dated 5.5.2000 referred to supra. Consequently, it is contended that the present proceedings are time barred inasmuch as this very aspect was considered while determining the value in the earlier proceedings and the decision given in favour of the appellants by the Commissioner (Appeals). The department filed an appeal but the same is also rejected by the Tribunal. It is further contended that the present proceedings are also not maintainable on account of res-judicata as also on limitation. In support of their contention that the buyers at the factory gate and the buyers procuring the goods through the consignment agents of the manufacturers do not fall in different class of buyers, the appellants are placing reliance on the decision of the Tribunal in the case of CMC (India) Limited v. CCE and in support of their contention of res-judicata, the reliance is placed on the case of CCE v. Pace Marketing Specialities Ltd. . The Ld. SDR appearing for the respondents reiterates the findings arrived at by the Commissioner in his order.

6. We have considered the submissions made before us by both the sides.

The issue under consideration in the present proceedings is whether the appellants have paid the duty at the appropriate assessable value in respect of the sales made by them through their consignment agents in Bombay, Hyderabad and Trichy. In our considered view, this issue already stands settled by the proceedings initiated earlier against the appellants in which their appeal was allowed by the Commissioner (Appeals) and an appeal by the Commissioner against this order is dismissed by the Tribunal vide Final Order dated 5.5.2000. In order to make these observations amply clear, we reproduce below the complete text of that order of the Tribunal: The proceedings taken by the Department against the respondents manufacturer has a chequered history. Various Show Cause Notices were issued right from 4.3.94. Circumstances which led to the issue of the Show Cause Notices, as seen from the Notice dated 4.3.94, are as follows: Whereas Kothari Products Ltd. have been filing price list in respect of clearances of Zarda mix Pan Masala under Section 41(b) of the Central Excise Act, 1944, in these price lists the party is showing different regional discounts to

dealers belonging to different States. The value claimed for approval (under Col. II) is being arrived at by deducting state-wise discount besides excise duty, CST, Freight and insurance from the wholesale price (under Col.3).

And whereas wholesale dealers cannot be considered as belonging to different classes only on the basis of the fact that they are located in different States such different discounts are therefore, not permissible to be deducted from the wholesale price to arrive at the assessable value for excise purpose.

And whereas the practice of deduction of different regional discount for different State has led to incorrect determination of assessable value which has resulted in short assessment and short payment of Central Excise duty amounting to Rs. 26,48,821.68 during the months of August and Sept., 1993.

2. All Show Cause Notices issued for different periods contained the same allegations and nothing further. On the basis of these Show Cause Notices the Asstt. Collector vide order dated 12.1.96 confirmed the demands. The manufacturer took the matter in appeal, Appellate Authority remanded the matter to the adjudicating authority by its order in appeal dated 30.4.96. As per that order adjudicating authority was directed to re-examine the issue in the light of law laid down by Supreme Court in the decision of Union of India v. MRF and those in Bombay Tyres International. It appears that the manufacturer challenged the said order before this Tribunal. During the pendency of the appeal before this Tribunal the adjudicating authority re-examined the entire issue and passed Order-in-Original No. 38-Demand/ACK-III/97 dated 18.6.97. By that order he confirmed the demand made in all the Show Cause Notices amounting to Rs. 6,09,75,357.23. Manufacturer challenged that order before Commissioner (Appeals), Appellate Authority by order-in-appeal No. 260-CE/APPL/KNP-I dt. 28.11.97 allowed the appeal. Hence Revenue has come up in appeal.

3 Appellate Authority posed the following three questions for decision: (i) Whether different normal price of the same goods to customers in different regions is permissible under Section 4.

(ii) Whether buyer in different regions are different class of buyers in the eye of law.

(iii) Whether the contrary instruction issued by the Central Board of Excise & Customs is valid and enforceable when it was declared invalid and against the status by the Delhi High Court.

4. The three questions posed have been correctly answered by the Commissioner. Now the argument advanced by the Ld. DR is that the manufacturer was transferring their stock to the various depots/States for sale by the dealers situated in those States. In such stock transfer the manufacturer was not entitled to have the deductions now allowed by the Commissioner. The Ld. DR is not justified in advancing such an argument when such ground was never taken in any of the Show Cause Notices issued to the party. Since the Revenue cannot be allowed to rake up new grounds to the surprise of respondents we cannot allow him to raise such contentions. We are confining ourselves to the facts mentioned in the Show Cause Notice.

The Commissioner rightly framed issues which were germane for decision on the facts of the case. Those issues have rightly been decided by the Commissioner in the light of law stated by the Supreme Court in Bombay Tyre International and MRF cases. We do not find any error in applying those principles stated by Apex Court.

5. In view of what we have stated above we find no merits in this appeal. It is accordingly dismissed.

7. The facts narrated in the above order of the CEGAT speak for themselves. The Tribunal in para 4 of the order have observed that the department in their appeal advanced the argument that the manufacturer was transferring their stocks in the various depots/states for sale by the dealers situated in those states as such stock transfer the manufacturer was not entitled to have deductions allowed by the Commissioner. The Tribunal, however, did not allow the Ld. DR to raise this contention with the observation that advancing such an argument was not justified when such argument was never taken in any of the show cause notices issued to

the party. The department has again raised the same plea in the fresh proceedings--the show cause notice relating to which is issued to the appellants on 4.2 2000 i.e. during the pendency of their earlier appeal before the CEGAT. All the facts and the evidence relied upon in the present proceedings were fully known to the departmental authorities when the seven show cause notices were issued to the appellants demanding duty of Rs. 6,09,75,357.23 covering the period from August 1993 to July 1995. There are no fresh investigation undertaken which would entail issue of this show cause notice. The relationship between the appellants and their dealers/consignment agents are covered by the agreements entered into by these parties. The agreements were with the department right from the beginning when the earlier proceedings were initiated against the appellants, yet at no stage it was either felt or alleged that the prices of the goods as declared in the invoices issued by the appellants under Rule 52A at the time of removal of the goods from the factory to these places (Hyderabad, Bombay and Trichy) was not normal value/price of the goods and hence not acceptable. We are clear in our mind that the issue in the present appeal is fully covered by the decision of the Tribunal in the earlier proceedings in favour of the appellants and the Revenue are barred by limitation as well as on the principle of res judicata against raising the same issue again. Therefore, we allow these appeals by setting aside the impugned order passed by the Commissioner.

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