P.D. Gupta Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-06-2002

Reported in : (2003)(151)ELT148TriDel

Judge : K Usha, N T C.N.B.

Appellant : P.D. Gupta

Respondent : Commissioner of Central Excise

Judgement :

1. The common issue involved in these appeals is the Central Excise valuation of foot wear manufactured in the three factories of Liberty Shoes Group. The factories are located at Karnal in Haryana and Agra and Saharanpur in U.P. The foot wear was liable to duty on ad valorem basis and the appellants were clearing the foot wear from the factories after payment of duty on the basis of ex-factory sale price. The impugned order has held that there was undervaluation of the foot wear in question which led to short levy of Central Excise duty during the period 1991-96. the order has, accordingly, demanded the duties short levied as well as interest on the amounts short levied and has imposed penalties. The short levies have been held to be the result of suppression of facts which justified the duty demand for the extended period of five years permissible in such cases in terms of proviso to Section 11A of the Central Excise Act. The appellants have challenged the order on merits as well as on the question of limitation.

2. On merits, the submission of the appellants is that the foot wear in question were being sold basically through two channels, namely, to show rooms as well as to Distributors. Both Show-rooms and Distributors were wholesale buyers of the goods. The sale price of foot wear to both the channels were the same. The Show-rooms owners disposed of the foot wear purchased by them through retail sale to general public. The Distributors sold the goods to dealers after marking up the price by 15%. It is the contention of the appellants that since the goods were sold at whole-sale prices to unrelated buyers those sale prices satisfied the requirements of the normal sale price under Section 4(i) of the Central Excise Act. They maintain that since the original payments of duty was on the basis of normal price as assessable value, there was no short levy requiring to be recovered under Section 11A of the Central Excise Act and that the entire demand is the result of an erroneous application of the provision regarding central excise valuation.

3. The appellants have pointed out that even though reference has been made in the show-cause-notice and impugned order to several aspects covering the trade in the goods by the appellants like recovery of 2% service charges, 4% collection towards Central Sales Tax, extra freight etc. the grounds for confirming the demand is that the appellant had taken certain deposits from their distributors and for this reason the ex-factory sale price cannot be treated as normal value and the correct assessable value is to be arrived at by loading ex-factory price by 15%. The submission of the appellants on the non-maintainability of this addition are many. It has been pointed out that addition of 15% to the ex-factory price would make it equivalent to the sale price of the appellant's distributors to their dealers, which according to the appellants is not justified in the facts of the case at all.

4. With regard to the deposits it is the appellants' submission that these deposits were of small amounts like Rs. 20,000/- or Rs. 35,000/- per distributor and such small amounts of deposits in no way affected the ex-factory sale price. The appellants seek to establish this in two ways. First, that several distributors had not made the deposits.

Second, that the price was the same to the distributors who make the deposits as well as to the distributors who did not make the deposits.

It has been pointed out that the appellants had filed in the adjudication proceedings a list of 45 distributors who had made no deposits but had received the goods at the same price as the distributors who made the deposits. It is the grievance of the appellants that the adjudication order has rejected this evidence. They have submitted that a mere verification of the invoices covering the transactions would have set at rest all doubts as to whether the deposit had affected the ex-factory sale price and whether ex-factory sale price to distributors making deposits was a favoured lower price.

During the hearing of the case, the learned Counsel for the appellants took us through the invoices and showed that sale prices were not affected by the token deposits made by distributors. The learned Counsel also submitted that it is a normal industrial practice that manufacturers insist on certain deposits from their distributors and the deposits were insisted upon to ensure that the manufacturers had some security to fall back upon in respect of credit sales, and the appellant's practice was no different.

5. The appellants have also submitted that even if the deposits are considered to have had the effect of lowering the prices, what was permissible in law was only to make suitable addition to the ex-factory price so as to make it equivalent to the total consideration for the sale of the goods, namely, ex-factory sale price + the money value of the extra consideration i.e. the interest attributable to the amount in deposit. The learned Counsel pointed out during the hearing that such addition would have led to a total duty demand of Rs. 16,53,094/- while the duty demanded in the impugned order is 35 to 40 times multiplied.

6. During the hearing of the case, the learned Counsel for the appellants has further pointed out that the findings in the impugned order regarding valuation is contrary to orders passed by the jurisdictional Central Excise authorities on the issue of valuation of the goods manufactured by the appellants. In this connection he took us to order dated 28-11-97 of the Jurisdictional Asstt. Collector, wherein it has been held that there was no nexus between the security deposits and the sale prices and the assessments should be based on ex-factory price. The learned Counsel also pointed out that this decision has been affirmed by Commissioner

(Appeals) vide Order- in-Appeal No.50-51/CE/DLH, dated 7-1-2000. It is the submission of the learned Counsel for the appellants that these orders were in accordance with the correct legal position on central excise valuations and the impugned order is in complete error in taking a position contrary to them.

7. During the hearing of the case, learned Counsel pointed out that the impugned order is contrary to the settled legal position that addition of notional interest in view of advance payment/security deposit will be attracted only in cases where the advance/deposit has the effect of lowering the normal sale price. The learned Counsel referred in this connection to the decision of the Apex Court in the case of VST Industries Limited [1998 (97) E.L.T. 395 (S.C)] and many decisions of the Tribunal on this legal issue. He submitted that since the sale prices to distributors who did not make any deposit was the same as the price to those making the deposit, there was no case for holding that sale prices were lower on account of deposit.

8. On the question of time limit, the appellants have pointed out that the conflict between the view taken in the impugned order and the aforesaid orders passed by jurisdictional authorities for the subsequent period (even while the assessee's trade practice was the same) itself was sufficient to show that there was no contumacious conduct on the part of the assessee. Instead, the finding regarding incorrect adoption of assessable value has been reached in the order impugned on account of taking a different opinion on the assessable value on the same facts.

9. Ld. SDR took us through the evidence relating to recovery of service charges (2%) even though no service has been rendered and recovery of 4% towards Central Sales Tax even when no LST was payable, and contended that the ex-factory prices could not be accepted as assessable value.

10. It is clear from the records that during the relevant period appellants have been selling foot wear manufactured by them to large numbers of wholesale buyers i.e. show-room keepers and distributors.

Some of them deposited the amounts like Rs. 20,000/- and Rs. 35,000/- with the appellant. The very modest nature of this amounts should satisfy that these are normal security deposits made by dealers/distributors with manufacturers from whom they bought goods on credit. These amounts are very small compared to the turnover in the goods. Therefore, it is clear that those deposits cannot influence pricing of goods. The appellants have displayed this by showing that several buyers who did not make deposit, (even though it was the appellants policy to enforce the deposit) also were sold the goods at the same price as persons who made the deposits. The appellants have also shown that even though their headquarters issued letters indicating that the distributors who did not make the deposits would be liable for 15% higher price, no sale was made at such a higher prices.

10. The sale of goods at the same price to parties making the deposits and parties not making the deposits clearly indicates that deposit does not sway the sale price. In the absence of the finding about the sale price being depressed on account of the deposit, no addition in the name of a notional interest or gain can be made. That is the settled legal position in view of the Apex Court's decision in the case of V.S. T. Industries. There is also no justification for adopting any other sale price as the assessable value. Adding 15% of the ex-factory price, makes that the distributors sale price i.e. the second tier in the trade. This is not permissible. The concern of the excise is with the act of manufacture. So the measure for valuation is the manufacturer's price i.e. the first tier in the trade.

11. Contentions relating to limitation also merit acceptance. The appellants trade practice has remained the same during the period covered by the impugned order and the period covered by the aforesaid orders of Asstt Commissioner and Commissioner (Appeals). The impugned order has reached the finding that ex-factory sale price is not at normal price. The other orders have accepted that the ex-factory sale prices represented full and final value of the goods. Thus, the contrary findings can only be treated as the result of differences in opinion and perception. In any case, it is not the result of any fraud or misrepresentation of facts by the assessees.

12. In view of the above, we hold that the impugned order is not sustainable in law or on facts. The same is accordingly set aside and the appeals are allowed with consequential relief to the appellants.