Rasoi Limited Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-04-1987

Reported in : (1987)(11)LC820Tri(Delhi)

Appellant : Rasoi Limited

Respondent : Collector of Central Excise

Judgement :

1. The appellants obtained Oxygen Gas as a bye-product in their factory. Compressed Oxygen Gas is chargeable to Central Excise duty under item 14-H of the Tariff. The appellants entered into an agreement with M/s. Rishi Gases (P) Ltd. to sell them compressed Oxygen Gas of 99.5% purity. The sale price for the first year was fixed at 70 paise per cubic metre of the Gas. The appellants sold their entire output of Oxygen Gas to Rishi Gases. Rishi Gases in turn sold the entire Gas to Asiatic Oxygen & Acetylene Co. Ltd. @ Rs. 3.25 per m3. M/s. Asiatic sold the Gas, along with their own production, at prices ranging from Rs. 4.665 to Rs. 5.701 per m3. The lower authorities have held that the price of 70 paise per m3, charged by the appellants from Rishi Gases was not a price at arm's length. The Appellate Collector has further held that the sale to Rishi Gases was only a paper transaction. Both the lower authorities have held that the sale price of Asiatic was the correct assessable value in terms of Section 4(1)(a), Proviso (iii) as it was the wholesale price charged to non-related persons. The Revision Application filed by the appellants against the Appellate Collector's order is now before us for disposal as the present appeal.

2. We have heard both sides and have carefully considered the matter.

Placing reliance on the Supreme Court judgment reported at 1984 (17) ELT 323 (SC) - Union of India and Ors. v. Atic Industries Ltd., the appellants pleaded that there was no mutuality of interest between them on the one hand and Rishi Gases and Asiatic Oxygen on the other, hence Rishi and Asiatic could not be considered their related persons and the lower authorities were not justified in taking the sale price of Asiatic who were a third and un-connected party. There is force in the appellant's plea insofar as lack of evidence showing mutuality of interest between the parties is concerned. Yet, we find that the conclusion reached by. the lower authorities is not wide off the mark though the said conclusion has been reached via the wrong reasoning and by application of the wrong provision. M/s. Rishi Gases and Asiatic Oxygen do not fulfil the test of 'related person' as laid down by the Supreme Court in their aforesaid Atic judgment. We hold, therefore, that Rishi Gases and Asiatic Oxygen could not be considered as related persons of the appellants. At the same time, we find that the lower authorities were justified in rejecting the appellants' sale price of 70 Paise per m3, charged from Rishi Gases. That this price was not the sole consideration for the sale is established from the following three circumstances which the appellants themselves have admitted :- (1) The price of 70 paise per m3 was arrived at on the basis of manufacturing cost and manufacturing profit only. It did not include the appellants' selling cost and selling profit. Perhaps, the appe- Hants' thinking was influenced by the interpretation of Section 4 accepted by the various courts prior to 1983. The said interpretation stood over-ruled by Supreme Court judgment in the case of M/s. Bombay Tyre International [1983 ELT 1986 (SC)] in which it was held that all costs upto the point of delivery of the goods were includible in the assessable value. It is quite evident from the appellants' own submission that the price of 70 paise per m3 did not include their selling costs and selling profit.

(2) Investment on the gas compressing plant installed in the appellants' factory had been made by Rishi Gases and not by the appellants themselves. This was certainly a factor in depressing the sale price to an artificial level.

(3) All expenses relating to compressing and transportation facilities, such as electricity charges and other over-heads etc.

were borne by Rishi Gases and not by the appellants. The full commercial cost of manufacturing and selling the compressed Oxygen Gas was thus not reflected in the low price of 70 paise per m3 .

There were other pertinent factors too. The appellants did not sell their Oxygen Gas to anyone except Rishi Gases. Rishi Gases were not a recognised Gas dealer in Calcutta area. Neither the appellants nor Rishi Gases had any Gas cylinders. Rishi Gases did not purchase Oxygen Gas from anyone other than the appellants and they in turn sold to no one except Asiatic Oxygen. In other words, the entire output of Oxygen Gas in the appellants' factory went to Rishi Gases and via them to Asiatic Oxygen. What actually happened was that Asiatic Oxygen sent their own Gas Cylinders to the appellants' factory, there they were filled with Gas and despatched direct to Asiatic Oxygen. When these facts are considered in conjunction with the artificial low price of 70 paise per m3 and the other three circumstances already mentioned above in this paragraph, the conclusion is inescapable that Rishi Gases were only a shadow unit created to depress the taxable value of Oxygen Gas.

Incidently, Rishi Gases had their office in the same premises as Asiatic Oxygen. In the facts and circumstances of this case, the learned representative of the department very aptly relied on the Supreme Court judgments at 1969 SCR 988 - Juggilal Kamla-pat v. C.I.T.and 59 S.T.C. 277 - McDowell & Co. and asserted that the lower authorities were justified in 'lifting the corporate veil' and unmasking the 'colourable device' adopted by the appellants to suppress the real value of their compressed Oxygen Gas. We agree with him. The so-called sale to Rishi Gases was nothing more than a paper transaction and it has to be ignored.

3. At the same time, we find that the lower authorities were not entitled to ignore the sale price charged from Asiatic Oxygen just for the reasons that Asiatic Oxygen supplied the empty Gas Cylinders and purchased the entire output of Oxygen Gas from the appellants' factory.

So long as the price charged is a fully commercial price, it cannot be rejected for the reason that the entire output is sold to only one party. Secondly, Gas Cylinders are a durable container and are returnable to their owners. It is not un-usual for customers to supply their own durable containers for taking supply of the goods. Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944 makes a specific provision for excluding the cost of packing which is of a durable nature and is returnable by the buyer to the assessee. A division Bench of the Karnataka High Court has held [1986 (24) ELT 23 (Karnataka) - Alembic Glass Industries Ltd. v. U.O.I. and Ors., paragraph 1.5] that cost of durable containers has to be excluded even if they belong to the customer. There is no contrary judgment of any other High Court on this point. Respectfully following this judgment, we hold that the price of Rs. 3.25 per m3 (and similar higher price for subsequent years) was an acceptable basis for valuation of the appellants' Oxygen Gas for assessment of central excise duty, once the transaction as between the appellants and Rishi Gases is ignored. The price of Rs. 3.25 was quite reasonable when compared with Asiatic Oxygen's own sale price of Rs. 4.665 to Rs. 5.701, after due allowance is made for the cylinder cost, transport and handling expenses and Asiatic Oxygen's profits.

4. In the light of our above discussion, we modify the impugned orders to the extent that instead of Asiatic Oxygen's sale price, their purchase price of the Oxygen Gas manufactured in the appellants' factory should form the basis of valuation and assessment of central excise duty. Except for this modification, we uphold the lower orders and reject this appeal.