

Mohan and Co. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-21-1987

Reported in : (1987)(13)ECC125

Appellant : Mohan and Co.

Respondent : Collector of Central Excise

Judgement :

1. M/s. Mohan and Company, Madras had filed a Revision Application to the Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi being aggrieved from order in Appeal No. 1502/79 (A.No. 341/ 74, C.No. V/4/341/79), dated 30-10-1979 passed by Appellate Collector of Central Excise, Madras. The said Revision Application stands transferred to the Tribunal in terms of provisions of Section 35P of the Central Excises and Salt Act, 1944 to be disposed of as an appeal.

2. Briefly the facts of the case are that M/s. Mohan and Company are having L-4, Licence No. 4/75, and the appellants are manufacturer's of snuff. In terms of Notification No. 124/75, dated 12-5-1975 the rate of duty on snuff, whose value did not exceed Rs. 10/- per Kg., was 75 paise per Kg, and on snuff, whose value exceeded Rs. 10/- per Kg., was Rs. 2/-per Kg. The appellant had declared in AR-1, the value at Rs. 10/- per Kg. Besides this, the appellant had charged .02 paise per Kg.

on account of Dharmada (charity) receipts, which was part of the invoice. The Superintendent of Central Excise, Madras had issued a show cause notice No. 15/77, dated 30-3-1977 to the effect that the appellant had cleared 6788.750 kgs. of snuff for the period 1-3-75 to 30-9-1975 and had to pay a duty at Rs. 8,485.91 and had also cleared from 1-10-1975 to 4-3-1977, 3,0812 kgs of snuff and the duty was to be paid at Rs. 3,8515.30 and the total duty works out at Rs. 75,201 whereas the appellant had paid duty at Rs. 28,200.36. As a result the appellant did not pay a sum of Rs. 47,001.14 by way of Central Excise Duty and the appellant had contravened provisions of Rule 9 read with Rule 52 of the Central Excise Rules. The Ld. Assistant Collector had added 0.2 paise in the assessable value of the goods and had charged Central Excise duty and had created a demand of Rs. 47,001.14. Being aggrieved from the aforesaid order the appellant had filed an appeal to the Appellate Collector. The Ld, Appellate Collector of Central Excise had observed that collection of 2 paise per kg. for charity will go to add the already approved assessable value of Rs. 10/- per kg. for the period in question and had confirmed differential duty demand and had rejected the appeal. Being aggrieved from the aforesaid order the appellant has come in appeal before the Tribunal.

3. Shri M.N. Krishnamani, Ld. Advocate, has appeared on behalf of the appellant. He has reiterated the facts and has referred to the show cause notice, the order in original and order in appeal. He has pleaded that the order passed by the Assistant Collector and confirmed by the Appellate Collector is not correct in law. He states that Dharmada receipts are charity receipts and the appellant has got no right to the same. He further states that in the show cause notice there is no allegation against the appellant that there was suppression of facts on the part of the appellant and as such the extended period of limitation was not applicable. He states that during the period in question the limitation was three months. He states that there was no fraud on the part of the appellant; and there was no self-removal procedure; and clearances were made from the factory on the basis of physical control.

He has further argued that Dharmada receipts cannot be a subject matter of tax. In support of his argument he has referred to a judgment of the Hon'ble Supreme Court in the case of Commissioner of Income-tax (Central), New Delhi v. Bijli

Cotton Mills (P) Ltd. reported in [(1979) 116 ITR 60] where the Hon'ble Supreme Court had held that Dharmada receipts are customary receipts and are exempt from tax. He has referred to a judgment of Government of India in the case of Premier Automobiles Limited reported in 1982 ELT 554 (G.O.L) where the Central Government has held that dealer's contribution to charge Rs. 10/- per car was neither a part of the manufacturing cost nor the manufacturing profit for running training school was not includible in the assessable value of the motor car under Section 4 of the Central Excises and Salt Act, 1944. Shri Krishnamani, the Ld. Advocate, states that the judgment of the Government of India though not binding on the Tribunal, but definitely it carries a persuasive value.

4. Shri P.K. Ajwani, the Ld. SDR, who has appeared on behalf of the respondents, states that Dharmada receipts are taxable. He has pleaded that the Appellate Collector of Central Excise has passed order No.1258/77, dated 28-10-1987 and in the said appeal the appellant had objected to the levy of Central Excise duty after adding charity receipts; and the Ld. Appellate Collector of Central Excise had confirmed the finding in this regard and the appellant did not file any appeal or Revision Application against this order and that portion of the order had become final. The other ground in the said appeal was towards freight and the Appellate Collector of Central Excise had remanded the matter for de-novo adjudication and had further directed that the principles of natural justice should be observed. Shri P.K.Ajwani states that the order in respect of charity has become final and amounts to resjudicata, the appellant cannot now agitate before the Tribunal. He has referred to Section 4 of the Central Excises and Salt Act, 1944 and also Section 2(10) of Sales of Goods Act. He has also referred to a judgment of the Tribunal in the case of Hindustan Shipyard Ltd. v. Collector of Customs, Madras vide Order No. 119/87A, dated 13-2-1987. Shri Ajwani has referred to a judgment of the Hon'ble Calcutta High Court in the case of Akhil Bandhav Chemicals Industries (P) Ltd. v. Union of India and Ors. reported in 1977 ELT (365). He has referred to para 7 of the said judgment where the Hon'ble High Court had held that excise duty is an indirect tax but as between the petitioner and those two companies the excise duty formed part of the price of those goods and those two companeis were liable to pay excise duty to the Excise authorities at the point of removal of those goods from their respective factories. They have also paid actual

duty liable on those goods to Excise authorities. Shri Ajwani has referred to another judgment of Hon'ble High Court of Calcutta in the case of Bata Shoe Company Pvt. Ltd. v. Collector of Central Excise, Calcutta and Orissa and Ors. reported in 1979 ELT (3 464) where it was held that while determining the value of goods under an exemption notification, the duty leviable is also to be taken into consideration because unless the duty is leviable, the exemption cannot be granted. The Hon'ble High Court had further held that the value for the purpose of exemption notification is the real value after the duty has been paid and calculated and not the deemed value of Section 4 of the Central Excises Act, 1944. Shri Ajwani states that the judgment of the Honourable Supreme Court in the case of Commissioner of Income-tax (Central), New Delhi v. Bijli Cotton Mills (P) Ltd. reported in 1979 ITR 116 is not applicable in the case of the appellant as the judgment is under the Income Tax Act. Both the acts have to be interpreted separately. Shri Ajwani has referred to a judgment of the Hon'ble Madras High Court in the case of N.S. Pandaria Pillai v. State of Madras reported in 1973 (31) STC 108 where the Hon'ble High Court had held that Mahimai receipts i.e. contribution by the purchasers for the renovation of Vinayagar Temple at the rate of 1/2% of the net sale price demanded and collected by the assessee from his purchasers on the occasion of the sale and shown separately in the sale bill would form part of the taxable turn over of the assessee, although the purchaser were under no legal obligation to pay the same. He has also referred to another judgment of the Hon'ble Andhra Pradesh High Court reported in 1956 (7) STC 65 where the observations of the Hon'ble High Court were similar.

Lastly, Shri Ajwani has referred to a judgment of the Hon'ble Supreme Court in the case of Markand Saroop Aggarwal and Ors. v. Bajaj and Anr.

reported in AIR 1979 SC 110 where the Hon'ble Supreme Court had held that the minimum charges collected by the appellant for entry in the restaurant for cabaret performances every evening was to be includible for the charging of the entertainment tax. Shri Ajwani has referred to the show cause notice as well as to the Ld. Assistant Collector's Order.

He states that the appeal filed by the appellant may be dismissed. In the alternative, Shri Ajwani has pleaded that the matter may be remanded to the lower authorities for de-novo consideration.

5. In reply, Shri Krishnamani, Ld. Advocate, has pleaded that the argument of the Ld. SDR as to resjudicata is not tenable. He has stated that the lower authorities have acted against the principles of natural justice and have re-adjudicated the whole issue. He has referred to a judgment of the Hon'ble Calcutta High Court in the case of Conterman Peipers (India) Limited v. Additional Secretary to the Government of India reported in 1986 (26) ELT 471 (Cal.) where it has been held that the tribunal is not, a court. Therefore, its earlier decision cannot be res-judicata or precedent for subsequent decision but it is an important factor to be serious taken into consideration and Tribunal can differ on cogent grounds. However, the Tribunal cannot reopen a question previously decided unless fresh facts come to light, that may clothe the Tribunal to come to the conclusion different to the one previously reached. The Tribunal, being a quasi-judicial authority, cannot arbitrarily depart from the findings reached after consider material evidence. Shri Krishnamani, the Ld. Advocate, states that the argument of the Ld. SDR as to resjudicata cannot be accepted in view of the Calcutta High Court judgment as after remanding the matter by the Appellate Collector of Central Excise in the de-novo proceedings, the Assistant Collector had acted afresh and the Ld. Appellate Collector in appeal has also decided the matter. Shri Krishnamani also opposes to the request of remand made by the respondent.

6. We have heard both the sides and have gone through the facts and circumstances of the case. We have also considered the case law cited by both the .sides. We would like to observe that the appellant was following the physical control system and it was well within the knowledge of the Revenue authorities as to the clearances. The Revenue has not placed any evidence on record that the charity (Dharmada) receipts by the appellant were used for any other purpose than the charity. Hon'ble Supreme Court in the case of Commissioner of Income-tax (Central), New Delhi v. Bijli Cotton Mills (P) Ltd. reported in 116 ITR 60 had held that Dharmada collected from customers on sale was not a trading receipt. Head note from the said judgment is reproduced below :- "Dharmada" or "Dharrnadaya"

in common parlance, means anything given in charity or for religious or charitable purposes. Among the trading or commercial community in various parts of this country a gift or payment for "dharmada" is by custom invariably regarded as a gift for charitable purposes. A gift to "Dharmada" or "Dharmadaya", both in common parlance as well as by customary meaning attached thereto among the commercial and trading community, cannot be regarded as void or invalid on account of vagueness or uncertainty.

The respondent, a private company carrying on the business of manufacturing and selling yarn, realised certain amounts on account of "Dharmada" from its customers on sales of yarn and cotton, at the rate of 1 anna per bundle of 10 lbs. of yarn and 2 annas per bale of cotton. In the bills issued to the customers these amounts were shown in a separate column headed "Dharmada". The respondent did not credit the amounts so realised by it in its trading account, but maintained a separate account known as the "Dharmada account", in which the realisations on account of Dharmada were credited and payments made thereout were debited. The Tribunal held that the amounts could not be regarded as having been received or held by the respondent under a trust for charitable purpose, the trust being void for vagueness and uncertainty and that the realisations partook of the character of trading receipts. On a reference, the High Court held that the amounts in question were not the respondent's income liable to tax, as the amounts were paid by its customers specifically on account of Dharmada, the amounts were never treated by it as trading receipts or surcharge on the sale price, and that the "Dharmada" was a customary levy prevailing in certain parts of the country and where it was paid by the customers to a trading concern the amount was not paid as a price for the commodity sold to the customer, and that the respondent was merely acting as a conduit pipe or clearing house for passing on the amounts to the objects of charity. On appeal to the Supreme Court held: (i) that when the customers or brokers paid the amounts to the respondent earmarking them for "Dharmada", those payments were validly earmarked for charity : in other words, right from the inception those amounts were received and held by the respondent under an obligation to spend them for charitable purposes only, with the result that those amounts were not its trading receipts; (ii) that the "Dharmada" amounts could not be regarded as part of the price or a surcharge on the price of goods

purchased by the customers: the amount of "Dharmada" was undoubtedly a payment which a customer was required to pay in addition to the price of the goods which he purchased from the respondent, but the purchase of the goods by the customer would be an occasion and not the consideration for the "Dharmada" account taken from the customer. It was true that without payment of the "Dharmada" amount the customer might not be able to purchase the goods from the respondent but that did not make the payment of "Dharmada" involuntary inasmuch as it was out of his own volition that he purchased yarn or cotton from the respondent.

The "Dharmada" amount was, therefore, not a part of the price, but a payment for the specific purpose of being spent on charitable purposes.

Held also, that none of the following facts would lead to the inference that no obligation to utilise the amounts exclusively for charitable purposes could be said to have been created: (a) the compulsory nature of the payment, (b) the fact that the respondent had some discretion as regards the manner in which and the time when the respondent should spend the Dharmada amounts for charitable purposes; or (c) the facts that the respondent did not keep the amounts in a separate bank account." Keeping in view the facts and circumstances of the case and the findings of the Hon'ble Supreme Court in the case of Commissioner of Income-tax Central, New Delhi v. Bijli Cotton Mills (P) Ltd. reported in 116 ITR 60 we hold that Dharmada receipts i.e. 0.02 paise per kg.

charged by the appellant from his customers in the invoices does not form part of the normal price especially when there is no evidence on record from the Revenue's side that the appellant had used this amount for any other purpose. The argument of the Ld. SDR that the finding by the Hon'ble Supreme Court is under the Income Tax Act, 1961, does not help him. Hon'ble Madras High Court judgment in the case of N.S.Pandaria Pillai v. the State of Madras reported in 1973 (31) STC 108 is much earlier to the judgment of the Hon'ble Supreme Court. Keeping in view the facts of the case, we set aside the impugned orders and allow the appeal. Since we are allowing the appeal on the ground whether Dharmada receipts are taxable or not, on the basis of material on record, we need not go the

point of limitation.

In view of the above discussion, the appeal is allowed. Revenue authorities are directed to give consequential effect to this order.

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