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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-18-2004

Reported in : (2004)(97)ECC690

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

Appellant : ipca Laboratories

Respondent : Commissioner of Central Excise

Judgement :

1. The question that has come up for consideration before us relates to interpretation of Clause (ii) of proviso to Section 4(1)(a) of the Central Excise Act 1944. Different views had been expressed by benches of coordinate jurisdiction and, therefore, it became necessary for a Larger Bench to consider the issue.

2. Appellants are engaged, inter alia, in the manufacture of bulk drugs falling under Chapter 29 of the First Schedule to the Central Excise Tariff Act, 1985. The bulk drugs, namely, Frusemide, Trimethoprim, Norfloxacin, Erythromycin Estolate, Pyrantel Pamaoate and Erythromycin Sterate manufactured by the appellants are specified in the Schedule to the Drugs (Price Control) Order, 1995 (for short, DPCO). Paragraph 3(1) of the DPCO provides that the Government may with a view to regulate the equitable distribution and increasing supplies of a bulk drug specified in the First Schedule and making it available at a fair price from different manufacturers, fix from time to time a maximum sale price at which such bulk drug shall be sold. Paragraph 3(3) mandates that no person shall sell a bulk drug at a

price exceeding the maximum sale price fixed under sub-paragraph (1) plus local taxes if any.

Appellants had been selling the above-mentioned bulk drugs at a price lower than the maximum price fixed under DPCO. Above facts are not in dispute. The appellant paid excise duty on the price at which the above drugs were actually sold by them and not at the maximum price fixed by DPCO. They filed price declarations under Rule 173C of the erstwhile Central Excise Rules, 1944 from time to time specifying the price at which the drugs are sold. While so, show cause notice was issued to the appellant by the Central Excise authorities demanding differential duty of an amount of Rs. 32,75,573 for the period 6-1-95 to June 2000 on the ground that the appellant should have paid duty on the bulk drugs at the maximum price fixed by DPCO in terms of proviso (ii) to Section 4(1)(a) of the Central Excise Act, 1944. Appellant contested the demand relying on Circular F. No. 312/1/75-CX-10, dated 8-8-75 and also on the decision of the Hon'ble Supreme Court in Delhi Cloth & General Mills Co. Ltd. v. UOI - 1986 (24) E.L.T. 175. The Joint Commissioner who adjudicated the show cause notice dropped the proceedings against the appellant. On appeal by the Revenue, Commissioner of Central Excise (Appeals) Bhopal under order dated 23-10-2003 reversed the order of adjudication and allowed the appeal following the decision of this Tribunal in the case of CCE, Indore v. Panchsheel Organics - 2002 (139) E.L.T. 319.

3. In order to resolve the dispute between the parties as to whether the appellant has to pay duty on the actual price at which the drugs are cleared by it or at the maximum price fixed under DPCO, it is necessary to examine the scope of Section 4(1)(a)(ii) of the Central Excise Act. Three decisions of this Tribunal, namely, Orchid Chem. & Pharmaceutical Ltd. v. CCE, Chennai Vera Laboratories Ltd. v. CCE, Visakhapatnam - 2001 (47) RLT 1059; and Commissioner of Central Excise, Vadodara v. Abbot Laboratories (I) Ltd. - 2001 (135) E.L.T. 88 are in favour of the contention raised by the appellant, whereas contrary view is taken in Commissioner of Central Excise v. Panchsheel Organics - 2002 (139) E.L.T. 319 and Koprana Ltd. v. CCE, Pune - 2003 (156) E.L.T. 484, Relevant provisions of Section 4 of Central Excise Act read as follows : "4. Valuation of excisable goods for purposes of charging of duty of excise - (1) where under this Act, the duty of

excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be - (a) the normal price thereof that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of whole- sale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale : Provided that - (ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in Clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;" 4. In Panchsheel Organics a Bench of this Tribunal did not follow the ratio of the decision in Orchid Chem. & Pharmaceuticals Ltd. taking the view that the issue is covered by the decision of the Supreme Court in Aluminium Industries Ltd. v. CCE, Bhubaneswar - 1998 (99) E.L.T. 486.

It is contended on behalf of the appellant before us that in Panchsheel Organics the Tribunal has not correctly understood the scope of the decision of the Supreme Court in Aluminium Industries Ltd. In Aluminium Industries Ltd. the assessee was found to have realized the price in respect of aluminium rods in excess of the price fixed under a notification issued under Price Control Order. Duty was demanded on the higher price realized by the assessee. The assessee contended that the price fixed under the Price Control Order in force is to be treated as normal price of the goods for the purpose of valuation under Section 4(1)(a) and not the higher price realized by the assessee. The above contention was accepted by the Supreme Court. It was held that if there is a Price Control Order in force, it is expected that the goods would ordinarily be sold at the controlled price. It was further observed that the point is placed beyond any doubt by the proviso (ii) to Section 4(1)(a) of the Central Excise Act, 1944. The Apex Court held that by virtue of this proviso a legal fiction has been created. The price fixed under any law for the time being in force has to be taken as the normal price of the goods and, therefore, in the instant case the price fixed by the notification dated 18th October, 1978 will have to be taken as the normal price of the aluminium rods manufactured by the appellant.

5. Learned Counsel for the appellant points out that what was under consideration before the Hon'ble Supreme Court was the price fixed for a commodity. But in Panchsheel Organics, as also in the present case, what has been fixed is the maximum price of the bulk drug. The prohibition under the DPCO is not to sell such bulk drugs above the maximum price so fixed. There is no mandate that manufacturer shall not price the drugs below the maximum price fixed under DPCO. Therefore, according to the appellant the ratio of the decision in Aluminium Industries was wrongly applied by this Tribunal in Panchsheel Organic.

It is also submitted that when there is no fixed price prescribed but only a maximum price under DPCO, any price below the maximum will be the price fixed under DPCO. Therefore, even applying the ratio of Aluminium Industries it has to be taken that appellants price of the bulk drug is the price fixed under DPCO and, therefore, has to be treated as normal price as provided under Section 4(1)(a)(ii) of the Central Excise Act. Learned Counsel for the appellant referred to the decision of the Hon'ble Supreme Court in Delhi Cloth & General Mills Co. Ltd., in support of his contention.

6. It is contended on behalf of the Revenue that in the light.-of the amended Section 4(1)(a)(ii) the ratio of the decision in Delhi Cloth & General Mills Co. Ltd. can have no application to the present case. It was also submitted that the decisions of this Tribunal in Panchsheel Organic and Koprana Ltd. have laid down the correct law by applying the ratio of the decision of the Supreme Court in Aluminium Industries and, therefore, the contention raised by the appellant herein has only to be rejected.

7. We find merit in the contention raised by the appellant. No doubt Koprana Ltd. has been correctly decided on the basis of the ratio of the decision in Aluminium Industries. In the above case the assessee had recovered from its buyers for sale of goods amounts in excess of the maximum price fixed. Following Aluminium Industries the Tribunal held that the price fixed by DPCO will be the assessable value and not the amount that was actually paid. But, in Panchsheel Organic facts were different. As in the present case price realized by the assessee was less than the maximum price fixed under DPCO. While following the ratio of the decision in

Aluminium Industries, the Bench (one of us was party to the decision) did not notice the fact that the notification dated 18th October 1978 fixed the price of Aluminium Rods and not the maximum price. In respect of bulk drugs where maximum price is fixed under DPCO, manufacturer can price their goods at any price below the maximum. This will be the effect of prescribing a maximum price. If that be so, any price below the maximum price will be a price fixed under relevant law. The appellant is therefore fully justified in contending that duty demand can be only on the price realized by it which is below the maximum price fixed. In *Vera Laboratories Ltd. v. C.C.E., Visakhapatnam*, South Zonal Bench at Chennai of this Tribunal has also taken the view that the ratio of *Aluminium Industries* will not be applicable when the assessee sold the drugs at a price lesser than the maximum price fixed under DPCO. Similar view was taken in *C.C.E., Vadodara v. Abbot Laboratories Ltd.* also. We are in full agreement with the view taken in these two decisions.

9. In the light of the above discussion, we hold that duty demand raised on the appellant taking maximum price fixed under DPCO as the normal price cannot be sustained. Since no other issues are involved in this appeal, we are disposing of the appeal itself.

10. The order passed by the Commissioner (Appeals) is set aside and the appeal stands allowed.

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