Dalmia Biscuits Pvt. Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-07-2004

Reported in : (2004)(117)LC973Tri(Delhi)

Judge : S Kang, Vice, A T V.K.

Appellant : Dalmia Biscuits Pvt. Ltd.

Respondent : Cce

Judgement :

1. In this appeal, filed by M/s. Dalmia Biscuits Pvt. Ltd., the issue involved is whether the transport charges collected by them are includible in the assessable value of the goods manufactured by them.

2. We heard Sh. K.K. Anand, learned Advocate for the appellants and Shri S.M. Tata, learned S.D.R. for the Revenue.

3. When the Central Excise Officers visited the factory premises of the appellants, they found that they were charging freight @ 6 per cent of the assessable value from their customers which was not included for determining the assessable value of their final products. It was also observed by the officers that there was a difference in the freight charged by them from their customers and the freight actually incurred by them. Accordingly, a show cause notice dated 9.11.1999 was issued to them for recovering the duty short paid on the element of freight recovered in excess of the actual freight incurred by them. The Additional

Commissioner, under the Order-in-Original No. 31/2000 dated 21.12.2000, did not confirm the duty following the decision of the Supreme Court in the case of Indian Oxygen Ltd. v. CCE 1988 (36) ELT 732 (SC) : 1988 (18) ECR 161 (SC) : ECR C 1234 SC and Baroda Electric Meters Ltd. v. CCE . However, on appeal preferred by the Revenue, the Commissioner (Appeals), under the impugned order, has confirmed the demand of duty after setting aside the Adjudication Order holding that the excess amount of freight recovered by the appellants was nothing but flow-back of money from the buyer to them in the garb of transportation charges and was, thus, includible in the assessable value. He has relied upon the decision in the case of Bihar Caustic & Chemicals Ltd. v. CCE . We agree with the submissions of the learned Advocate that the duty cannot be confirmed on the excess amount of freight collected by the appellants as the duty of excise is on the manufacture of the goods and not a tax on profit made by the manufacture on the transportation of the goods. He has rightly contended that as the assessable value of the goods at the factory gate was known, the question of adding of transportation charges therein does not arise. It has been held by the Supreme Court in the case of Indian Oxygen Ltd. (supra) that the value under Section 4 of the Central Excise Act is to be determined on the basis of wholesale price at which the goods are sold at the factory gate i.e. place of removal.

Thus, the cost of transportation from the factory gate to the place of delivery, cannot be added to the price at factory gate because the duty of excise is a tax on manufacture and not on the profits made on transportation charges. Similar views have been expressed by the Supreme Court in the case of Baroda Electric Meters Ltd. (supra), wherein the freight actually paid by the assessee was less than the amount collected by way of equalised freight. The Supreme Court has held that "the duty of excise is tax on the manufacture and not a tax on the profits made by a dealer on transportation." The learned Advocate has also relied upon the decision in the case of Empire Industries Ltd. v. CCE 1997 (95) ELT 653 (T) : 1997 (73) ECR 93 (T), wherein the Tribunal, following these two judgements of the Supreme Court, has held that the collector was wrong in including the charges in excess of the cost incurred in the assessable value. The Tribunal has held that "any profit which the appellant may make in the activity of transport which has nothing to do with the activity of manufacture.

These decisions, relied upon by the learned Advocate, are applicable to the facts of the present matter. The finding of the Commissioner (Appeals) in the impugned Order that these judgements are not applicable as the same apply when profit is made on transport by the dealer whereas in the instant case, dealer is not involved. The ratio of the decision is that the profit made on transport is not to be included in the assessable value. In view of the decision of the Supreme Court, the decision in the case of Bihar Caustic & Chemicals Ltd. (supra), is not applicable to the facts of the present case. It is also apparent from the observations made by the Tribunal in the case of Bihar Caustic & Chemicals Ltd. (supra) to the effect that "each sale had negotiation involved and based on this negotiation, a price is stipulated under a contract between the buyer and the appellants" and therefore, "it cannot be stated that the factory gate price is ascertainable as was in the case of Indian Oxygen Ltd." (supra). We, therefore, set aside the impugned order and allow the appeal.