Collector of Central Excise and Vs. United Glass and ors.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-22-1987

Reported in : (1987)(12)LC1105Tri(Delhi)

Appellant : Collector of Central Excise and

Respondent : United Glass and ors.

Judgement :

1. Common issues are involved in the 7 matters listed above. They were heard together and are being disposed of by this common order.

2. We have heard both, sides and examined the record. The facts, in brief, are that M/s. United Glass ('the assessee') manufacture Glass and Glassware at their factory situated at Bangalore. They supply empty glass bottles to M/s. H.M.M. Ltd. ('the customer') who are situated nearby. The customer uses these bottles for packing their product 'HORLICKS' therein. The customer sent empty cardboard cartons to the assessee. These cartons belonged to the customer and were supplied free of cost to the assessee. The cartons were printed with the customer's legend "Horlicks the great Nourisher, made in India by H.M.M. Ltd.".

The assessee placed empty glass bottles in the cartons and despatched the same to the customer without closing the lids of the cartons.

3. Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944, reads as under :- (i) where the goods are delivered at the time of removal in a packed condition,

includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee." (1) whether the cost of carton is includible at all in the assessable value of the glass bottles sold by the assessee to the customer; 5. The assessee filed a price list on 1.7.1980. It contained the following entry on cost of packing : "Rs. 79.00 (Rupees Seventy-nine only) per thousand bottles, (packed in returnable carton and the cost of one carton, which can be used repeatedly to supply 100 bottles)".

The assessee calculated the amount of Rs. 79/- on the basis that each carton cost Rs. 7.90 and was capable of carrying 108 bottles in six trips.

6. Without any notice or hearing to the assessee, the Assistant Collector enhanced the packing cost from Rs. 79/- to 442/- per thousand bottles. He did so on the ground that there was no evidence to show that each carton was used to carry empty bottles six times. The assessee started paying duty on the enhanced value under protest. On 9.10.1980, the assessee represented to the Assistant Collector and asked for total exclusion of the packing cost. The Assistant Collector, on adjudication on 29.12.1980, stuck to his earlier order. The proceedings were then taken before the Appellate Collector. As time passed, further price lists were filed by the assessee. They gave rise to the same type of dispute. The various proceedings have ultimately culminated into the present three appeals of the department, three corresponding cross-objections of the assessee and one independent appeal of the assessee. The assessee's independent appeal No.E-2620/86-A and the assessee's cross - objection No. E-24/87-A are really a duplication of each other.

7. The department's case is that the full cost of carton at Rs. 442/- per thousand bottles should be added in the assessable value. The assessee's case is that there should be no addition on account of the cost of packing at all. The assessee's alternative case is that if the addition has got to be made, it should be only @ Rs. 79/- per thousand bottles. It is a common ground between the two parties that there was no basis for adding the notional cost of imaginary gunny and straw packing which, in fact, was not used in delivering the bottles to the customer but which the Collector (Appeals) ordered to be included (vide appeal No. E-2637/

86-A).

8. The assessee's pleas in support of their case for total exclusion of the packing cost are as follows :- (1) The packing cost envisaged in Section 4(4)(d)(i) was the cost incurred by the manufacturer of the goods. Since in their case the cartons belonged to the customer and were supplied free to the assessee, the assessee incurred no cost on packing. The assessee sold only naked empty glass bottles to the customer. Hence, no cost on account of packing was includible in the assessable value.

(2) The assessee manufacture glass bottles for various customers, including M/s. H.M.M. Ltd. Glass bottles were capable of being supplied to the customers without any packing and actually the assessee did supply glass bottles to their various customers in naked condition. Packing cost was, therefore, not includible in the assessable value for this reason also.

(3) In the case of supplies to M/s. H.M.M. Ltd., cartons were used only to facilitate safe transportation. No packing was required for storage and handling of glass bottles. The assessee showed photographs of empty glass bottles staked in their store room. The Suprme Court had held in their judgments in the case of Bombay Tyres International Ltd. - 1983 ELT 1896 (S.G.) and Godfrey Phillips - 1985 (22) ELT 306 (S.C.) that cost of packing necessitated solely by the consideration of safety of the goods during transport was not includible in the assessable value.

In support of their case, the assessee relied on the following three High Court judgments :- M/s. H.M.M. Ltd., the customers, were allowed to intervene in the iroceedings. They supported the assessee's pleas for total exclusion of he cost of packing. They particularly stressed the point that the Gujarat and Karnataka High Court judgments aforesaid were on identical goods nanufactured by their competitors, M/s. Alembic.

(1) Section 4(4)(d)(i) makes no distinction between the packing belonging to the customer and that belonging to the assessee. So long as the goods are delivered in packed condition, the packing cost is includible, the only exception being the cost of durable and returnable containers.

(2) Glass bottles were fragile articles. Packing was essential for their protection. In this particular case the carton was the first and' the only or primary packing and not any special or secondary packing. Hence the cost of primary packing was includible in the assessable value. The department also relied on the Supreme Court judgment in the case of Bombay Tyres International aforesaid.

(3) There was no evidence of repeated use of the same carton for six despatches. We asked the learned representative of the department that since the assessee had claimed the carton to be returnable in their price lists, whether the Assistant Collector had called upon the assessee to substantiate it if he doubted the assessee's claim of repeated use. The learned representative of the department stated very fairly that the Assistant Collector did not call upon the assessee to substantiate with evidence their claim of repeated use of the same carton. The learned representative of the department, in this connection, relied on the letter dated 15.2.1984 of M/s. H.M.M. Ltd. addressed to the Superintendent of Central Excise in which the said customer stated that the cartons, on receipt with empty bottles from the assessee, were "recycled for use as packing material for packed horlicks." The assessee intervened to say that the cartons were so recycled after six trips with empty bottles. The assessee, however, admitted that M/s. H.M.M.'s letter did not say so.

10. We have given the matter our earnest consideration. Since excise is an indirect tax, uniformity in valuation and assessment of the goods ought to be ensured so that different manufacturers producing similar goods in the country are not discriminated. With this desirable object in view, it has been the practice of this Tribunal to respectfully follow the judgment delivered by a High Court on a particular issue so long as there is no contrary judgment by another Might Court on the same issue. We observe that Gujarat and Karnataka High Court judgments mentioned in paragraph 8 above covered, inter-alia, goods identical to those before us, namely, empty Horlicks bottles. The goods were supplied to the same customer also, namely, M/s. H.M.M. Ltd. The supplier was, however, a different one, namely, M/s. Alembic Glass Industries Ltd. M/s. Alembic were thus a direct competitor of the assessee, M/s. United Glass. Both the competitors had their factories situated at or near the same station, Bangalore, and both fell within the

jurisdiction of the same High Court, Karnataka. The department relies on the general proposition laid down in the Supreme Court judgment in the case of Bombay Tyres International. We find that the Karnataka High Court has delivered its judgment in the Alembic case after considering the Supreme Court judgment in Bombay Tyres International case. No contrary judgment of any other High Court has been brought to our notice so far as the specific case of empty Horlicks bottles supplied in customer's packing is concerned. In such circumstances, as per our practice, we were bound to respectully follow the Karnataka High Court judgment, whatever be our own views in the matter. That would be the only just and proper course for us to follow so that there is no discrimination as between two competitors producing identicl goods and supplying them to the same customer. Accordingly, following the ratio of the Karnataka High Court judgment, we hold that the cost of carton supplied free by the customer was not inclu-dible in the assessable value.

11. In the result, we dismiss the three appeals of the department and allow the corresponding three cross-objections as well as the independent appeal of the assessee in terms that the cost of customer's carton shall not be added to the assessable value of the glass bottles.

We dispose of all the 7 matters in the above terms. Consequential relief should be granted to the assessee. We may place it on record here that the assessee very fairly accepted before us that in case the assessee decided to retain the duties on packing cost collected from the customer, the assessable value would be liable to be re-determined, taking the retained portion of the duties as a part of the assessee's price realisation.