

'J' Foundation And Ors. Vs. Commissioner Of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-17-2005

Judge : S T S.S., T Anjaneyulu

Appellant : 'J' Foundation And Ors.

Respondent : Commissioner Of Central Excise

Judgement :

1. These appeals are against the common order of the Commissioner who vide the order impugned has determined duty on the assessee M/s. Haldyn Glass Ltd. (herein after referred to as Haldyn for short) along with interest for undervaluation of the glass bottles cleared on payment of duty and penalties imposed. Penalties were also imposed on the buyers, the other appellant herein under Rule 209A.1.2 The order impugned is consequent to an order in remand made by Tribunal vide its order CO/1252 to 1258/ WZB/2003 dated 13.06.03 wherein the Tribunal had observed - 8... We, therefore, set aside the impugned order and remand the case for fresh decision by the Commissioner, who shall extend a reasonable opportunity of hearing to the assessee. It shall be open to the assessee to advance all arguments available to them in their defense.

1.3 The Commissioner, after considering the material, especially the share holding of Shri. N.D. Shetty, the Managing Director and Director Shri. J.A. Mehta in the assessee Company Haldyn and the said buyers were J. Group a partnership of family - of Shri. J.A. Mehta, even though J.A. Mehta was not a partner at any time in the J. Group and M/s. Tarvin Trading & Investment Pvt. Ltd. the other buyer

shares were held by Shri. N.D. Shetty and therefore they were 'Related Persons', and in view of this fact of declaration filed in Part II for the 'favored buyers', he concluded - 47. In view of the foregoing discussions conclusion comes that M/s.

Tarvin Trading and 'J' Group of concerns were related person and favoured buyer of M/s. Haldyn Glass Ltd., Central Excise duty was not paid on sale price of those related persons; assessable value can be decided by adding 20% to 25% profit margin of those concerns to assessable value declared by M/s. Haldyn Glass Ltd., in respect of those goods, there was suppression of facts and proviso to Section 11A can be invoked; M/s. Haldyn Glass Ltd. are liable to pay duty demanded in the Show cause notice and also liable to penalty as provided under then Rule 173Q of Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944. As the proposed penalty is imposed on M/s. Haldyn Glass Ltd. under Rule 173Q of Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944, no separate penalty is imposable on Shri. N.D. Shetty as a Managing Director and Shri. J.A. Mehta as a Whole Time Director of M/s. Haldyn Glass Ltd. under the provisions of Rule 173Q of Central Excise Rules, 1944 as the penalty imposed on M/s. Haldyn Glass Ltd., in my opinion, will meet the ends of justice.

48. Considering involvement of Shri. N.D. Shetty and Shri. J.A. Mehta, Managing Director and Whole Time Director of M/s. Haldyn Glass Ltd. and shareholder / partner in M/s. Tarvin Trading and Investment P. Ltd. and M/s. J. Group of concerns the only conclusion comes that they arranged business of M/s. Haldyn Glass Ltd. through M/s. Tarvin Trading & Investment P. Ltd. and M/s. J. Group of concerns in such a way that profit to individual beneficiary remained same, when there was undervaluation to determine duty liability and there was evasion of duty at factory gate of M/s.

Haldyn Glass Ltd. Hence, it is evident that M/s. Tarvin Trading & Investment Pvt. Ltd., M/s. J. Group of Concern aided and abated M/s.

Haldyn Glass in evasion of Central Excise duty. Hence, M/s. Tarvin Trading and Investment Ltd., M/s. Janata Glass Works, M/s. 'J' Inundation, M/s. 'J' Traders are liable to penalty under then Rule 209A read with Section 38A of Central Excise Act, 1944.

2.1 It is on fact and the show cause notice dated 04.02.93 issued in this case records 1.2 The assessee, from time to time filed price lists declaring prices at which said excisable goods were sold to industrial consumers, wholesale dealers in terms of contract and determining there from assessable values of the said goods. In all these cases, the assessee declared these prices in proforma meant for sale to/through other than related persons. They also declared that prices were sole consideration and that nothing beyond the declared prices flew or would flow to them, directly or indirectly. They accordingly determined & paid duty of excise on the basis of assessable values so declared.

2.1 The jurisdictional Asstt. Collector noticed that the prices for sale of the said goods to M/s. Janta Glass Works, M/s. 'J' Traders & M/s. 'J' Foundation were on lower side compared to prices for sale of like goods to other like customers. S.C.N. No. V-(70) Cell-18/89 dated 7.2.89 was, therefore, issued interalia requiring the assessee to show cause as to why the declared ass. Values in case of the said 'J' group of concerns should not be revised and why differential duty should not be recovered.

2.2 The assessee in reply to the said SCN contended interalia that the said 'J' group of concerns were their regular customers purchasing large quantities of goods and that, therefore, somewhat lesser prices were charged from the said customers.

2.4 Collector C.Ex. Bombay II in exercise of powers conferred Under Section 35 of CESA, 1944 reviewed the Order-in-Original dated 25.04.89 and vide Review order dated 24.04.90 directed for filing appeal against the said O-in-O. The Collector also observed that mutuality of interest between the assessee and the said 'J' Group of concerns was not considered by the Asst. Collr. while passing the said O-in-O. The appeal was, accordingly filed before Collector (Appeals), Bombay.

2.5 Collector of C.Ex. (Appeals), Bombay vide Order-in-Appeal No. V-2(Ch. 70)47/BII/R/90 dated 03.4.1991, allowed the appeal setting aside the Order-in-original dated 25.04.89. The Collr. (Appeals) also directed that nature of relationship between the assessee and the said 'J' group of concerns be looked into during the fresh proceedings.

Thus the sales at lower prices to the buyers, 'J' Group, and the issue of valuation on such sales made was well within the knowledge of the department and the Assistant Commissioner, who was the proper officer under Rule 173C of the Central Excise Rule, 1944 under which the Price Lists were filed, had after due enquiry as required under that rule, not found any reason to uphold the charge of loading of values in any manner and had accepted the plea of quantity discounts and the sales to industrial buyers have to be of special tailor made designs and rejection cases in there case were high as pleaded were considered. The Ld. Assistant Commissioner found - In case of comparison between pries of wholesale dealers and industrial consumers in the SCN is to be dropped because they do form a separate class of buyers and therefore they can form different prices in part II. I also find reason in the party's argument that the lower price in case of 'J' Group i.e. M/s. Janata Glass Works, 'J' foundation and 'J' Traders are because they are their main wholesale buyers to whom the majority of the sales are effected and therefore the price difference can be explained as a quantity discount. Therefore, the SCN should BE DROPPED ON THIS Account too....

This order in review by Commissioner was remanded back by CCE (Appeals) by finding to the effect - 5... The distinction between Industrial Consumers on the one hand and the wholesale dealers on the other is quite natural (This is not objected to by the Collr). However, what is the sub distinction between the two categories of wholesale dealers itself between J Group and others is not clear. It is not brought out in the impugned order. Such a distinction is not normal and if there are any special circumstances then that has to be established and brought out in the order. The Asst. Collr has based his distinction on the following casual observation in the impugned order.

... Therefore the price difference can be explained as quantity discount The Collr. is right in objecting to this. Any discount has to be explicitly indicated in the price list and has to be approved by the Dept. Secondly it has also to be part of the contract. This does not seem to be the case discounts cannot be implied as presumed and he set aside the order and ordered that during the fresh proceedings the point raised by the Collr. about the native of relationship between Respondents and J Group may also be duly looked into by the Asstt. Collr.

In this view of the facts on record, there is force in the plea and ground taken that the proceedings now initiated by SCN dated 04.02.93, by merely recording these facts of the parallel proceedings will not call for upholding the notice. The Price Lists filed are required to be finalized pursuant to the CCE (Appeals) remand orders. The assessee has traveled to the Tribunal against the order of remand and that matter is pending in Appeal no. E/2060/91. Therefore approving the reliance of the appellants on the case of UOI v. Godrej & Bayer Mfg. Co.(P) Ltd. Petition No. 12824 of 1989 in SC and ITC Ltd. , the present show cause notice has to be held to be bad abinitio and is required to be struck down.

2.2 Appellant strongly urged and pleaded that their proceedings are not called for and barred by limitation as there was no suppression. This notice is the second notice issued on the questioning of the sale price of sales made to J. Group and invokes the proviso of Section 11A(1).

However on perusal of paragraph of the notice, it is abundantly clear that the issue of valuation in this case was well within the knowledge of the Department and the dispute was resolved and was subjudice in Tribunal. Therefore there cannot be any cause or and case of suppression of facts or otherwise to invoke the proviso to Section 11A(1) clause. Reliance placed by the appellants on the case of ECE Industries Ltd. 2002 (153) ELT 14 (SC); P & B Pharmaceuticals (P) Ltd., Hyderabad Polymer (P) Ltd. (2004(61) RLT 621 (SC); is well founded wherein the law laid down is that when previous Show cause notice has been issued on identical issue, then no case of willful misstatement in the part of the assessee has to be upheld on subsequent show cause notice. An order consequent to such a notice as in their case is therefore to be set aside by us.

2.3 The notice in this case in Para 2.4 & 3 indicate that the proceedings have been taken up by the Commissioner in pursuance of CCE (Appeals) order dated 03.04.91 which was itself a result of exercise of Commissioner powers under Section 35E of the Central Excise Act 1944.

The remand order in appeal was to Asst. Collector. By taking over the case, by the Commissioner, the assessee has been deprived of his valuable right of an appeal to Commissioner (Appeals) and thereafter an appeal to Tribunal, since against an

order of Commissioner, there would be only one appeal to the Tribunal. No reasons in law or in facts exist to deprive the right of one tier of appeal against an approval of Price List as in this case. The initial proceedings before the Asstt.

Commissioner did not invoke penalty clauses, which this time barred show cause notice purposes. The issue simplicitor of approval of Rule 173C Price Lists declarations has been converted into a penal case on buyers and the assessee, for claiming a price, Penalty proceeding for making a claim cannot be called for or upheld. There is no new material or allegation of fraud, collusion etc, to call for penal action on assessee or & the buyers. The allegation of mis declared sale price even in respect of said sales in proforma II was never the dispute on record in the proceedings before the Assistant Commissioner. Therefore even the remand direction is beyond the dispute before the Commissioner (Appeals).

2.4 The order impugned before us has calculated the assessable value in a manner not permissible in law in the case of "related person". The notice demands duty on Total sales Value (As per Balance Sheet) of alleged "related person". The demand was required to be made after permitting required deduction especially duty already paid. Assessee's plea on this ground is to be accepted.

2.5 Examining the issue on merits of the demands made, by considering the buyers in this case to be "Related person and favoured buyer" we find no concept of favoured buyer in Section 4 of the Central Excise Act, 1944 or the Valuation rules framed there under. The concept of "related person" is however to be found therein. Further it is found- a) The "Related Person" concept brought in this case by the fact of the relatives of a Director who are partner/s of the buyer firm.

This is directly in violation of the law as laid down by the Supreme Court in case of U.G. v. Kantilal Chunilal wherein the apex court, dealing under the Central Excise Act, 1944 with sales made to a partnership firm which had partners who were relatives of a Director of the assessee company, had held that sales made to a partnership firm of M/s. Alok Textiles, whose partners were related to some of the Directors of the assessee company, did not meet and approval of the concept of 'Related person' under Section 4(1)(a) of the Central Excise Act 1944 when no interest of the firm in the business of the assessee company could be found. In the

present case, no interest of the buyers firm are to be found in the business of the assessee. The mutuality of interest brought in by between some common Directors of two company who were relatives and the buyer does not make, the later a relative of the former, reliance in Cosmos (India) Rubber Works Ltd. 1988 (36) ELT 109 (Bom) by the Ld. Advocate is well founded & is relied upon. The apex court decision in case of CCEx. Madras v. S.T.I. Millers Ltd. Madras and Ors. laid down that a limited company cannot have interest direct or indirect in the business carried on by one of its share holders and we find no reason not to apply the law and set aside the Related Person or and mutuality of interest brought in the impugned order. Ld. DR's reliance upon CCEx Ahmedabad v. ITEC (P) Ltd. will not help the Revenue's case, as in that case both the limited companies were family concern and benefit were shared by one family, while in this case there are two families i.e.

Shetty & Mehta family as the assessee & Buyers. The assessee is not exclusively belonging to any single family.

b) The reliance of the Ld. Advocate on the full Bench Deccan in case of CCEx v. Ashok Arc on the issue that when sale value is available at the factory gate as 'normal price' if available had to be applied and reliance on the Tribunal's decision in case of Delta Cables Ltd. , wherein it was held that bulk buying dealer / customer lifting 60% of manufacturers products and balance output being sold to a number of industrial consumers which constituted a different class of buyers and prices charged from such bulk buyer customer lower than that charged to industrial consumers could not be found fault with. The reliance placed by the Advocate on Acron Engg Ltd. 2005(181) ELT 175 (SC) full bench decision and the Tribunal holding that higher discount by itself is no proof of interest in business of buyer (whole stationery Products Ltd. is well founded to induce us to uphold that, on merits, in the facts of this case, all bulk buyers sales i.e. to J. Group or and M/s. Travin Trading etc should be held to be as "normal price" under Section 4(1)(a) in the course of wholesale trade and there is therefore no reason to determine any undervaluation or short payment of duty.

2.7 When we do not find any reason to uphold the show cause notice, the order of duty demands on merits and or cause for any penalties to be called for, the order impugned is required to be set aside.

3. In view of the foregoing, the order is set aside and the appeals are allowed.

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