Parle Beverages Vs. Collector of Central Excise

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SooperKanoon Citation : sooperkanoon.com/4293

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-07-1988

Reported in : (1989)(39)ELT606TriDel

Appellant : Parle Beverages

Respondent : Collector of Central Excise

Judgement :
1. The appellants manufacture aerated waters of various descriptions and hold a Central Excise licence to do so. Aerated waters were to the material time assessable to Central Excise duty on an ad valorem basis.

For a long time the appellants were paying Central Excise duty (where payable) on the basis of the trices charged to dealers by their sole selling agents Mis. Kismat Pvt. Ltd. (hereinafter referred to as Kismat) through whom they used to book their sales.

2. On or about 13.12.1972 the appellants submitted a revised price list. This revision, according to the appellants, was due to a change in their pattern of sale whereby they began to sell aerated waters directly to a number of wholesale dealers and not through the sole selling agents.

3. Certain inquiries were conducted by the Excise Department. The statements of those persons who were declared by the appellants to be their wholesale dealers were recorded and certain records were also examined by the Department. From

these investigations the Department came to the tentative conclusion that the dealers were really not independent entities but were selling aerated waters under the direction of Kismat. In other words, the Department was of the opinion that the change of the sales pattern was not real.

4. The Department, therefore, issued a show cause notice setting out the charges and alleging that Kismat and Company under the appellant's management, were still the sole selling agents and that the so-called wholesale dealers were actually working under the control and direction of the appellant. The Department, therefore, claimed that duty should be paid at the prices charged by Kismat to the wholesale dealers as was done prior to 1.1.1973 (from which date their revised price list was to come into operation) and that the trade discount claimed by the appellants was inadmissible. The Department accused the appellants for suppression of facts and deliberate mis-declaration with intention to evade payment of duty. It was further alleged by the Department in the show cause notice that the appellants were to pay differential duty amounting to Rs. 7,28,356/- based on the difference between the actual duty paid and the correct duty payable by the appellants.

5. The appellants resisted the notice. In their reply they stated that in December, 1972 they decided to withdraw the sale distributorship from Kismat and to have all the selling activities undertaken directly from the factory to the wholesale dealers. Accordingly, they filed the revised price list effective from 1.1.1973. This was approved by the Assistant Collector. They disputed the right of the Assistant Collector to issue the show cause notice and argued that the notice was barred by limitation under Section 40 of the Central Excises and Salt Act (hereinafter referred to as the Act). They denied having made any false declaration or having committed suppression. They claimed that the wholesale dealers were genuine and independent. They argued that the terms of the agreement and certain practices like receiving back un-sold goods did not in any way dilute their pattern of sale through independent wholesale dealers. They also argued that under Rule 10 of the Central Excise Rules, 1944, (as it then was) the Department could demand short levied duty only for a period of 12 months prior to the date of show cause notice and no more.

6. The Collector heard them in person. Extensive arguments were advanced on behalf of the appellants. The appellants denied that the sales to dealers were not at arm's length. They pointed out that the price charged from all the buyers was the same and claimed that the Supreme Court judgment in Atic Industries v. H.S. Dave 1978 E.L.T. (J 444) was applicable to their case.

7. The Collector rejected their arguments and held that the charges against the appellants were proved. He confirmed the demand to the extent of Rs. 6,68,924/- (excluding Rs. 58,431/- on account of time-barred demand for August and September, 1973), imposed a penalty of Rs. 8 lakhs on the appellants as also Rs. 1,000/-. In addition, he confiscated all land, building, plant and machinery of the appellants under Rule 173Q of the Central Excise Rules giving, however, an option to the company to redeem the same on payment of fine of Rs. 25 lakhs.

Hence this appeal.

8. Shri Anil Dewan, the learned Sr. Advocate (with others) during the course of his arguments recalled the facts of the matter. He submitted that prior to December 1972 the appellant company was selling their product to its sole distributor Kismat but decided to withdraw the sole distributorship and to have all selling activities directly from the factory gate to the wholesale dealers or customers. The fresh price list effective from 1.1.1973 was accordingly filed and approved by the Assistant Collector on 29.12.1972. Between 1.8.1973 to June, 1974 the appellant company cleared the products after paying excise duty as per approved price list. Shri Dewan further submitted that 18 show cause notices were issued to the appellants between 28.6.1978 and 4.12.1979 for the period 1.10.1975 to 30.9.1979 demanding aggregate duty of over Rs. 80 lakhs. He submitted that the Collector of Central Excise, Bombay Shri S.R. Narayan set aside the 18 show cause notices and directed the refund of all amounts paid by the appellants. The learned Counsel further stated that 22 show cause notices were issued to the appellants between 27.9.1978 and 26.3.1983 for the period 1.4.1978 to 28.2.1983 demanding aggregate duty of over 1.57 crores of rupees. By 22 separate orders Shri H.M. Singh, the Collector of Central Excise, Bombay set aside these 22 show cause notices and directed refund of all the amounts which were paid by the

appellants. He submitted that the impugned Order-in-Appeal is the only adverse order and except for this the department did not confirm any other demand.

9. Shri Anil Dewan explained that it was true that some of the employees of the Appellant's company were given wholesale dealership but this was done to help them to set themselves up and also because they would be reliable. He submitted that even if the prices to such (ex-employee) wholesale dealers are ignored, there are still 7 independent wholesale dealers, namely : He submitted that the prices to these 7 dealers who are independent may be taken into consideration and emphasised that the Appellant company sold their product at the same prices to all their dealers.

10. Referring to the Franchise agreement the learned Counsel stated that this agreement was entered into with all their dealers. Referring to the terms of agreement he reiterated that all the terms were normal commercial conditions and there was no term or condition which could be construed as unreasonable or uncommon in their agreements.

11. Referring to certain affidavits filed by some of the wholesale dealers Shri Anil Dewan argued that ignoring these affidavits completely was wrong. The Collector should nave cross-examined them as was required by law.

12. The learned Advocate also submitted that the Assistant Collector having approved the price list, there was no warrant to interfere with the same at the later stage. He denied any mis-statement or suppression of facts on the part of the appellants' company.

13. The learned Counsel further submitted that the imposition of the penalty on the appellants was unwarranted and, in any event, harsh.

Referring to the confiscation of the plant and machinery Shri Dewan submitted that in terms of 173Q, the penalty was not sustainable. No reason was given for such confiscation as required by Rule 173Q(i). He submitted that in any event the imposition of the fine of Rs. 25 lakhs could not be justified under any circumstances.

14. Shri V.M. Doiphode, the learned SDR opposed the arguments and submitted that though the appellants claimed that all their dealers are independent, they really insisted on such independence in respect of only 7 of their dealers, namely : Out of these 7, the appellants pressed only the names of M/s. Janta Soft Drinks, M/s. Poona Bottling Co. and M/s. Surat Bottling Co. before the Collector with claims that they were independent. Therefore, the learned SDR argued, the appellants cannot now be permitted to argue about four more dealers. Explaining that none of the independent dealers was really independent of the appellants, Shri Doiphode argued that : (i) the dealers were under strict obligation to operate only on given routes and were compensated by payment of commission only.

They were nothing more than salesmen.

(ii) the title to the goods lifted from the factory did not vest in the so-called dealers.

(iv) the dealers, so-called, had to deposit all the cash collected by them either with Kismat or with the appellants and had no access to the cash beyond that point.

(v) the dealers were bound by conditions which made them purchase petrol from the petrol pump run by Kismat, get their vehicles serviced there and were to compulsorily use two loaders and one salesman of Kismat.

15. Shri Doiphode submitted that the above-mentioned facts emerged from the statement dated 17.8.1984 of Sh. Sodawala (Janta Soft Drinks) and 14 other statements of various persons which were recorded during the course of investigation. He specifically referred to the statement dated 17.8.1974 of Shri Rodrigues and pointed out that according to this statement the dealers were getting a commission of Rs. 1.20 per crate and were paying loaders who are sent by Kismat. Commission was being settled at the end of the month. The learned SDR extensively referred to Shri Sodawala's statement. He also referred to the affidavit filed by Shri Sodawala in 1976 and argued that this affidavit was filed after a period of two years from the date of the initial statement. Therefore, this affidavit was only an after-thought and should not be given any importance. In this context, Shri Doiphode relied upon a judgment of the Bombay High Court Uni-Sanhyo Ltd. v.U.O.I. (1981 E.L.T. 922, Bombay) and Anr. judgment of the Tribunal 1987 (31)

E.L.T. 130. Shri Doiphode further pointed out that even in his affidavit Shri Sodawala admitted that only monthly bills were issued and that petrol was purchased from petrol pump of Kismat. According to the learned SDR this affidavit further admitted that the services of one salesman of Kismat were utilised. He pointed out that the only difference between the statement and affidavit was that the amount of Rs. 1.20 was claimed in the affidavit to be "profit" whereas earlier he called the same amount "commission". Shri Doiphode further pointed out that only monthly bills were raised which, according to him, indicated that there was no sale of goods from the appellants to the so- called dealers.

16. Referring to the affidavit of Tushar agency Shri Doiphode submitted that even according to this affidavit at all relevant times the salesman of Kismat were used for distribution and sales of the product purchased by them. Further, it was pointed out by the learned SDR that proof is found in respect of the Collector's finding, in the statement of Shri Motani, Shri Jaswala, Shri Chauhan and Shri Ramesh Mehta all of whom deposed facts which indicated that they were not independent wholesale dealers but only commission agents.

16A. Shri Doiphode further argued that dealers such as Poona Bottling Co. and Surat Bottling Co., as also those who are far away from Bombay cannot be considered as independent dealers. Shri Doiphode explained that Poona Bottling Co., Surat Bottling Co., Ruby Agency and Indore Bottling Company were Franchise holders to whom the appellants might have sold some stray consignments at times when there was shortage of soft drinks in those distant places. Such sales, the learned SDR submitted, could not be considered as being in the ordinary course of trade. Besides, he pointed out that the quantum of such sales is too small to be taken into consideration.

17. Finally, Shri Doiphode submitted that the sales made to the so-called independent persons formed only 5 to 8 per cent of the total sales. The majority of the sales were made to Kismat and others.

Therefore, the Collector was correct in coming to the conclusion he did.

19. The real and only point to be decided by us is whether the appellants had any independent sales; that is to say, sales at arm's length, sales whose bona fides cannot be questioned and dis-approved by the department and sales which can be accepted to be genuine sales to independent wholesale dealers. The appellants themselves did not press the consideration of all their wholesale dealers as being independent dealers. Their submission is that the independence of some of the dealers could be suspected but not in the cases of all the dealers.

Besides mentioning 7 such dealers specifically, the ap-pealants repeatedly emphasised that they were selling their goods to all the dealers at the same price. Keeping this in mind we propose to examine the cases of the 7 dealers who are stated to be independent. We ignore the objection raised by the learned SDR that the appellants mentioned only 3 dealers as being independent, when proceedings took place before the Collector. We ignore this objection because we are examining whether any independent dealer exists, and the appellants can argue on the basis of evidence already on record. Also, all the facts are on record and no fresh evidence has been brought before us.

20. We take up the dealership of M/s. Janta Soft Drinks first. Outside Kismat this party accounts for the single biggest dealership, having purchased 5.58 per cent of the appellants' goods during the period of October, '73 to June, '74. This fact has been brought to our notice by an affidavit dated 4.9.1987. We may observe just now that the other 6 dealers together account for 1.6 per cent of the sales during this period.

21. The Collector rejected the claim that M/s. Janta Soft Drinks of Shri Sodawala was independent wholesale dealer for the reason that the statement of Sh. Sodawala was to the effect that the company was not an independent entity and it was, therefore, not a wholesale dealer in the actual sense of the term. In coming to this finding the Collector relied upon Shri Sodawala's statement given on 17.8.1974 as also on the statement of Sh. Rodrigues and 13 others. These statements were to the effect that the deponents were under obligation to pay for the services of 3 loaders of Kismat, to buy petrol from the pump belonging to Kismat and for operating on given routes.

22. We have carefully gone through these statements. So far as "given routes are concerned", we do not consider that this condition should result in rendering a dealer dependent. A manufacturer has a right to give dealership in specified areas and to restrict their sales so that one dealer does not clash with others. The claim that buying petrol at Kismat's petrol pump should be considered as a sign of dependence has to be considered in the total context. Petrol costs the same anywhere and even if some of the dealers purchased petrol at Kismat this fact alone does not lead to an inference that the dealers were dependent on Paries. Providing empolyment to Kismat's loaders has also to be considered as peripheral evidence.

23. We cannot, however, brush away the contents of the statement of Sh.

Sodawala to the effect that Rs. 1.20 per crate was the "commission" allowed to him. The Ld. Counsel for the appellants submitted that the affidavit filed by Shri Sodawala corrected his version and also explained to us that Sh. Sodawala mistakenly referred to discount as commission. We are not able to accept their explanation. We don't believe that Shri Sodawala did not know the difference between commission and discount. Read together with the above-mentioned peripheral evidence, we believe that while giving the statement, Shri Sodawala was only telling the truth.

24. We also note that while filing the affidavits Sh. Sodawala and others filed copies of the invoices from Parley Beverages Pvt. Ltd. to the respective dealers. The Collector, as can be seen from the documents, did not call the deponents of the affidavits for cross-examination. We can understand a view that the affidavits having been filed nearly 2 years after the initial statements their veracity is in doubt. It laid down by the High Court of Bombay in Subhash Chandra Nishat v. Union of India and Anr. in (1979 E.L.T. J 212) cited by the appellants, that where affidavits are filed before an officer it would not be proper for him to arbitrarily reject them as incorrect.

The Collector should have cross-examined the deponents or got them cross-examined before coming to a finding. That invoices also filed alongwith affidavits make such cross-examination not only a legal requirement but also a tool for justice. Before coming to an adverse conclusion the invoices had to be examined thoroughly. This has not been done.

However, we have perused the affidavits and went through the statements relied on by the Collector. We note that the affidavits and invoices were filed two years after the statements were recorded from the deponents. These deponents did not produce the invoices at the time of recording the statements or soon thereafter.

25. Therefore, it does not appear that the Collector's omission to conduct cross-examination is such a fatal defect that the order has to be set aside. In Subhash Chandra Nishat v. Union of India (Supra) what the High Court observed, recalling a judgment of the Supreme Court. In M. Parik & Co. v. I. T. Commissioner (AIR 1956 S.C. 554) was that where affidavits are filed before an officer, normally speaking, if he desired to challenge the correctness of the averments made in these affidavits, he should call the deponents for being cross-examined or test the correctness of the averments by any other mean open to him and it would not be proper for the said officer to arbitrarily reject these affidavits as incorrect. Here, the Collector had, before him, statements of the deponents and a number of other attendant circumstances which he kept in view while not giving any weight to the affidavits. We feel that in the light of what we have discussed above the Collector's omission does not render the order void or unsustainable.

We also take note of what was stated before the Collector of Central Excise, Bombay on behalf of the appellants as recorded in Order-in-Original No. 66/1984 the arguments related to a period subsequent to the period in question in these appeals (111/1983 to 228/1983). During the course of arguments the Ld. Counsel for the appellants referred to the practice prevailing prior to 1.10.1975 and stated as follows, according to the Collector's order : "Shri Hidayatullah explained that the show cause notices which are at present the subject matter can be broadly divided in three groups. First will include the show cause notices covering the period upto 1.10.1975. The second group will include the show cause notices covering the period upto 30.9.1979 and the third and the last group of show cause notices will cover the period from 1.10.1979 onwards. Sh. Hidayatullah stated that he would put up the defence first for the period from 1.10.1979 onwards. Thereafter he would make submission on the allegations in the show cause notices covering the period from 1.10.1975 to 30.9.1979, Sh. Hidayatullah read out the show cause notice dated 27.3.1980 covering the clearances during the period from 1.10.1979 to 31.12.1979 and stated that all the show cause notices are issued on identical footing, only periods covered in the show cause notices are different. Shri Hidayatullah then referred to the company's reply dated 10.4.1980 to the aforesaid reply it would be seen that the sales were made to 4 parties and some others. Shri Hidayatullah stated that others' mentioned in the said reply referred to 5 star Hotels, canteens etc.

Shri Hidayatullah argued that all the dealers are independent and they are different from the dealers cited in the show cause notice dated 8.10.1974. Shri Hidayatullah also read out the show cause notice dated 27.9.1980 covering the clearances effected during the period from 1.4.1980 to 30.6.1980. He also explained that there was a change in the sale pattern of the company and emphasised that the commercial price at the factory gate was available. Goods once sold were also not received back. It was the responsibility of the wholesale dealers for making their own arrangements for storage of usold goods. Sh. Hidayatullah contended that the company did not own any transport vehicles and no transport facilities were provided to the wholesale dealers. There was therefore no question of servicing of their transport vehicles or services of loaders and salesman.

Shri Hidayatullah pleaded that all the activities narrated in the SHAW CAUSE NOTICE DATED 8.10.1974 HAD BEEN STOPPED AND SAID ALLEGATIONS WERE NO MORE VALID. All the sales were at the factory gate and on cash payment and prices charged to all the whoesale dealers were the same. Shri Hidayatullah again referred to the aforesaid page 2 of the Annexure-A and reiterated that none of the alleged grounds survive now. Sh. Hidayatullah conceded that only Raj & Co. continue to be wholesale dealer purely on the humanitarian ground. Partner of the said Company was a Chemist in their company and accidentally almost lost his eyesight. In the circumstances, the allegations in the show cause notice dated 8.10.1974 does not exist now...." (Emphasis supplied).

26. We refer to this portion to note what the appellants themselves stated with regard to the position prevailing during the period covered by the present appeal. Taking all the circumstances into consideration we hold that M/s. Janta Soft Drinks, Bombay cannot be considered as an independent dealer.

27. We do not place any value on the 4 franchise holders to whom small quantities of goods was sold. These sales cannot be considered to be in the ordinary course of business as they are infrequent and are very small. We had already observed that the sales to these 4 Bottling Companies together with the sales to M/s. Shalimar Soft Drink Centre, Bombay and M/s. Tushaf Agency, Bombay constitute only 1.6 per cent of the company's sales. (These two were not claimed before the Collector as independent). Therefore, these sales cannot be said to be illustrative of the price charged by the company, especially keeping in mind that between Oct., 1973 and June, 1974 Kismat Pvt. Ltd. accounted for 56.76 per cent of the sales and 24 other so-called wholesale dealers, in respect of whom there are no claims of independent dealing, accounted for another 36 per cent of the sales. These figures are taken from the affidavit dated 4.9.1987 filed by the company. We also take note of the contents of Sh. S.K. Motani's statement (at page 49 of the paper book) which lead us to the conclusion that follows. Shri Motani's statement, not resiled, is valuable because he was the Accounts Executive of the appellants company. We have no hesitation in rejecting these sales as not representing the true and genuine sale price of the goods and in holding that the entire argument of so-called wholesale dealers was only an elaborate show of a marketing pattern which was not genuine. There is no proof that the goods were available for sale to any independent purchaser at the stated price at the factory gate.

28. For these reasons we uphold the conclusion reached by the Collector. We uphold the demand for duty.

29. We have considered the various arguments putforward by the Ld.

Counsel for the appellants in connection with the penalties imposed and the confiscation ordered. In the background of our findings, it is seen that the appellants did try to evade Central Excise duty amounting to nearly 7 lakhs of rupees by mis-representation about the nature of their sales to the various dealers. Therefore, a penalty was correctly imposed but a penalty has to be in proportion to the seriousness of the offence. Keeping in mind all facts and circumstances of the case we reduce the penalty of Rs. 8 lakhs to Rs. 3.5 lakhs only. We uphold penalty of Rs. 1000 under Rule 210 of the Central Excise Rules, 1944.

30. In our view the confiscation of the land, building, plant and machinery of the appellants was unnecessarily harsh decision. Apart from the legal requirements of stating reasons for such confiscation there was also the necessity for justification on the grounds of justice. Neither of these requirements had been satisfied in this case.

We. therefore, set aside the confiscation of land, building, plant and machinery.

31. The appeal is rejected excepting for the modification ordered above. Consequential relief on account of the modifications should be granted to the appellants.