

Commissioner of C. Ex. Vs. Arvind Mills Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-10-2006

Judge : J Balasundaram, Vice-, A T K.K., T Anjaneyulu

Appellant : Commissioner of C. Ex.

Respondent : Arvind Mills Ltd.

Judgement :

2. The matter referred to us is regarding admissibility of cash discount in the context of new Valuation provisions coming into force with effect from 1-7-2000.

3. Shri Ajay Saxena, the Ld D.R. for Revenue submits that the provisions relating to valuation of excisable goods for the purpose of charging duty of excise are incorporated in Section 4 of the Central Excise Act, 1944 and these provisions have undergone a basic change with effect from 1-7-2000 when the concept of transaction value instead of a deemed value has been introduced. He took us through the relevant provisions of Section 4 existing both prior to and after 1-7-2000 which read as under : Section 4. Valuation of excisable goods for purposes of charging of duty of excise- Whereunder 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 wholesale 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.

Section 4 Valuation of excisable goods for purpose of charging of duty of excise.

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall - (a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.

4. It was submitted that a comparison of the two provisions will show that earlier the assessable value was the price at which such goods are ordinarily sold by an assessee to a buyer in the course of wholesale trade which means the value was to be the deemed value at which the goods are ordinarily sold and not the actual value. However, under new Section, price has to be determined for each removal and price for every such removal shall be the assessable value and such assessable value shall be the transaction value only. Under new Section, there is no concept of ordinarily sold and no requirement of sale in wholesale only and even a retail price can be considered for the purpose of determining the assessable value. Each price has to be accepted as an assessable value.

5. It was further submitted that old Section 4(d)(ii) provided for allowing trade discount and the same read as under: Does not include the amount of duty of excise, sale tax, and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal price of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

(d) Transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage or outward handling, servicing warranty, commission or any other matter; but does not include the amount of duty of excise as well as tax and other taxes, if any,

actually paid or actually payable of such goods.

6. It was submitted that while under the old Section 4, there was a provision for allowing discounts, which are in accordance with the normal practice of the wholesale trade, no such provision for allowing discount has been provided for in the new Section 4. However, it was fairly admitted that this does not mean that any discount whatsoever would not be permissible but for such discount it will have to meet the criteria provided under the provisions of new Section 4(a) relating to transaction value which means that it should be the price actually paid or payable for the goods. In other words, it means that where no discounts are availed by the customer, then the price actually paid or payable shall be the transaction value and will accordingly be the assessable value. Reliance in this regard was placed on the CEGAT decision in the case of Purolator India Ltd v. CCE which in para 11 has held as follows : 11. Thus the value has undergone a complete change. The question to be asked for determination of the assessable value under new Section 4 is what is the "transaction value" of the goods that is "the price actually paid or payable for the goods when sold." Contrary to these provisions, under the old Section 4 the value was a deemed one, that is to say, the price at which goods are ordinarily sold in the course of wholesale trade. Now under New Section 4, one has not to look as to what is the price at which goods are ordinarily sold in the course of wholesale trade. The price actually paid or payable is to be taken up as the assessable value. In the present matter, the transaction value has to be taken for the purpose of assessment of duty under Section 4 of the Central Excise Act and as admittedly no cash discount has been given to the customers, the actual price paid by them shall be the assessable value.

7. It was submitted that this decision has taken note of the earlier decision in the case of Commissioner v. Pace Marketing Specialities Ltd. where a different view was taken. It was accordingly contended that since it is a latter decision, it should be preferred over the decision of the Tribunal in the case of Pace Marketing Specialities Ltd. 8. The Ld D.R. further submitted that as per the invoice pricing, the respondents were indicating two sets of price in their invoice, one which represents the net amount which is payable, and the second, with a foot note that in case payment is made before a particular date, which generally is within ten

days of date of invoice, then a lesser amount is to be collected. This shows that a higher amount being charged was nothing but price itself and the same did not include any element of interest and therefore charging a lower price cannot be attributed on account of the interest element incurred for delay in payment if the amount is paid within ten days. Attention was also invited to the circulars issued by the Board, No. 643/34/02-CX dated 1-7-2002 wherein the Board has clarified in regard to a query that whether cash discount is an admissible deduction that since valuation is now based on transaction value, the cash discount, if actually passed on to the buyer, will be allowed as deduction, the transaction being on principal to principal basis which clearly shows that cash discount will be permissible only in those cases where it is actually availed of and not in any other cases. The earlier decision of the Bombay High Court in *Jenson and Nicholson (India) Ltd and Anr. v. Union of India and Ors.* and in *Goodlass Nerolac Paints Ltd v. Union of India* 1993 (65) E.L.T. 186 (Bom) which was approved by the Hon'ble Supreme Court are not relevant in the present case as they related to the valuation under the old rules when the concept of 'ordinarily sold in the course of wholesale trade' was in vogue, unlike the present context where the assessable value is the transaction value i.e. the price actually paid or payable and not otherwise.

9. Shri V. Sridharan, the Ld Advocate for the Respondents, however, submits that there is no distinction between the new provisions and the old provisions relating to Section 4, so far as cash discount is concerned, and the decisions earlier rendered by the Bombay High Court duly approved by the Supreme Court still hold good. It was submitted that cash discount was allowed not on the premise that the goods were ordinarily sold at the same price or that the trade discount was allowed to all in the normal course of business, but on the ground that at the time of removal the price was less than what was payable after a specific period and the difference between the two was on account of delay in payment of price and not that it was a lesser price which was deemed price. It was submitted that this is evident from the CEGAT decision in the case of *Bhartia Cutler Hammer Ltd. v. CCE* , where the contention of the Revenue that the higher price at which about 65% of the goods were sold was the price ordinarily charged and hence that would be the normal price under Section 4(1)(a) was rejected and it was observed that once the cash discount is offered to all buyers and is known to them at the time of

removal of the goods, then the same will be admissible deduction and where the payments were not made within the stipulated period, and accordingly cash discount was denied to them, it can be said that late payers were in fact asked to pay interest for the period of delay. This decision has been approved by the Supreme Court as reported in 2000 (119) E.L.T. A 175. Thereafter reference was invited to the decision of the Supreme Court in the case of MRF Ltd where the Supreme Court in para 16 has observed as under : 16. Another head of deduction disallowed to MRF relates to interest on receivables (sundry debtors for sales). MRF has represented that this cost is inbuilt in the price and is incurred on account of the time factor between the time the goods are delivered and the time the moneys are realized. The cost is incurred only where credit terms are given in case of upcountry and other buyers where payment is made much after the sales are effected. They contend that it is nothing but an extension of the principle underlying Rule 4 of the Central Excise (Valuation) Rules. They contend that this is an adjustment in value required to be made to take into account and provide for the difference in the time of delivery and the realization of the sale value. As stated in our judgement in Union of India and Ors. v. Bombay Tyres International Ltd. (supra), it is only those expenses incurred on account of factors which have contributed to its value up to the date of sale or the date of delivery which are liable to be included in the assessable value.

The interest cost and expenses on sundry debtors or interest on receivables is an expense subsequent to the date of sale and removal or delivery of goods and in our opinion MRF Ltd, would be eligible to claim deduction on this account.

10. In view of the above, it was submitted that the Supreme Court has very clearly held that interest accrued on account of delay in payment i.e. interest on receivable is an expenditure subsequent to the date of sale and removal or delay of the goods and therefore are allowable for reduction. These findings were reiterated in MRF Ltd.'s case reported in 1995 (77) E.L.T. 433 (S.C.) para 66. Reference was also invited to the Tribunal decision in the case of ICI India Ltd v. CCE issued vide Order 2823/99 dated 4-11-1999 where it was clearly held that interest on receivable even when inbuilt in the price of the goods, for delayed payment is an admissible deduction. It was submitted that similar views were

taken in the case of High Court decision in Nelson Nikolas Gordha and therefore it is clearly established that the cash discount is on account of delayed payment and any extra price charge is on account of delay in payment and consequential interest accrued thereon and once it is not the revenue's case that the interest is so exorbitant that part of the price is being recovered in the form of interest which is not so in the present case, the deduction cannot be denied even in those cases where the same is not availed of by the customers on account of late payment.

11. Reference was also invited to the WTO ruling on interest pertaining to Customs Valuation where also the concept of valuation is the transaction value. The Technical Committee on Customs Valuation Section Edition July 1997 has clarified that charges of interest under the financial arrangement entered into by the buyer and relating to the purchase of the imported goods shall not be regarded as part of the customs value provided that such goods are actually sold at the price declared as the price actually paid or payable and the claim rate of interest does not exceed the level for such transaction prevailing in the country where and at the time when the finance was provided.

Attention was also invited to the circular issued by the Board vide F.No. 354/81/2000-TRU dated 30-6-2000 at the time of introduction of new Section 4 wherein para 8 it was clarified as under: 8. As regards interest for delayed payments it is the normal practice in industry to allow the buyers some credit period for which no interest is charged. That is to say, the assessee allows the buyers some time (normally 30, which could be less or even more depending upon industry) to make the payment for the goods supplied.

Interest is charged by him from the buyer only if the payments are made beyond this period. A question has been raised whether such interest on receivables (for delayed payments) should form part of the transaction value or not. As per the existing practice under Section 4 such amount of is not included in "value". Also, similar is the practice followed in this regard on the Customs side, where duties are collected on transaction value basis, and the importers are given certain "free" period for payment or to pay up interest for delayed payments. As the intention is not to disturb the existing trade practice in this regard, charges for interest under a

financing arrangement entered between the assessee and the buyer relating to the purchase of excisable goods shall not be regarded as part of the assessable value provided that: (a) the interest charges are clearly distinguished from the price actually paid or payable for the goods; (c) where required, assessee demonstrates that such goods are actually sold at the price declared as the price actually paid or payable.

12. Above circular clearly brings out that the intention was not to disturb existing practice with regard to charging of interest and that once the assessee demonstrated that the goods are actually sold at the price declared, as the price actually paid or payable, then interest if any charged for delay in payment cannot be added in the assessable value. Para 9 also refers to admissibility of discount including year discounts which are not readily known at the time of removal and in that case, the field formation has been asked to make assessment provisionally and to allow such discounts.

13. A somewhat similar clarification was given in the budget circular issued vide F. No. 20/10/2000-TRU, dated 12-5-2000 in which in para 2.2. it has been stated that the definition of transaction value does not seem to be divergently wider in content and scope from the interpretation of value under existing Section 4.

14. As regards the revenue's contention that the transaction value is nothing but invoice price, and as long as the invoice price indicates the higher amount, the duty has to be paid on the higher price, attention was invited to the decision of the Supreme Court in particular para 55 and 56 reported in 2004 (172) E.L.T. 289 (S.C.), which, while dealing with new Section 4 and the concept of transaction value as per explanation under new Section 4, stated that "the machinery provision contained in Section 4 and that too the explanation contained therein by way of definition of 'transaction value' can neither over rule the charging provision nor by reason thereof the goods which is not excisable would become an excisable one only because one is fitted into the other, unless the context otherwise required." In para 54, it was held that "only because the expression on 'by reason of in connection with the sale' have been used in the definition of 'transaction value', the same by itself would not take away the recourse of Sub-

section (1) of Section 4, as also the requirement of charging section as contained in Section 3". In para 56 it was held that in voice value is not always excisable value in respect of the goods. In view of this, it was submitted that the transaction value has to satisfy the conditions of Sub-section (1) in regard to time and place of removal and once a price is available at the time of removal, that will be the price at which the duty can be charged and any other higher price on account of delay in payment would be in relation to interest for the delay. In the end, it was submitted that a similar view has been taken by the Tribunal in yet another decision in the case of Kishan Moulding Ltd. v. CCE 2004 (62) RLT 712 (T) following the Tribunal decision in the case of CCE v. Pace Marketing Specialities Ltd. cited supra.

15. We have considered the submissions. We find that the only difference between the old Section 4 and the new Section 4 is regarding the deemed price and the actual price payable in respect of each transaction i.e. while under the old Section 4, the normal price at which the goods are ordinarily sold was to be applied to all transactions irrespective of the actual price charged, while under the new Section 4 each price charged for each transaction whether in wholesale or retail is to be considered as the assessable value.

However, the other elements like price for delivery at the time and place of removal remains the same. The question therefore to be asked is what is the transaction value for delivery at the time and place of removal. Obviously, the answer to this is the price actually charged i.e. the lesser price payable for making prompt payment at the time of delivery which shall be relevant transaction value to be considered for the purpose of assessment. The price payable at a latter date cannot be said to be the price payable at the time of removal and therefore, cannot be considered as the transaction value at the time and place of removal. The difference in price has to be considered as representing an element of interest on account of delay in payment and unless it is established that such difference in price is so vast that it actually amounts to charging part of the price in the form of interest, the same cannot be rejected, and shall be the price applicable even in respect of those cases where cash discount is not availed of. We find that this view clearly emerges from the catena of decisions cited by the Ld Counsel for the respondents and in the Board's circular issued on the subject of transaction value.

Even as per the WTO clarification dealing with the subject of transaction value, the interest element cannot be added in the transaction value as long as the rate of interest does not exceed the level for such transaction prevailing in the country where and at the time when the finance was provided. It is not the revenue's case that in the instant case the price was exorbitant or beyond the normal level of interest rate charged in such business transaction or that there were stringent conditions put on for availing cash discount which make the availment of cash discount more illusory than real. We further note that the earlier decisions under the old section were not on the ground that the goods were normally sold at a lesser price and therefore the cash discount was admissible even in those cases where it was not availed of as we find that the Tribunal in the case of *Bhartia Cutler Hammer Ltd v. CCE* cited supra found that the sales at higher price was to the extent of 65% without availing cash discount but still held that the lesser price after allowing cash discount will be applicable even in those cases where cash discount has not been availed of. The same shall be the case with respect to the cost of finance where such cost is only relatable to the delay in receiving the payment and such goods are actually sold at the price declared as the price actually paid or payable i.e. the declared price at the time of removal. We are therefore in agreement with the views expressed by the Tribunal in the case of *CCE v. Pace Marketing Specialities Ltd.* cited supra and hold that cost of finance and cash discount whether availed of or not are to be granted as abatement even after 1-7-2000 and the reference is accordingly answered.

16. The matter is sent back to the referral bench for passing appropriate orders.

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