Neha Cosmetics Vs. Cce

Neha Cosmetics Vs. Cce

SooperKanoon Citation : sooperkanoon.com/44939

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-23-2007

Reported in : (2007)(119)ECC33

Judge : R Abichandani, S T T.V.

Appellant : Neha Cosmetics

Respondent : Cce

Judgement :

1. The appellant challenges the order of the Principal Collector made on 29.12.1989 by which recovery of Rs. 3,60,089.84 was ordered under Rule 9(2) of the Central Excise Rules, 1944 on the ground that the appellant had suppressed the facts of having entered into an agreement with M/s Bakson Homeo Pharmacy and also suppressed the facts of the real assessable value. By the impugned order, the seized goods valued at Rs. 66,636/- were confiscated and redemption was allowed on payment of fine of Rs. 10,000/-, besides imposing a personal penalty of Rs. 50,000/-.

2. The matter has come up after the remand order dated 29.11.2006 made by the Hon'ble High Court of Delhi restoring the appeal on the appellant's depositing the entire duty and penalty with a direction to appear before this Tribunal on 02.01.2007.

3. Briefly stated, the case of the Revenue was that, the appellant was manufacturing the excisable goods (Arnica Hair Shampoo and Arnica Hair Oil) in the brand name of the buyer, who also was a manufacturer, and selling the goods under an agreement to the buyer at self adopted lower price of the goods so as to get undue benefit of the Notification No.140/83 dated 05.05.1983. According to the Revenue, the benefit was not available to the goods where the manufacturer affixes the brand or a trade name of another person who was not eligible for grant of exemption. It was alleged in the show cause notice that, the agreement was made with M/s Bakson Homeo Pharmacy by the appellant, which is a sole-proprietorship concern, with a view to remain within the exemption limit of clearance of Rs. 5 lakhs, though M/s Bakson Homeo Pharmacy was also manufacturing these goods and claiming benefit of the said notification.

4. The Principal Collector on the basis of the material on record has come to a finding that, Clauses 4, 11, 12 & 13 of the agreement did not support the allegation of the Revenue that the goods manufactured by the appellant were manufactured for and on behalf of M/s Bakson Homeo Pharmacy. Even the question, whether the benefit of the Notification No. 140/83 dated 05.05.1983, as amended, was available to the appellant, was decided in favour of the appellant. There has been no challenge against these findings given by the adjudicating authority in favour of the appellant. The only issue on which the appellant lost the proceedings was that, the value of the goods shown by the appellant in their invoices could not be taken to be the real value for the assessment purposes. On this aspect, while considering the provision of Section 4(1)(a) of the Central Excise Act, 1944, which was applicable during the relevant period i.e. 1987-88, it was held that, there were no independent sales to wholesale buyers inasmuch as the sales were effected under the agreement between the appellant and M/s Bakson Homeo Pharmacy. It was observed that, the determination of assessable value did not only envisage determination of the whole sale price at the factory gate, but the price should be 'independent' whole sale price and should not be influenced by any other factor.

5. The adjudicating authority has categorically found that the goods manufactured by the appellant were manufactured in its own capacity, though in the brand name of the buyer and that they were sold to the buyer under the terms of the sale

agreement. However, according to the adjudicating authority, such agreement did not reflect 'independent' whole sale price at the factory gate of the appellant and that the invoices did not reflect the real assessable value. It was held that, the price charged by the appellant was undervalued.

6. Under Section 4(1)(a) of the said Act, as it stood during the relevant period, it was provided that, where excise duty was chargeable with reference to value of the excisable goods, such value shall be deemed to be the normal price thereof. The normal price is described in the said provision to be the price at which such goods were 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. In the present case there is a categorical finding that the buyer was not related to the appellant. Under the terms of the agreement, it was provided in Clause 6 that, all prices will be for delivery ex the manufacturer's factory at New Delhi. In Clause 3 it was stipulated that, the quantity, price and other particulars of the product to be sold by the manufacturer to the company will be determined as per the sale order issued by the Company or any of its branches from time to time. Clause 7 provided that, the relationship between the parties under this agreement was on principal to principal basis. Under the terms of the agreement, as is obvious, the appellant had undertaken to manufacture and sell the goods at ex-factory price. The manufacturer was not concerned at what price the buyer would be selling his branded goods. Once a finding was reached that the parties were not related, the price at which the goods were sold by the assessed to M/s Bakson Homeo Pharmacy, was required to be considered as a normal price of the goods manufactured under the said agreement. It is open for the manufacturer to sell the goods on wholesale basis or even on semi-wholesale or retail basis to any buyer. There is no allegation that the goods were sold on retail basis under the said agreement and rightly so, because the entire bulk of the goods manufactured under the agreement was required to be sold to the said buyer alone. The activity of such sale by the appellant/manufacturer was in our opinion, sale in the course of wholesale trade because the goods were supplied on wholesale basis to the buyer. There is no allegation that the appellant had sold these goods to any other buyer. It would, therefore, appear that the finding of the adjudicating authority that

the goods were not sold at the normal price, is not warranted on the facts of the case and in view of the provisions of Section 4(1)(a), as it applied at the relevant time. Since the price, at which the goods were sold, was required to be taken as the normal price, it was not open to the adjudicating authority to question it on the ground that it was unreasonably low, especially in view of the finding given by the adjudicating authority that the parties were not related. The impugned order cannot, therefore, be sustained and is hereby set aside with consequential relief, as per law.

8. While fully agreeing and concurring respectfully with the above decision of the Hon'ble President, I cannot help, but referring to the oversight on the part of the Revenue in drafting the show cause notice.

While several clauses have been taken into account in the show cause notice, Clause 11, which confirms the possible linkage between the appellant with M/s Bakson Homeo Pharmacy Pvt. Ltd. in terms of the goods manufactured by the former, seems to have been overlooked. This vital Clause 11 reads as follows: 11. It is expressly agreed and understood between the parties that all raw materials and packing materials in respect of the said product shall either be procured by the manufacturer or may be supplied by the company as may be mutually agreed upon from time to time.

9. By not including/investigating the said clause in the body of show cause notice, the entire case has come down like a pack of cards.

Perhaps at the time of drafting of show cause notice, more care could have been shown which could have lent this investigation much strength, which is badly lacking.