Collector of Central Excise Vs. Duke and Sons (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-18-1988

Reported in : (1989)(21)LC38Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : Duke and Sons (P) Ltd.

Judgement :

1. The proceedings in the present appeal were initiated under Section 36A(2) of the Central Excises and Salt Act, 1944 as in force at the relevant time by issue of a show cause notice by the Government of India for the purpose of reviewing the order of the Appellate Collector of Central Excise, Bombay in respect of M/s. Duke & Sons Pvt. Ltd. referred to as assessee in the show cause notice. The proceedings now stand transferred to the Tribunal under Section 35F of the Central Excises and Salt Act, 1944 after this Tribunal was constituted and the matter is now being treated as an appeal before the Tribunal.

2. The brief facts of the case are that the appellants in the present proceedings had claimed refund on the ground that the element of equalised freight was included in the assessable value and should be allowed abatement. The Assistant Collector rejected the appellants claim for the abatement of the transport charges under Section 4(2) of Central Excises and Salt Act for the reason that there were sales at the factory gate and therefore, the price applicable in respect of those sales of the appellants was applicable to the sales of the goods to other consumers also in terms of Section 4(1) (a) of the Central Excises and Salt Act,

1944 and that the question of abatement of the transport charges did not arise. The Collector (Appeals) however allowed the appellants claim and allowed the abatement of equalised freight for different areas by different amounts. The Government of India after examining the records, were of the tentative view that the order of the Appellate Collector was not proper, legal and correct. The ground given in this regard as set out in the show cause notice issued by the Government of India are reproduced below for convenience of reference - "It is seen that the goods manufactured by the assessee were sold in Greater Bombay upto Dahisar and Thane at a uniform price irrespective of whether the deliveries are made at the factory gate or at the customer's premises. It is also seen that there are sales at the factory gate although the quantum of such sales are few when compared to the total sales. It would appear that the price of the goods is inclusive of an element of equalised freight that is charged throughout Greater Bombay and such charges towards equalised freight appear to be in-cludable in the assessable value. Govt observes that the issue of inclucion of equalised freight in the assessable value is pending decision before the Supreme Court. Prima facie the Appellate Collector appears to have erred in holding that such equalised freight should not be included in the assessable value.

The Central Govt. therefore, in exercise of the powers vested in them under Section 36(2) of the Central Excises and Salt Act, 1944 propose to set aside the order of the Appellate Collector of Central Excise, Bombay or to pass such order as deemed fit after consideration of the submissions of the assessee".

3. The learned Departmental Representative for the Department pleaded that before the provisions of new Section 4 came into force, the respondents filed a price list for approval in terms of new Section 4 with effect from 1.10.1975 vide their price list dated 15.9.1975 with a covering letter. He pointed out that at the time of filing of the price list, the appellants on their own stated that they were not clear about the quantum of deduction of the component described as post manufacturing cost. It was only later vide their letter dated 20.2.1976 they sought the deduction of equalised freight, alongwith some other post manufacturing expenses. He pointed out that the Assistant Collector vide letter dated 15th July, 1976 itself partially allowed their plea for abatement of post manufacturing charges

by allowing a deduction of transport charges @ Rs. 0.81 per crate for the sale price for greater Bombay subject to the actual cost of transportation incurred by them. The appellants filed an appeal against this order of Assistant Collector and the Appellate Collector took note of the enhanced claim of transportation expenses for the purpose of abatement and remanded the matter for de novo consideration by the Assistant Collector. The Assistant Collector allowed appellant the abatement @ 1.06 per crate based on the details set in his order dated 31.12.1977 and the appellants filed refund claim in pursuance to this order of the Assistant Collector.

4. The Assistant Collector who considered the refund claim however, rejected the claim made by the Assessee for the following reasons - "I find that refund claim is filed by the party on account of abatement of transport charges allowed by A.C.C. Ex. Bombay Dn. VII for the period earlier to 1.10.1975 and the order passed by the concerned Assistant Collector was based in C.A. certificate for the period 1st July, 1974 to 30th June, 1975 which in fact has no relevant to the present refund claim. It also find that party has issued three types of cash memos for sale of soft drinks in Greater Bombay viz. (1) for cash sale at the factory (2) Direct sales to Industrial units (3) Cash sale through their salesmen in Geater Bombay. I also find that sales at factory gate vis-a-vis the total sales during the last 2 years were as under -Year Total Sale Sale at factory30.6.1975-76 68,53,993 Dozen 1,661 Dozen30.6.1976-77 73,86,719 Dozen 1,520 Dozen The party has no sales Department/godown in Greater Bombay and all sales are effected from the factory itself. I find that normal price of the soft drinks as envisaged in Section 4(1) (a) is available in the present case and the same represents the price at which the soft drinks are sold by the party in Greater Bombay at the time of removal from the factory itself. This price is common throughout Greater Bombay. I, therefore, do not find any substance in arguments that the normal price is not available at the end place of removal of the goods from the factory. In fact this price was considered for the purposes of assessment even under old Section 4.

I, therefore, disallow the abatement claimed by the party on account of transport charges and reject the refund claim for Rs. 2,86,845.26, Rs. 7,229.05 and Rs. 3,379.27 filed by the party".

5. The assessee filed appeal against the order of the Assistant Collector rejecting their three refund claims by a common order. The Assistant Collector also disallowed while approving the price list filed by the appellants for approval of price with the abatement of Rs. 1.06 as transport charges. They filed an appeal against this order before Collector of Central Excise (Appeals), Bombay. The learned Collector (Appeals) Bombay allowed the appeal of the appellants in the following terms - "In view of the judgment of the Andhra Pradesh High Court in the case of Mis. Indo National Limited, Nellore and Ors. v. Union of India and Ors. 1979 ELT (J 334) and in view of the provisions of Section 4(2) of the Central Excise Act, 1944, cost of transportation charges have to be excluded from the assessable value, as they constitute post manufacturing costs.

However, in the instant case, the figure of Rs. 1.06 per crate claimed by the appellants and allowed by the Assistant Collector, Central Excise, Bombay Dn VII, towards cost of transportation will not be correct figure, as it was based upon the figures given by the appellants for the period 1.6.1974 to 30.6.1975. The refunds claimed by the appellants relate to the period 1.10.1975 to 28.1.1978. The appellants, under their letter dated 28.12.1979 submitted certificates from their chartered accountants indicating the expenses of transport per crate as follows- Period Cost of transportation Cost of transporta- No. of crates tion per crate1.7.1975 to Rs. 37,14,608/- Rs. 1.0830.6.1976 34,26,996-1/21.7.1976 to Rs. 40,62,831 Rs. 1.1030.6.1977 36,93,359-1/21.7.1977 to Rs. 46,12333 Rs. 1.0030.6.1978 46,00349 "In view of the fact that the appellants have now produced the cost of transportation incurred by them during the relevant period, I allow the appeals with consequential relief, subject to the following conditions - (i) The Department should be satisfied that the cost of transportation as indicated in the Chartered Accountant's certificates dated 9.2.1977, 28.2.1978 and 25.1.1979 and now claimed by the appellants were actually incurred. The appellants are directed to furnish to the lower authority, copies of the certificates which have been filed by them before the appellate authority.

(ii) Since the original abatement in the assessable value towards cost of transportation was restricted to Rs. 1.06 the refunds claimed by the appellants will be granted subject to the conditions that the maximum abatement will not exceed

Rs. 1.06. It could be lower based upon the actual cost of transportation incurred by the appellants, as indicated in the Chartered Accountant's certificate and verified by the Department.

(iii) After verifying the above certificates issued by the Chartered Accountants of the appellant company, the lower authority shall grant consequential refund of duty to the appellants. Further, the price lists during the relevant period will be approved after granting abatement towards cost of transportation. If any refund of duty accrues to the appellants as a result of modification of the prices, such refund of excess duty collected also would be granted to the appellants".

6. It is against this order of the Collector (Appeals), the learned Departmental Representative pleaded that the Government of India initiated the proceedings. He pleaded that in terms of Section 4 in case the price at which the goods were normally sold at the factory gate was available, the same should form the basis for assessable value and no abatement from this, except for the discount as allowed under Section 4 could be given. He pleaded originally when the appellants were allowed the abatement of Re. 0.81 and later Rs. 1.06 per crate, no evidence was produced before the Assistant Collector that there were sales at the factory gate. He pointed out that there were some sales at the factory gate and this value of the goods at the factory gate has to be adopted for assessment purpose. In this connection he drew our attention to Section 4(1)(a) and Sec-tion 4(2) of Central Excises and Salt Act, 1944. He" pleaded that Section 4(2) comes into play only when there were no sales at the factory and the sales were made away from the factory gate. In this connection, he drew our attention to the judgment of the Hon'ble Supreme Court in the case of Union of India and Ors. v. Bombay Tyre International Ltd. [1983 ELT1896 (SC)] para 50 at page 1925. The said para for convenience of reference is reproduced below - "Where freight is averaged and the averaged freight is included in the wholesale cash price so that the wholesale cash price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on it".

He also drew our attention to the judgment of the Hon'ble Supreme Court in the case oilndian Oxygen Ltd. v. Collector of Central Excise (1988 (36) ELT 723). He stressed that the Hon'ble Supreme Court in the case of Indian Oxygen has clearly held that if the price at the factory gate is available, the same should be adopted for tie purpose of assessment.

7. The learned advocate for the respondents pleaded that there was no dispute that the factory gate price as pleaded by the Revenue, included in the element of equalised freight. He stated that as it is, sales at the factory gate which had been made, were only stray sales made to their own employees on special occasions like birthdays, etc. or on festivel occasions. He pleaded the decision of the lower authorities were given at a time when the law had not been settled by the judgment of the Hon'ble Supreme Court and that in view of the same, legally there was no infirmity in the order of the Collector (Appeals). He pleaded that the ratio of the judgment of the Hon'ble Supreme Court cited by the Revenue in the case of Union of India v. Bombay Tyres (supra) squarely applies to the facts of this case. He pleaded that where the equalised freight element is incuded in the sale price, the same was present in the price irrespective of the fact the sales were made at the factory gate or at a point outside the factory and the Hon'ble Supreme Court took note of this fact and laid the law as in para 50 quoted by the Revenue, and allowed the appeal on this point after clearly stating that the element of equalised freight bcluded in uniform wholesale cash price is required to be abated. He stressed it has been clearly set out that such an element of average freight is to be excluded from the sale price for arriving at the wholesale price at the factory gate for the purpose of assessment under Section 4. He pleaded that the judgment of the Indian Oxygen cited by the Revenue was not applicable to the facts of this case and only applicable to the facts of that case.

8. We observe that there is no challenge that the element of equalised freight allowed by the Collector (Appeals) does not represent the correct position so far as equalised freight is corcerned. All that has been pleaded is that there were some sales at the factory gate, even though sale price at the factory gate is the same as that away from the factory gate and notwithstanding this inasmuch as the price at the factory gate is available abatement of equalised freight is not to be

allowed.

9. We observe that this plea is totally contrary to the judgment of the Hon'ble Supreme Court in the case of Bombay Tyre International on this point as set out in para 50 referred to supra. The Hon'ble Supreme Court has clearly held that where the freight is average, the same will stand included in the price whether for sales at the factory gate or outside for the purpose of having the same price and the element of this freight in terms of Section 4(2) is required to be abated for arriving at the factory gate price for the purpose of levy of Central Excise duty.

In view of this, we find no merit in the pleas of the Revenue and dismiss the same.