Collector of Central Excise Vs. Bihar Alloy Steel Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-24-1989

Reported in : (1990)(31)LC194Tri(Delhi)

Judge : H Chander, S Maruthi, R T V.

Appellant : Collector of Central Excise

Respondent : Bihar Alloy Steel Ltd.

Judgement :

1. The Additional Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi, had issued a review show cause notice to the respondents, M/s. Bihar Alloy Steel Limited. The said review show cause notice stands transferred to the Tribunal in terms of provisions of Section 35-P of the Central Excises and Salt Act, 1944 to be disposed of as an appeal. The respondents had cleared compressed oxygen gas. The gas was packed in the cylinders belonging to the customers. The Assistant Collector had held that the cost of cylinders was includible in the assessable value of the gas for the purposes of assessment of Central Excise duty and had confirmed the duty demand for Rs. 17,17,581.60 for the period 30th March, 1978 to 23rd March, 1979.

2. Being aggrieved from the order passed by the Assistant Collector of Central Excise, Ranchi, the respondents had filed an appeal before the Appellate Collector of Central Excise, Calcutta. The learned Appellate Collector of Central Excise had accepted the appeal and being aggrieved from the order passed by the Appellate

Collector of Central Excise, Calcutta, the Government of India had commenced the review proceedings and which is the present subject-matter of the appeal before the Tribunal.

3. Shri V.K. Sharma, the learned Senior Departmental Representative, who has appeared on behalf of the appellant, states that in terms of Notification No. 313/77-CE and Notification No. 136/79-CE dated 28th March, 1979, exemption was not available in respect of cylinders in which oxygen gas is compressed and filled. This exemption was available only in respect of Chlorine gas. He has pleaded that the order passed by the Assistant Collector was correct in law. There was no specific exemption in respect of oxygen and the value of the cylinders in which the oxygen is compressed and filled is to be included in the assessable value and he has again referred to Notification No. 136/79-CE dated 28th March, 1979. Shri Sharma stated that serial No. 7 of the said Notification reads as follows:--S. No.Item No. of the First Schedule to Description of the excisable goods, the Central Excises & Salt Act,--7 14H (i) Oxygen (ii) Acetylene (whether in dis- Shri Sharma states that since there is no specific mention of oxygen, the value of the cylinders has to be included in the assessable value.

4. Shri S.K. Bagaria, the learned Advocate, who has appeared on behalf of the respondents, has argued that value has to be determined in terms of Section 4(4)(d) of the Central Excises and Salt Act, 1944. The value of the cylinders cannot be included in the assessable value. He has relied on the earlier judgments of the Tribunal and various High Courts. He has placed reliance on the following judgments:Collector of Central Excise, Bangalore and Ors. v. United Glass and Ors.

(vii) Alembic Glass Industries Limited v. Union of India and Ors.

(ix) Collector of Central Excise v. Indian Oxygen Ltd. Shri Bagaria, the learned advocate stated tha(sic) Bombay High Court in the case of Govind Pay Oxygen Ltd. v. Assistant Collector Central Excise, Panaji and others "It is admitted that the cylinder in which gas is delivered to the buyer belongs to the latter and not to the petitioner. The buyer brings it to the factory of the petitioner where the gas is filled in the cylinder and is returned to the buyer with the gas in it. Actually, what the manufacturer sells to the buyer is only the gas. Since the container in which the gas is delivered belongs to the buyer, therefore, the cost of the cylinder supplied by the buyer to the manufacturer for the purpose of taking delivery of the gas is not includible in the assessable value of the gas under Section 4 of the Central Excises Act. The contention that Section 4(4)(d)(i) does not make any provision for exempting the packing material which is furnished by the buyer to the assessee manufacturer is not tenable." 5. Shri Bagaria, the learned advocate has pleaded for the dismissal of the appeal.

6. We have heard both the sides and have gone through the facts and circumstances of the case. The facts are not disputed that the gas cylinders were supplied by the buyers and the respondent only manufactures oxygen, compresses the same and fills it into the cylinders. The respondent's case is fully covered by the judgments of the Tribunal and the various High Courts. Para No. 5 from the judgment of the Bombay High Court in the case of Govind Poy Oxygen Ltd. v.Assistant Collector Central Excise, Panaji and others 5. As stated above it is admitted that the cylinders in which the gas is delivered to the buyer belong to the latter and not to the petitioner. What seems to be done is that the buyer brings its own cylinders to the factory of the petitioner where the gas is filled in those cylinders and they are returned to the buyer with the gas in it. Now actually what the manufacturer, in these circumstances, sells to the buyer is only the gas, since the container in which the gas is delivered admittedly belongs to the buyer. It would, therefore, appear that for the purpose of assessing the excise duty on ad valorem basis, as provided in Item 14H of the Schedule of the Act, value of the goods which are actually sold to the buyer would be the value for the purpose of arriving at the duty. Now as seen above what is sold by the manufacturer to the buyer is the gas alone without the container, which admittedly belongs to the buyer. There is no question at all of including the price or the cost of the container or the cylinder in the value of the gas for the purpose of determining the excise duty. We are, therefore, clearly of the opinion that the cost of cylinder which is supplied by therefore, clearly of the opinion that the cost of cylinder which is supplied by the buyer to the manufacturer assessee for the purpose of taking

delivery of the gas cannot be included in the price of the gas for the purpose of assessing the excise duty. In our view, therefore, the first respondent was not right in asking the petitioner to resort to the Provisional Assessment on the basis of including the cost of such cylinder in the price of the gas for the purpose of assessing the excise duty.

7. In view of the above discussion and the judgments cited by the learned advocate and also the judgment of the Supreme Court in the case of Collector Central Excise v. Indian Oxygen Ltd. , we are of the view that the value of the cylinders cannot be included in the assessable value. Accordingly, we do not find any merit in the appeal. The appeal is dismissed.

8. Since we are dismissing the appeal on merits and as such we are not going into the other issues raised in the appeal.