

Collector of Central Excise Vs. Jai Hind Oil Mills Co. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-16-1990

Reported in : (1990)(30)LC354Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : Jai Hind Oil Mills Co. Ltd.

Judgement :

1. The Government of India had issued a Show Cause Notice under Sec.

36(2) of the Central Excise & Salt Act, 1944 for review of the Order in Appeal No. 1430/79 issue under No. V-2(132) 1071/79, dated 19-11-1979 of the Appellate Collector of Central Excise, Bombay on the issue of including the value of the containers used in the packing of the vegetable product. The Appellate Collector has held that the decision of the High Court of Bombay in the case of Union of India v. Mansingha Industries Pvt. Ltd. 1979 (4) ELT (J 158) (Bom) is applicable and allowed the cost of the containers to be deducted from the assessable value and allowed consequential refund.

2. The revision petition was transferred to the Appellate Tribunal. The Show Cause Notice, dated ,28-8-1980 purported to review the order of the Appellate Collector on the ground that the question of inclusion of the cost of the containers have been held by different High Courts differently. In the case of Auro Food Products v. Union of India reported in 1978 (2) ELT. J. 672, it has been held that the cost of the containers has to be included. Since the issue of inclusion of packing charges

was pending decision before the Supreme Court, it would not be correct to hold that the Bombay High Court judgment in the case of M/s.

Mansingha Industries should be applicable to all cases.

3. The noticees have filed their reply dated 22-9-1980 to the above Show Cause Notice.

4. The preliminary objection raised by the respondents on the time bar of the review Show Cause Notice, was dismissed by the Tribunal order, Misc. Order No. 43/89-A.5. The learned SDR, Sh. S. Krishnamoorthy presented the department's case, where he drew attention to the settled law in the Bombay Tyre International case reported in 1983 (14) ELT. 1896 S.C. He, therefore, pleaded that the cost of the primary packing of the tin containers has to be included in the assessable value. Since the matter was pending decision, with a review Show Cause Notice, dated 28-8-1980, all pending proceedings will have to be in accordance with the decision laid down in the Bombay Tyres case. He referred to the decision of the Madras High Court in Auro Food Products v. Union of India reported in 1978 (2) ELT J. 672 in support of his contentions. He was, therefore, firmly advocating his plea of including the cost of the tin containers in the assessable value.

6. Shri M.A. Rangaswamy, Learned Advocate for the respondent in referring to the Show Cause Notice stated that it was vague, as it speaks of different High Courts, holding different views. No specific mention was made of the cases decided by the different Courts. The Show Cause Notice refers to M/s. AuroFood Products, where there is a major error. The case relates to a period prior to the amendment of Sec. 4 on 1-10-1975, while the Section referred to is the amended Sec. 4.

Therefore, the citation was wrong.

7. On merits, he held that it was the practice all over the state of Maharashtra to exclude the value of the tin containers and the respondent alone was discriminated, and the value of the tin containers was included in the assessable value. On a query from the bench, as to whether he could produce any evidence of such containers where the value of the tin containers was excluded, he

expressed his inability due to the long interval of time. He stated that vegetable oil was sold in bulk in durable and returnable containers and further the Asstt.

Collector had not passed any appealable order.

8. The appeal was made part heard and in the next date of hearing on 4-8-1989, Shri Rangaswamy, Learned Advocate reiterated his submissions and emphasised that the Show Cause Notice was invalid as it referred to the case of Auro Food which was irrelevant as it wrongly referred to the new Section, while his case was covered by the old law. The Show Cause Notice was contrary to the decision held in Supreme Court's decision A.K. Roy v. Voltas - 1977(1) ELT (J177) (SC) which got modified only subsequently. He further cited the case law 1989 (42) ELT 320 SC. The Show Cause Notice referred to the Madras High Court's decision which was irrelevant to his case and the revenue cannot go beyond the scope of the Show Cause Notice.

9. The learned SDR quoted the decision of the Bombay Tyre International case in paras 51, 52, 53 and 54 and submitted written submissions in support of his case and maintained that the Show Cause Notice dated 28-8-1980 should be confirmed. The submissions made have been considered. Union of India v. Mansingha Industries Pvt. Ltd., the Bombay High Court has held the view that any levy of Central Excise Duty on the value of the tin containers and the cost of freight is wholly outside the law.

11. In the case of M/s. Auro Food Products it has been enunciated that the removal of biscuits must be for the purpose of delivery. The excisable article here viz. biscuits are not delivered at the factory gate without tin containers. Therefore, their value will have to be necessarily included.

12. The Show Cause Notice dated 28-8-1980 states that the question of inclusion of the cost of the tin containers in the assessable value is a subject of varying views by different High Courts and specifically the Madras High Court in the case of Auro Food Products Ltd. has held the view that it is the value at the wholesale price when the excisable article is delivered at the factory gate, which should provide the quantum for levy and also the inclusion of packing charges is pending

decision before the Supreme Court in some other cases. The question now before us is whether the revenue could rely on a decision which has invoked the amended Sec. 4 to a case pertaining to the period prior to the amendment from 1-10-1975 in preference to a High Court decision which covers the jurisdiction of the respondent's factory. The Madras High Court's decision in Auro Food case in respect of packing of biscuits, pertain to a period in 1973. Obviously, the law prevailing at that time has to be referred to. The respondent is, therefore, correct in pointing out that the law existing at the relevant period was not referred to in the Auro Food case and as such should not be the basis for relying upon for the purpose of review of the Collector's orders.

Moreover, the learned SDR has referred to the decision of the Supreme Court in the Bombay Tyre International case which is an interpretation of the amended Sec. 4. Therefore, an assessee cannot be proceeded against for recovery of amounts under a different set of circumstances not prevailing at the time when the assessment was made. The Bombay Tyre International decision was pronounced much after the assessment of the respondent's products and should conform to the law prevailing at that relevant time and the revenue by issuing the Show Cause Notice and limiting its scope to a particular decision of the Madras High Court which is found not relevant, cannot now go beyond the scope set forth in the Show Cause Notice.

13. On reference to the case, relied upon by the Collector (Appeals) viz. Union of India v. Mansingha Industries, it is found that the law prevailing at that time in respect of Sec. 4 has been analysed, and the Bombay High Court has relied on the decision of the Supreme Court in A.K Roy v. Voltas Ltd. AIR 1973 SC 225. The High Court has come to the decision - para 33 and para 51 (reproduced here below) :- "In the case before us we have noticed that the product which can be made subject to excise duty under Item No. 13 of the First Schedule to the Act of 1944 is the hydrogenated vegetable oil itself. Item No. 13 does not contemplate the container in which the hydrogenated vegetable oil may be put as being part of the product. It was sought to be contended by the appellants that the tin container should be treated as a part of the product and manufacture of the vegetable product is not complete until it is packed in a tin container. We find no warrant for

such a construction." "Now, in the case before us we have held that imposition of Central Excise duty on the tin container and on freight was not warranted by any of the provisions of the Act, 1944. Thus any levy of Central Excise duty on the value of the tin container and the cost of freight was wholly outside the law and it could not be said to be a mere question of an error in the exercise of jurisdiction. The Central Excises and Salt Act of 1944 only provides for the duty of excise on excisable goods so that when an attempt is made to levy duty of excise on goods which are not excisable then such a levy falls outside the law and, therefore, would be illegal." 14. This decision of the Bombay High Court must have a binding effect over similar valuation aspects over assesseees in the jurisdiction of the State in which the Bombay High Court has jurisdiction, in preference to a decision of a High Court which is with reference to a later interpretation of the amended Section of the Act on valuation.

The other High Court decisions have not been mentioned and rightly found to be vague.

15. In consequence, this Tribunal is of the view that Appellate Collector has rightly allowed the appeal filed by M/s. Jai Hind Oil Mills. The Show Cause Notice issued by the Department is, therefore, not valid and is set aside. The appeal is dismissed.

With due respect to Learned Member (Technical) and Member (Judicial), my observations and orders are as follows :- 16. I notice that the matter first came up before Bench consisting of Shri I.J. Rao, Shri P.C. Jain and Ms. S.V. Maruti on a preliminary point regarding limitation. The preliminary objection that the notice was time barred was dismissed by the bench vide misc. Order No.43/89/A, dated 28-4-1989, and the matter was posted for hearing on merits.

17. In the hearing before us the main contentions of the respondents are that the notice was vague and invalid. It relies on a judgment of Madras High Court which was distinguishable; And the Collector (Appeals) had correctly allowed the refund on the basis of Bombay High Court judgment in Mansingha's case (The Hon'ble Bombay High Court had in turn relied on Supreme Court's judgment in Voltas case and the understanding of the law, in terms of this judgment, prevalent at the time

the orders were passed). Therefore, there was no cause for review at that time; And this position was required to be taken into account inspite of Supreme Court's subsequent judgment in Bombay Tyre's case [1983 (14) ELT 1896 (SC)].

18. In this connection, I observe that in the review notice the issue has been clearly spelt out and the Govt. had appropriately indicated its tentative view. Further, the facts of the case and the laws sought to be applied have also been duly mentioned. As such, Learned Counsel's plea that the notice was vague and invalid on this score was not acceptable.

19. Further, it is observed that the notice mentions that different High Courts have held different views and the matter was pending before Hon'ble Supreme Court. The said notice does mention Madras High Court's judgment in the case of Auro Food Products and Bombay High Court's judgment in case of Mansingha Industries in this context.

20. But I do not see as to how by mentioning the above facts the notice becomes either vague or invalid.

21. Of course, it was open to the respondents to make submissions with reference to the cases mentioned and to show which case could be more appropriately relied upon. But it was not open to them to plead that the notice becomes invalid merely because it cites a particular case or reference to others.

22. Since the fact that Sec. 4, as it stood at the relevant time, was applicable is not in dispute, the only thing which was required to be determined was the correct interpretation thereof.

23. In this respect, while it is correct that the Collector (Appeals) had taken a view based on Bombay High Court's judgment in Mansingha's case, it is equally a fact that Hon'ble Supreme Court has since clarified its own judgment in M/s. Voltas case and "having explained the true scope"; given a clear verdict in the case of Bombay Tyre International which is holding the field. In my opinion, the Ld. DR was correct in pleading that a Supreme Court judgment was required to be applied to all pending cases. Therefore, this case was required to be viewed in the light of

interpretation of Sec. 4 as given by the Hon'ble Supreme Court in the case of Bombay Tyre International. (1983 (14) ELT 1896 (S.C.) 24. The Ld. Counsel has been good enough to say himself that the position is now clear and the issue stands settled by the aforesaid judgment of the Hon'ble Supreme Court; And if this judgment is applied, it is not even denied that no refund would be due. Indeed, the fact that in the instant case vanaspati was sold in containers is not in doubt or dispute. Therefore, merely the fact that in some other cases, it was capable of being sold in bulk containers does not help the cause of the appellants. We are concerned here with the facts of this case; And in this case vanaspati having been sold in individual containers their cost was rightly included in the assessable value. In the above facts and circumstances, the tentative view expressed by Government of India in the notice is found to be correct. And merely because Government of India independently came to this conclusion (even before Supreme Court's judgment in Bombay "tyre International case) the proposal to review the order of the Collector could not be struck down.

25. Since the cost of primary packing had been correctly included in the assessable value by the Asstt. Collector; And it is found that in the light of the Supreme Court's judgment in the case of Bombay Tyre International this was the correct position in law; Hence the order of the Collector (Appeals) was required to be set aside and the deemed appeal of the Department was required to be accepted.

26. I may also mention that in the case of M/s. Pulgaon Cotton Mills, Pulgaon, this Bench had passed an order No. 242-249/89-D, dated 7-7-1989. In this order also, the latest judgment of the Supreme Court by which the matter was concluded, has been relied upon.

27. A similar view about judgment to be relied upon has also been taken in the case of M/s. Davangere Mills by this Bench.

In the light of ratio thereof also the appeal was required to be accepted.

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