

Collector of Central Excise Vs. Vst Industries

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-23-1990

Reported in : (1991)(52)ELT59TriDel

Appellant : Collector of Central Excise

Respondent : Vst Industries

Judgement :

1. These three appeals emanate from a common impugned order and have common facts and issues. These were heard together and are being disposed of by this common order.
2. The facts necessary for the disposal of the appeals are that the Respondents introduced a deposit scheme (during the years 1981, 1982, & 1983). In the Revenue's appeal, among the facts, it is mentioned that in their reply to show cause notice the Respondents mentioned that the scheme was intended to get working capital requirements to be met by the company in a period of "shrinking net realisations" and that they (Respondents here) went on to say that the additional commercial consideration for introducing the interest from the deposit scheme was to cover the risk of credit sales extended to the bulk of customers.
3. The Deptt. examined the matter and opined that the interest on the deposit should legitimately form additional element of value for assesment of the cigarettes cleared by the respondents. Therefore, the Deptt. proposed to include the notional interest @ 12% p.a. and to add this to the sale price to re-determine

the assessable value and to demand the differential value. The show cause notice alleged that in such circumstances, normal price has to be determined only under Rule 5 of the Valuation Rules, 1975. There was a further allegation in the show cause notice that the company received a sum of Rs. 35.01 lakhs towards "freight service charges" from the main dealers during the year 1982-83 and action was threatened under Rule 5 of the Valuation Rules in respect of this sum also.

4. After due process, the Asstt. Collector adjudicated the matter and confirmed a demand for over 2.23 crores of differential duty against the respondents on both the counts. The reasons given by the Asstt.

Collector are best referred to by reproducing the operative part of the Order:- "As regards the security deposit scheme, the party has mentioned that they resorted to this arrangement in order to get some capital money for investment by the company. It is worthwhile to note that the reply at Page 6, they have mentioned that "an additional commercial consideration" for introducing the interest from the security deposit scheme was to cover the risk of credit sales extended to the bulk customers. From this, it is obvious that the party had an idea that the introduction of the security deposit scheme would be an additional commercial consideration. Moreover in case the company is not able to mobilise funds for investment through the security deposit scheme, they would have obviously gone to some of the financial institutions like banks and procured the money required for investment. In such a case, they would have to pay some interest to the financial institutions offering the money as loan to them. Such being the case when the party is well aware that the security deposit scheme would give them the funds required for investment, it is much more obvious that this scheme would have influenced the fixation of the price relating cigarettes being sold to the dealers, from whom only the security deposits have been taken on a condition that no interest will be paid to them. The calculation of interest on the security deposit scheme at 12% also is not excessive nor arbitrary. This figure tallies more or less with the interest rates charged by the companies and other financial institutions during the relevant period i.e. during 1981-82 & 1982-83. Since the company has clearly submitted that the security deposit scheme was resorted to by them in order to raise capital, the interest element on account of such deposits raised by the company naturally

forms part of value on which the duty is payable.

Since this aspect of the value has not been taken into account during the relevant time for payment of C. Ex. duty, in terms of Rule 5 of Central Excise Valuation Rules, 1975, recalculation of assessable value is called for as has been done in the show cause notice.

In respect of freight service charges, the party had mentioned that these charges were collected from such of these customers who have given written request for making arrangements by the company for transportation of the cigarettes. Admittedly, these are not included as freight charges but collected as service charges on freight. Such charges are not eligible for any deduction on part with freight charges. In view of this, the freight service charges collected by the party during the year 1982-83 has to be added to the wholesale price of cigarettes in order to determine the correct assessable value in terms of Rule 5 of Valuation Rules 1975." 5. Aggrieved by the order, the Respondents filed appeals before the Collector (Appeals). The Collector allowed the appeal in so far as the interest on the deposits was concerned. Upholding the contention of the Respondents (appellants before us) he held that as the deposits were not taken from all the buyers uniformly, but only from buyers who wished to avail of credit facilities, the amounts calculated as notional interest did not constitute any financial returns to Respondents. On the second point, viz. Freight Service Charges, he rejected the appeal as the Respondents herein did not contest the demand in that regard.

6. Aggrieved by the order passed by the Collector (Appeals) in respect of the notional interest on the deposits, Revenue filed these 3 appeals before us.

7. We heard Shri L.P. Asthana, Id, JCDR for the Revenue (Earlier Shri Krishnamurthy & Shri V.K. Sharma also argued) and Shri Anil Dewan with the other Advocates for the Respondents.

8. Two issues arise for decision in this matter. One is whether the notional interest on the deposits received by the Respondents should be taken into consideration for calculating the excise duty. The second issue is whether, if so, the extra realisation should be added to the assessable value or to the wholesale price.

9. For the Revenue, the Id. JCDR reiterated the grounds of appeal and submitted that there was no question of time bar in these matters as the assessments were provisional pending in the Supreme Court. He submitted that the interest on the deposit obtained by the Respondents was to form part of the assessable value, the Id. Representative cited the following three Judgments:- 10. Shri Asthana (who took over at a later stage) argued that the additional consideration received by the Respondents was an element of the duty-cum-price, is an extra realisation and could influence the assessable value if the normal price is not revised openly.

11. At a later stage of hearing, which was re-opened to hear both sides on the question of how to include the extra consideration, Shri L.P.Asthana, the Id. JCDR submitted that the extra consideration should be added to the assessable value and cited the following Judgments in support of the proposition: Tribunal, Cochin Silicate & Glass Industries v. CCE 1987 (30) ELT 954 Tribunal, Synthetic Detergents Ltd. v. CCE, Cochin.

1988 (36) ELT 151 Tribunal, Aims Oxygen Pvt. Ltd., Baroda v. CCE, Baroda.

1988 (33) ELT 485 Tribunal, CCE, Bangalore v. R. Gac Electrodes (P) Ltd., Bangalore. Tribunal, Mysore Rolling Mills (P) Ltd. v. CCE Madras.

12. Shri Anil Dewan, in his reply, submitted that the notional value of interest should not be added for calculating the value. He also submitted that the deposits were collected purely on optional basis to ensure security in respect of big consignments and given on credit to other main dealers. He submitted that while many dealers opted for the scheme, many did not. The Bench questioned the Id. Advocate as to whether on delayed payments, interest was charged or not. The Id. Advocate answered in the affirmative. Referring to the grounds mentioned in the cross objections, Shri Anil Dewan further submitted that the Collector (Appeals) was wrong in directing the Asstt.

Collector for finding extra evidence when on the basis of existing evidence the inclusion of the amount of interest for purposes of calculating central excise duty was not held proper. The Id. Advocate argued that there was no price deflection and the same price was charged to the dealers who made the deposits and to the

dealers who did not.

13. Arguing that even if the interest is to be added, it should be added only to the price and not the assessable value. Shri Dewan submitted that Section 4 (1) (a) makes it quite clear that the addition should be to the realisation (wholesale price) and not to the assessable value. In this context, the Id. Advocate cited the following Judgments to support his proposition: 1988 (35) ELT (354) Tribunal, Hindustan Photo Films. Mfg. Co. Ltd. v. CCE, Coimbatore.

14. The Id. Advocate further submitted that the Delhi High Court in ITC v. U.O.I., 1987 (30) ELT 321 laid down how the assessable value is to be calculated. The Id. Advocate further submitted with reference to the two other respondents Hyderabad Deccan Cigarette (P) Ltd. & Venus Tobacco Co. (P) Ltd. - that the rate of duty on the cigarettes manufactured by these companies on a job work basis for VST should be on a job work charges only and that assessments cannot be at the prices at which VST sold the goods. Only raw material cost and profits should be taken for calculating assessable value.

15. Shri Dewan referred to the case law cited by him on the question of where the extra proceeds should be added on and reiterated that the extra consideration can be added on only to the wholesale price and not to the assessable value. He pointed out that in several of the Judgments cited by Shri Asthana, there are clear indications that though addition was ordered to be made to the assessable value, the Tribunal meant that the addition should be to the wholesale price only.

He further submitted that Rule 5 of the Central Excise Valuation Rules read with Section 4 (1) (a) of the Act is not a penal provision and referred to the form of Price List in part I. He submitted that Rule 5 applies equally at all stages and there is no difference as can be seen from Rule, if the discovery is made later. He argued that there is no separate method of calculating assessable value in bonafide and non-bonafide cases. He reiterated that the Delhi High Court Judgment in ITC (Supra) and the Tribunal's Judgment in Ashok Leyland Ltd. (Supra), according to him, support the Respondents' case and as also another Judgment of the Tribunal in Lili Foam Industries (P) Ltd. v. CCE Cochin reported in 1990 (46) ELT 462 (Tribunal). The Id. JCDR, however, submitted that Rule 5

refers to the value based on "aggregate" of the price and amount of money value of additional consideration but does not refer to the price. He further submitted that the proforma of the Price List is not relevant to the present proceedings.

16. We have considered the submissions of both sides. The first issue to be decided is whether the notional interest on the deposits received by the Respondents should be taken into consideration to arrive at the assessable value of the goods, viz. cigarettes. The Deptt.'s ground is that such interest was a commercial consideration amounting to a flow-back to the Respondents and therefore, legitimately forms a part of the assessable value. The appellants' plea is that the deposits are taken solely for the purpose of ensuring security when goods are given by them on credit to their dealers and payments are made later. In this context, we recall the question put by the Bench to the Respondents and reply to the effect that when payments are delayed, interest is charged by the Respondents. Therefore, we cannot accept as correct the plea that the deposits were simply to ensure security of the Respondents' monies due from the dealers. On the other hand, the Asstt. Collector's order shows that in the reply to the show cause notice, the Respondents expressed that the deposits were taken to get the working capital requirements which had to be met by the company in a period of "shrinking net realisations". The Respondents themselves, according to the Asstt. Collector's order, went on to say that an additional commercial consideration for introducing the interest free security deposit scheme was to cover the risk of credit sales. Therefore, it appears that the main purpose of the deposits was not security but collection of capital. The other consideration seems to be merely incidental. The Asstt. Collector's finding that if the Respondents borrowed the amount from the usual commercial channels they would have paid the interest is entirely a logical one. In our opinion, the Collector (Appeals) came to a different conclusion ignoring the factual position recorded by the Asstt. Collector. Merely that all the dealers did not participate in the scheme was not a correct reason for setting aside the Asstt. Collector's order. The impugned order is also wrong in taking the view that these interest charges accrued to the Respondents after the manufacture and clearance of cigarettes. The interest charges constituted an item which went into the wholesale value of the cigarettes and therefore, the exact value of the cigarettes itself was not correctly calculated, when these were not taken into

account.

17. The Tribunal's Judgment in Lili Foam Industries (P) Ltd. - (Supra) does not help the Respondents as in that appeal the question was whether loans taken on interest from the related persons should form an element of the assessable value when nearly half the sales were to independent buyers.

18. In Indian Oxygen Ltd. (Supra) relied on by the Respondents the question that was involved was whether the rental charges from the cylinders and the interest which accrues on account of deposits received for returnable cylinders, should form an element of value. The Tribunal held that neither of these would add to the cost of manufacture of the gases. Therefore, the ratio does not help the Respondents. A similar view was taken in Aims Oxygen (P) Ltd., Baroda, 1988, (36) ELT 151. Here also ratio does not help the Respondents in view of the difference in facts.

18A. For these reasons, we find that the Id. Collector (Appeals) was wrong in setting aside the Asstt. Collector's order, ignoring that the interest charges on capital formed a part of the wholesale price and again in directing the Asstt. Collector to make further inquiries. In our opinion this part of the impugned order has to be set aside and we do so with the result that the Asstt. Collector's order in so far as it directed that interest charges should be considered for arriving at the assessable value is restored.

19. That brings us to the second and last question that is before us (the Freight Service Charges not being an issue before us). It was the Deptt.'s case, from the beginning, that the amount of notional interest should be worked into the value through Section 4 of the Act read with Rule 5 of the Central Excise Valuation Rules. This Rule is reproduced below: "Where the exisable goods are sold in the circumstances specified in clause (a) of sub-Section (1) of Section 4 of the Act except that the price is not the sole consideration the value of such goods shall be based on the aggregate of such price and the amount of"...of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee." 20. It was never the case of Revenue and it cannot be made out now that any of the dealers were related persons of the Respondents. There is no

evidence to hold so, apart from such a ground not being admissible at this stage. Therefore, it can only be that sales are independent except that in view of the findings given by us above, the price was not the sole consideration. In such circumstance, Rule 5 comes into operation.

According to this rule, the value of such goods shall be based on the aggregate of such price and the amount of the money value of any additional consideration flowing from the buyer to the assessee.

21. We have already found that the additional consideration of interest flows here from the buyer to the assessee. Therefore, this has to be added. The addition should be to the assessable value according to the Revenue and to the wholesale price, according to the Respondents. The Revenue relied on several Judgments to buttress the argument that the extra consideration should be added to the assessable value. We proceed to examine it.

22. In Cochin Silicate & Glass Works - (Supra), the Tribunal held that the duty charged from the customers but not paid to the Revenue has to be included in the assessable value in terms of Section 4 of the Act.

In Synthetic Detergents Ltd. - (Supra), the Tribunal upheld the order of the Collector that the amount of excise duty recovered from the customers but not paid to the Govt. should form part of the assessable value of the excisable goods. In Aims Oxygen Ltd. - (Para 6) the Tribunal ordered that any charges incurred after the factory gate stage and recovered by the appellants are not includible but if they are incurred upto the factory gate, they would be includible for the assessable value. Shri Dewan pointed out that in Para 8 of the same Judgment, the Tribunal held that expenses actually incurred by the appellants on permissible deductions alone would be excludable and any excess recoveries from customers would be considered as part of the appellants' price realisation. In para 9 (ii) (Later part of the same order) the Tribunal reiterated that such recoveries would be part of the price realised by the appellants. In R. Gac Electrodes - (Supra), the Tribunal ordered that the value of additional consideration be added to the assessable value of goods. In Ram Das Motor Transport Co., cited by the Revenue, there is nothing which is relevant to the present matter. In Hubli Chemical Works - (Supra),

the Tribunal passed similar orders holding that the appropriate amount of duty must form part of the assessable value.

23. In Mysore Rolling Mills (P) Ltd. also the Tribunal ordered that the appellants had to pay duty on additional amount collected from the customers and that these amounts were part of the assessable value. The Respondents cited [Indian Oxygen 1989 (41) ELT 610], especially, paragraphs 14 & 15. In para 14, the Tribunal ordered that delivery and handling charges constitute a part of the assessable value as they make up the price of the goods ex-factory. Such charges, therefore, will have to be added to the price declared by the manufacturer.

23A. The Tribunal in Metal Box India (P) Ltd. - 1989 (39) ELT 79 held that additional consideration in terms of money value flowing directly or indirectly from the buyer in any form should be added to the declared price for determining the normal price.

24. In our opinion, the various Judgments cited by the Revenue wherein it was held that extra accrual should be added to the assessable value should be interpreted to mean that assessable value should be calculated after adding the extra accruals to the sale price (whole sale price). It is so because the Supreme Court in Ponds-(Supra) made the position very clear. In para 12 of the Hindustan Polymers 1989 (43) ELT 165 (SC) the Supreme Court observed as follows: "To construe new Section 4 as now suggested would amount to departing from this concept and replacing it with the concept of a notional value comprising of the wholesale cash price plus certain notional charges. This would be a radical departure from old Section 4 and cannot be said to be on the same basis. It has to be borne in mind that the measure of excise duty is price and not value. It has been so held by this Court in Bombay Tyre International's case (Supra). See in this connection, the observations of this Court in Bombay Tyres case at pages 368, 379, 382 and 383 where this Court emphasised ..." that in both the old Section 4 and the new Section 4, the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related concepts and price has a definite connotation. Therefore, it was held that the "value" of the excisable article

has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with the terms of Section 4. This Court rejected the contention on behalf of the assessee in that case, that Section 4 also levied excise on the basis of a conceptual value which must exclude postmanufacturing expenses and post manufacturing profit by observing that the contention proceeded on the assumption that a conceptual value governed the assessment of the levy. It was reiterated that the old Section 4 and new Section 4 determine the value on the basis of price charged or chargeable by the particular assessee." 25. The language of Section 4 and the extract of the Supreme Court's Judgment reproduced above show that the interpretation as given by the Supreme Court alone is the correct one. Rule 5 of Valuation Rules and Section 4 of the Act, have to be read together. A harmonious construction can lead only to one conclusion that the extra accrual should be added to the wholesale price and the assessable value worked back after allowing admissible deductions. Addition of such extra accruals to the assessable value would distort the meaning of the Section because there is no way in which abatement of excise duty which is permitted by Section 4 can be given if the extra accrual is directly added to the assessable value.

This view is best illustrated by taking instances where the rate of excise duty is 100% and, say, 150%. If the extra accrual is Rs. 100 and it is added to the assessable value the entire accrual is to be paid as excise duty when the duty is 100%. If the duty is 150%, the assessee has to pay, in case of extra accrual of Rs. 100, an amount of Rs. 150 as excise duty. Excise duty is not a confiscatory tax and therefore, whatever accrual is there to the assessee only a part of it, major or minor according to the rate of duty, would have to be paid as excise duty. This would be achieved only if the extra accrual is added to the price and not if it is added to the assessable value.

26. In this view, we find that the second issue in favour of the Respondents and direct that the extra accruals should be added to the wholesale price and not to the assessable value. The other argument of the Respondents that only cost of manufacture and manufacturing profits should be the assessable value are referred to only to be rejected as the Supreme Court in various Judgments

(Bombay Tyres, Hindustan Polymers etc. etc.) found to the contrary.

27. These orders will apply to all the three Respondents to the extent they are relevant. The Cross-Objections filed by each of them are also disposed of by these orders.

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