Spring Fresh Drinks Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-22-1990

Reported in : (1992)LC113Tri(Delhi)

Appellant : Spring Fresh Drinks

Respondent : Collector of Central Excise

Judgement :

1. The case of the appellants is that they are a Private Limited company and are engaged in the manufacture of aerated waters namely, Cola, Orange, Lemon, Trip & Soda. These aerated waters are manufactured under a Frenchise agreement entered into with M/s. Campa Beverages (P) Ltd., New Delhi. The aerated waters manufactured are sold to different wholesale dealers namely, Vidharbha Bottlers, Nagpur, Mukesh Campa Services, Nagpur, Amba Traders, Gon-dia, Bhole Drinks, Chindwara, Chandiram Sadhuram, Betul, and Shantiganga Soft Drinks, Bilaspur. Since the wholesale dealers invariably delayed the return of empty bottles and wooden crates to the appellants' factory the appellants recovered from the wholesale dealers an amount of Rs. 5/- per crate as container hire charges besides the ex-factory price charged for the sale of aerated waters. There is also an understanding between the appellants and the wholesale dealers to the effect that the dealers have to lift a particular number of crates in a year and if they fail to do so they would be liable to pay at the rate of Rs. 3/- per crate to the appellants by way of compensation for the quantity short purchased.

During the relevant period the appellants received Rs. 4,35,176/- towards the compensation. The appellants are also availing the benefit of exemption Notification No. 175/86. They have availed the said benefit on the value of clearances for the year 1986-87 at Rs. 7,23,483.60 and for the year 1987-88 at Rs. 6,84,080/-.

2. Adjoining their factory is located the factory of M/s. Vidharbha (P) Ltd. at plot No. C-102 M.I.D.C. Indl. Area. Since the factory was closed for annual maintenance and repairs from 12th July, 87 M/s.

Vidharbha Beverages requested the appellants to execute urgent orders for supply of Mr. Pik (Soda). The appellants manufactured the said Mr.

Pik in their factory, a trial production of 97 crates was made on 20th July, 87 and 21st July, 87.

3. On 21st July, 87 the Central Excise officers intercepted a matador belonging to Vidharbha Bottlers, Nagpur a few yards away from the appellants' factory and recovered 32 crates of Mr. Pik (Soda) issued by Vidharbha Beverages (P) Ltd. of sweet/flavoured aerated water issued by the appellants. The statement of the authorised agent of M/s. Vidharbha Beverages (P) Ltd. and the driver of matador recorded who stated that the aerated water was manufactured by the appellants.

4. Thereafter, the Central Excise officers seized the documents records/files from the factory premises of the appellants and also from the premises of Vidharbha Beverages (P) Ltd., Nagpur.

5. A common show cause notice was issued proposing to impose the penalty, confiscate the goods seized, demand duty amounting to Rs. 5,63,315.36 under Rule 92. The proposal is based on the following grounds: (i) Adding of Rs. 5/- per crate recovered by the appellants as container hire charges to the value of clearances, addition of the compensation amount for short lifting the agreed quota, to the assessable value.

(ii) Addition of 80 paise crate as transportation for return of empty bottles and crates from the premises of dealers to the premises of the appellants.

(iii) To deny the benefit of the Notification 175/86. On receipt of the reply the Collector passed the impugned order under which he confiscated the goods seized, imposed penalty and confirmed the demand of Rs. 4,02,754/- against which the present appeal is filed.

6. The Collector held that the expenses incurred on the maintenance of bottles and crates will be the cost of durable and returnable containers and any excess amount recovered would form part and parcel of assessable value. After considering the balance sheet and other records he found that the cost of durable and returnable containers (expenses on account of repairs and maintenance and depreciation) is Rs. 1.85 and Rs. 1.35 per crate for the year 1986-87 and 87-88, whereas they have recovered Rs. 5/- per crate as hire charges, and therefore, added Rs. 3.15 and Rs. 3.65 to the assessable value.

7. As regards the compensation for short lifted quantity of contracted crates he held that it is in the nature of quantity discount which were retained by the appellants instead of passing on to the buyers.

Therefore, he added the same to the assessable value.

7A. On the question of eligibility of exemption under Notification 175/86 he held that the clearances from both the factories should be clubbed. According to him "there is a common planning/market strategy adopted for the products of both the notices." "That there is a financial flow back and no separation of financial interest as much as the services of common staff is being utilised without any proper accounting or payment, and services of Shri Hasmukh Das Panchmatia are rendered to M/s. Vidharbha Beverages without any financial consideration. This is further proved by the fact that M/s. Spring Fresh Drinks (P) Ltd., Nagpur has suppressed the production of aerated waters and attempted to divert the same in the name of Vidharbha Beverages, Nagpur." He also observed that on earlier occasion the appellants tried to divert the production of 157 crates of Campa Cola in the name of M/s. Vidharbha Beverages. Therefore, according to him there is financial interest in both the units and the relations of both the companies are not based on commercial terms and they are running the business as a family business. He also held that the Directors and the appellant company and that of

Vidharbha Beverages are closely related. He further observed that there is no proper accounting of inter-unit transaction having financial implications. The services provided in one unit are used in other unit without proper accounting and payments for it. He also added the transportation cost for bringing back the empty bottles to the factory premises to the assessable value.

8. Challenging the above order Shri Sridharan contended that the clearances from both the companies cannot be clubbed in view of the fact that both are limited companies having separate and independent existence. The mere fact that the Directors are related does not make the clearances of one company on behalf of the other on the ground that the appellant is the owner of the other company. He also submitted that the allegation regarding clubbing in the show cause notice is vague as no particulars are given. He also relied on the order of this Tribunal in Shree Packaging Corporation v. CCE 9. Mrs. Zutshi appearing on behalf of the department contended that the appellants are clearing the goods benami for Vidharbha Beverages (P) Ltd. 10. In this context we may refer to the allegation made in the show cause notice It reads as follows :- "Whereas the officers have withdrawn the records of both statutory and private for scrutiny and it appears that :- (1) the Directors/Partners in the Noticee firm M/s. Vidarbha Beverages and M/s. Vidarbha Bottlers belonging to same group of families. Shri H. Panchmatia is giving a direction to Manager and Accountant of Vidarbha Beverages. Hence he appears to be Controlling Authority.

(2) both the units are using common brands i.e. Cola, Orange, Lemon and Soda.

(3) the services of the staff namely Shri Rambhau Hargude are being utilised for the maintenance of the records of both units though he is being paid by M/s. Vidarbha Beverages.

(4) both the units are having same sale pattern and major quantity being sold to M/s. Vidarbha Bottlers, Nagpur.

(5) both the units are situated adjacent and are having common security guards.

(6) one unit has shown the production of particular brand during the particular period whereas, the other unit has not shown the production of that brand during that period.

(7) the noticee was found utlising printed stationery of M/s.

Vidarbha Beverages by putting rubber stamps.

11. It is an admitted fact that the appellants, and M/s. Vidarbha Beverages (P) Ltd. are limited companies, and therefore, they have independent and separate legal identity. The claim of the appellants is that they are entitled for the benefit of the notification. In order to consider their claim we may refer to the language used in the notification. It says that "by a manufacturer from one or more factories upto the value limit of Rs. 30 lakhs etc." 12. The Collector says that there is financial flow back, therefore the clearances from M/s. Vidarbha Beverages should be clubbed. He does not refer to any material on record with reference to the audited accounts, payment of salaries, expenses incurred by both the companies and the income received - how apportioned between the two companies. The close relationship between the Directors of the two companies and the situation of both the companies in adjacent plots may not be by itself enough to establish that the clearances from Vidarbha Beverages is on behalf of the appellants. There is no evidence to establish that the appellants in fact manufactured the goods on their behalf in M/s.

Vidarbha Beverages Factory. The Collector though says that there is employment of common staff between the two companies does not give any particulars, except saying that the services of Shri Hansmukhdas Panchmatia of the appellants are utilised by M/s. Vidarbha Beverages.

There should be evidence to show that the factory of Vidarbha Beverages is used for the manufacture of the goods by the appellants which is not available in the instant case. The real test is whether the goods are manufactured by the appellants in M/s. Vidarbha Beverages with the raw material belonging to them. There is no direct evidence to this effect.

In this context we may refer to the observations of this Tribunal in Shree Packaging Corporation v. CCE "As earlier mentioned, the proprietors of two firms were closely connected and the two firms were functioning in practically adjacent premises. If they are able to establish that even materials commonly stand could be properly identified and separated with reference to the separate accounts kept therefor, it would not be proper to draw a conclusion, merely on the grounds of storage in a common place, that the two firms were in reality one." The Collector in this case did not enquire into the details of the receipts of raw materials utilisation and whether accounted for with reference to each company. Therefore, there is no evidence to show that the clearances from M/s. Vidarbha Beverages are clearances by the appellants from one or more factories. Therefore, we are of the view that the Collector is not justified in including the clearances of the appellants with that of M/s. Vidarbha Beverages (P) Ltd. 13. The next contention of Shri Sridharan is that the retention charges collected by the appellants from their customers cannot be added to the assessable value.

14. The Collector after examining the balance sheet and other records for the relevant period found that the cost of durable and returnable containers (expenses on account of repairs and maintenance and depreciation) is Rs. 1.85 and Rs. 1.35 per crate for the year 1986-87 and 1987-88 respectively. We do not see any reason to interfere with this finding as no material is brought to our notice as to how the said finding is not justified. Accordingly, we confirm this finding.

15. The next contention of Shri Sridharan is that the "Collector treated the liquidated damages recovered by the appellants for non-performance of the contract by the dealers as quality discount." In other words the appellants are collecting from the buyers i.e.

customers the notional cost for not lifting the contracted quantity of the aerated water. It is actually compensation for non-performance of the entire contract. This is an income or profit for the manufacturer, but not the price for the manufacture of aerated water. It is not the case of the department that the price of the aerated water is depressed by making a provision for compensation for short lifting the contracted quantity. In the absence of Such evidence the profit earned or income

cannot be added to the assessable value. In this context we may refer to the observations of the Supreme Court in CCE v. Indian Oxygen [1988 (36) ELT page 730 (SC)] which are to the following effect: "It is true that the gas being a commodity of peculiar nature had to be delivered in cylinders but these cylinders might be supplied either by the supplier as an ancillary activity or brought by the consumer or purchasers at their own risk and cost. For purchasers taking it in their own cylinders supplied by them, there was no charge for them. This is not an activity for the manufacture of gases. This is ancillary to it but not incidental. Any income either in the shape of interest on deposits, notional or real, may be earned on the deposit for the safe return of cylinders, or any rental would be though ancillary but would not be the price for the manufacture. These might be profits or gains, if any, of any ancillary or allied/ venture." 16. In view of the above observations the compensation recovered for not lifting the entire contracted quantity of the aerated water cannot be added to the assessable value as they represent profits of an ancillary nature.

17. The next contention of Shri Sridharan is that the cost of transportation for bringing back the empty crates from the premises of the buyer to the factory of the appellants cannot be added. He submitted that the expenses required for the transportation of filled crates and returning the empty bottles by the dealers to the appellants' factory was incurred by the dealers themselves and not by the appellants. In support of this contention he relied on Aquous Victuals (P) Ltd. v. CCE [1988 (38) ELT page 42]; CCE v. Jabalpur Oxygen Co. [1987 (30) ELT page 304]; Industrial Gases (Bihar) Ltd. v.CCE [1987 (29) ELT page 749].

18. We agree with Shri Sridharan that the delivery and collection charges have nothing to do with the manufacture of the product as they are for delivery of the filled bottles and collection of empty bottles.

These charges have to be excluded from the assessable value.

18A. We, therefore, direct the Collector to redetermine the assessable value in the light of the above observations and grant consequential relief if any. The appeal is thus allowed partly. In the light of the above penalties are set aside.