

Collector of Central Excise Vs. Babul Products

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-07-1991

Reported in : (1991)(33)ECC73

Appellant : Collector of Central Excise

Respondent : Babul Products

Advocate for Def. : Shri. D.A. Dave

Judgement :

1. This appeal arises from the Order-in-Appeal dated 26-10-1989 passed by the Collector (Appeals) upholding the order of the Assistant Collector, discharging the Show Cause Notice and granting refund of duty paid under protest by the respondents.

M/s Babul Products, Partnership firm, was a licensed manufacturer of chewing tobacco under the brand names "BABUL", "JANAK" etc., falling under erstwhile T.1.4 11(5) CET and presently falling under Heading 2404.41 CET 1985. The firm was filing price-lists under Section 4 CESA for clearance of excisable goods in Part IV (sale through related persons) which were approved by the Department. The price lists declared that M/s. Babul Agency was their all-India sole selling agent and prices of the sole selling agent were approved as normal price under provision (iii) to Section 4(1)(a).

3. M/s. Babul Products filed a Writ Petition in the Gujarat High Court in 1979, making a grievance against the stand taken by the Department that the petitioner's manufactured tobacco which is sold to M/s. Babul Agency does not reflect a transaction at arm's length but it amounts to sale to a related person. The High Court passed an interim order on 2-5-1979 whereby the Department was restrained from levying and collecting excise duty on the value determined under proviso 3 to Section 4(1) (a). This order was subsequently modified in May, 1983 and the respondents herein were permitted to pay the differential duty under protest in lieu of bank guarantee. The final order in the Writ Petition was passed on 4-11-1987, wherein the High Court accepted the contention of the petitioner that the issue for determination in the Writ Petition was answered against the assessee by the judgment of the Supreme Court in the case of Bombay Tyres International - (AIR 1984 Supreme Court 420). Regarding the merits, the High Court directed the issue of Show Cause Notice and held that it would be open to the petitioner to resist the Show Cause Notice on all legally permissible grounds including the ground on limitation. Accordingly, a Show Cause Notice was issued and the adjudicating authority discharged the Show Cause Notice and dropped the demand for differential duty on the ground that M/s. Babul Products and M/s. Babul Agency are not related persons in terms of Section 4(4) (c) and the lower appellate authority upheld this order. Hence, the present appeal.

4. At the outset, the learned Counsel for the respondents raised a preliminary objection that the original Show Cause Notice, dated 2-5-1988 is barred by limitation since it demanded duty for a period beyond six months from the date of service thereof. He contended that the Gujarat High Court had never stayed the service of notice to the respondents and therefore the Department ought to have issued a Show Cause Notice and not having done so, the notice of May, 1988 was barred by limitation and the Department was not protected in terms of the explanation to sub-section 1 to Section 11A which reads as under: "Where the service of notice is stayed by an order of the court the period of such stay shall be excluded in computing the period of six months or five years as the case may be." He submits that in the alternative, in any event, the explanation to Section 11A(1) will not be available to the Department prior to 17-11-1980 on which date Section 11A was introduced in the statute.

5. The learned SDR, however, submits that in view of the order of the Gujarat High Court, dated 2-5-1979 restraining the levy and collection of differential duty, the Department was precluded from issuing any notice and in the circumstances the explanation to 11A(1) would apply in this case.

6. The exact interim order, dated 2-5-1979 of the Hon'ble Gujarat High Court reads as follows:- "Rule. Interim relief in terms of para 18b on condition that the petitioners furnish bank guarantee for the amount of difference in excise duty that might be required to be paid by them in the event of their losing hi this litigation. Such amount to be computed inclusive of interest of 12 per cent." Bank guarantee position to be reviewed at intervals of 6 months. Para 18b of the special civil application is reproduced below :- "The petitioner, therefore, prays that pending the hearing and final disposal of the petition, your lordships may please grant interim relief/injunction restraining the respondents from levying and collecting excise duty on the value determined under the said proviso (iii) to Section 4(1)(a) of the CESA." "Petitioner is permitted to pay the amount of difference hi excise duty under protest in lieu of bank guarantee with effect from 11th May, 1983. The respondents will abide by the final decision rendered in the matter so far as refund of such amount is concerned." This order continued upto the date of delivery of the final judgment on 4-11-1987 disposing of the special civil application. The stay order can at best be treated as stay against recovery i.e. collection of duty on the goods assessed at a higher value. The order cannot be held to bar the issue of a show cause notice in terms of Section 11A(1).

Service of the show cause notice is a stage prior to determination of levy. The explanation to Section HA(1) enables the Department to exclude the time during which any interim order/injunction operated for service of the show cause notice and not for levying or detemining the amount of duty. This becomes clear from the judgment of the Supreme Court in the case of Gokak Patel Volkart Limited v. Collector of Central Excise, Belgaum [1987 (28) ELT 53], wherein it was held that the restraint order of the High Court restraining the Department from collecting the amount of duty did not operate as a restraint from service of show cause notice and then determination of the amount of duty. The order of the Supreme Court in that case held that the period of injunction could not be excluded in computing the

time limit under Section 11A.7. Following the above ratio, we are of the view that the Deptt. cannot avail of the interim stay order dated 2-5-1979 and subsequently modified on 8-5-1987 in excluding the period from 2-5-1979 onwards while computing the time limit of 6 months from the show cause notice dated 2-5-1988. We accordingly allow the cross objection of the respondent and held that the demand for duty is barred by limitation.

In view of this finding, it is not necessary for us to go into the alternate argument regarding the benefit of the explanation not being available prior to the date of amendment of Section 11A.8. Turning now to the merits of the appeal, brief facts are as follows :- On 5-11-1964, the respondent commenced business of manufacturing and selling chewing tobacco in its own factory. A partnership firm styled as "Babul Agencies" was formed and registered on 15-12-1974 for dealing with agency, dealership, distributorship, commission agent and as general merchants. None of the partners of Babul Products was a partner in Babul Agencies. However, seven partners out of 8 were relatives of the partners of M/s. Babul Products, while the 8th partner (a working partner) was not a relative. M/s.

Babul Products have the following partners :- M/s. Babul Agencies have the following partners and the share of each partner alongwith relationship vis-a-vis and partners of the Babul Products is illustrated below

:------Name of partner of Share Relationship with partnership of Babul Babul Agencies Products------(i)

Shri Mohanbhai 23% Brother of Shri Nanubhai Veljibhai Thakkar, Veljibhai Thakkar partner of Babul Products, (iii) Smt. Urmilaben 17% Wife of Shri Nanubhai Veljibhai Thakkar, (iv) Shri Nikhilkumar 14% Son of Smt. Triveniben Mohanlal Thakkar, (v) Smt. Damyantiben 17% Wife of Shri Maganbhai Veljibhai Thakkar, (vi) Kumari Bhanaben 05% Daughter of Smt. Triveniben Mohanlal Thakkar, (vii) Kumari Jyotiben 05% Daughter of Shri Nanubhai Veljibhai Thakkar, (viii) Shri Rashmin 14% Son of Smt. Triveniben Mohanlal Thakkar, Mohanlal Partner of Babul Products.----- On

16-12-1974, an agreement was arrived at between the respondent and Babul Agencies whereby Babul Products entrusted Babul Agencies with the work of

distribution of its products. Tobacco became excisable for the first time in 1975. On 18-3-1978, a further agreement between the respondent and Babul Agencies was entered into. The said agreement provided as under :- (i) M/s. Babul Products appoint M/s. Babul Agencies as their sole selling agent for entire India with assurance that no other distributor will be appointed... Clause (1) (ii) M/s. Babul Agencies, during the existence of their agreement, shall not accept like brand of goods viz. Tobacco, pan masala etc.

of other manufacturer.. Clause (2) (iii) M/s. Babul Agencies will keep an interest free deposit of Rs. 41,000/- with Babul Products and Babul Products will supply goods on one month's credit.... Clause (4) (iv) M/s. Babul Agencies will have to look after interests and relations with customers and will have to attend to complaints from customers. Babul Agencies will also look after the consumer marketing, publicity etc., for the goods supplied by Babul Products... Clause (6) Further terms of the agreement were that the respondent was to supply M/s. Babul Agencies goods at prices determined under the agreement. The primary liability of advertisement was with the respondent but M/s.

Babul Agencies was also to incur expenditure on this account, if required. However, the agreement provided for ceiling of 10 per cent of the total income of M/s. Babul Agencies towards this expenditure. The cost of replenishing damaged goods was to be with the buyer. The Department took the stand that all the partners of M/s. Babul Agencies are relatives of the partners of M/s. Babul Products and therefore, they appear to be related persons within the meaning of Section 4(4)(1). The Assistant Collector of Central Excise by order dated 17-10-1978, discharged the show cause notice recording the following findings :- (b) Except deposit of Rs. 41,000/- by Babul Agencies with the respondent, there was no other financial involvement between the two; (c) Respondent sells its products to Messrs Babul Agencies by way of sale and there is no agreement for payment of commission. Further, there is no stipulation that Babul Agencies should sell the goods at prices specified by the respondent; (d) There is no flow-back of money or profits from Babul Agencies to the respondent; (e) The transactions between the two are on principal-to-principal basis; (f) Messrs Babul Agencies cannot be considered a distributor of the respondent's products; (g) Messrs Babul Agencies

has no control over respondent and vice versa; (h) Delayed payment by Messrs Babul Agencies to the respondent were normal features of the trade and did not constitute extra-commercial relationship; (i) That advertisement expenses were mainly incurred by the respondent-manufacturer and the expenses incurred by Messrs Babul Agencies were not towards sales promotion but in the nature of information of its prices to its customers; (j) Messrs Babul Agencies received 8 to 12 per cent margin in the form of profit out of which 2 to 7 per cent was passed on by it as trade discount to its buyers; (k) That respondent-manufacturer had no interest, direct or indirect, in the business of Messrs Babul Agencies and vice-versa.

Accordingly, there was absence of mutuality of business interest; (l) That only on some occasions Messrs Babul Agencies had supplied packing material to Messrs Babul Products in view of special circumstances, which did not show any extra commercial or special relationship; (m) That accommodation facility given to Shri Kantilal Thakkar, partner of Messrs Babul Agencies was given as early as 1972, and non-withdrawal thereof did not amount to any special benefit; (n) That Messrs Babul Agencies were purchasing the goods from the respondent-manufacturer on principal-to-principal basis and was therefore not a relative and a distributor of the respondent-manufacturer.

The lower appellate authority also held that there was no mutuality of business interest between the respondent and Messrs Babul Agencies and that Messrs Babul Agencies was not a relative and a distributor of the respondent. It is this order that is now under challenge before us.

9. The dispute for resolution is whether Babul Agencies was a "related person" of Babul Products within the meaning of Section 4(4)(c) which reads as under : "related person" means a person who is so associated with the assessee that they have interest directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor".

"(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal

price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons, who sell such goods in retail)".

The Department's contention is that Babul Agencies is a related person because of mutuality of interest between the two, established by predominant inter-relationship among the partners of the 2 firms and certain terms of the agreement of 18-3-1978. Learned DR submits that the decisions of the Tribunal in the case of Prabhat Zarda Factory Ltd. v. Collector of Central Excise, Patna [1988 (34) ELT 239] squarely applicable to the present case. In that case, the Tribunal had held that the two partnership firms in question "related persons" in the facts and circumstances therein - the Tribunal came to its conclusion after considering the agreement between the two partnership firms, namely, Prabhat Zarda Factory and Ratna Zarda Supply Company. There are distinguishing features between the agreement in that case and the agreement between the parties herein. In the case of Prabhat Zarda Factory, Ratna Zarda Supply Company was a commission agent whereas Babul Agencies purchases the goods from Babul Products on a principal-to-principal basis. The entire publicity expenses and expenses towards sales promotion were to be borne by Ratna Zarda Supply Company while in this case, the expenses incurred by Babul Agencies are mainly towards information about the price from time to time to their buyers and the agreement provides that primary responsibility of advertisement was with the respondent/manufacturer and expenses, if any incurred on this account by Babul Agencies were not to exceed 10 per cent of the total income. Yet another distinction is that in the case of Prabhat, there was financial involvement while in this case, it has been found on facts that except for the interest free deposit of Rs. 41,000.00, there was no other financial involvement between the respondent and Babul Agencies. Babul Agencies also have not incurred any additional expenses on publicity and goodwill protection as in the case of Ratna. In the Prabhat case, the authorities had recorded a clear finding that the price was not the sole consideration for the sale and that the transactions between the two were not at arm's length whereas in this case, the lower authorities have, after consideration of relevant material, held that

the price at which goods were sold by the respondent to Babul Agencies was the sole consideration for the sale and that the transaction between the two was at arm's length and principal-to-principal basis. In addition, there is no finding that there was mutuality of business interest between Babul Products and Babul Agencies. In view of the distinguishing features between the two agreements, we do not accept the contention of the learned DR that the decision in the Prabhat case (supra) covers the present appeal on all fours. We are of the opinion that, in the totality of the circumstances, Babul Products and Babul Agencies cannot be held to be related persons within the meaning of Section 4(4)(c) of the CESA, 1944.

10. During the course of the hearing, Shri D.A. Dave, learned counsel for the respondents drew our attention to several judgments of the Supreme Court and High Courts to emphasise his point that a firm cannot be a relative of another firm. He relied upon the following decisions :- 1. AIR 1948 P.C. 100 - Bhagwanji Morarji Goculdas v. Alembic Chemical Works Co.:- The Indian Partnership Act recognises that a firm may possess a personality distinct from the persons constituting it and the provisions of Sections 22, 48 & 55 of The Income Tax Act also go to show that the technical view of the nature of a partnership in English or Indian law cannot be taken to applying the law of income-tax.

It is true that under the law of partnership, a firm has no legal existence apart from its partners and it is merely a compendious name to describe its partners but it is equally true that under that law, there is no dissolution of the firm by the mere incoming or outgoing of partners. The law with respect to retiring partners as enacted in the Partnership Act is to a certain extent a compromise between the Strict Doctrine of English Common Law which refuses to see anything in the firm but a collective name for individuals carrying on business in partnership and the mercantile usage which recognises the firm as a distinct person or quasi-corporation. But under the Income Tax Act, the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually. State of Punjab v. Jullunder Vegetables Syndicate Though under the partnership law, a firm is not a legal entity but only consists of individual partners for the time being, for tax law, income tax as well as

sales tax, it is a legal entity.

4. 1981 (8) ELT 177 (Delhi) - Jaswant Sugar Mills Ltd. v. Union of India - It is true that the partnership concern by itself is not a legal entity and has been given individual status in various enactments like the Income Tax. Act or the Code of Civil Procedure. But whether it is a person or not, Section 3(42) of the General Clauses Act makes it abundantly clear that the partnership firm would be a person distinct from the petitioner. Technically in law, partnership is not a legal entity or a juristic person, yet there are occasions, both in law and in practice, when a firm has been treated as having a distinct personality from those of the partners. Thus, partnership firm is a person or an entity having an independent and distinct existence liable for its acts.

However, since we have already taken the view that in the facts and circumstances of this case, mutuality of interest between the respondent and Babul Agencies has not been established by the Department, we do not consider it necessary to go into the citations' above.

11. In the light of the above discussion, we uphold the impugned order and dismiss the appeal.

12. As a result, the Appeal No. E/334/90-A is dismissed and Cross Objection No. 161/90-A is allowed.

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