

itec (P) Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-25-1991

Reported in : (1991)LC220Tri(Delhi)

Appellant : itec (P) Ltd.

Respondent : Collector of Central Excise

Judgement :

1. Brief facts of the case are that the appellants herein are the manufacturers of Cinematograph projectors and parts thereof falling under Tariff Item 37B of the erstwhile First Schedule to the Central Excises and Salt Act, 1944.

1.1 The appellants sell their products either to M/s. International Talkie Equipment Co. Pvt. Ltd. (hereinafter referred to as M/s.

International) or to other buyers. M/s. International, however, are their major buyers. When the appellants sell the goods directly to other buyers, invoices are issued by the appellants charging the prices at which M/s. International sell the said excisable goods to such independent buyers. However, for such direct sale to other buyers the appellants issue Credit Notes to the extent of price differential between their selling price to M/s. International and the invoice price charged by the appellants from such other buyers. The prices at which M/s. International sell the goods to such other buyers (independent buyers) are the prices at which they receive the goods from the appellants plus the element of Central Excise duty and sales tax added to the said prices.

1.2 The appellants were also enjoying the benefit of Notification 71/78 dated 1-3-1978 (effective from 1-4-1978 to 18-6-1980).

1.3 The appellants also declared the prices of their goods in Proforma Part IV relating to "sale of goods through related buyers" as follows:-1978-79

Descrip-	Par-	Price at	Deduction if	claimed Value as	Value as	No. tion of	ticulars of
which the	from such	price claimed	approved	goods the	goods	S.T. Amt.	C. Ex.
duty for ap-	buyers sold	by Amt.					

proval

the

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Projector major	12779/-	per	372/-	2869/-	9544/-	9544/-	(2)	Sound	-do-	2807/-	per	82/-	629/-	2096/-	2096/-	(3)	Arc	-do-	6854/-	per	200/-	1535/-	5119/-	5119/-	Lamp(1)
Projector	-do-	13530.24	570.24	3360/-	9600/-	9600/-	(2)	Sound	-do-	3065.44	129.19	761.25	2175/-	2175/-	(3)	Arc	-do-	7216.13	304.13	1792.00	5120/-	5120/-			

1.4 Accordingly a show cause notice was issued to the appellants to show cause (i) as to why the duty on the higher value fetched directly or indirectly by them from independent buyers (i.e. including the element of excise duty) should not be charged from them when they were not paying Central Excise duty at all in view of the benefit of Notification 71/78 being availed of by them at the relevant time and (ii) as to why a penalty should not be imposed on them under the provisions of Rule 173Q of the Central Excise Rules.

1.5 On adjudication, the adjudicating authority has found that the appellants herein and M/s. International have common directors, namely, Dinesh B. Adalja and Dalip A. Parekh. Apart from the common directors, the other directors are relatives of one and another in the two companies. He has thus held that both the companies appear to be family concerns and are beneficiaries of their ventures. The benefits from both the concerns are shared by members of one and the same family. He has, therefore, in other words held that the appellants, namely M/s.

ITEC and M/s. International are related to one and another in terms of Section 4 of the Act. Thus, it has been held that the Central Excise duty is leviable on the price which is charged from the customers by M/s. International.

1.6 It has further been held that there is no dispute about the availment of Notification 71/78 by the appellants. In other words, when no duty was being paid by the appellants, it was being collected by the appellants from their customers (independent buyers) either directly by them or through their related persons M/s. International and that collection of duty would form part of the total price charged by the appellants for the goods. Since no duty was paid by the appellants in terms of Notification 71/78 the computation of the exemption limit under the said Notification 71/78 would have to be on the basis of the total price (i.e. including the element of excise duty collected by the appellants) charged by the appellants for their goods or by their related persons M/s. International. In that view, a duty of Rs. 1,04,665.37 p was confirmed.

1.7 The plea of time-bar taken by the appellants before the adjudicating authority was also set aside on the ground that the fact of actual price charged by them or by their related person was suppressed from the department and therefore, the larger time limit of 5 years was applicable.

2. Shri K.K. Kapoor, learned Consultant for the appellants, has urged that the finding of the adjudicating authority that the appellants and M/s. International are related is incorrect in law. He has submitted that the appellant company and M/s. International are two Private Limited Companies and are therefore, separate entities. They cannot, therefore, be treated as related persons at all. He relies in his support on 1989 (41) ELT 287 \ICIM]. He has further urged that there is no evidence of flow back of any benefit to the appellants. Neither is there any evidence that M/s. International or the appellants have interest in the business of each other.

2.1 Rebutting the aforesaid plea of the learned Consultant, Shri Prabhat Kumar for the Revenue, has urged that mutuality of interest between M/s. International and the appellants is clear from the fact that commission is given by the appellants to M/s. International even in respect of independent sales to other buyers. He has also submitted that price list is also indicative of this fact inasmuch as the price list has been submitted by the appellants in Part IV pertaining to "sales through related persons" by the appellants themselves. He has relied on Bombay High

Court's judgment in the case of Cosmos (India) Rubber Works Pvt. Ltd. and Anr. v. UOI [1988 (36) ELT 102 (Bom.)].

2.2 We have considered the pleas advanced on this issue from both sides. While we note that the appellants themselves have treated M/s.

International as their related person inasmuch as they have themselves submitted the price list in Part IV relating to "sales through related persons" on their own, we are of the view that they are not estopped from taking a legal position that the two companies being Private Limited Companies cannot be relative of one and another. To that extent the citation relied upon by the learned Consultant, Shri Kapoor in the case of ICIM mentioned supra, is correct but we note that the decision in ICIM that the appellant therein and the buying company International Computers Ltd. (ICL) were held not to be related persons was on different facts. It was found as a fact that both the appellant company and the ICL were subsidiaries of the same holding company and there was no common share holding between the buyers and the seller. In the instant case, however, we have the finding of the adjudicating authority that there are not only common directors in the buyers and the seller but also that the other directors in the two companies are relatives of one and another. This finding has not been rebutted by the appellants. It has also been held by the adjudicating authority that both the companies are family concerns and are beneficiaries of their ventures and that the benefit of both the concerns are shared by members of one and the same family. The question that arises for consideration is whether in the aforesaid facts and circumstances the appellants and M/s. International can be treated as "related persons".

Answer to this question is found in the judgment of Bombay High Court in Cosmos case referred to by the learned JDR, which in turn relies on Supreme Court's judgment in the case of UOI v. Kantilal Omnilal [1986 (26) ELT 289]. Para 6 of Cosmos India is reproduced below :- "6. In my opinion, the above extract from the judgment of the Supreme Court in Union of India v. Kantilal Chunilal answers both the questions which have been raised in this petition. In the first place, it shows that merely because a large volume of the sales of a particular company goes to some partnership or other entities, that itself does not make that other entities

related persons and does not authorise the department to levy excise duty on the prices at which these later entities sell the products. Secondly, this authority also shows that merely because there are certain directors common to the assessee and the wholesalers, be they partnership firms or limited companies, that itself does not make the latter as related persons under Section 4 of the Act unless there is some mutuality. It has not been suggested by the department that there is any mutuality between the petitioner company and the other entities to whom the products are sold as wholesalers by the petitioner company." In view of the foregoing judgment, we are of the view that merely because there were some common directors between the appellants and M/s. International, that by itself would not be a sufficient ground for holding that the appellants and M/s. International are related persons.

No evidence regarding mutuality of interest has been brought on record except the evidence of sale of goods by the appellants to or through M/s. International. While this fact of sale may create a one way interest of M/s. International in the business of the appellants, it is not indicative of the interest of the appellants in the business of M/s. International. Once the goods are sold by the appellants to M/s.

International, they are not concerned whether the goods are further sold by M/s. International or not. Hence we hold that even in the given facts and circumstances M/s. International and the appellants cannot be treated as related persons.

3. Next issue is regarding the show cause notice being barred by time.

The appellants' learned Consultant has contended that the department was fully aware of the Notification 71/78 being availed of by the appellants. The price had also been declared in Part IV holding out M/s. International as the related person of the appellants. In these facts, therefore, it could not be contended by the department that there was any suppression of fact on the part of the appellants. It was the duty of the department to have verified the prices of M/s.

International and compute the exemption limit under Notification 71/78.

3.1 On this issue, the learned DR has reiterated the findings of the adjudicating authority, as already set out above.

3.2 On this issue we are inclined to accept the plea of the learned Consultant. Once M/s. International had been declared as the related persons after having filed the price list in Part IV it became the duty of the department to verify the prices of M/s. International and compute the exemption limit under Notification 71/78 accordingly. That having not been done by the department, fault cannot be laid against the appellants for suppression of facts. In fact, the price charged by the related person i.e. M/s. International is the same as declared by the appellants in their price lists for 1978-79 and 1979-80. The department also knew of the fact that the appellants were availing of the benefit of Notification 71/78. The department, therefore, in the first instance ought not to have approved the price after deduction of the element of excise duty, as claimed by the appellants in their price lists when the appellants were not paying any duty in terms of Notification 71/78. The larger time limit of 5 years cannot be invoked by the department in this case. Accordingly, the demand of duty made in terms of the impugned order would be barred by time, inasmuch as the show cause notice was issued on 13-4-1982 for the period 11-4-1978 to 29-9-1979. Demand of duty is, therefore, set aside.

4. Another issue raised by the learned Consultant was that the Notification 71/78 did not envisage that the benefit of exemption must necessarily be passed by the manufacturers to the customers. Reliance has been placed by him on the judgment of Delhi High Court in the case of Modi Rubber India Ltd. v. UOI [1978 (2) ELT 127] as well as on Bombay High Court's judgment in the case of Apollo Tyres Ltd. v. UOI [1980 (6) ELT 228].

4.1 We need not dwell on this issue any longer because of amendment of Section 4(4)(d)(ii) by insertion of an explanation thereto w.e.f.

1-10-1975 by Clause 47 of the Evidence Act, 1982. The judgments of Delhi High Court and of Bombay High Court were rendered before this amendment was made and given retrospective effect from 1-10-1975.

Effect of the said amendment is that it is only the effective duty payable by an assessee which is to be deducted from the total price charged by an assessee but this issue is only of academic interest in view of our findings on the first two issues earlier and therefore, does not affect the result of the appeal.

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