Collector of Central Excise Vs. Indian Oxygen Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-26-1991

Reported in : (1993)LC319Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : Indian Oxygen Ltd.

Judgement :
2. The Respondents are manufacturers of various varieties of Welding Electrodes falling under T.I. 50 of Central Excise Tariff. The goods are sold through their depots. They filed a price list No. 3/86. The Electrodes are first packed in cartons and then put in polythene bags and thereafter, in wooden cases. In the price list, they claimed abatement of duty on the cost of wooden cases relying on the judgment of the Hon'ble Supreme Court in Godfrey Philips 1985 (22) ELT 306 (SC).

The Asstt. Collector issued a show cause notice proposing to disallow the claim made by the respondents. In reply to the show cause notice, the respondents stated that the function of wooden boxes used is to protect the Electrodes contained in the cartons from damage during transit. This is nothing but protective packing. They further contended that packing in wooden cases is also done with a view to facilitate transport of Electrodes from the factory gate to the godowns of wholesale dealers. It is also mentioned that the sales of Electrodes are primarily effected through their various depots. From these depots, sales are made in cartons as well as in wooden cases according to the desire of the customer. The

Electrodes are marketed in cartons if a customer so desires but it is the customer's choice to take delivery in wooden cases to facilitate transport of the Electrodes in bulk packing.

Packing in wooden cases is not essential for putting the Electrodes in wholesale market at the factory gate. The wooden cases are applied only for the purpose of facilitating transport as well as to avoid damage during transit. On a consideration of the reply, the Asstt. Collector held that the invoices of goods sold from depots indicates that the goods are sold in Polythene bags in retail and from the factory gate, the goods are transported in wooden cases to the depots and selling of goods in small quantities from the depots in retail in cartons is not to be taken into account for determining the assessable value. He also observed that it is the trade practice among the Welding Electrodes manufacturer that Welding Electrodes are first packed in cartons which are put in polythene bags and packed in wooden cases for removal to wholesale trade from the factory gate. In the case of Electrodes, wooden case is a necessity and is an ordinary trade practice for removing the Welding Electrodes in polythene cartons and therefore, the cost of wooden packing should be included in the value of the goods.

The wooden cases serve like primary packing before removal of the goods from the factory gate and it is an essential necessity to contain the polythene cartons for removal at the factory gate.

3. On appeal, the Collector held that the electrodes are packed in 120 or 150 in numbers depending upon their brands in cartons which are well covered with cellophane sheets. It cannot be said that 120 or 150 electrodes are sold in retail. Wooden cases are used for packing 1200 electrodes or 1500 electrodes and are removed from the factory in such cases. He observed that there is nothing to indicate that the wooden case packing is essential in wholesale trade in goods except to protect the goods during transit. The sale to actual user other than in wooden cases cannot be brushed aside by saying that they are retail sales in as much as electrodes are not consumable items. He also observed that the consumable cartons covered by cellophane does not include one or two number of electrodes but contain 120 or 150 electrodes. As such, the cartons covered by

cellophane packing can be considered as wholesale packing. Therefore, the wooden cases containing 1200 or 1500 electrodes can be described as packing principally for protecting the goods during transit as goods are not sold at the factory gate; against which the present appeal is filed.

4. In Weldcraft (P) Ltd. v. C.C.E., Bangalore (Order No. 129/91-A, dated 19-2-1991) following an earlier order in C.C.E. v. Apar (P) Ltd. (Order No. 1588/90-A) this Tribunal held (to which one of us was a member) that in the case of Electrodes packed initially in polythene bags and greyboard cartons and then, finally into wooden cases/corrugated paper boxes, the value of corrugated boxes or wooden cases is not includible in the assessable value. While holding as above, this Tribunal followed the judgment of the Supreme Court in Godfrey Philips. Following the above order, we allow the appeal and direct the Asstt. Collector to redetermine the assessable value by excluding the value of cardboard boxes/wooden cases, as the Department has accepted the above orders, as the Departmental Representative did not bring it to our notice any appeal having been filed to the Supreme Court against the above said two orders.

5. Before we dispose of the appeals, we would like to deal with the argument of Shri Ganu that the issue is not covered by the earlier orders of this Tribunal as the facts in the present case are entirely different. He submitted that the finding of the Asstt. Collector is that the Electrodes are sold at the depot in wooden cases and the wooden cases are essential for making the goods marketable. In view of the finding of the Asstt. Collector, the value of wooden boxes is includible in the assessable value of electrodes. He also relied upon the judgment of the Supreme Court in C.C.E. v. Pond's India Ltd. [1989 (44) ELT 185 (SC)] wherein it was observed that the packing in which the goods are actually sold in the wholesale is material. Therefore, he submitted that since according to the findings of the Asstt. Collector, the wooden boxes/cases are essential and the electrodes are actually marketed, the value of wooden cases is includible in the assessable value. His further submission is that the Collector's observations that the cartons covered by cellophane packing can be considered as a wholesale packing is based on no evidence, and it should be treated as a retail sale and therefore, it cannot be treated as the basis for determining the assessable value.

6. Before we deal with the argument of Shri Ganu, we would like to examine the concept of Central Excise under Section 3 and the machinery provided under Section (4). Section 3 reads as follows : "SECTION 3: Duties specified in the (Schedule to the Central Excise Tariff Act, 1985) to be levied : (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in (India) and a duty on salt manufactured in, or imported by land into, any part of (India) as, and at the rates, set forth in the (Schedule to the Central Excise Tariff Act, 1985):" Interpreting this Section 3, the Supreme Court in Bombay Tyre International [1983 (14) ELT 1896 (SC)] held that "the nature of excise is indicated by the fact that it is imposed in respect of the manufacture or production of an article, the point at which it is collected is not determined by the point of time when its manufacture is completed, but will rest on consideration of administrative convenience and then generally it is collected when the article leaves the factory for the first time." Thus, Section 3 defines the nature of the charge. It was further observed that "Section 4 of the Act provides the measure by reference to which the charge is to be levied. When enacting a measure to serve as a standard for assessing the levy, the legislature need not contour it along lines which spell out the character of the levy itself. Any standard which maintains a nexus with the essential character of the levy can be regarded as valid for assessing the measure of levy." In other words, there should be nexus between the levy and the measure. The Supreme Court construing the scope of Section 4 held "that the levy of excise is made on manufactured goods which are excisable goods. Section 4 provides how the value of manufactured goods shall be determined. The expression 'Value' has been extended to include the cost of packing. The packing itself is not the subject of the levy of excise duty. The manufactured goods are subject of the levy because excise duty is charged on the manufactured commodity that is to say on goods. For the purpose of computing the measure of the levy, however, the statute has given an extended meaning to the expression 'Value' in clause (d) of Sub-section (4) of Section 4 of the Act. Plainly, the extension must be strictly construed for what is being included in the value now is something beyond the value of the manufactured commodity itself." 7. In other words, excise is a levy on manufacture of goods and the manufactured goods are subject to levy and the measure

provided for levy should have nexus with the levy and Section 4 extended the levy to include the cost of packing. For the purpose of computing the levy, the legislature has given an extended meaning to the expression 'Value'.

Since the legislature extended the levy beyond a particular stage namely beyond the stage of production, it should be strictly construed.

By including the value of packing in the assessable value of manufactured commodity the levy is being extended to something beyond the value of the manufactured commodity itself.

8. We may now examine the facts of this case. The goods manufactured are electrodes. Therefore, the levy of excise is on electrodes.

However, in view of the extended meaning of value by including packing, the cost of packing is also includible in the assessable value. In other words, though the excisable commodity is electrodes, the assessable value of electrodes is determined by adding the cost of packing. But the question is how much packing is includible. Is the cost of all packing is to be included in the assessable value .In determining how much cost of packing is to be included, the Supreme Court laid down in various decisions that degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing the cost of which can be included in the value of article for the purpose of excise levy. Therefore, it is only that much packing which is necessary to put the electrodes in the wholesale market at the factory gate that is to be included in the assessable value.

9. In this context, we may refer to the explanation offered by the appellants in their reply to the show cause notice. We may also point out that the appellants filed the Price List mainly relying on the judgment of the Supreme Court in Godfrey Philips. In the explanation, the appellants have categorically stated that the wooden cases/boxes are used only to protect the Electrodes contained in the cartons from damage during the transit and the wooden boxes are not essential for making the goods marketable. The Asstt.Collector gave the finding which we have already extracted in the earlier paragraphs without considering the reply filed by the

appellants to the show cause notice. The Asstt.

Collector also refers to trade practice. There is no material from where and how he got the trade practice. On the other hand, in the two orders, we have already held that the cost of wooden packing is not includible in the assessable value of Electrodes and the Department does not appear to have filed any appeal before the Supreme Court. It shows that the Department has accepted that the cost of wooden cases is not includible in the assessable value as it is not necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate. We may also infer from the above that the trade practice is to market the goods in polythene bags in the wholesale market at the factory gate. We do not see any reason why we should not follow our earlier orders in the present case in the absence of any appeal challenging our earlier orders to the Supreme Court. Departing from our earlier orders, relying on a finding given by the Asstt. Collector which is based on no material, without considering the reply of the appellants, would effect the uniformity of assessment and levy of excise in respect of the same commodity. We are also of the view that the finding of the Collector is based on sound reasons and is in conformity with our earlier orders of this Tribunal. We, therefore, are of the view that the cost of wooden cases is not includible in the assessable value. We reject the contention of Shri Ganu that the present appeal is not covered by our earlier orders.

10. We, accordingly, allow the appeal following the Order No. 129/91-A, dated 19-2-1991 [Weldkraft (P) Ltd. v. C.C.E., Bangalore], Order No.1588/90-A [C.C. v. Apar (P) Ltd.] and direct the Asstt. Collector to redetermine the assessable value by excluding the cost of wooden cases.

11. While I agree on the facts and circumstances with the conclusion reached in this case by the learned Sister, S.V. Maruthi, Judicial Member, in the order proposed by her, I am unable to agree with her observation that since the department has not brought any material on record that it has gone in appeal against the Tribunal's Order No.129/91-A, dated 19-2-1991. [Weldkraft (P) Ltd. v. CCE, Bangalore], it should be assumed that department has accepted the finding reached by the Tribunal in the said decision and therefore, that finding is also

applicable in this case. Firstly, the learned SDR is not in a position to say whether an appeal has been filed against a particular order of the Tribunal or not. Secondly, the finding that the cost of a particular packing is not includible in the case of an assessee, should also be made applicable in the case of another assessee manufacturing the same commodity, cannot be accepted as a matter of principle in the absence of any clear provisions of law in that respect. It will depend upon the trade practice of each manufacturer which in turn may be further dependent on the quality of the goods, on the extent of his reputation etc.