Peico Electronics and Vs. Collr. of C. Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-09-1994

Reported in : (1994)(71)ELT1053TriDel

Appellant : Peico Electronics and

Respondent : Collr. of C. Excise

Judgement :

1. M/s. Peico Electronics and Electricals Ltd. (hereinafter referred to as 'Peico'), have filed the present appeal against the order-in-original No. 46/C. Ex./1988, dated the 29th February, 1988, passed by the Collector of Central Excise, Pune.

2. It was alleged in the show cause-cum-demand notice dated 3-12-1986, read with supplementary show cause notices dated 22-6-1987 and 2-9-1987, that Peico had failed to correctly determine the assessable value of audio goods manufactured by them during the period from 1983 to September, 1986 by claiming inadmissible deductions from the price realised from their dealers, and had thus paid Rs. 25658659.50 less by way of Central Excise duty, than the duty correctly leviable.

3. In place of replying to the show cause notice the appellant filed a writ petition in the Bombay High Court. The Hon'ble Bombay High Court, however, rejected the writ petition, inter alia on the ground that the facts were disputed.

4. The Collector, Central Excise, Pune who adjudicated the matter under his order-in-original dated 29-2-1988 observed that :- (1) the assessees were not eligible for the deductions on account of that portion of normal trade discount as described by the assessee, to the extend of 2% of the discount attributable to after sale services etc. incurred by the dealers on behalf of the assessee; (2) for the non-recoverable taxes, surcharge and octroi, the demand was liable to be modified. The period prior to 1-10-1984 was not taken into account, and the duty was worked out for the remaining period of 1984-85 on pro rata basis (3) the freight averaged by the assessee and claimed as deduction was to be allowed (4) the deduction on account of transit insurance was allowable as a deduction.

5. The total duty of Rs. 7496623.80 was confirmed, and a penalty of Rs. 37 lakhs was imposed on Peico.

6. The matter was posted for hearing on 15-12-1993 when Shri A.Hidayatullah, Senior Advocate alongwith Shri M. Beri and Ms. P.Bhandari, Advocates appeared for the appellants. Shri Prabhat Kumar, S.D.R. represented the respondents.

7.1 Shri A. Hidayatulla, the learned Sr. Advocate submitted that the issue for consideration was whether a portion of the trade discount which is given to the dealers by the appellants could be disallowed and added to the assessable value, because of the fact that under terms of agreement the dealers were required to advertise and to offer after sale services.

7.2 As regards non recoverable additional sales tax and octroi, it was to be considered whether they were permissible deductions.

7.3 The learned Senior Advocate stated that in earlier proceedings on the same issues, partially comprising the same period, the jurisdictional Assistant Collector had decided in their favour, and in place of appealing against the said order, the Collector, Central Excise had initiated proceedings Under Section 11A of the Central Excises and Salt Act, 1944 (hereinafter referred to as the 'Act'). On the question of limitation, he pleaded that the agreements with the dealers had been with the department for a number of years; he however, admitted that the price lists had been approved provisionally under Rule 9B of the Central Excise Rules,

1944 (hereinafter referred to as the 'Rules'), and had remained provisional.

7.4 He mentioned that a writ petition had been filed in the Bombay High Court and that the Hon'ble High Court had rejected the writ petition and that thereafter they had filed their reply to the show cause notice and submitted to the proceedings before the Collector, Central Excise, Pune.

7.5 The learned Sr. Advocate stated that under the terms of agreement with their dealers, there were specific clauses to maintain showrooms, to provide after sales service, and to advertise for the products of Philips. It was also admitted that 2% of the discount was towards advertisement and after sales service etc., and that this 2% discount has been disallowed by the adjudicating Collector of Central Excise.

7.6 With regard to the additional sales tax, the Learned Sr. Advocate referred to the provisions of the Bombay Sales Tax Act, 1959, whereunder it has been provided that the additional sales tax was not recoverable from the customer.

7.7 The point regarding review of the orders earlier passed, was not pressed by the learned Sr. Advocate.

7.8 In support of the arguments advanced the learned Sr. Advocate relied upon the following citations :- 1. General Industrial Controls Pvt. Ltd. v. C.C.E., 1991 (52) E.L.T. 449 (Tri.); 3. Standard Electric Appliances v. Superintendent of Central Excise, 1986(23) E.L.T. 302 (Mad.); 4. Union of India v. Mahindra & Mahindra Ltd., 1989 (43) E.L.T. 711 (Cal.);Union of India v. Bombay Tyre International, 1984 (17) E.L.T. 329 (SC).

8.1 Shri Prabhat Kumar, the learned S.D.R. went through the facts of the case and dealt with the inter-connection and inter-relation between the manufacturers and the dealers. He submitted that the trade discount in this case was not an independent discount. It had a nexus with certain services that the dealers were required to undertake, on behalf of the manufacturer. The advertisement was the job of the manufacturer, and advertising is a recurring feature. Normally no one advertise in others' name.

(1) The arguments relating to advertisement will also refer to after sale service. After sale service was compulsory. He referred to paras 18 and 19 of the agreement (2) The addition of additional consideration, the flowback could be direct or indirect. He submitted that in this case additional consideration was in the form of free after sale services on behalf of the manufacturer, irrespective of the fact whether the goods whose after sales service was done were sold by the dealer, or by any other Philips dealer, and the advertisement for the Philips products under agreement without relationship with the goods sold by the particular dealer.

(3) The concept of "related person" and "additional consideration" are different and as held in the case of Hindustan Photo Films Manufacturing Company v. C.C.E., 1988 (35) E.L.T. 354 (Tribunal), advertisement expenses were to be added to sale price for arriving at the assessable value. He also referred to the Tribunal's decision in the case of Collector, Central Excise v. R. GAC Electrodes Pvt.

Ltd., 1988 (33) E.L.T. 485 (Tri.) wherein it has been held that the cost of advertisement and publicity was includible in the assessable value of the goods. With regard to advertisement expenses, he also relied upon the Tribunal's decision, 1988 (35) E.L.T. 647 (Tri.) in the case Killick Slotted Angles v. C.C.E., and Samurai Electronics Pvt. Ltd. v. C.C.E., 1993 (44) E.C.R. 6 (Tribunal). Money value of the additional consideration by way of expenditure on advertisement and after sale service, on behalf of the manufacturer, were to be added to the assessable value of the goods in terms of Rule 5 of the Central Excise (Valuation) Rules, 1975, as held in the Tribunal's decision in the case of Eddy Current Controls India Limited v. C.C.E., 1989 (39) E.L.T. (Tribunal).

(4) As regards limitation the facts had been suppressed and the internal arrangements between the manufacturer and the dealers were not disclosed. No correct declaration was filed. The responsibility for filing the correct information was on the assessee. In this connection, the learned SDR relied upon the Supreme Court's decision in the case of Jai Shri Engg. Company Pvt. Ltd. v. C.C.E., 1989 (40) E.L.T. 214 (SC), wherein it has been held that the penalty was imposable if there was deliberate suppression or wrong statement.

(5) The after sale service, testing etc. were the job of the manufacturer. In this connection, the learned SDR relied upon the Tribunal's decision in the case of Diamond Clock Manufacturing Company v. C.C.E., 1988 (34) E.L.T. 662 (Tri.) wherein it has been held that the manufacturer is responsible for the warranty, and the expenses incurred for the same should be included in the assessable value.

8.3 The learned S.D.R. submitted that in the case of General Industrial Controls Pvt. Ltd. v. C.C.E., 1991 (52) E.L.T. 449 (Tribunal), the learned JDR representing the department did quote a number of relevant and applicable decisions, and that case had no precedence value. He further submitted that that case related to invoice value assessment under Notification No. 120/75-C.E., dated 30-4-1975. The provisions of Notification No. 120/75-C.E. were not applicable to the cases covered by Section 4 of the Act, as referred to by the Hon'ble Supreme Court in the case of Texmaco case reported at 1992 AIR SCW 2020.

8.4 The learned SDR also referred to a number to a number of other citations in support of the points made by him.

9. In rejoinder the learned Sr. Advocate submitted that the citations quoted by the learned SDR were earlier to the decision in the case of General Industrial Controls Ltd., and the various decisions quoted by him reflected the views of one particular bench. In earlier decisions the matter related to the concept of 'related person'. He submitted that in case of conflict of views in various decisions, the latter pronouncements have to be followed, as held by the decisions of the various High Courts (AIR 1963 Bom. 236, AIR 1961 Mysore 3; AIR 1950 Madras 680.) In the end the learned Sr. Advocate relied upon the Tribunal's decision in the case of National Auto Accessories Limited v.C.C.E., 1993 (67) E.L.T. 575 (Tribunal), and submitted that the after sales service was not offered by Philips, but by the dealers, and that the dealers advertised by hoardings, bill boards etc.

10. We have carefully gone through the facts and circumstances of the case and have given our due thought and consideration to the submissions made by the learned Sr. Advocate on behalf of the appellants, and the learned SDR for the respondent.

11. Peico are engaged in the manufacture and sale of Philips brand of Audio products - Mono radio recorder; mono cassette recorder; stereo radio recorder; stereo radio cassette recorder; compo stereo radio recorder; stereo cassette deck, etc. They produced various products in their own factories, and also got them produced from other manufacturers. The goods procured by them from other parties were invoiced in the usual manner alongwith their own products (statement of Shri S.K. Behl - page 81 of the paper book). Whether produced in their own factories or got produced from other manufacturers, they were sold exclusively by them through a nation wide network of Philips authorised dealers. The goods reached the Philips authorised dealers through their regional/branch offices, and their regional warehouses/sales depots, located in different parts of the country.

12. Under the "terms of agreement" between the Philips authorised dealers and Philips India Limited, among others, the following terms have been stipulated :- "18. The dealer undertakes strictly to comply with the terms of guarantee of free service for the company's products laid down by the company from time to time regardless of where the purchase has been made and further undertakes that it shall not charge the customer for any repairs to any Philips receivers, during the prescribed guarantee service period." "24. The company reserves the right to exercise control and supervision at any time over all repairs of Philips receivers and in case repairs are considered by the compnay to be of an unsatisfactory nature, the company will be free to correct such repairs at the cost and expense of the dealer." "26. The dealers shall carry out at their own expenses, advertisement compaign to promote sales of the company's products." 13.1 It is seen from the "guarantee" that the guarantee is from the Peico, is valid throughout India, and is for a period of 6 months from the date of purchase. Semi conductors and lamp for stereo cassette deck were guaranteed for 3 months. The guarantee reads as under :- "Should a defect develop in this apparatus during the period of guarantee Peico Electronics and Electricals Limited undertake to get the apparatus repaired 'FREE OF CHARGE' by their authorised dealer from whom it has been purchased. However, if the purchaser has to shift his residence to another town on account of transfer of other causes, the guarantee benefit will be available at the nearest authorised Philips dealer." 13.2 During the guarantee period of 6 months (3 months for semi conductors and lamps) the Philips authorised dealer (also

referred to as Philips authorised service station) was required to repair the apparatus free of charge on production of the Guarantee Card, regardless of the fact whether the apparatus has been purchased by the customer from him or any other Philips authorised dealer. The customer was not to be charged for such after sale service. There is nothing on record to show that the expenses incurred by the dealer on this account were re-imbursed by the manufacturer. Obviously, the dealer was to meet these expenses out of the discount offered by the manufacturer to him.

It is clear from paras 23 and 25 of the terms of agreement wherein it is provided as under :- 23. The dealer will return repaired Philips receivers in perfect condition to the entire satisfaction of the customer. Should any technical difficulty arise regarding repairs to any defect in a Philips receiver which cannot be solved locally, the dealer shall be at liberty to send the Philips receivers to the respective "Philips" regional service department, where the set will be repaired at the expense of the dealer. Freight and the risk of transit both ways will be to the dealers account." "25. The dealer shall after the equipment and the management of the service workshop have been approved in writing by the company, be entitled to style this service workshop as a "Philips authorised service station." 13.3 Shri S.K. Bahl, Regional Administrator, Western Region, Peico, had stated that "the after sales service is provided by the dealers on behalf of the company and such services are extended out of the dealer's discount only." Shri R.B. Tandon, Product Sales Manager has also stated that "no service charges are given by the company during the guarantee period to the dealer. He is supposed to bear this expense from his discount." 14.1 It was also obligatory upon the dealers as per terms of agreement that they have to carry out at their own expenses, the advertisement campaign to promote the sales of the Philips products. While there could be no dispute on the point that dealers advertise for their establishment, their name and the products dealt with by them, but they do it on their own accord and in the way as they like it. If they are bound by the terms of the agreement to advertise for the products of their suppliers, then such an advertisement is not on behalf of themselves but on behalf of their suppliers. In this case, the advertisement is mandatory - shall carry out; all expenses have to be borne by the dealers himself - at their own expenses, and the advertisement campaign was to promote sales of

the company's products, with no relationship whether the dealer was dealing in all of them or in few of them.

14.2 Shri R.B. Tandon, Product Sales Manager, Consumer Electronics for Western Region had stated that the advertisement cost is shared between the company and the dealers in 50 :50 basis.

15. Under Section 4 of the Act 'value' in relation to any excisable goods, does not include, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever, allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale. The expression "such discount not being refundable on any account whatsoever" signifies that the buyer should not be under any obligation, other than the normal obligation of a buyer, to the seller on account of and for the reason of such discount allowed.Seshasayee Paper and Boards Ltd. v. C.C.E., 1990 (47) E.L.T. 202 (SC), the Hon'ble Supreme Court have held that "It is equally well settled that in the determination of the normal price for the purposes of levey of excise duty, it is only a normal trade discount which is paid to the purchaser which can be allowed as a deduction, and commission paid to selling agents for services rendered by them as agents cannot be regarded as a trade discount qualifying for deduction (Coromandal Fertilisers Ltd. v. Union of India and Others, 1984 (17) E.L.T. 607 (SC)." 17. In the case before us, the dealers to the extent they were obligated to provide after sale service to the products of Peico, free of charge, under agreement, where acting as agent of their suppliers.

Further, in so far as they were incurring expenditure on advertising the products of their supplies under agreement, and not out of their own free will for the purpose of their own business, they were not acting independently, and that part of the discount which could be attributable to such activities was not the normal trade discount, for the purposes of Section 4 of the Act.

18. The Supreme Court's clarificatory decision in the case of Union of India v. Bombay Tyres International Ltd., 1984 (17) E.L.T. 329 (SC) with regard to trade discounts had to be read alongwith the decision reported in that case at 1983 (14)

E.L.T. 1896 (SC). The Hon'ble Supreme Court in para 49 of their decision have noted that "advertisement expenses, marketing and selling organisation expenses and after sales service promote the marketability of the article and enter into its value in the trade." 19. In the case of Coromandal Fertilisers Ltd. v. Union of India, 1984 (17) E.L.T. 607 (SC), the Hon'ble Supreme Court have affirmed that the question whether a particular payment is a trade allowance or not, depends upon the facts of each case.Kirloskar Brothers Limited, Dewas (M.P.) v. Union of India, 1992 AIR SCW 1324 the Hon'ble Supreme Court had before them the area distributors who were required to provide after sale service, and the wholesalers who were not required to provide after sales service. A higher trade discount was given to the area distributors who were required to provide the after sales service, and a lower trade discount was given to the wholesalers who were not required to provide the after sale service. The Hon'ble Supreme Court held in para 16 of their judgment as under :- "Threrfore, the Central Government rightly did not take into account such area distributors who may have to provide after sale service.

The trade discount given to such wholesalers, who were under no obligation to provide after sale service is the relevant trade discount given to the wholesalers." 21. In para 15.7 of his order, the Collector, Central Excise, taking into consideration all the facts discussed by him in the order had come to a finding that Peico were not eligible for the deduction on account of that portion of normal trade discount as described by them, to the extent of 2% of the discount attributable to after sales service and advertisement incurred by the dealers on behalf of the assessee.

22. Out of the trade discount given to their authorised dealers from time to time, out of their sale price, the Collector, Central Excise has thus disallowed 2% of the discount attributable to after sale service and advertisement. He confirmed on these account the demand of Rs. 5617416.80 (against Rs. 19660959.76 demanded in the show cause notice.) 23. The facts on whose basis the 2% exclusion was arrived at by the Collector, Central Excise have not been disputed.Moped India Limited v. Assistant Collector, Central Excise, 1986 (23) E.L.T. 8 (SC), the dealers had no obligation to advertise for the products manufactured by M/s. Moped India Limited.

Further, the company was re-imbursing the dealer at Rs. 4/- per each free service rendered by him. The main issue before the Hon'ble Supreme Court in that case was whether the dealers were related persons vis-a-vis the appellant.

25. In the case of Union of India v. Mahindra & Mahindra Ltd., 1989 (43) E.L.T. 611 (Cal), M/s Voltas who had been granted the sale and exclusive right to sell in the whole of India, the products of the assessee, were their sole distributors. The distribution agreement was not found to be an agency agreement for reaching out the wholesale buyers of the manufacturer's products, for the purpose of old Section 4(a) of the Act.Standard Electric Appliances v. Supdt. of C. Ex., 1986 (23) E.L.T. 302 (Mad.), 90% of the production was sold to a single sole distributor, and the rest 10% was sold to retailers; the advertisement by the sole distributors M/s. Philips India Ltd. was not on behalf of the manufacturer - M/s. Standard Electric Appliances. It was also a case under old Section 4 of the Act.National Auto Accessories Ltd. v. C.C.E., 1993 (67) E.L.T. 575 (Tri.) related to the additional 10% discount extended by the appellants to the distriubutors on legitimate commercial considerations (Para 10).

28. In the case of General Industrial Controls (Pvt.) Ltd. v. C.C.E., 1991 (52) E.L.T. 449 (Tribunal), the goods under consideration were classifiable under Item No. 68 of the old Central Excise Tariff, the assessees were availing of the exemption under Notification No.120/75-C.E., dated 30-4-1975, and the provisions of Section 4 of the Act were not applicable in the circumstances of that case. The entire production was lifted by a single buyer with a very large purchasing and distribution network, and in that case the advertising by the wholesellers was not considered to be on behalf of the manufacturer. In that case the clause relating to the advertisement in the agreement read as under :- "(5) Advertisements : - The advertisement and sales promotion budget and media shall be determined by distributors. Distributors shall alone be responsible for carrying out the advertisement campaign and shall bear the cost of such advertisement. The distributors shall further be responsible for designing and producing adequate sales literature, the cost of which will be borne by the distributors entirely. The distributor shall not include in such advertisement and/or other sales promotional media and technical data without the same being approved in consultation with the

manufacturers prior to its publication. The manufacturers shall not withhold their approval on such technical data unreasonably."Collector of Central Excise v. Ashok Leyland Limited, 1987 (29) E.L.T. 530 (Tribunal) were entirely different. There were sales to Government departments, to main dealers; there were retail sales; there were removals, for captive use, and there were stock transfers to the assessee's own regional sales offices. The Tribunal in that case had held that the net dealer price charged by the assessee from their main dealers from time to time, will form the basis for assessments Under Section 4(1)(a) of the Act. This decision is not applicable to the facts of present case.

30. Taking all the relevant considerations into account, we find no infirmity in the order of the Collector on this score.

31. As regards non recoverable taxes, the assessee had claimed deduction on account of non recoverable additional sales tax, turn over tax, surcharge on sales tax, on average basis in the price list. The assessee had also claimed deductions on account of non recoverable octroi in the price lists. It was submitted that these were not passed on to the customers, in accordance with the provision of the appropriate sales tax and municipal laws.

32. Under Section 4(4)(d)(ii) of the Act, the 'value' in relation to any excisable goods "does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods." 33. According to the Black's Legal Dictionary (5th Edition 448), the meaning of the word 'payable' is as under :- "Payable - capable of being paid suitable to be paid admitting or demanding payment justly due, legally enforceable." A sum of money is said to be payable when a person is under an obligation to pay it. 'Payable' may, therefore, signify an obligation to pay at a future time but when used without qualification term normally means that the debt is payable at once as opposed to 'owing'." 34. A sum of money is said to be payable when a person is under an obligation to pay it. The word 'payable' may, therefore, Signify an obligation to pay at a future time. ('Madras High Court in the case of A.P. Mariappa Mudlaliar v. State of Madras [1962 (13) Sales Tax Cases 35. Although under the provisions of Section 15A(4) of the Bombay Sales Tax Act, 1959, the additional sales tax / turnover tax cannot

be recovered from the customers, the Central Excise Law provides that if the taxes are payable with reference to the goods under assessment then they are excludible from the 'value'. It cannot be said that if such taxes are payable and have been paid by the assessee, he cannot claim deductions in respect of such taxes only on the ground that they are not recoverable from the customers.

36. In their clarificatory judgment in the case of Union of India v.Bombay Tyres International, 1984 (17) E.L.T. 329 (SC), Hon'ble Supreme Court have held as under :- "Additional sales tax, surcharge on sales tax and turnover tax should be allowed to be deducted from the sale price in order to arrive at the assessable value and also octroi where payable/paid by the manufacturer. These taxes if proved to have been paid should be allowed even if they are paid periodically to the relevant taxing authorities in accordance with the relevant provisions of taxing statutes/rules." 37. It is seen that the appellants had claimed deduction on account of irrecoverable taxes on equalised basis by arriving at the average of such taxes.

38. The Collector, Central Excise had observed that the non recoverable taxes were not included in the factory cost but covered under selling and distribution over head account. He came to a finding that the non recoverable taxes were not included in the assessable value. He had referred to the order of the Assistant Collector, Central Excise at page 51 of his order that "M/s. Peico are recovering/showing Central Excise duty, additional tax, non-recoverable taxes separately in the invoices". It has been contested by the appellant. They have submitted that such taxes could never be recovered from the customer (ground 'H' of the Grounds of Appeal).

39. The Collector, Central Excise has modified the demand towards non recoverable sales tax, octroi etc. from Rs. 2444208.26 to Rs. 1879207.

40. We consider that the amount of additional sales tax, turnover tax, surcharge on sales tax, and octroi, "if proved to have been paid" in respect of the goods assessed to duty, "to the relevant taxing authorities in accordance with the relevant provisions of taxing statutes/Rules", even if non recoverable from the customers, is eligible for exclusion if included in the value. However, the factum and the quantum of these taxes actually paid have to be determined on the basis

of the facts and evidence on record/produced by the assessee.

41. The adjudicating Collector of Central Excise has already given relief on account of equalised freight and transit insurance.

42. The appellants have contested that the issues had already been decided in their favour by the lower authorities and that nothing has been suppressed from the department.

43. The show cause notice issued in the case was quite detailed, and contained allegations and the grounds on which those allegations were based. It was issued by the Collector of Central Excise in exercise of the powers vested in him.

44. It seems that the matter before the Assistant Collector of Central Excise in the Order-in-Original dated 31-12-1984 related to (1) deductions on account of post manufacturing expenses, post manufacturing profits and (2) equalised freight and transit insurance.

Earlier the Collector of Central Excise (Appeals) vide his Order-in-Appeal dated 25-2-1984 had remanded the case to the Assistant Collector of Central Excise for redetermination of the assessable value in the light of the Supreme Court decision in the case of Union of India v. Bombay Tyre International, 1983 (14) E.L.T. 1896 (SC). The quantum of the trade discount to be allowed or disallowed was not specified and he had left it to the lower authorities to redeterminethe assessable values.M.R.F. Limited v. Superintendent, Central Excise, 1986 (24) E.L.T. 273 (Madras), the Madras High Court have observed that the principles of res judicata do not apply to tax matters and that the correct construction of notification cannot be prevented from convassing even earlier rejected (para 11). In the case of East West Exporters v. Collector of Customs, 1992 (57)E.L.T. 635 (Tribunal), the Tribunal have held that res judicata was not to apply to adjudication or assessment proceedings before revenue authorities. (para 6). In the case of D.C.W. Limited v. C.C.E., 1988 (35) E.L.T. 167 (Tribunal) the Tribunal have observed that when new facts have come to light consequent on the investigation, second show cause notice was not barred by res judicata. In the case of Vinod Paper Mills Limited v.C.C.E., 1989 (39) E.L.T. 105 (Tri.), it has been held that when total sale value

was not disclosed to the department, extended period of limitation was applicable (para 8). In the case of U.P. Lamination v.C.C.E., 1988 (35) E.L.T. 398 (Tribunal) in para 15 of their order, the Tribunal have held that extended limit of 5 years was invokable when suppression of facts was established. Visits of Excise officers to manufacturer's factory would not absolve the manufacturer of liability to duty. It was added that penalty was also justified in absence of disclosure of full facts relating to clearances.

46. The various annexures to the show cause notices have been discussed in detail by the Collector of Central Excise alongwith the comments filed by the assessee thereon. The persons whose statements had been relied upon were the employees of the assessee, and the charges were mainly based on the documents and records of the assessee, and on undisputed facts.

47. As per show cause notice the fresh facts have come to light and they had been taken on record. In the case of Bramec Surie (P) Ltd. v.C.C.E., 1986 (25) E.L.T. 79 (Tribunal) the Tribunal had held that issues already concluded in earlier proceedings could be reopened in subsequent proceedings for another period of time if emerging fresh materials give a new dimension to the matter. It was added that limitation in such cases was to be computed from the date of issue of the last show cause notice.

48. The appellants were working under the self removal procedure under which a good deal of trust is reposed on the tax payers. While filing of a price list in the prescribed form was obligatory under Rule 173C of the Rules, the requirement of prior approval was limited to only few situations. The assessee was required to declare in the price list that the particulars furnished therein were true and complete to the best of their knowledge and belief.

49. As we have discussed above the show cause notice issued in this case is a detailed one, and a reading of the same would show that the notice issued was clearly the one on the basis of which a notice could be issued within the extended period of limitation under the proviso to Section 11-A of the fact, as observed in similar circumstances by the Hob'ble Supreme Court in the case of Union of India v. Mahashvari Woollen Mills, 50. Taking all the relevant considerations into

account we confirm the findings of the adjudicating Collector of Central Excise, Pune with regard to the discount attributable to after sale service and advertisement, to the extent of 2%. However, we vacate that part of the order relating to non recoverable taxes, without going into the quantum of such taxes, actually paid by the assessee, in respect of the dutiable excisable goods, for which the relief has been claimed by the appellants.

51. As regards the penalty of Rs. 37 lakhs, keeping in view the facts and circumstances of the case, we reduce the amount of penalty from Rs. 37 lakhs to Rs. 10 lakhs only.

52. Subject to above, the appeal is otherwise rejected and we order accordingly.