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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-28-1994

Reported in : (1994)(74)ELT647TriDel

Appellant : Madurai Soft Drinks (P) Ltd.

Respondent : Collr. of Central Excise

Judgement :

1. M/s. Madurai Soft Drinks Pvt. Ltd., Madurai, have filed the present appeal against the Order-in-Original dated 24-08-1984, passed by the Collector of the Central Excise, Madurai.

2. The appellants were engaged in the manufacture of different brands of aerated waters falling under Item No. ID of the old Central Excise Tariff. They had filed price lists in Part-I of the Price List Proforma, in which only net assessable values (Ex-duty) were declared.

The aerated water bottles were delivered by the assessee in their specially designed vehicles, to the premises of their dealers. By way of separate debit notes, the transportation charges were being collected from their dealers by them. In addition another debit note towards advertisement and publicity charges was also being raised. This second debit note was raised towards advertisement and publicity charges, up to 31-3-1979, and thereafter these debit notes were named as for management service charges. " 3. It was alleged vide Show Cause Notice dated 29-3-1983 that the assessee had been collecting the transportation charges

in excess of the actual transportation costs, and that they had also been collecting the advertising/ publicity and management service charges from their dealers and had wilfully suppressed the material facts from the department in order to get the assessable values approved at a lower level, collecting a part "of the value by way of two debit notes, and thereby evading the Central Excise Duty. On adjudication the Collector of Central Excise, Madurai held that the assessee had declared deliberately a fictitious price of a lower level, not relevant to the marketing pattern adopted by them for their goods, and got the same approved by wilfully suppressing the material facts from the knowledge of the department. Regarding advertising/management service charges, he held that the entire amount of advertising charges and management service charges were not eligible for deduction from the said price, and the duty was payable by the assessee on the amount of such charges collected. As regards the transportation charges the adjudicating Collector of Central Excise allowed the deduction of the expenses incurred on vehicle maintenance, in addition to the expenses under the head 'transport, handling, distribution etc., and recalculated the duty liability on the basis of the actuals. He gave relief also with regard to the rate of effective duty. Demand of Central Excise Duty of Rs. 11,53,200.59 was confirmed against the demand of Rs. 20,98,898.20 made in the Show Cause Notice.

4. The matter was posted for hearing on 3-2-1994 when Shri C.Chidambaram, Consultant appeared for the appellants. The Respondents were represented by Shri Prabhat Kumar, SDR.5. Shri C. Chidambaram, the learned Consultant referred to the summary of arguments which had already been filed by him on 31-7-1993, and reiterated the submissions made therein. He argued that the case related to the period prior to the Supreme Court's decision in the case of Bombay Tyre International and that at that time it was the universal practice to go by the manufacturing cost and the manufacturing profit only. They had not suppressed any fact, and he particularly referred to the correspondence exchanged with the department in respect of transportation charges. He also invited attention to the list of records furnished by them to the department. The learned Consultant pleaded that in terms of Rule 173C of the Central Excise Rules, 1944 (hereinafter referred to as the 'Rules')/ it was the responsibility of the department to verify the declaration. With regard to the advertising and publicity/ management service

charges, he submitted that they related to the painted boards put up by the dealers and the posters in exhibition etc. Relying upon the Tribunal's decision in the case of General Industrial Control (P) Ltd. v. Collector of Central Excise - 1991 (52) E.L.T. 449 (Tri.), he submitted that the expenses incurred by buyers for advertisement as well as sales promotion etc., were not includible in the assessable value.

6. Shri Prabhat Kumar, the learned SDR dealt with the facts of the case as contained in the Show Cause Notice, and stated that in this case the transportation charges were collected in excess of the actual cost incurred. Although the retail sales from the factory gate were almost negligible, the disproportionately high transport charges were collected even in respect of such few retail sales. In one earlier Price List they have indicated the transport charges, but no such charges were shown in the Price Lists filed for the subsequent period.

As regards the advertisement and management service charges were concerned, they were never disclosed to the Department. The list of the records was filed after filing of the price lists, and even after the assessments. In any case the filing of the list of their private records could not amount to the declaration of correct prices under the law, and the appellant could not escape from the consequences of non-declaration of the charges which formed part of the assessable value. The learned SDR stated that the Assessee was not to claim deductions himself. Here even debit notes were not filed with the Price Lists and were not known to the Department. Regarding advertising charges the learned SDR submitted that they were in the nature of expenses incurred by the field staff of the assessee's company, and in place of bearing them themselves, the assessee has recovered these charges from the dealers as an additional consideration. There was no optionality in the payments by the buyers in respect of such advertising charges. As regards the Tribunal's decision in the case of General Industrial Controls, the learned SDR submitted that a number of relevant decisions were not cited before the learned Bench, and that the decision did not take into account a number of other citations, and had no precedent value. Further the facts and the law dealt with in that case were also different. In support of his arguments, the learned SDR cited a number of decisions, some of which will be referred to by us while dealing

with the merits of the case.

7. In rejoinder, the learned Consultant stated that the prices of the raw-materials had come down; the details of the transport charges were not furnished in the subsequent Price Lists on the specific directions of the Department. About the advertising expenses, the learned Consultant again invited attention to their list of record filed with the department. In support of his arguments the learned Consultant referred to the following decisions :-Shiva Glass Works v. Collector of Central Excise -1989 (41) E.L.T. 376 (SC) - The transportation charges for journey from the factory gate were excludible even if on equalised basis.Jay Drinks Pvt. Ltd. v. Collector of C. Excise -1991 (36) E.C.R. 14 (Tri.) - If the Department was aware of the practice adopted by the appellants, then the extended period of limitation could not be invoked.

8. 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 both the sides.

9. The assessees were engaged in the manufacture of aerated waters, falling under Item No. 1D of the old Central Excise Tariff. The goods were being transported by the assessee in their own specially made vehicles from the factory of production to the establishments of their dealers, who were scattered in different districts and in different places. The prices were declared to the department net-Ex-Duty and did not include any other element whatsoever, admissible or not admissible for deduction. The cost of transportation was being collected from the buyers under a separate debit note. On the Price List filed on 14-7-1977, transport charges for site deliveries were shown separately, but no such charges were shown in their subsequent Price Lists. The appellants have pleaded that the Excise Authorities had asked them that no approval for such charges was necessary from the department. In addition to the transport charges, separate debit notes were also being raised for advertisement and publicity charges/management service charges. No declaration with regard to such charges was filed by the assessee to the department at any stage. Under the Self-Removal Procedure, the assessees were required to file the list of various records

maintained by them. The assessee in the case before us had pleaded that in their list of records, there was a mention of the debit notes for advertisement charges and as such they had discharged their obligation, and according to them no separate declaration in the Price Lists or otherwise was necessary.

10. The Self-Removal Procedure places a great deal of trust on the assessee. While under the Physical Control System, each and every clearance was required to be physically supervised by the Central Excise Officers, under the Self - Removal Procedure, on the basis of the already approved classification list and approved price list, the assessee on their own, could assess their own duty liability and effect clearance. In the scheme of things the Price List and the classification list on whose basis the assessments were to be made by the assessee, and clearances were to be effected, assumed considerable importance. Thus, the complete and true declaration became the corner-stone of the Self-Removal Procedure. The assessee could not take a plea that they had not filed proper Price Lists as they had mentioned certain private records which they were maintaining in the declaration of their list of records.

11. The assessee had claimed that-their transport charges would cover the expenditure under the following heads :- (1) Transport, handling, distribution etc. (2) Vehicle maintenance; (3) Salary and bonus of Sales staff; (4) Breakages in transit; (5) Interest on loans; (6) Depreciation on vehicles and trolleys. The adjudicating Collector of Central Excise had allowed the expenses under the heads :- (1) Transport, handling, distribution etc. and (2) Vehicle maintenance. He had disallowed (1) Salary and bonus to Sales staff; (2) Breakages in transit; (3) Interest on loans (4) Depreciation on vehicles and trolleys.

12. With regard to these transportation charges we do not consider it necessary to get into the details as on the point of limitation we find that in so far as transportation charges are concerned, the appellant has a good case. The period involved is from 1-7-1977 to 23-7-1982 and the Show Cause Notice is dated 29-3-1983. Although the assessee had collected the sums higher than the cost incurred towards the transportation of aerated water bottles from their factory to the premises of their dealers, we find it difficult to sustain the charge of suppression

and to justify the invocation of the extended period of limitation.

13. In the Price List dated 14-7-1977, it was remarked by the assessee that for site deliveries through their own vehicles, extra transport charges at varying rates, as specified in that list were to be charged.

Under their letter dated 1-8-1977, the assessee had sought some amendment on account of typographical mistake, in the Price List already filed pertaining to the transportation charges for site deliveries in the districts of Coimbatore and Trichy. Under his letter No. 3694/77, dated 17-12-1977, the Superintendent of Central Excise had remarked that it was not necessary to approve the transport charges as referred to by the assessee in their Price List approved on 15-7-1977.

He has remarked : "So long as the wholesale normal prices exist at the factory gate, the question of approval of freight charges to different destinations does not arise. In case the factory charges equalised freight then only the freight charges have to be included. The freight charges are also necessarily to be approved in case the wholesale normal price is not known and the price approval is required under Section 4(2). The price approval on 15-7-1977 for M/s. Madurai Soft Drinks (P) Ltd., Madurai is not covered by the above cases. Hence, it is not necessary to approve the transport charges referred to in your reference cited above. The assessee may be informed accordingly." 14. In the subsequent Price Lists, the assessee did not indicate the transportation charges. Without going into the merit or quantum of these charges separately collected, we do not consider that the Department was justified in invoking the extended period of limitation in so far as the transportation charges are concerned. The letter from the Superintendent, Central Excise, although contains a number of conditionalities 'so long as', 'in case' etc., but the conclusion that "the price approved on 15-7-1977 for M/s. Madurai Soft Drinks (P) Ltd., Madurai is not covered by the above cases", is unambiguous and categorical. In view of this conclusion, it could be rightly presumed that the assessee considered it justifiable as not to obtain approval of their transportation charges. If in the process, he had collected amounts higher than the actual transportation cost, no liability on this account could be imposed for the period beyond the normal period of limitation. In this case, the Show Cause Notice was

issued on 29-3-1983 after the normal period of limitation even when calculated from the last date of the period involved from 1-7-1977 to 23-7-1982.

15. The position is, however, different in so far as the advertisement expenses are concerned.

16. The advertisement and publicity/management service charges were said to be towards promotional activities, such as expenses incurred by the firm's field staff, for promoting the sales and for advertising the products. (Para 8 of the Show Cause Notice). These are the activities germane to the operations for which the goods are manufactured, and the expenses thereon had to be incurred for the primary purposes of the production of the goods. Such expenses give the "marketability in the trade" for his product. They "promote the marketability of the article and enter into its value in the trade." (refer para 49 of the Supreme Court's decision in the case of Union of India v. Bombay Tyre International, 1983 (14) E.L.T. 1896 (SC). The appellant had explained the scope of their advertising and publicity/management service charges as relating to painted boards put up by the dealers and posters in exhibition etc. This explanation raises a number of pertinent questions. Why the dealers scattered in far-off places should get the boards painted or the posters pasted from the manufacturer at a distance. Then why the dealers should pay for the advertisements if such advertisements were not as they liked or why the dealers should pay for the activities decided upon by the manufacturer, for the advertisements on account of the manufacturer. 'The buyers were located in different places in the districts of Ramnad, Trichy, Tanjore, Tirunveli, Coimbatore, Vagarcoil, Salem, Nilgiris etc., while the manufacturer was based at Madurai. The appellant have not furnished the details of the publicity material, their procurement and expenditure incurred with regard to these marketing activities. In this connection, the statements of their dealers are revealing. They have deposed that they had never requested the manufacturer to do any advertising on their behalf. They had stated that they were not aware of the reasons for getting the debit notes in addition to the invoices. While some dealers had admitted to have signed some papers; none of them admitted to have received any copy of the same. The dealers have submitted that so far as the total cost was within their purchase price, they were not concerned as in what way it

was collected from them. Eddy Current Controls (India) Limited v. Collector of Central Excise, 1989 (39) E.L.T. 147 (Tribunal), expenditure on advertisement on behalf of the appellant was in the nature of additional consideration, and the money value of the additional consideration was liable to be added to the assessable value of the goods (Para 3 refers). In the case -Collector of Central Excise, Bangalore v. R. Gac Electrodes (P) Ltd., Bangalore -1988 (33) E.L.T.485 (Tribunal), the Tribunal has observed that organisation of sales promotion, publicity and advertisement by the buyer of goods, being an additional consideration for sales, the money value of the same, was includible in the assessable value of the goods. (Para 5) 18. There is no evidence on record that the advertisement expenses collected from the buyers, were brought to the notice of the department. Filing of the list of "records for private accounts purpose" does not amount to the declaration of the charges, and it cannot be said that on that account the Department was aware of such charges. The visits by the Central Excise Officers to the appellant's factory also cannot absolve them from their responsibility to furnish all particulars truly and correctly. Visits of the departmental officers to the factory were of no avail in case of misdeclaration.

[Refer Tribunal's decision in the case of Jay Shri Engg. Company Pvt.

Ltd. v. C.C.E., 1989 (39) E.L.T. 449 (Tribunal)] 19. The appellants have pleaded that there was no basis for the allegation of wilful suppression of facts and for invoking the provisions of Section 11A of the Central Excises and Salt Act, 1944 (hereinafter referred to as the 'Act'). They have contended that all along, the department was aware of the facts of the case. The assessee was collecting their charges through three documents:- one invoice and two debit notes. In the invoice the Central Excise Duty as applied to the declared ex-duty prices, was shown. In the first debit note, the transportation charges were collected from the buyers/and in the second debit note, advertising and publicity charges /management service charges were collected from their buyers. While both the debit notes were not disclosed to the department, we have already observed that in so far as the transportation charges were concerned, the assessee had declared them in their earlier Price List and stopped showing the transport charges separately in the Price Lists on receipt of a communication from the department.

But in the case of the collection of the advertising and publicity charges/management service charges, we find that they were never disclosed to the department at all.

20. The assesseees were collecting these charges by way of separate debit notes which at no stage were disclosed to the department. The prices declared were net assessable values, arrived at by them on their own. The Tribunal in the case of Kerala State Detergents and Chemicals Limited v. C.C.E. Cochin, 1987 (27) E.L.T. 323 (Tribunal), in para 3(a) have observed as under :- 21. Reference may also be made to the Tribunal's decision in the case of C.C.E. v. Metal Box India Ltd. -1989 (39) E.L.T. 79 (Tribunal). Para 22 of that order is extracted below: 22. There was no declaration at all about these charges; so there was no occasion for calling of their details or of their justification in not including them in the declared prices. As the department was not aware of the practice adopted by the appellants for collecting the advertisement charges, the extended period of limitation was correctly invocable, on the rationale of the Tribunal's decision in the case of Jai Drinks Pvt. Ltd. v. C.C.E. -1991 (36) E.C.R. 14, itself relied upon the appellants. The plea that the list of their records included "debit note for collection of advertisement and publicity charges" and "debit notes for collection of delivery charges and management service charges" and as such there is no suppression, has no force in as much as under the Self-Removal Procedure the assessee is required before assessment to file correct classification list/price list. The list of private records may be made use of by the audit, Assessment is made by the assessee himself on the basis of the approved classification list/price list, and it is obligatory on them to furnish true and complete particulars. As they have made some mention of transport charges, they were obliged to declare about the collection of advertisement charges also. In the case of TIL Ltd. v. C.C.E. - 1991 (52) E.L.T. 602 (Tri.), the Tribunal had held that non-disclosure of recovery of designing and consultancy charges amounted to suppression, and having been mentioned in the Show Cause Notice, extended period of limitation was invocable. They were raising separate debit notes, and withheld the vital information from the Department. In the case of Mysore Rolling Mills Pvt. Ltd. v. C.C.E., Belgaum, 1987 (28) E.L.T. 50 (SC), the Hon'able Supreme Court in para 5 of their judgment have observed as under :-Jabalpur Oxygen Company v. C.C.E. -1991 (52) E.L.T. 455

(Tribunal) in para 6 have held as under :-* * * * * 24. The Tribunal in para 14 of their decision in the case of Mysore Rolling Mills (P) Ltd. v. C.C.E., Madras, 1985 (21) E.L.T. 875 (Tri.), had held as under :- 25. It was not mere inaction or failure on the part of the assessee but a conscious and deliberate withholding of information. Raising of the separate debit note, in addition to the invoice, makes it clear that the manufacturer deliberately suppressed the information from the department. The Hon'able Supreme Court in the case of Collector of Central Excise v. Chemphar Drugs and Liniments, 1989 (40) E.L.T. 276 (SC) had observed that "whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statements or suppression or contravention of any provision or any Act, is a question of fact depending upon the facts and circumstances of a particular case." (Para 8) As we have analysed the facts and circumstances in this case, there is no doubt that the assessee had suppressed the fact of collecting advertisement expenses separately under specific debit note from the buyers. Once there is a deliberate suppression, penalty is imposable, as held by the Hon'ble Supreme Court in the case of Jai Shri Engg. Co. Pvt. Ltd. v. C.C.E. - 1989 (40) E.L.T. 214 (SC). In that case, the Hon'ble Supreme Court had also observed in para 10 that "the fact that the department visited the factory of the appellant and they should have been aware of the production of the goods in question, were no reason for the appellant not to truly and properly describe these goods". If such is the case with the production, it is much more necessary as regards valuation, that too when separate debit notes were being raised without the knowledge of the department.

26. The facts in the case of General Industrial Controls (Pvt.) Ltd. v.C.C.E. - 1991 (52) E.L.T. 449 related to goods falling under Item No.68 of the old Central Excise Tariff, and the assessments were being made on the basis of the invoice value, under exemption Notification No. 120/75-C.E., dated 30-4-1975. The matter related to the expenses incurred by the buyer for advertisement on his own account, and not on behalf of the manufacturer. In the case before us the assessees were raising separate debit notes and collecting additional consideration to themselves from the buyers.

27. Taking all the relevant considerations into account, we confirm that part of the impugned order which relates to the advertising and publicity

charges/management service charges, but vacate that part of the impugned order which relates to the transport charges, with consequential relief to the appellant, if any. In the circumstances of the case, the amount of penalty imposed on M/s. Madurai Soft Drinks Pvt. Ltd., Madurai is reduced from Rs. 2,02,000/- (Rupees Two Lakh Two Thousand Only) to Rs. 50,000/-(Rupees Fifty Thousand Only).

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