

## **M/S. M.G. Shahani & Co. (Delhi) Ltd. vs Collector Of Central Excise, New Delhi on 8 August, 1994**

**Equivalent citations: AIR1994SC2413, 1996(53)ECC3, 1994(73)ELT3(SC), JT1994(5)SC333, 1994(3)SCALE696, 1994SUPP(3)SCC269, 1994(2)UJ466(SC), AIR 1994 SUPREME COURT 2413, 1994 AIR SCW 3411, (1994) 5 JT 333 (SC), 1994 (3) SCC(SUPP) 269, 1994 (2) UJ (SC) 466, (1994) 73 ELT 3, (1996) 53 ECC 3**

**Bench: M.N. Venkatachaliah, S. Mohan**

### **ORDER**

1. This is an appeal under Section 35L of the Central Excise and Salt Act, 1944 (hereinafter referred to as the Act) directed against the order of Customs, Central Excise and Gold (Control) Tribunal (hereinafter referred to as CEGAT) dated 30th September, 1993 in Final Order No. 500/93-A in Appeal No.E/2407/91-A. In and by the said order the Tribunal allowed the review/appeal filed by the Excise Department and set aside the order of the Collector of Central Excise dated 30th May, 1990 and remitted the matter for a fresh decision.

2. The facts are as under:

3. The appellant, M/s. M.G. Shahani & Company (Delhi) Ltd. are engaged in the manufacture of shampoos falling under sub-heading No. 3305-09 of CET, 1985. The manufacture is under the brand names "Halo" and "Palmolive". The shampoos were sold by the appellant exclusively to the owner of the brand name of M/s. Colgate Palmolive. These two, the appellant company and Colgate Palmolive are independent companies. Colgate Palmolive in order to promote its own trade names and marks, incurred advertisement and publicity expenses in respect of the said branded products. Further, Colgate Palmolive also incurred certain testing expenses, in order to enable it to decide whether to accept or to reject the goods manufactured by the appellant.

4. On April 15, 1985, the appellant company submitted price lists to the Excise Department valuing the said goods manufactured by it, on the basis of the value at the appellant company's factory gate. After making detailed enquiries, the Excise Authorities duly approved the said price lists.

5. On July 3, 1989, show cause-cum-demand notice was issued by the Collector proposing to raise a demand for excise duty on the appellant in respect of the period 1.4.1985 to 31.12.1988 on the ground that the said advertisement and publicity expenses and testing expenses were includible in the assessable value of the appellant's products.

6. On October 28, 1989, reply was sent by appellant to the said show cause notice dated 3.7.1989. The appellant pointed out that the said advertisement and publicity expenses and testing expenses

incurred by Colgate Palmolive could not possibly be included in the assessable value of the appellant's products. It was also pointed out and submitted that there was no warrant at all to invoke the longer period of limitation under the proviso to Section 11A of the Act.

7. On March 19, 1990, the Collector afforded the appellant a personal hearing. The appellant submitted detailed written submissions on all points raised in the show cause notice.

8. The Collector rendered the following finding:

The department has not disputed the fact that M/s. MGS manufacture the goods in their own factory and have all the infrastructure for the said manufacturing activity. It is also not the case of the department that there was any relationship between is M/s. MGS and M/s. CP other than that of the seller and buyer. it has also not been alleged that the brand names belonged to M/s. MGS or that M/s. CP were obliged to incur any expenditure on advertisement and publicity at the instance of M/s. MGS. The case of the Collector of Central Excise v. Kerala Electric Lamp Works Ltd. decided by the Tribunal has been relied by the learned Counsel and I find that this decision supports the case of the notice. The distinction drawn by the learned Counsel in the matter of treating v manufacturer brand owner' and v buyer brand owner' situations with reference to various judgments is well laid down and taken care of. I do not find any reason to disagree with the said proposition I observe that the letters under reference mention about terms and conditions of purchase. These terms and conditions are contained in printed form of which reference will be made later. In the letters dated 17.1.85 and 2.5.85, it is clearly spelt out that M/s. MGS will have no right to sell the goods under the brand name of Palmolive to any body other than M/s. CP and M/s. MGS will not be entitled to use the brand name on any other goods manufactured by MGS. This puts restriction on M/s. MGS regarding the use of brand name of Palmolive to any other party except to M/s. CP and further this also stipulates that brand name Palmolive cannot be used on any goods manufactured by M/s. MGS. However, more important than that is the condition regarding how M/s. MGS will procure the raw material and in the event of goods failing to be of the specifications the manner of disposal thereof. It is clear that MGS have been manufacturing goods on their own account from raw material purchased by them from the market. The goods to be supplied have to be as per specifications enclosed with the order. The buyer (M/s. CP) will be entitled to reject the goods in case they are not upto the specifications. From these conditions, it is clear that neither M/s. MGS is a hired labour of M/s. CP nor are they a front company of CP. The right of rejection of goods by CP clearly establishes that the M/s. CP and M/s. MGS are two separate entities and the transaction of sale and purchase between them is on a principal to principal basis.

9. Ultimately, after referring to the case law he concluded in relation to the advertisement as follows:

In the present case M/s. MGS were engaged in the manufacture of shampoos for and on behalf of M/s. CP under the latter's brand name of Halo' and 'Palmolive'. I, therefore, hold that the advertisement charges incurred by M/s. CP of their own for selling goods purchased by them and to promote their brand name Halo and Palmolive, cannot be added to the price charged by M/s. MGS.

10. In relation to testing charges he held as follows:

...I find that there is no justification in ignoring the price charged by M/s. MGS to M/s. CP. Thus there is no justification for taking into account the cost incurred if any advertisement and publicity by M/s. CP for determining assessable value of the products manufactured and sold to M/s. CP is the correct assessable value and the proposal to take into account the advertisement expenses incurred by M/s. CP is not sustainable.

I also find that even in respect of the testing charges the department's case is not that quality control tests necessary for offering the products to M/s. CP were not undertaken by M/s. MGS in their factory or costs incurred on such tests in the laboratory of M/s. M.G.S. were not included. Since the tests undertaken and the expenditure incurred by M/s. CP are after clearances of the product from M/s. MGS and are for the personal satisfaction of M/s. CP I find forced in the arguments advanced by the learned Counsel. Since the testing charges incurred by M/s. CP in their laboratory after purchase from M/s. MGS have no nexus to the manufacture and sale of the products by M/s. MGS I hold that these charges in not be taken into account in determining the assessable value and for demanding duty from M/s. MGS.

11. Similarly, concerning the loss incurred by the appellant, he found in favour of the appellant. In this view, he did not consider it necessary to render a finding regarding the allegation of suppression of facts. In fine, the proceedings initiated by show cause notice dated 3rd July, 1989 were dropped. Aggrieved by this, the matter was taken up in appeal to CEGAT. The Tribunal, after dealing with the arguments, has, under the impugned order, held as under:

...It appears that the Collector decided the case mainly on the basis of the two letters dated 17th January, 1985 and 2nd May, 1985 of M/s. Colgate Palmolive addressed to the respondents and jumped to the conclusion that the price at which the respondents sold the goods to M/s. Colgate Palmolive is the correct assessable value and the proposal to take into account the advertisement expenses incurred by M/s. Colgate Palmolive in the show cause notice is not sustainable. To us, the impugned order appears to be a laconic one. In this view of the matter, we are of the view that the case should go back to the Collector of Central Excise, New Delhi, for passing fresh order with detailed reasoning after hearing the respondents. Since he has not decided the contention of the respondents that the demand was time-barred, a contention which was raised before us also, as aforesaid, he is directed to decide the same also and while passing fresh order he will also take into consideration the case

law and the arguments advanced before us, as aforesaid. Since the demand in the instant case relates to 1.4.1985 to 31.12.1988, we direct the Collector to expedite the matter at his end on receipt of this Order.

12. The complaint by the appellant before us, for which we find sufficient justification, is that the Tribunal should have itself gone through the evidence and rendered a finding because all the relevant materials were before the Tribunal. To characterise the order of the Collector as laconic is not correct since he has written a detailed order including reference to the relevant case law. Thus, it is prayed, the order may be set aside and the Tribunal itself may be directed to decide the matter.

13. Opposing the stand of the appellant, the Department argues that the Collector has misdirected himself by merely referring to the two letters dated 17.1.1985 and 2.5.1985. That was why the Tribunal referred to the revealing paragraphs. At least, the letters ought to have been analysed in the proper perspective. Equally, the order findings as to testing charges and the loss. Therefore, the remit was fully warranted.

14. Having regard to the course which we propose to adopt there is no need to discuss the merit of the case. To our mind, it appears that the Tribunal has adopted an easy course in remitting the matter to the Collector. On the materials on record, being an appellate authority, the Tribunal itself should have analysed the evidence and given a factual conclusion. If this course had been adopted the decision could have been rendered in one way or the other. The remit was superfluous and the parties had argued at length. Therefore, we set aside the impugned order of the Tribunal and remit the matter to it. The Tribunal is directed to decide the issues involved on their merits. The appeal will stand disposed of in the above terms. However, there shall be no order as to costs.