Metal Box India Ltd vs C.C.E on 10 January, 1995

Equivalent citations: 1995 AIR 750, 1995 SCC (2) 90

Author: S.B Majmudar

Bench: S.B Majmudar, B.P. Jeevan Reddy

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           PETITIONER:
METAL BOX INDIA LTD.

        Vs.

RESPONDENT:
C.C.E.

DATE OF JUDGMENT10/01/1995

BENCH:
MAJMUDAR S.B. (J)
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MAJMUDAR S.B. (J)
JEEVAN REDDY, B.P. (J)

CITATION:
 1995 AIR  750            1995 SCC  (2)  90
 JT 1995 (1)   479        1995 SCALE  (1)109


ACT:



HEADNOTE:



JUDGMENT:
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The Judgment of the Court was delivered by MAJMUDAR, J.- These two appeals are filed by the assessee, Metal Box India Limited, under Section 35-L of the Central Excises and Salt Act, 1944 read with Order XX-A and B of the Supreme Court Rules, 1966, challenging the order of the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi, in two appeals filed by the appellant-assessee on the one hand and the Collector of Central Excise, Madras, on the other. The appellant is aggrieved by the aforesaid decision of the Tribunal by which it was held that the Department was entitled to reload the price of the goods concerned manufactured by the assessee and sold to M/s Ponds (1) Limited by ignoring the deduction claimed by the assessee by way of trade discount and also by adding the interest accruing on advances made by the said buyer, Ponds (1)

Limited to the assessee during the relevant years of assessment. A few relevant facts may be stated at the outset. The appellant is a Public Limited Company carrying on the business of manufacturing and marketing metal containers which were classified under Tariff Item No. 46 of the erstwhile schedule to the Central Excises and Salt Act, 1944 and liable to excise duty ad valorem. The Company for the purpose of its aforesaid business has factories in several parts of the country including Madras. The present appeals relate to the Madras factory.

2. That the appellant is manufacturing goods as per the individual customer's requirements and supplies to the customers against negotiated prices which are printed in the contract. It is the case of the appellant that one such customer is Ponds (1) Limited, an independent corporate body, which is neither related to the appellant nor has it any interest either directly or indirectly in the business of the appellant. The said Ponds (1) Limited which is engaged in the business, inter alia, of marketing cosmetic products being in need of steady supply of containers for its aforesaid business approached the appellant by way of an arrangement under which the appellant was to manufacture containers as per the specification supplied by Ponds (1) Limited and in consideration of the appellant's maintaining a steady and regular supply of the containers, the Ponds (1) Limited agreed to pay as advance certain amounts with a view to seeing that ready stocks of raw materials and components were made available by the appellant to meet the demands of containers as put forward by Ponds (1) Limited. An agreement was entered into between the parties about certain discounts to be given to Ponds (1) Limited which were to be deducted from the gross price which reflected various factors that went into the determination of a negotiated contract price.

3. The appellant submitted the price list in Part 11 in respect of its sales to Ponds (1) Limited in which the contract price of the goods sold was shown as net price after deducting discounts and rebates as appearing in Schedule 11. Earlier these price lists were approved by the appropriate officer. However, a show-cause notice was issued by the Assistant Collector of Central Excise, Madras, on 27-6-1984, calling upon the appellant to show cause:

> (1) Why the gross price indicated in the aforesaid agreements should not be treated as the true price for the purpose of arriving at the assessable value and why the additional consideration by way of interest accruing on the advances made by Ponds (1) Limited should not be added to arrive at the assessable value for the period of 1-7-1983 onwards? (2) Why the gross prices should not be arrived at after adding the interest accruing on the advances and the assessable value arrived at on this basis for the period from 1-7-1983?
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> (3) Why the consequential duty should not be demanded from the appellant under the proviso to sub-rule (1) of Rule 10 of the Central Excise Rules, 1944, and under the proviso to Section 11-A of the Central Excises and Salt Act?

4. The appellant replied to said show-cause notice. Another notice was issued on 18-1-1985 in the nature of a demand-cum-show-cause notice whereby the appellant was called upon to show cause as to why basic excise duty in the sum of Rs 23,50,013.40 paise and special excise duty in the sum of Rs 1, 17,500.68 paise for the period 1-7-1980 to 30-11-1984 should not be demanded from the

appellant. The appellant replied to the said notice on 18-1-1985.

5. After hearing the appellant, the Assistant Collector, Central Excise, Madras, by his decision dated 27-5-1985, held against the appellant on all counts. The Assistant Collector held that the appellant suppressed material facts in order to evade payment of duty and consequently held that the, extended period of limitation was available to the Department. The Assistant Collector also added the rebates and discounts mentioned in the agreements between Ponds (1) Limited to the contract price between the appellant and Ponds (1) Limited to arrive at the assessable value. The Assistant Collector also added ad hoc interest on the advances received by the appellant and added the same to the gross price for arriving at the assessable value. Accordingly, the demand of duty and special excise duty was confirmed.

6. The appellant preferred an appeal to the Collector of Central Excise (Appeals), Madras. The Collector of Central Excise (Appeals), Madras after hearing, partly allowed the appeal by accepting the contention of the appellant relating to loading of ad hoc interest on the advances made by Ponds (1) Limited but rejected the appellant's contention relating to the inclusion of rebates and discounts given to Ponds (1) Limited. The appellant, thereafter, preferred appeals to the Tribunal, as stated above. The Department also filed cross-appeal against that portion of the order of the Collector of Central Excise (Appeals), Madras, whereby he had accepted the appellant's contention relating to the loading of ad hoc interest.

7. The Tribunal heard both the sides, allowed the Department's appeal and dismissed two appeals of the appellant and consequently the entire order of the Assistant Collector was confirmed. That is how the appellant is before this Court in the present appeals.

8. We have heard learned counsel for the parties in support of their respective cases. Mr Sorabjee assisted by Mr D.A. Dave, learned counsel, raised the following contentions in support of the appeals.

(1) That the proceedings consequent to the show-cause notice inasmuch as they sought to invoke the period of five years under the proviso to Section 11-A of the, Act were misconceived and only shorter period of limitation was available to the Department to raise such a demand.

(2) In any case even on merits the Tribunal had patently erred in law in allowing the Department's appeal and in restoring the loading of purchase price by the ad hoc interest on advances made by Ponds(1) Limited to the assessee.

(3) The Tribunal equally erred in law in rejecting the appellant's contention regarding rebates and discounts given to Ponds (1) Limited for being deducted from the gross price. We shall deal with these contentions seriatim.

9. So far as Contention 1 is concerned, it is obvious that the Department invoked proviso to Section 11-A on the ground that while submitting the price list, the appellant had suppressed material facts. It has been found on record that in the price lists submitted by the appellant details of advances

made by Ponds (1) Limited, the wholesale buyer of appellant's goods and that too interest-free advances of huge amounts were all suppressed from the Department and, therefore, it has to be held that the duty had been short levied on account of wilful suppression of relevant facts by the assessee. This finding is well-sustained on record and calls for no interference. We, therefore, concur with the conclusion reached by the Tribunal that longer period of limitation is available to the Department. We reject Contention 1.

10. So far as Contention 2 is concerned, it is true that Ponds (1) Limited was almost a wholesale buyer of the appellant's goods, namely, metal containers manufactured by it as it was lifting 90 per cent of the total production of the appellant. For that purpose huge amounts were being advanced free of interest by Ponds (1) Limited to the appellant. When Ponds (1) Limited was given 50 per cent discount from normal price then the material aspect that Ponds (1) Limited had advanced large amounts free of interest had necessarily entered into consideration between the parties. Therefore, special treatment was given by the assessee to Ponds (1) Limited. It has to be appreciated that if Ponds (1) Limited had not given these amounts, the appellants would have been required to borrow these amounts for purchasing raw materials and other accessories from outside like banks etc. and would have been required to pay large amounts of interest which naturally would have got reflected in the purchase price to be charged from the buyers as it would be a part of cost of production which was to be passed on to the customers of the appellant's goods. It has been laid down by Section 4(1)(a) that normal price would be price which must be the sole consideration for the sale of goods and there could not be other consideration except the price for the sale of the goods and only under such a situation subsection (1)(a) would come into play. If the price in a particular transaction is not the sole consideration flowing directly or indirectly from the buyer to the assessee-manufacturer, either in cash or any other form, the additional consideration quantified in terms of money value is to be added to the price declared by the assessee for determining the normal price of the goods. In these circumstances the Tribunal was perfectly justified in upsetting the decision of the Collector and confirming the decision of the Assistant Collector when the latter held that notional rate of interest on the advances given by the wholesale buyer, Ponds (1) Limited, to the appellant should be reloaded in the price so as to reflect the correct price of the goods sold by the appellant. The Tribunal was right when it considered the fact that after agreement entered by the appellant with Ponds (1) Limited, the appellant got large amounts of Rs 75 lakhs in 1980, Rs 100 lakhs in 1981 and Rs 200 lakhs in 1982 free of interest and these advances were maintained at the same level on the first working day of every month as specifically provided for in the agreement column 9 as the special agreement between the parties and it had a direct impact on the pegging down of purchase price which ultimately was charged by the appellant from the wholesale buyer, Ponds (1) Limited. The said price charged by the appellant from Ponds (1) Limited could not be said to be normal price of containers on account of extraneous reason, namely, that a favoured treatment was given to Ponds (1) Limited which had given such large amounts to the appellant free of interest for purchasing raw materials and accessories for manufacturing the containers which were ultimately sold by the appellant to Ponds (1) Limited. The Tribunal has also noted the reasoning of the Assistant Collector on this aspect to the effect that the extent of such deduction in the price can reasonably be attributed to the interest amount payable on the advance which M/s Metal Box India Limited had obtained from any other source with interest-bearing loan, would have been loaded on the cost of manufacture and sale price of the metal containers naturally increasing the concessional

price charged from Ponds (1) Limited.

11. On the facts on record, therefore, it must be held that the Tribunal was perfectly justified in taking the view that charging a separate price for the metal containers supplied to M/s Ponds (1) Limited could not stand justified under Section 4(1)(a) proviso and, therefore, to that separate price charged from the Ponds (1) Limited, the extent of benefit obtained by the assessee on interest-free loan was required to be reloaded by hiking the price charged from M/s Ponds (1) Limited to that extent. Contention 2 also, therefore, fails and is rejected.

12. This takes us to the last contention. On this contention the appellant is on a better footing. The Ponds (1) Limited was almost a wholesale buyer of the metal containers of the assessee during the relevant periods of assessment. Out of the total metal containers manufactured by the assessee in its factory at Madras, 90 per cent were lifted by Ponds (1) Limited. In such a situation the question arises whether the proviso to Section 4(1)(a) can be made applicable after taking out the consideration of interest-free advance made by Ponds (1) Limited to the appellant. As we have rejected Contention 2 and allowed reloading of purchase price by the notional value of interest on the advances made by Ponds (1) Limited to the assessee, that aspect now has to be kept out of picture. In that light we may visualise the situation prevailing at the relevant time. It becomes clear that the assessee came forward to give special rebate in the purchase price to an almost wholesale buyer of its goods and when it had to meet the demand for metal containers as placed in advance by such a bulk buyer. It is not in dispute that 90 per cent of metal containers which were manufactured by the appellant were supplied to this wholesale buyer, Ponds (1) Limited. Now the question whether Ponds (1) Limited was also a financier becomes irrelevant as that aspect is taken care of by our decision on Point 2 and the price charged by the appellant from Ponds (1) Limited has got reloaded by the amount of notional interest which the appellant had to pay to Ponds (1) Limited for utilising its money for purchasing raw materials etc. Therefore, the net picture which emerges is that here was a wholesale buyer claiming discount because it avoided the botheration of the appellant by way of advertising cost for marketing its products as 90 per cent of its product were guaranteed to be lifted by Ponds (1) Limited. For such a buyer if a concession by way of trade discount is given, may be to the extent of 50 per cent though in fact now it will not be to the extent of 50 per cent but much less as we have permitted reloading of the contract price between the parties by the notional value of interest on advances received by the assessee from Ponds (1) Limited during the relevant time, such a trade discount cannot be said to be in any way uncalled for or a special treatment contrary to trade practice. Therefore, once Contention 2 is rejected then for deciding Contention 3 the proviso to Section 4(1)(a) would directly get attracted. Learned counsel for the respondent contended that for attracting the said proviso it should be shown that in accordance with normal practice of wholesale trade different prices are charged from different classes of buyers. That a buyer who purchases 90 per cent of the goods cannot be said to form a different class of buyers. It is difficult to agree with this contention. The buyer who purchases small quantities of goods may stand in different class as compared to a buyer who purchases 90 per cent of manufactured goods. He would certainly form a separate and distinct class. In this connection, we may usefully refer to the term 'value' as mentioned in Section 4, sub-section (4)(d). It is subject to deductions envisaged by Section 4(4)(d)(ii) which include amongst others 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. It cannot be gainsaid that the appellant was manufacturing the goods which were offered for sale in wholesale to Ponds (1) Limited, a buyer also in wholesale and it lifted 90 per cent of the manufactured goods. For such a buyer if the manufacturer offers trade discount that amount cannot be included in the value of the excisable goods and has to be deducted for computing the normal price of the goods concerned.

13.Learned counsel for the Department vehemently contended that such a discount to be admissible has firstly to be uniformly made available to all customers like concessional sales of goods on festivals like Diwali or Christmas etc. It may be that such general concessions are given on such occasions to all customers but it cannot be said that if a special trade discount is given to such an esteemed customer who is a buyer of 90 per cent of goods, it would amount to trade practice which would not be a normal trade practice but would be in any way an impermissible trade practice. In fact such type of concessions are usually given by manufacturers whose goods are lifted by wholesale buyers whose availability avoids lot of marketing and advertising costs for the manufacturer and also ensures a guaranteed quantity of sales year after year. In order to keep such a wholesale monopolistic buyer attached to it, if under such circumstances by way of business expediency, the manufacturer offers him a special trade discount, it cannot be said that it is not in accordance with normal practice of wholesale trade. It is not in dispute that Ponds (1) Limited has not refunded such discount on any account. Therefore, it satisfies the requirement of clause

(ii) of Section 4(4)(d) of the Act. Learned counsel for the appellant in this connection invited our attention to the decision of the Gujarat High Court in Gujarat State Fertilisers Co. Ltd. v. Union of India1. The Division Bench of the Gujarat High Court consisting of RD. Desai and G.T. Nanavati, JJ., interpreting the scope of Section 4 of the Act laid down that Section 4 of the Central Excise Act does not in terms enact that the trade discount in order to qualify for deduction thereunder should be on a uniform basis to all wholesale purchasers at the factory gate. Any such view would require the addition of word 'uniform' before "trade discount" occurring in Section 4 which is not evidently permissible. Nor would it be advisable to read the requirement of uniformity even by implication. Even if trade discount is not uniformly given or is given at different rates to different purchasers, it cannot by itself disqualify it from being excluded for arriving at the assessable value so long as the lack of uniformity is not founded on any extra-commercial considerations. To ignore the deduction of trade discount would amount to adding a non-existent fraction to the manufacturing profit which will artificially inflate the net assessable value for the levy of excise duty which is not legally permissible having regard to the basic concept of excise levy. We concur with the aforesaid view on the scope and ambit of trade discount envisaged for Section 4. In view of the aforesaid discussion, it must be held that the Tribunal was in error in taking the view that as trade discount was uniformly not given to all its customers by the assessee, it was not a permissible deduction and it had to be reloaded in the price of the excisable goods. We, therefore, accept the last contention. In the result these appeals are partly allowed, the order of the Tribunal will stand confirmed insofar as period of limitation applicable herein and reloading of the purchase price by the notional value of interest on advances made by wholesale buyer Ponds (1) Limited to the assessee is concerned and to that extent Assistant Collector's order will stand untouched. However, to the extent of disallowance of the trade discount offered to the wholesale buyers Ponds (1) Limited by the assessee, the decision of the

Tribunal is set aside and accordingly the original order passed by the Assistant Collector to that effect will also stand set aside. In the facts and circumstances of the case, there will be no order as to costs.

14.The liability of the appellant for the demanded duty in the showcause notice will have to be recalculated in the light of the present judgment.

1 (1980) 6 ELT 397 (Guj)