Customs, Excise and Gold Tribunal - Delhi
Escorts Ltd. vs Collector Of Central Excise on 9 June, 1997
Equivalent citations: 1997 (93) ELT 707 Tri Del
ORDER U.L. Bhat, J. (President)

1. Appellant, engaged in the manufacture of motorcycles falling under erstwhile T.I. 34, had filed price lists stating that the price did not include a sum of Rs. 150 per motorcycle which was proposed to be collected towards equalised freight and insurance charges and the said amount was not liable to be included in the assessable value. Price lists having been approved, appellant cleared motorcycles from time to time paying duty on the assessable value as declared in the price lists. Motorcycles were being transported from the factory gate to the premises of the dealers in special trucks built by the appellant with several deckers so that one truck can carry quite a large number of motorcycles.

2. Dispute in this case relates to the year 1983. On 14-10-1987 notice was issued to the appellant stating that the appellant had failed to declare the correct assessable value of the goods and pay correct duty of central excise and motorcycles had been cleared without payment of proper duty. The notice further alleged that scrutiny of private accounts maintained by the assessee and the written confirmation of the appellant disclosed that a sum of Rs. 1,65,31,604.98 had been collected during the year on account of freight, forwarding and insurance while actually incurring expenditure of only Rs. 1,13,14,381.20. Thus there was net benefit of Rs. 52,17,222.78. The show cause notice alleged that this differential amount became part of the assessable value under Section 4 of the Central Excise Act, 1944, on which duty would be payable. Collection of excess amount was made without disclosing the facts to the department in the price lists or subsequently and facts had been suppressed. Therefore, larger period of limitation under the proviso to Section 11A of the Act was available. The notice further proposed demand of differential duty on the differential amount, imposition of penalty, confiscation of land, building, plant and machinery etc. Appellant resisted the notice on various grounds including the one based on limitation. However, the Principal Collector overruled the contentions and confirmed the duty demand and imposed penalty of Rs. 50,000/-. This order is now challenged.

3. Shri P.S. Bedi, Consultant representing the appellant submitted that equalised freight for 1983 was based on the actuals of 1982 and was only an estimate and in a year the estimate may be more than the actual cost which may be incurred thereafter and in some years estimate may be less than the actual amount incurred. In 1984 and 1985 amounts collected were less than the amounts expended. Learned Consultant placed reliance on the decisions of the Supreme Court in Bombay Tyre International Ltd. -1983 (14) E.L.T. 1896, MRF Ltd. -1995 (77) E.L.T. 433 and 1989 (41) E.L.T. 376 for the proposition that when freight had been equalised the same cannot be part of assessable value. He also placed reliance on the decision of the Supreme Court in Indian Oxygen Ltd. -1988 (36) E.L.T. 730 (S.C.), where the Court observed that the supply of cylinders (in the case of gas) was an activity ancillary to the manufacture of gas and any income either in the shape of interest on deposit received for the safe return of cylinders, or any rental charge would not be part of the price of manufactured goods and the same might be profit or gain of the ancillary or allied venture and therefore the amount in dispute could not be included in the assessable value as defined in Section

4(1) (a) of the Act. These contentions are rebutted by Shri M. Ali, JDR.

4. The first two decisions of the Supreme Court have been considered by us in Baroda Electric Meters Ltd. v. CCE, Ahmedabad - 1996 (85) E.L.T. 363 (Tribunal) and we observed as follows :

"It is no doubt true that the wholesale cash price of the goods at the factory gate as declared by the appellant in the price list is available. But in most of the cases the price list also refers to the freight and insurance charges and also the total prices. Freight and insurance charges cannot be part of the assessable value but wherever freight and insurance charges actually met are less than the amount collected by way of freight and transport charges, it is not the appellant's case that the difference was being refunded to the Electricity Boards. In fact, the difference was not intended to be refunded, but intended to be appropriated by the manufacturer. If the difference was so appropriated by the manufacturer and there is no dispute that it was so appropriated, that would become part of the price of the goods in which case the same would be legitimately part of the assessable value."

5. The above proposition would hold good except in cases where the principle in Indian Oxygen Ltd. case could be successfully invoked. In order that principle of Indian Oxygen Ltd. case can be invoked, the assessee must have a case that the activity in question was regarded as an ancillary or allied profit making venture. If assessee has earned profit in a specific case the same should be considered in the light of the decision of Indian Oxygen Ltd. Where however the assessee has not put forward such a case, the principle would not be attracted.

6. The main contention urged by the learned Consultant on behalf of the appellant is that while the figures Rs. 1,65,31,604.98 and Rs. 1,13,14,381.20 are correct, the latter figure is not exhaustive of all the factors which contributed to the actual freight expenses. To illustrate, it was submitted by Shri Bedi that the cost of fuel and salary of drivers may have been taken into consideration but the cost of designing the specially manufactured truck, salary of those personnel who are required to devote some time on the maintenance, upkeep, repair of the truck, the cost of spare parts for the special truck during the year in question and similar other expenses have not been taken into consideration in arriving at the figure of actual expenses. We find a slight contradiction between the show cause notice and the impugned order. While the show cause notice alleged that the figures are taken from "private accounts" maintained by the assessee, the order states that the figures are taken from Balance Sheets. In our opinion, it was necessary for the Collector to have furnished to the appellant the calculation data on the basis of which the cost of freight was arrived at Rs. 1,13,14,381.20. If the data sheet had been supplied the appellant would have been in a" position to point out omissions, if any, and the Collector would have been in a position to consider the same. We are of the opinion that in this state-of-affairs 'what is necessary to find is whether equalised freight was in excess of the actual freight and if so to what extent.

7. For the reasons indicated above, we set aside the impugned order and remand the case to the jurisdictional adjudicating authority for decision afresh after supplying the appellant the data on the basis of which the actual expenditure on freight and insurance charges had been arrived at and after giving the appellant an opportunity to rebut the correctness of the calculation. The adjudicating authority will also have to consider the question of limitation in the light of the contentions raised by

both the parties. The actual expenditure should be arrived at on consideration of relevant aspects. Naturally, on the basis of such findings the question of imposition of penalty has also to be considered.

8. The appeal is allowed.