

SUPREME COURT OF INDIA

Commissioner of Central Excise, Pune

Vs.

Poona Bottling Company Limited

C.A.Nos.2660-2661 of 1999

(C. K. Thakker, Mrs.Ruma Pal and Arijit Pasayat JJ.)

09.02.2005

JUDGMENT

C. K. Thakker, J.

1. The question in, these appeals .is whether the amount on account of crate hire charges', loading and unloading, charges', sales, promotion and publicity charges' were includible in the assessable value of the; bottles which were manufactured by the respondent-assessee The period question is 1-3-94 to31-10-95

2. The Commissioner (Appeals) had come to the conclusion, affirming the findings of the Assistant Commissioner, that they were so includible. As far as the crate hire charges were concerned was said that these was an increase in the rate of crate hire and this has not been satisfactorily explained by the appellatant. It was found that the reason given by the appellatant for the increase in the crate hire charges was misleading and incorrect:, It was not that there was at the same time a corresponding increase in the cost of production by reason of the! increase in the quantum of the aerated water and the size of the bottles which were being manufactured. According to the Commissioner, this additional cost of production had been ""adjusted" with the increase in the crate hire charges.

3. The Tribunal, however, was of view that crate hire charges were not includible. The Chartered Accountant of the assessee had certified that the cost of production had not been passed on under the Head of increased crate hire charges. The Tribunal acted on the Chartered Accountant's certificate in view of the fact that the departmental authorities had not questioned the, same, it was therefore of the view that the increase of the crate hire charges could at best be termed to be a profit on freight and that this was not includible in the assessable value.

4. It is not in dispute that the crate hire charges are not normally included in the assessable value. It may be that there was no explicit challenge that the Chartered Accountant's certificate was unacceptable; however, the tenor of the orders of the departmental authorities would show that the Chartered Accountant's certificate Was-questioned. In that view of the matter, we are of the view that this issue needs to be reconsidered in the light of facts

actually prevailing for the period in question on the basis of such evidence as may be adduced by the parties.

5. The Commissioner also held that the loading 'and unloading charges were includible in the assessable Value. The loading and unloading charges which were sought to be included were in respect of the costs incurred by M/s. Gaurav Investments Pvt. Ltd., a distributor of tote assessee. The Commissioner sought to include the charges of M/s. Gaurav Investments Pvt; Ltd. on the ground that it was really a dummy company of the assessee. The learned Counsel appearing on behalf of the appellant, however, does not seek to press this ground. The Tribunal held that only those charges incurred for loading the finished goods within the factory of the assessee are includible. We find no reason to differ from this view. The appeal insofar as it pertains to this finding is, there fore, dismissed.

6. The final item which was sought to be Included in the assessable value of the goods related to the sales, promotion and publicity charges. As we have said earlier, the Commissioner had included this in the assessable value but the Tribunal did not. According to the tribunal the factual situation was covered by the decision of this court in Phillips India Ltd v. collector of center Excise, pune.

7. In the decision in Phillips India Ltd (supra) this court had held that where there is an agreement between the manufacturer and dealer which is a genuine agreement entered into at arms length as between principal and principal which provides that the dealer shall carry out at their own expenses advertisement campaign to promote sales of the company product, the entire amount could not be included in the assessable value. The reasoning of the Court was that the advertisements which the dealer was required to make at his own cost benefited in equal degree the manufacturer and the dealer and that for this reason the costs of advertisement was borne half and half by the manufacturer and the dealer. The expenses attributable to the dealer's interest therefore, was not includible in the assessable value. This decision clarified the principle enunciated in Union of India v, Bombay Tyre International Ltd. which held that expenses incurred by the manufacturer, including marketing and selling organisation expenses, which contribute to the value of the goods up to the date of sale at the factory gate are includible in the assessable value of the goods. Philips India Ltd. was subsequently considered by a three Judge Bench in Commissioner of Central Excise, Surat v. Surat Textile Mills Ltd. & Ors. reported in]. In that case the question was whether the costs incurred in advertisement of aerated waters was includible in the costs of the manufacture of the concentrate required for the manufacture of the aerated water by treating the cost of advertisement of aerated waters as the cost of advertisement of the concentrate. In dealing with this question, the Court held that the advertisement expenditure incurred by a manufacturers-customer could be added to the sale price for determining the assessable value only if the manufacturer had an enforceable legal right against the customer. The decision has left untouched the principle enunciated in Phillips India Ltd. that the ultimately the question will have to be resolved with reference to the benefit secured as well as the principle laid down in Bombay Tyres that the question will have to be determined with reference to the sale ex factory. The principle laid down in Surat Taxtile Mills Pvt. Ltd. case has been

followed by a Bench of this Court in Collector of Central Excise, Chandigarh v. Eicher Tractors Ltd. reported in].

8. We are of the view that the factual foundation on which either the Commissioner or the Tribunal came to the conclusion has not been clearly set out. We are of the view that unless the factual foundation is clear there can be no question of applying any of the aforesaid principles as enunciated in the earlier decisions. Therefore, we remand this aspect of the matter back to the Assistant Commissioner as well.

9. In the circumstances of the case, the appeal is partly allowed to the extent that the decision of the Tribunal insofar as it relates to the crate hire charges and sales, promotion and publicity charges are remanded back to the Assistant Commissioner for re-determining the same in the light of the observations in this judgment. The appeal insofar as it relates to the loading and unloading is dismissed.

10. There shall be no order as to costs.