SUPREME COURT OF INDIA

Commissioner of Central Excise, Jaipur

Vs.

Dugar Tetenal India Limited

C.A.No.4055 of 2002

(Ashok Bhan and Dalveer Bhandari JJ.)

07.03.2008

JUDGMENT

Ashok Bhan, J.

1. These two appeals are directed against the order of Customs Excise and Gold (Control) Appellate Tribunal, Delhi in appeal no. E/303/2001-C (Final Order No. 14/02-C) dated 25.1.2002. Civil Appeal No. 4055 of 2002 has been filed by the Revenue whereas Civil Appeal No. 5608 of 2002 has been filed by the assesses.

2. The Assesses is engaged in the manufacture of photographic chemicals. During the period from March, 1988 to February, 1992 assessee cleared its products under the brand name "Tetenal" without payment of duty, claiming the benefit of exemption under Notification No. 175/86-CE dated 1.3.86. From the result of investigation conducted by the officers of Central Excise, it was found that the brand name "Tetenal" belonged to M/s Tetenal Vertribs Gm BH, Germany and that the assessee was not eligible for the benefit of exemption Notification as they had cleared their product affixed with the brand name of another person. It further appeared to the department that the assessee had mis-stated and suppressed facts with intent to evade payment of duty on the goods. The department, therefore, by show cause notice dated 24.6.1992 called upon the assessee to pay central excise duty of Rs.32,25,465/- on the goods cleared during the aforesaid period and also to show cause why penalty should not be imposed on them.

3. The Collector vide his order dated 5.11.1992 dropped the proceedings. The Revenue filed an appeal before the Tribunal. The Tribunal by its order dated 21.3.2000 held that the assessee was not entitled to the benefit of the Notification and consequently remanded the matter to the adjudicating authority for fresh decision on the question whether the demand of duty was within the time prescribed under the Act.

4. In pursuance to the order passed by the Customs Excise and Gold (Control) Appellate Tribunal, the Commissioner by its order dated 6.11.2000 rejected the plea taken by the assessee that the extended period of limitation could not be invoked. The Commissioner confirmed the demand of duty of Rs.32,25,465/- against the assessee by invoking the extended period of limitation prescribed under the proviso to Section 11A(1) of the Central Excise Act, 1944 (for short "the Act") and also imposed a penalty of Rs. 3 lakhs under Rule 173Q of the Central Excise Rules, 1944 (for short "the Rules").

5. The assessee being aggrieved filed an appeal against the aforesaid order before the Tribunal. Apart from raising the issue of applicability of the Notification and limitation, the assessee further contended that the selling price of the goods was the cum-duty price and they were entitled to deduct the duty element from the sale price for the purpose of determination of assessable value of the goods in terms of Section 4(4) (d) (ii) of the Act. Tribunal by its impugned order held that the demand of duty is not barred by time. That the extended period of limitation was invokable in the present case. Against this portion of the order the assessee has filed the appeal. The Tribunal however set aside the quantum of duty and directed the adjudicating authority to re-determine the assessable value of the goods after examining the assessee's claim under section 4(4) (d) (ii) of the Act on its merits and in the light of the Tribunal's order in the case of *Shri Chakra Tyres Ltd. V. CCE, Madras*[1] Against this portion of the order, the Revenue is in appeal. Tribunal had set aside the order imposing penalty but the same has not been challenged by the Revenue. Civil Appeal No. 5608 of 2002

6. Mr. V. Lakshmikumaran, learned counsel appearing for the assessee strenuously contended that the assessee was under a bonfire belief that they were entitled to the benefit of exemption under the Notification in respect of the products manufactured by the assessee and cleared under the brand name "Tetenal" during the material period and, therefore, they had no intent to evade payment of duty. It was also contended that the brand name "Tetenal" on the finished goods was duly declared by the assessee in its classification list which were accepted by the Revenue. That they were eligible to the exemption treating the brand name "Tetenal" as their own product. That the classification list was being submitted right from 1988 and approved by the department and that it was not a case of mis-statement or suppression of the fact but interpretation of Notification No. 175/86-CE. The period of dispute was from February, 1988 to March, 1992 and the show cause notice was issued on 26.6.1992, hence the demand prior to 24.12.1992 was clearly barred by time.

7. As against this, Mr. I. Venkatanarayana, learned senior counsel appearing for the Revenue submitted that the assessee was fully aware of the fact that during the material period, the brand name "Tetenal" did not belong to them but belonged to their German collaborator. The assessee suppressed this material fact before the Department with intent to evade payment of duty on the branded goods by wrongly availing the benefit of Notification No. 176/86-CE. It was contended that there was no material on record to support the plea of bonafide belief. It was further submitted that the assessee deliberately withheld from the department the material information that the brand name was that of their foreign

collaborator and the same was done with the intention to avail the benefit of exemption under the notification to which the assessee was not entitled.

8. Assessee's main contention is that use of brand name

> "Tetenal" on finished goods was duly declared in their classification list and they were under a confide belief that they were entitled to SSI benefit treating the brand name "Tetenal" as their own property. That the belief of the assessee was reinforced by the fact that classification lists which were being submitted from 1988 onwards had been duly approved. It is not disputed that the appellants had given the following declaration on various classification list filed by it from time to time:- "We shall affix our brand name on finished goods which will be only our brand name viz. "Tetenal"

9. This declaration gives an impression as if the brand name "Tetenal" was owned by them. On investigation the claim of the assessee was found to be false. The excise officers unearthed that the said brand name was in fact owned by one M/s. Tetenal Vertriebs GmBH, Germany, their foreign collaborator and that they were paying royalty @ 4% of ex-factory price minus the cost of imported inputs as per written agreement between them. Thus it is established beyond reasonable doubt that the assessee had wrongly been giving declaration in various classification lists that the brand name "Tetenal" was owned by them.

10. Proviso to Section 11A (1) of the Act reads:

> "Section 11A - Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made there under, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" were substituted"

11. The declaration of the assessee in the classification list that the brand name "Tetenal" was owned by them was a willful mis-statement/suppression of facts with the intent to evade payment of duty with ulterior motive to avail benefit under Notification No. 175/86-CE dated

1.3.86. The assessee was fully aware of the fact that the same was not owned by it and that the same belonged to their foreign collaborator. Shri Vijay Prakash Katta, Director of the unit in his statement dated 11.3.1992 admitted that the brand name "Tetenal" was owned by the foreign collaborator and not by the assessee. Thus the conditions postulated in proviso to Section 11A (1) for invoking extended period of limitation are fully satisfied.

12. Para 7 of the Notification No. 175/86-CE stipulates that the benefit of exemption will not be available to the goods on which the brand name of another manufacturer is affixed and the said manufacturer is not entitled to the small scale exemption, so that the benefit of small scale exemption should not be misused by manufacturers manufacturing goods for different persons. Admittedly the German collaborator was not entitled to avail the SSI exemption. We presume that the assessee while filing the classification list would be aware of Clause 7 of the Notification. In spite of clause 7 in the Notification, the assessee made a mis-statement in the classification list for claiming benefit of the exemption Notification No. 175/86-CE. For the reasons stated above, we do not find any merit in the appeal filed by the assessee.

13. The assessee in addition to the submission that the extended period of limitation could not be invoked had contended that the selling price of the goods was the cum-duty price and they were entitled to deduct the duty element from the sale price for the purpose of determination of assessable value of the goods in terms of Section 4(4) (d) (ii) of the Act. The Tribunal accepted this plea of the assessee relying upon the decision of the Tribunal in the case of Shri Chakra Tyres Ltd (supra). The view taken in Shri Chakra Tyres Ltd (supra) was affirmed by this *Court in Commissioner of Central Excise, Delhi V. Maruti Udyog Limited*[2] Learned counsel for the Revenue has relied upon the judgment of this *Court in Asstt. Collector of Central Excise V. Bata India Limited*[3].This judgment was duly considered in Maruti Udyog Limited (supra). After considering the case in Bata India Limited (supra) this Court observed in para 5 as under:-

> "A reading of the aforesaid Section clearly indicates that the wholesale price which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax, or other tax which is included in the wholesale price is to be excluded in arriving at the excisable value. This Section has been so construed by this Court in Asstt. *Collector of Central Excise and Ors v. Bata India Ltd*[4] and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realised by the respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In

such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4) (d) (ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty. "

14. In our view, the Tribunal has rightly remanded the case to re-determine the duty payable keeping in mind the provisions of Section 4(4) (d) (ii).

15. For the reasons stated above, we do not find any merit in either of the appeals and accordingly dismiss the same leaving the parties to bear their own costs.

[1] *1999 32 RLT-001*
[2] *2002 3 SCC 0547*
[3] *1996 4 SCC 0563*
[4] *1996 4 SCC 0563*