SUPREME COURT OF INDIA

Commissioner of Central Excise, Faridabad

Vs.

Food Healthcare Specialities

C.A.Nos.6539-6540 of 2010

(D.K. Jain and Anil R. Dave JJ.)

13.02.2012

JUDGMENT

D.K. JAIN, J.:

1. These appeals under Section 35L(b) of the Central Excise Act, 1944 (for short the Act) are directed against a common final order, dated 2nd February 2005 in Appeal No. E/5261-62/04-NB(A), passed by the Customs Excise Service Tax Appellate Tribunal, New Delhi (for short the Tribunal). By the impugned order the Tribunal has quashed the additional excise duty demand of `9,34,89,367/- under Section 11A of the Act; penalties of `1.5 crores each on respondent Nos.1 and 2 under Rule 173Q of the Central Excise Rules, 1944 (for short the 1944 Rules) and Rule 25(1) of the Central Excise Rules, 2001 (for short the 2001 Rules) read with Section 38A of the Act and a penalty of `2 crores under Rule 209A of the 1944 Rules and Rule 26 of 2001 Rules read with Section 38A of the Act on Respondent No. 2 as confirmed by the Deputy Commissioner of Central Excise.

2. Succinctly put, the material facts giving rise to the present appeals are as under:

> Respondent No.1--M/s Food Healthcare Specialities (for short the Assessee) was engaged in the blending and packing of `Glucon D' for M/s Heinz India Pvt. Ltd. (for short Heinz), respondent No.2 in these appeals, pursuant to an agreement commencing from 1st March 2000. Under the agreement, Heinz was to supply raw material, packing material and the technical know-how to the Assessee for the blending and packing of the said product. From March 2000 to September 2000, the Assessee paid excise duty on the basis of wholesale price of the product at the depots of Heinz. However, for the

period commencing from October 2000, they filed price declarations seeking to modify the assessable value of the product as the aggregate of cost of raw material, packing material and their job work charges and started paying duty on the same. During the course of investigations undertaken by the revenue, it was found that the said product was also being processed at the Aligarh factory of Heinz and the duty on those clearances was being paid at the assessable value/depot sale price of Heinz. Consequently, three notices were issued to the Assessee for the period October 2000 to December 2000; January 2001 to June 2001 and July 2001 to February 2002, to show-cause as to why the assessable value declared by them be not rejected and the price declarations submitted by them be not amended by determining the assessable value on the basis of the sale price fixed by Heinz at its depots and the duty so paid be not recovered along with penalty under Rule 173Q of the 1944 Rules.

Upon consideration of the cause shown by the Assessee, the Adjudicating Authority, by its order dated 31st August 2004, confirmed the differential demand indicated in the show cause notices and imposed the aforesaid penalties on the Assessee as also on Heinz. On appeals preferred against the said order, the Tribunal, by an exceptionally short order, set aside the order-in-original, concluding that since the Adjudicating Authority has itself given a specific finding that the status of the Assessee was not better than that of hired labour and Heinz is the manufacturer, the duty is leviable only on the manufacturer. Being aggrieved by the dismissal of its appeal under Section 35G of the Act by the High Court, as not maintainable, the revenue is before us in these appeals.

3. Mr. B. Bhattacharyya, learned Additional Solicitor General appearing for the appellant, referring to several clauses of the agreement between the Assessee and Heinz, in particular, clauses (d), (1), (2), (5), (7), (9),(13), (15) and (16), vehemently submitted that the relationship between the Assessee and Heinz was one of principal and agent and not of principal to principal and therefore, the price at which, Heinz sold `Glocon-D' in the wholesale market must be taken as the assessable value. According to the learned counsel, Heinz had complete control over the activities of the Assessee, who was merely a job worker. To bring home his point that the Assessee was merely an extended arm of Heinz, he laid emphasis on the fact that processed `Glocon- D' was stored at the same premises from where Heinz was operating; Heinz had also taken an exemption from registration under Rule 9(2) of the erstwhile Central Excise (No.2) Rules, 2001, in terms of Notification No. 36/2001 dated 26th June 2001, which was available to a

manufacturer who got his goods manufactured on his account from any other person, subject to the condition that the said manufacturer authorised the person, who actually manufactured or fabricated the said goods, to comply with all the procedural formalities under the Act and the rules made thereunder, in respect of the goods manufactured on behalf of the said manufacturer. Relying heavily on the decision of this Court in Commissioner of Central Excise, Indore Vs. S. Kumars Ltd. Ors.1, wherein dealing with the question of assessable value of the processed goods in relation to the processor the earlier decisions of this Court in M/s Ujagar Prints Ors. (II) Vs. Union of India Ors.2 (for short Ujagar Prints (II)), M/s Ujagar Prints Ors. (III) Vs. Union of India Ors.3 (for short Ujagar Prints (III)), Empire Industries Limited Ors. Vs. Union of India Ors.4 and Pawan Biscuits Co. Pvt. Ltd. Vs. Collector of Central Excise, Patna5, were discussed. Learned counsel argued that the formula laid down in the Ujagar Prints (II) or (III) would not apply to the fact-situation. It was stressed that having failed to examine the relationship between the Assessee and Heinz, the Tribunal's order deserved to be set aside and the matter was fit to be remitted back to the Tribunal for fresh adjudication on the touchstone of the ratio of S. Kumars.

1 (2005) 13 SCC 266

2 (1989) 3 SCC 488

3 (1989) 3 SCC 531

4 (1985) 3 SCC 314

5 (2000) 6 SCC 489

4. Per Contra Mr. V. Lakshmi Kumaran, learned counsel appearing on behalf of the respondents submitted that in the show cause notice there was no allegation that the Assessee and Heinz are related persons and therefore, Section 4 (1)(b) of the Act could not be invoked to determine the assessable value. It was asserted that in reply to the show cause notice, it was clearly stated that apart from the fact that dealings between the Assessee and Heinz were on principal to principal basis, the Assessee was also processing goods for other manufacturers. In support of this argument, learned counsel relied upon clause 22 of the agreement between the said parties, which stipulated that:

Nothing herein contained shall constitute or be deemed to or is intended to constitute FHS as an agent of Heinz. It is hereby expressly agreed and declared that FHS shall not at any time-

> a) Enter into a contract in the name of or purporting to be made on behalf of Heinz.
>
> b) .... It was argued that the clause clearly shows that the parties were at arm's length and the Assessee was processing `Glucon-D' only on job-work basis. It was thus asserted that dealings between the Assessee and Heinz being on principal to principal basis, the principle laid down in Ujagar Prints (II), as clarified in Ujagar Prints (III), for determining the assessable value, was on all fours with the fact-situation at hand and as such the ratio of the judgment in S. Kumars will not apply. In the compilation filed on behalf of the Assessee, reliance is also placed on Circular No.: 619/10/2002-CX dated 19th February 2002, which clarifies that even after the introduction of new valuation provisions with effect from 1st July 2000, in respect of goods manufactured on job-work basis, valuation would be governed by Rule 11 read with Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (for short the 2000 Rules) and the decisions of this Court in Ujagar Prints II and Pawan Biscuits. According to the learned counsel, the issue raised by the revenue stands concluded by the ratio of Pawan Biscuits, and therefore, the appeals deserve to be dismissed.

5. The principles of valuation of excisable goods for the purpose of charging excise duty are contained in Section 4 of the Act (as amended with effect from 1st July 2000), which, insofar as it is relevant, reads as follows: 4. Valuation of excisable goods for purposes of charging of duty of excise.—

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall—

> (a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

(2) ....

(3) For the purposes of this section,--

(a) ....

(b) persons shall be deemed to be related if—

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

Explanation.--In this clause--

(i) inter-connected undertakings shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and

(ii) relative shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);

(c) ....

(d) transaction value means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of

excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

The new Section 4 of the Act, substituted w.e.f 1st July 2000, and material for our purpose, prescribes that the value of excisable goods shall be the transaction value subject to satisfying the conditions that: (i) the price must be the sole consideration; (ii) the buyer must not be a related person and (iii) the goods must be sold by the assessee for delivery at the time and place of removal. The basic principle underlying Section 4(1)(a) of the Act is the transaction value as defined in clause (d) of sub-section 3 of Section 4 of the Act, which inter-alia, means the price actually paid or payable for the goods when sold, provided the assessee and the buyer of goods are not related. Clause (b) of sub-section (3) of Section 4 of the Act, inter-alia, stipulates that person shall be deemed to be related if they are so associated that they have interest, directly or indirectly, in the business of each other. It is clear that if the assessee and the buyer are related, valuation has to be under Section 4(1) (b) of the Act read with the 2000 Rules. We may, however, note that conceptually there is no significant change in the definition of related person in the new and repealed Section 4 of the Act.

6. Thus, the pivotal question on which learned counsel for both the parties addressed us, is whether the Assessee was merely a processor of `Glucon-D', independent of Heinz or it was related to Heinz. In other words, whether the relationship between the Assessee and Heinz was one of principal to principal or that of an agent and principal. As aforesaid, the stand of the revenue is that the Assessee, as the processor, is not independent of Heinz and therefore, ratio of Ujagar Prints (III) would not apply. It is evident from the order of the Tribunal that it has not addressed this aspect of the matter in detail, and has not considered whether the Assessee and Heinz were related persons. Nevertheless, since the rival contentions urged before us mainly related to the question as to whether the formula laid down in Ujagar Prints (III) and reiterated in Pawan Biscuits, would apply or the principle enunciated in S. Kumar will govern the present case, it will be useful to notice the principle enunciated in Ujagar Prints (II) and (III) as also the ratio of S. Kumar.

7. In Ujagar Prints (II), a Constitution Bench of this Court was called upon to consider the correctness of the view taken by this Court in Empire Industries. In Empire Industries, it was held that the Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980, by which, the processes of bleaching, dying and printing were brought within the definition of `manufacture' for the

purposes of the Central Excise and Salt Act, 1944 and the Additional Duties of Excise (Goods of Special Importance) Act, 1957 were constitutionally valid. While upholding the validity of the Amendment Act, it was observed that when the textile fabrics are subjected to the processes like bleaching, dyeing and printing etc. by independent processes, whether on their own account or on job charges basis, the value for the purposes of assessment under Section 4 of the said Act will not be the processing charges alone but the intrinsic value of the processed fabrics which is the price at which such fabrics are sold for the first time in the wholesale market. The principle enumerated in Section 4(1)(a) of the Act was applied to the processed goods. In other words, the assessable value of the processed goods, as far as the processor was concerned, had to be the same irrespective of the fact whether the processor manufactures the goods and then processes them itself or gives the goods and merely undertakes processing before returning the same to the manufacturer/owner. That common norm was the wholesale price.

8. On an application filed for clarification of the judgment in Ujagar Prints (II), this Court by a short order in Ujagar Prints (III) clarified as follows:

> 1...it is made clear that the assessable value of the processed fabric would be the value of the grey cloth in the hands of the processor plus the value of the job work done plus manufacturing profit and manufacturing expenses whatever these may be, which will either be included in the price at the factory gate or deemed to be the price at the factory gate for the processed fabric. The factory gate here means the deemed factory gate as if the processed fabric was sold by the processor... The Court went on to explain:
>
> 2. If the trader, who entrusts cotton or man-made fabric to the processor for processing on job work basis, would give a declaration to the processor as to what would be the price at which he would be selling the processed goods in the market, that would be taken by the excise authorities as the assessable value of the processed fabric and excise duty would be charged to the processor on that basis provided that the declaration as to the price at which he would be selling the processed goods in the market, would include only the price or deemed price at which the processed fabric would leave the processor's factory plus his profit...

9. The decision in Ujagar Prints (III) was subsequently followed by this Court in Pawan Biscuits. In that case, the Tribunal had held that the assessee was, in reality, an agent of Britannia Industries Ltd. and, therefore, the price at which Britannia was selling the manufactured goods in the wholesale market was to be taken as the

assessable value. The decision of the Tribunal was reversed by this Court. It was found that the agreement between Pawan Biscuits and Britannia indicated that their relationship was one of principal to principal and not that of principal and agent and also that the assessee (Pawan Biscuits) could manufacture biscuits of other brands and sell them. Observing that Pawan Biscuits had been established much prior to its agreement with Britannia, it was held that the decisions in Ujagar Prints (II) and (III) could not be factually distinguished. In short, it was held that for the purpose of determining assessable value, it is necessary to include the processor's expenses, costs, and charges plus profit, but it is not necessary to include the trader's profits who gets the fabrics processed, because those would be post-manufacturing profits.

10. A similar issue again came up for consideration of this Court in S. Kumars. In that case, the assessee was processing grey fabrics. Sometimes the grey fabrics were processed on their own account and sometimes the grey fabrics were received for processing on job charge basis from others, referred to in the judgment as the merchant manufacturers. The assessee paid excise duty on the fabrics processed by it treating the value of the processed fabric as being that at which, the merchant manufacturers were selling the processed goods. This, according to the assessee was in accordance with the decision in Empire Industries. However, on the fabrics processed by it which had been received from the merchant manufacturers, the assessee valued the processed goods on the basis of the cost of grey fabrics plus the processing charges as well as its manufacturing expenses and profits. In other words, the price at which the merchant manufacturers were selling the processed goods was not taken into consideration. According to the assessee, this was done in light of the decision in Ujagar Prints (II) and (III). A notice was issued to the assessee to show-cause as to why differential duty of Excise along with penalty be not recovered from it as the assessee and the merchant manufacturers were all firms and companies having a common management and control with some of them selling grey fabrics to the assessee, which after processing the fabrics was sold to some independent dealers. All such independent dealers as well as the merchant manufacturers were described as `S. Kumars' and the revenue asserted to treat the price charged by the merchant manufacturers from independent dealers as the assessable value of the processed fabrics and to levy excise duty thereon. The assessee denied that the merchant manufacturers were related persons and thus disputed the basis on which claim for additional excise duty was made. The stand of the assessee was that by virtue of the decision of this Court in Ujagar Prints (III), they were liable to treat the notional sale by the assessee to the merchant manufacturers as the relevant point for determining the assessable value. Examining the provisions of Section 4 of the Act, as it existed at the relevant time,

with reference to the Central Excise Valuation Rules, 1975 and the decisions of this Court in Ujagar Prints (II) and Ujagar Prints (III) and Pawan Biscuits, the Court held as follows: We, therefore, do not agree that Ujagar Prints (III) would apply even to a processor who is not independent and, as is alleged in this case, the merchant manufacturers and the purchasing traders are merely extensions of the processor. In the latter case, the processor is not a mere processor but also a merchant manufacturer who purchases/manufactures the raw material, processes it and sells it himself in the wholesale market. In such a situation, the profit is not of a processor but of a merchant manufacturer and a trader. If the transaction is between related persons, the profit would not be normally earned within the meaning of Rule 6(b)(ii). If it is established that the dealings were with related persons of the manufacturer, the sale of the processed fabrics would not be limited to the formula prescribed by Ujagar Prints (III) but would be subject to excise duty under the principles enunciated in Empire Industries as affirmed in Ujagar Prints (II), incorporating the arms length principle. (Emphasis supplied by us)

11. It is manifest from the above that the only distinctive feature of S. Kumars in comparison with Ujagar Prints (II) and (III) is the emphasis on the factum of relationship between the parties viz., the processor and the merchant manufacturers/traders, in the former. In short, S. Kumars holds that if the processor-assessee is not at arm's length with the merchant manufacturer and is a related person, the formula prescribed in Ujagar Prints (III) would not apply and assessable value for the purpose of levy of excise duty will have to be determined in terms of the ratio of S. Kumar i.e. in accordance with the procedure contemplated in Section 4(1)(b) of the Act read with the relevant valuation Rules. We deferentially concur with the ratio of S. Kumars.

12. In the present case, as aforesaid, neither did the Tribunal address this aspect of the matter, nor did it consider whether the Assessee and Heinz are related persons. It based its decision solely on the observation made by the Adjudicating Authority that the status of the Assessee was not better than that of a hired labour. We are, therefore, of the opinion that in the light of the above discussion, it would be necessary for the Tribunal to examine in depth the agreement between the Assessee and Heinz as also any other additional material, the parties may like to adduce and determine the question whether or not both of them are related persons.

13. Resultantly, the appeals are allowed and the matter is remanded back to the Tribunal for the purpose of determining the nature of relationship between the Assessee and Heinz. If it is found that they are not related persons, then the present decision of the Tribunal will stand affirmed. However, if the Tribunal finds that the

Assessee and Heinz are related, it shall remit the matter to the Adjudicating Authority for fresh determination of the assessable value of the goods in question in accordance with law. However, having regard to the facts and circumstances of the case, there will be no order as to costs.