SUPREME COURT OF INDIA

Commissioner of Central Excise Pune

Vs.

Hindustan National Glass and Industries Limited

C.A.No.1829 of 2008

(Dipak Mishra and N.V. Ramana,JJ.)

14.01.2016

ORDER

Dipak Misra. J.

1. A show cause notice under F. No. Prev/CEX/AEI/OBL/ 141/99/797 dated 16th August, 2002, was issued to M/s. Owens Brockway (I) Pvt. Ltd., the predecessor-company of the respondent which is presently known as Hindustan National Glass and Industries Limited, by the Commissioner of Central Excise, Pune-I, alleging that the manufacturing company was not adding the additional consideration received from the customers in the form of advance and, therefore, the notional interest accrued thereon is to be added to the sale price, for such non-addition had resulted in depression of the assessable value of the goods, namely, the bottles manufactured by the respondent-assessee.

2. In the show cause notice, it was mentioned that the assessee had short paid the duty on its products, that is, printed glass bottles, by under-valuing the same at the time of clearance from its factory inasmuch as it did not add "additional consideration" received from M/s. Coca Cola India and M/s. Pepsico India Holdings Pvt. Ltd. The show cause notice referred to the statement of the Manager (Sales) of the Company from which it was discernible that the respondent-assessee had received 90% advance from M/s. Coca Cola India and 100% advance from M/s. Pepsico India Holdings Pvt. Ltd. for the goods and it was giving 3-4% discount to the said Companies.

3. After the reply to the show cause was received, the adjudicating authority passed an order on 28th November, 2003, making a demand of Rs. 33,91,934,00/- under Section 11A(1) of the Central Excise Act, 1944 (for short "the Act") being the duty payable on the additional consideration received by the assessee from the customers in the form of notional interest accrued on advance payments and also imposed penalty for the same amount under Section 11AC of the Act. Apart from that, the adjudicating authority confirmed certain other demands.

4. Being grieved by the aforesaid order of the adjudicating authority, the respondent-assessee preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (for short, 'the tribunal'). Initially, the matter was heard by two Members consisting of Member (Judicial) and Member (Technical). The Member (Technical) came to hold that the revenue had not been able to discharge the onus by adducing cogent material evidence that the advances obtained from a buyer had really been instrumental in depression of the price. Learned Member further opined that there was no nexus of interest with the price and hence, the demand was not acceptable and consequently, no penalty could be levied.

5. The Member (Judicial) adverted to the order passed by the Commissioner wherein the statement of the Manager (Sales) had been adumbrated in detail, referred to the other documents that had been put-forth by the revenue before the adjudicating authority and in course of discussion adverted to the principle stated in *Commissioner of Central Excise, New Delhi vs. Hero Honda Motors Ltd*[1]. and opined as follows:

> "In view of the above decision, I am of the opinion that the matter needs to be remanded to the Commissioner for fresh examination in the light of the observation made by the Hon'ble Supreme Court in the case of *Hero Honda Motors Ltd. vs. CCE* referred supra and after examining the entire aspect of the use of the advances, income generated from the said advances, their contribution of the pricing structure and their reflection in the Balance-sheet or the Annual Reports of the appellants, and the deployment of the funds so received by them, as I agree with the learned brother Shri Sekhon that onus to prove so is on the Revenue. However, the appellants would be at liberty to produce relevant evidences before the adjudicating authority in support of their contention that the interest accrued on such advances have not in any way resulted in depreciation of the price. All other issues are left open for the appellants to address before the adjudicating authority."

6. As there was difference of opinion, the matter was referred to the third Member and the third Member, who was a Judicial Member, vide order dated 29th August, 2007, cogitated on the concept of assessable value under the Act, the concept of two prices and eventually opined that the decisions in *Hero Honda Motors Ltd. (supra*) and *Metal Box India Ltd. vs. Collector of Central Excise*[2], Madras are not applicable to the case at hand and accordingly concurred with the opinion expressed by the Member (Technical). Hence, the revenue is before this Court in appeal.

7. We have heard Mr. Yashank Adhyaru, learned senior counsel for the appellant-revenue and Mr. Aarohi Bhalla, learned counsel for the respondent-assessee.

8. On a scrutiny of the factual score, it is noticeable that the respondent-assessee had obtained certain advance sums from some companies/users to supply the bottles and on that count it had granted 3-4 per cent discount. Though the quantum had not been stated precisely, yet it has been found as a matter of fact that M/s. Coca Cola India and M/s.

Pepsico India Holdings Pvt. Ltd. had given advances for 90% and 100% respectively for their purchases.

9. In Metal Box India Ltd. (supra), the Court while dealing with the transaction between the appellant therein and M/s. Ponds (I) Ltd., who was a whole-sale buyer of the appellant's goods, had accepted the view of the tribunal and expressed thus:

> "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 (I) Limited could not stand justified under Section 4(1)(a) proviso and, therefore, to that separate price charged from the Ponds (I) 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 (I) Limited to that extent. Contention 2 also, therefore, fails and is rejected."

10. In Hero Honda Motors Ltd. (supra), the question that arose for determination is whether receipt of advance and the income accruing thereon, had gone towards the depreciation of the sale price. In that context, the Court opined that there is conspectus of decisions which clearly establish that inclusion of notional interest in the assessable value or wholesale price will depend upon the facts of each case. The three-Judge Bench adverted to the facts of the case, the agreement existing between the parties and the lower price at which the respondent-assessee therein had sold the motor-cycles and after analysing the factual matrix opined as follows:

> "For the above reasons, we hold that the tribunal has disposed of the appeal before it in a most perfunctory manner without going into any figures at all but by merely on the statement made by counsel and on the basis of material which appears to have been produced first time before the tribunal. We, therefore, set aside the order of the tribunal and remand the matter back to the tribunal. The tribunal will consider in detail, if necessary, by taking the help of a Cost Accountant and after looking into the accounts of the respondent whether or not the advances or any part thereof have been used in the working capital and whether or not the advances received by the respondent and/or the interest earned thereon have been used in the working capital and/or whether it has the effect of reducing the price of the motorcycle. The tribunal to so decide on the material which was placed before the Commissioner and not to allow any additional documents/materials to be filed before it. None of our observations made herein shall bind the tribunal to which this case is remitted."

11. In the case at hand, the Member (Judicial) has remitted the matter to the competent authority to deal with it afresh in the light of the decision rendered in Hero Honda Motors Ltd. (supra).

12. Mr. Aarohi Bhalla, learned counsel for the respondent-assessee would submit that when no evidence was adduced by the revenue at any point of time and the law is settled that the

onus is on the revenue to establish that there has been depression of assessable value, the majority view of the tribunal cannot be found fault with.

13. Mr. Yashank Adhyaru, learned senior counsel appearing for the appellant-revenue would submit that the documents were produced before the adjudicating authority as well as the tribunal to show the nature of advance and the manner of transaction from which it is demonstrable that there has been depression of the assessable value.

14. On a perusal of the order passed by the Commissioner, it is seen that observations have been made on certain aspects and inferences have been drawn. It cannot be said that no material was produced by the revenue. The concerned Commissioner has taken note of the statement made by the Manager (Sales) of the assessee-Company. An aspect raised relates to percentage of total sales made to two companies, but the core issue is whether there was a depression of the sale price on account of receipt of advance. In the case of Metal Box India Ltd. (supra), the facts were extremely clear as there was an agreement that M/s. Ponds (I) Ltd. had given 50% advance with a stipulation that it would purchase 90% of the manufactured goods. It was a case where a separate price was charged. In the case of Hero Honda Motors Ltd. (supra), the facts, as we perceive, were not clear and, therefore, there was a remit. Be it noted, sale price agreed between two competing parties may get depressed, when substantial and huge advances are periodically extended and given with the objective and purpose that the sale price paid or charged would be lowered, to set off the consideration paid by grant of advances. There should be a connect and link between the two i.e. the money advanced it should be established was a consideration paid which could form the basis for depression of sale price. Evidence and material to establish the said factual matrix has to be uncovered and brought on record to connect and link the sale price paid on paper and the "other" consideration, not gratis, but by way of interest free advances.

15. In our considered opinion, in the present case, there has to be application of mind by the tribunal regard being had to the amount of money paid by purchasers, namely, M/s. Coca Cola India and M/s. Pepsico India Holdings Pvt. Ltd. and what is the effect of the sales made to the two companies in percentile terms, whether this had the effect of depressing the sale price. The onus would be on the revenue. That being the thrust of the matter, liberty is granted to the revenue to produce the documents in this regard to discharge the onus. As we are remitting the matter, we may note one submission of the respondent-assessee. It is urged by the learned counsel that when the entire activities were within the knowledge of the excise authorities, penalty is not leviable. Needless to emphasize, the tribunal shall advert to the said submission, if required, in the ultimate eventuate, in proper perspective.

16. In the result, the appeal is allowed, the order passed by the tribunal is set aside and the matter is remitted to the tribunal for fresh disposal keeping in view the observations made herein-above. We may hasten to clarify that we have not expressed any opinion on any of the aspects. There shall be no order as to costs.

Judgment Referred.

[1]*(2005) 4 SCC 0182*
[2]*(1995) 2 SCC 0090*