

M/S. SONY INDIA LTD. A
v.
COMMISSIONER OF CENTRAL EXCISE, DELHI

MAY 5, 2004

[S. RAJENDRA BABU, CJ. AND G.P. MATHUR, J.] B

Central Excise Act, 1944—Section 4A(2), 11-AB and 11-AC—Levy of duty—On Colour Television—Whether to be on ad valorem basis or at specific rate—By notification duty at specific rate introduced where the manufacturer did not print the retail price on the package or such retail sale price was not the price as contemplated in the explanation or where the retail sale price was not the sole consideration—Clearance of goods by manufacturer from factory gate and sale price affixed at their depots and gifts offered—Levy on ad valorem basis @ 18% and penalty and interest imposed as having violated Weights and Measures Act—Confirmation of levy by CEGAT—On appeal, held : Duty liable to be levied at ad valorem basis @ 18%—Manufacturer had removed the goods from factory for the purpose of getting over the payment of higher duty—Notwithstanding free gifts, sale price would not cease to be the sole consideration—Standards of Weights and Measures Act, 1976—Standards of Weights and Measures (Packaged Commodities) Rules, 1977. C D E

Appellants, manufacturers of Colour Television were required to pay excise duty on the product at the rate of 18% ad valorem. On 2.6.1998 Notification was issued indicating that where manufacturer did not print the retail price on the package of Colour TV receivers or where the retail sale price either did not include the elements required to be included by Explanation of the Notification or where the retail sale price was not the sole consideration for the sale, in such cases specific rate of duty was leviable depending on the size of the screen of the Television. F G

Excise authority raised demand of duty on all the models of Colour Television manufactured by the appellant on ad valorem basis @ 18% and imposed penalty u/s. 11-AC and interest u/s. 11-AB. Excise authority found that goods had been removed from the place of H

A manufacture without printing the retail sale price as it was mandatory for them to print the price once the goods are cleared in packed condition as per requirement of Standards of Weights and Measures Act, 1976. Plea of appellant was that the transfer was only a stock transfer from factory to depots and the retail price were printed at

B depots; that stock transfer was not sale of goods as the sale took place from their depots, and that the printed retail price was not the sole consideration as they had launched an exchange scheme. Hence duty was not leviable at *ad valorem* basis @ 18%. Excise authority rejected the plea and confirmed the duty. On appeal, Customs, Excise and Gold

C (Control) Appellate Tribunal (CEGAT) upheld the order of authority holding that notwithstanding free gifts, the sale price charged from the buyers will not cease to be sole consideration and that it was mandatory to print the maximum retail price on the package at the time of clearance from the factory; that extended period of demand of duty and the penal provision u/s. 11-AB and 11-AC have been rightly

D invoked; that appellant could not have been said to be under *bonafide* belief that their case was not covered by the expression “the retail sale price being the sole consideration for such sale” as appellant postponed the printing of maximum retail price before clearance from the factory premises to the depots intentionally to avoid payment of

E duty at the appropriate rate applicable to their goods. Hence the present appeal.

Dismissing the appeal, the Court

F HELD : 1. Appellant had cleared the goods from factory without indicating the price thereof but affixed the price in their depots. Therefore, it is clear that the whole object of removing the goods from their factory premises to their depots was with the purpose of getting over the payment of higher duty. Though the goods were marketed from the depots of the appellant it is clear that the same was done after

G affixing the price and that become the sale price of the goods in question. Notwithstanding the free gifts offered by the appellant to the buyers on the sale of television sets, the sale price charged from the buyers will not cease to be the sole consideration for such sale. The offer of gifts was only incidental benefits and not the part of the

H consideration to be paid in regard to television sets as such. From

totality of the circumstances and the nature of transaction conducted by the appellant, the view taken by the Tribunal that the stock transfer from their factory to their depots would not amount to sale of goods and actual sale of goods took place from their depots and when the goods were sold they were having printed retail price on the packages and also that the sale price charged from the buyers was the sale transaction notwithstanding there were free gifts that had been offered thus stands to reason and does not call for interference. [133-A-D]

2. Under Section 11-AC of the Central Excise Act, 1944, the manner in which the whole transaction went on makes it very clear that the appellant became liable to pay duty under the circumstances which warrant application of the provisions of Section 11-A(i) and, therefore, if the authorities chose to impose penalty equivalent to duty payable by the appellant, there is no jurisdiction for interference. [133-E-F]

Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax and Ors., (1980) ELT 295, *Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay*, (1995) 78 ELT 401; *State of Uttar Pradesh and Ors. v. Kasturi Lal Har Lal*, (1987) 67 ELT 154; *Hindustan Steel Ltd. v. The State of Orissa*, (1970) 25 STC 211 and *State of Madhya Pradesh v. Bharat Heavy Electricals*, (1998) 99 ELT 33 SC, distinguished.

3. In the present case, earlier the appellant was paying duty at the rate of 18% *ad valorem* on the maximum retail price. It is only after 2.6.1998 change was sought by the appellant by not printing the price on the packed goods by removing the same to their depots in order to claim that the packed goods had not been priced at the time of their removal from factory and gifts were offered by the appellant to indicate that the consideration in the sale transaction was not solely the price. These factors were rightly taken note of by the authorities and the penalty imposed need not be considered in the present proceedings. [133-G-H; 134-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4964 of 2000.

From the Judgment and Order dated 12.6.2000 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. No.

A 488/2000-A in A. No. F/2335/99-A.

V. Lakshmikumar, Alok Yadav, V. Balachandran and Anil Mishra
for the Appellant.

B Raju Ramachandran, Additional Solicitor General, Adharu Yashank,
T.A. Khan, Mrs. Binu Tamta and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

C **RAJENDRA BABU, CJ. :** A show cause notice was issued to the
appellant by the Commissioner of Central Excise demanding duty of Rs.
2,07,64,870.16 for the period from 1.7.1998 to 31.1.1999. The appellant
D complied with the demand under protest without prejudice to their
contentions and filed a reply to the show cause notice contesting the various
points raised therein. The Commissioner ultimately gave a finding that the
E goods in question had been removed from the place of manufacture without
printing the retail sale price as it was mandatory for them to print the price
once the goods are cleared in packed condition as per requirement of
Standards of Weights and Measures Act, 1976. It was admitted that it was
F only stock transfer to the depots of the appellant from the factory gate and
retail price was printed at their depots. The appellant contended that stock
transfer is not sale of goods in their case and actual sale of goods took place
from their depots and before putting the goods in question for sale in the
market they had been printing retail sale price on their goods and when
G the goods were sold these were having printed retail sale price. They also
contended that the printed retail sale price was the sole consideration as
they had launched an exchange scheme; that the goods were sold in the
market with the printed sale price in packed condition; that central excise
duty was not leviable at *ad valorem* basis @ 18% on all different models
of television sets manufactured by them. These contentions were rejected
by the Commissioner.

H On appeal to the Customs, Excise and gold (Control) Appellate
Tribunal (hereinafter referred to as the Tribunal) against the order of the
Commissioner, it was held that colour T.V. is an item in relation to the sale
of which the provisions of the Standards of Weights and Measures Act and
Rules made therein to declare the retail sale price on their packages would

be attracted and that under Section 4-A(2) of the Central Excise Act, 1944 excise duty is liable to be paid at the applicable rate with reference to the retail sale price after effecting the abatement from the retail sale price as specified in the said provision and, therefore, the Tribunal held that the CTVs are subject to duty @ 18% *ad valorem*. A

As regards offer of gifts made by the appellant, it was stated that notwithstanding free gifts offered by the appellant to the buyers on the sale of TV sets, the sale price charged from the buyers will not cease to be the sole consideration for such sale and, therefore, the Tribunal affirmed the findings of the Commissioner that it was mandatory for the appellant to print the maximum retail price on the package at time of clearance from the factory as per the requirement of Standards of Weights and Measures Act, 1976 and it was the sole consideration for sale. The Tribunal also noticed that the appellant is only stock transferring their goods from the factory to their depots and retail price was printed at their depots; that the stock transfer is not sale of goods, actual sale of goods took place from their depots and when the goods were sold these were having printed retail sale price on the packages; that this printed retail sale price was the sole consideration for the sale of the goods and the central excise duty was leviable @ 18% *ad valorem* on the CTVs as provided in the relevant notification issued under Section 4-A(a) of the Act. B C D E

As regards the contention put forth by the appellant that the appellant were of *bona fide* belief that their case was not covered by the expression "*the retail sale price being the sole consideration for such sale*" and the price had not been printed at the time of clearing the goods and they had indicated so in their letter to the concerned authorities, the Tribunal took note of the fact that the appellant should have printed the maximum retail price on the packages before clearing the goods from their factory; that in order to bye-pass the rigors of the legal provisions relating to the maximum retail price based payment of duty, they postponed the printing of maximum retail price before clearance from the factory premises to the depots; that this was done with the sole intention to avoid payment of duty at the appropriate rate applicable to their goods; that, therefore, there was hardly any circumstance for the appellant to raise the plea of *bona fide* belief. The Tribunal was of the view that the extended period for the demand of duty and the penal provisions under Section 11- H

- A AB and 11-AC have been rightly invoked by the Commissioner. The Tribunal was not impressed with the decisions cited before it, viz., *Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax and Ors.*, (1980) ELT 295, *Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay*, (1995) 78 ELT 401 SC, *State of Uttar Pradesh & Ors. v. Kasturi Lal Har Lal*, (1987) 67 ELT 154, *Hindustan Steel Ltd. v. The State of Orissa*, (1970) 25 STC 211, and *State of Madhya Pradesh v. Bharat Heavy Electricals*, (1998) 99 ELT 33 SC.

The arguments advanced before the Commissioner and the Tribunal are reiterated before us on the merits of the matter.

- C The sole question that arises for consideration in the present case is whether the appellant was required to pay excise duty at *ad valorem* basis or at specific rates as provided in the relevant notification. Prior to 2.6.1998 only one duty was leviable on the colour television sets and, that is, at the rate of 18% *ad valorem* and the duty was required to be paid on the basis of maximum retail price printed after allowing an abatement of 30% on the retail sale price. But by notification issued on 2.6.1998 it was indicated that where the manufacturer did not print the retail price on the package of the colour television receivers or where such a retail sale price was not the retail sale price as contemplated in the explanation to the notification, that is, in a case where the retail sale price either did not include the elements required to be included by the explanation or where the retail sale price was not the sole consideration for the sale, then in all such cases specific rate of duty ranging from Rs. 1500 per set to Rs. 5400 per set was leviable depending upon the size of screen of CTVs. The appellant contended that they have launched a gift scheme in which they were giving VIP suit cases and cordless head phone as gifts free of cost and claimed that they were entitled to pay specific rate of duty. The basic plea was that they had not printed any sale price of colour television sets at the time of clearance from their factory gate and the price offer was not the sole consideration in the said transaction inasmuch as certain gifts were involved. It has been found as a matter of fact by the Tribunal and by the Commissioner that the appellant had cleared the goods from factory without indicating the price thereof but affixed the price in their depots. Therefore, it is clear that the whole object of removing the goods from their factory premises to their depots was with the purpose of getting over the payment of higher duty. The Standards of Weights and Measures (Packaged

Commodities) Rules, 1977 specifically provides that every package shall bear thereon or on a label securely affixed thereto a definite, plain and conspicuous declaration among other things the sale price of the package. Therefore, though the goods were marketed from the depots of the appellant it is clear that the same was done after affixing the price and that become the sale price of the goods in question. Notwithstanding the free gifts offered by the appellant to the buyers on the sale of television sets, as noticed by the Tribunal, the sale price charged from the buyers will not cease to be the sole consideration for such sale. The offer of gifts was only incidental benefits and not the part of the consideration to be paid in regard to television sets as such. From totality of the circumstances and the nature of transaction conducted by the appellant, the view taken by the Tribunal that the stock transfer from their factory to their depots would not amount to sale of goods and actual sale of goods took place from their depots and when the goods were sold they were having printed retail price on the packages and also that the sale price charged from the buyers was the sale transaction notwithstanding there were free gifts that had been offered thus stands to reason and does not call for our interference.

Now the other aspect that has to be considered is whether penalty imposed under Section 11-AC and interest under Section 11-AB was justified in the circumstances that arise in the case. The Commissioner had imposed penalty to an extent of Rs. 2,07,64,870.16 equivalent to the duty that was payable by the appellant. Under Section 11-AC of the Central Excise Act, the manner in which the whole transaction went on makes it very clear that the appellant became liable to pay duty under the circumstances which warrant application of the provisions of Section 11-A(i) and, therefore, we think if the authorities chose to impose penalty equivalent to duty payable by the appellant, we do not think, there is any justification for us to interfere with the same. The decisions adverted to by the learned counsel have different complexions and bearing. These cited cases arose in the circumstances where certain actions had been taken in *bona fide* belief or the parties were under *bona fide* doubt as to under what tariff item they had to pay tax in question or where the assessee was under *bona fide* belief that his company was not required to be registered as dealer under the Sales Tax Act. In the present case, earlier the appellant was paying duty at the rate of 18% *ad valorem* on the maximum retail price. It is only after 2.6.1998 change was sought by the appellant by not printing

A the price on the packed goods by removing the same to their depots from their factory in order to claim that the packed goods had not been priced at the time of their removal from the factory and gifts were offered by the appellant to indicate that the consideration in the sale transaction was not solely the price. These factors, we think, were rightly taken note of by the

B authorities and the penalty imposed need not be considered in the present proceedings.

In the result, the appeal is dismissed.

K.K.T.

Appeal dismissed.