

A COMMISSIONER OF CENTRAL EXCISE, SURAT
v.
M/S. SURAT TEXTILE MILLS LTD. AND ORS.

APRIL 26, 2004

B [S. RAJENDRA BABU, DR. AR. LAKSHMANAN AND G.P. MATHUR, JJ.]

C *Central Excises and Salt Act, 1944—Excise duty—Levy of—Inclusion of advertisement expenditure incurred by manufacturers' customers in the assessable value of the goods of the manufacturers—In different appeals CEGAT decided in favour as well as against revenue—On appeal, matters remitted back to the Tribunal for reconsideration.*

D In Civil Appeal Nos. 2357-2361/2002 Excise authorities held that expenses towards advertisement, which the owners of the processed fabrics incurred, but passed on to the dealers of these goods, were includible in the assessable value of the processed fabrics. Custom, Excise and Gold (Control) Appellate Tribunal (CEGAT) allowed the appeal of the assessee holding that such sales promotion expenses was not includible in the assessable value relying on *Philips v. C.C.E., Pune*, [1997] 6 SCC 31 and *M/s. Ujagar Prints and Ors. v. U.O.I. and Ors.*, [1999] 3 SCC 531.

E In Civil Appeal Nos. 13400/1996, 4672/1997 and 4762/1997, the appellant-Companies were manufacturers of non-alcoholic beverage base. The beverage base was further sold to their customers who manufactured finished product i.e. aerated water. Excise authorities levied duty on the beverage base holding that the cost of advertisement incurred by the manufacturers of finished products was includible in the assessable value of the beverage base. CEGAT decided in favour of revenue upholding the view of Excise authorities. Hence the present appeals.

F Disposing of the appeals and remitting them back to CEGAT, the Court

G HELD: Custom, Excise and Gold (Control) Appellate Tribunal failed to appreciate that in several earlier judgments, it consistently held that the advertisement expenditure incurred by a manufacturers customer can be added to the sale price for determining the assessable value, only if the manufacturer has an enforceable legal right against the customer to insist on the incurring

of such advertisement expenses by the customer. In some cases, CEGAT failed to appreciate that the appellants have acted honestly and under *bona fide* belief that the Beverage Base were exempted from excise duty. The CEGAT in the orders impugned in these appeals have also failed to appreciate and follow the ratio of several judgments of this Court wherein it has been laid down that if the assessee acts honestly and under the bona fide belief and manufactured products are exempted from duty, the longer period of limitation is not attracted. Therefore, these matters require reconsideration by the CEGAT to arrive at a correct finding on the issues involved. [648-A-D]

Government of India and Ors. v. Madras Rubber Factory Ltd. and Ors., [1995] 4 SCC 349; *Philips India Ltd. v. Collector of Central Excise, Pune*, [1997] 6 SCC 31; *M/s. Ujagar Prints and Ors. (III) v. Union of India and Ors.*, [1989] 3 SCC 531; *Pepsi Foods Ltd. v. CCE, Chandigarh*, (2003) 111 ECR 776 (SC) = JT (2003) 9 SC 595; *Union of India and Ors. v. Bombay Tyre International Ltd. and Ors.*, [1984] 1 SCC 467; *Assistant Collector of Central Excise and Ors. v. Madras Rubber Factory Ltd. etc.*, [1986] Supp. SCC 751; *Assistant Collector of Central Excise and Ors. v. Madras Rubber Factory Ltd.*, [1989] 3 SCC 238; *Collector of Central Excise, Madras v. T.I. Millers Ltd., Madras and T.I. Diamond Chain, Madras*, [1986] Supp. SCC 361; *Collector of Central Excise, Hyderabad v. M/s. Jayant Oil Mills Pvt. Ltd.*, [1989] 3 SCC 343; *Cosmic Dye Chemical v. Collector of Central Excise, Bombay*, (1995) 75 ELT 721 (SC) and *Amco Batteries Ltd. Collector of Central Excise, Bangalore*, (2003) 153 ELT 7 (SC), referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2357-2361 of 2002.

From the Judgment and Order dated 29.3.2001 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, West Zonal Bench, Mumbai in F.O. No. C-I/1064-1068/WZB/2001 in A. No. E/4563-4567 of 1995 SB(WR)

WITH

C.A. Nos. 13400/96, 4672 of 1997.

A.K. Ganguli, Joseph Vellapally, Dushyant Dave, Daleep Tandon, Ms. Nisha Bagehi, K.C. Kaushik, B.K. Prasad, D.N. Mehta, Ms. Suruchii Aggarwal, U.A. Rana, Arvind Kumar, Sadeep Kharel, P.H. Parekh, Sameer Parekh, S. Ramakrishnan and Ms. Ranjeet Rohtagi for the appearing parties.

A The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. In Civil Appeal Nos. 2357-2361/2002

This appeal is filed by the Commissioner of Central Excise, Surat, against the final judgment and order dated 29.3.2001 of the Custom, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench at Mumbai passed in Order No. C-I/1064-1068/WZB/2001 in Appeal No. E/4563-4567/95 SB(WR). In this case, the Commissioner of Central Excise held that the expenses towards advertisement which Garden Silk Mills Ltd. and owners of the processed fabrics incurred, but passed on to the dealers of these goods, were includible in the assessable value of the processed fabrics. He further held that the assessable value of the second quality fabrics sold by Garden Silk Mills Ltd. to Vareli Associates and Garden Associates should be the price at which these two concerns sold them to their dealers.

The appeals filed by the assessee before the CEGAT were allowed and the impugned order of the Commissioner was set aside. Aggrieved by the said judgment and order of the CEGAT, the Commissioner of Central Excise filed the above appeals.

According to the appellants, the question which arises for the determination is as to whether the CEGAT was correct in not including the sales promotion expenses, (Advertising expenses) recovered by the manufacturer from its own dealers in respect of the goods sold to them, in the assessable value of the goods processed and sold by them from their factory.

A further question also arises for consideration to the effect that as to whether the CEGAT was correct in not appreciating the facts that all Merchant Manufacturers were created by main Mills i.e., M/s Garden Silk Mills Ltd., and were created with a view to camouflage and avoid excise duty, as subsequently most of the (Merchant Manufacturers) were either dissolved or amalgamated with other companies.

It is pertinent to notice that the CEGAT, in the instant case, allowed the appeals of the Mills and Merchant Manufacturers with the contention that in the case of *Philips India Ltd. v. CCE, Pune*, (1998) 74 ERC 722 = [1997] 6 SCC 31, this Court held that the expenses incurred by the dealers towards advertising of a manufactured product should not form part of the assessable value of the product. Applying the ratio of this judgment, the expenses

incurred by the dealers should not form part of the assessable value. The expenses incurred towards advertisement by the owner of the fabrics which Garden Silk Mills Ltd. processed, would in any case, not form part of the assessable value of these goods. The CEGAT also relied upon the judgment of this Court in the case of *M/s Ujagar Prints and Ors. v. Union of India and Ors.*, (1989) 39 ELT 439 = [1989] 3 SCC 531 wherein this Court laid down that it is the cost of raw material and the cost incurred by the processor towards its processing should form the assessable value of the goods.

When the above appeals came up before this Court on 24.2.2003, a Bench of two Judges of this Court while placing the matter before Hon'ble the Chief Justice of India for directions, passed the following order:

“Learned counsel for the appellant has relied upon the judgment of this Court in the case of *Govt. of India and Ors. v. Madras Rubber Factory Ltd. and Ors.*, reported in [1995] 4 SCC 349 which is a judgment of a three, Judge Bench, while the Tribunal has relied upon the judgment of this Court in the case of *Philips India Ltd. v. Collector of Central Excise, Pune*, reported in [1997] 6 SCC 31. Since there appears to be some conflict in these - judgments, we think it appropriate that this matter should be referred to a three Judge Bench. Hence, the papers be placed before Hon'ble the Chief Justice for directions.”

Several other grounds have also been taken by the appellants questioning the correctness of the judgment and order of the CEGAT which is impugned in these appeals.

A counter affidavit was filed by the respondents herein submitting that the matter is squarely covered by the judgments of this Court in the case of *M/s Philips India Ltd.* (supra) and in the case of *M/s Ujagar Prints* (supra) as also held in the impugned judgment. It was submitted that the sales promotion expenditure is not liable to be added in the value of the fabrics and, therefore, not exigible to excise duty.

Several other factual and legal contentions have also been taken in the counter affidavit filed by the respondents.

In Civil Appeal No. 13400/1996

This appeal is filed by *M/s Delhi Bottling Co. Pvt. Ltd.* questioning the correctness of the order dated 9.7.1996 passed by the CEGAT, New Delhi in

A Appeal No. E/2751/84-A arising out of order in Appeal No. 68/84 dated 29.10.1984 passed by the Additional Collector of Central Excise, New Delhi. This matter relates to the inclusion of the amount separately collected by the appellant - Delhi Bottling Co. Pvt. Ltd., in short "DBC", by raising subsidiary invoices in the name of Cooperative All India Advertisements, from their customers to whom they were supplying the beverage base, while determining

B the assessable value of such beverage base. The Department had alleged that the value mentioned in the regular sale invoices as well as the value collected separately through subsidiary invoices constitute the value of the beverage base manufactured by DBC. The DBC was availing of the benefit of exemption Notification No. 120/75-CE dated 30.4.1975 and had declared the

C value collected through regular sale invoices only. The Department had alleged that the value mentioned in the regular sale invoices as well as subsidiary sale invoices constituted the value of the goods and for the assessment under Notification No. 120/75-CE, the full invoice price will be taken into consideration. According to the appellants, the following substantial questions of law arise for consideration in this appeal:

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“(i) Whether the authorities were justified in including the cost incurred for advertisement of aerated waters in the assessable value of the concentrate required for the manufacture of aerated waters by treating the cost of the advertisement so incurred as the cost of the advertisement of the concentrate;

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(ii) Whether CEGAT was justified in denying the appellant the benefit of Notification No. 120/75-CE when the appellant had opted for the facility contained therein specifically in respect of items falling under the erstwhile Item 68 of the Central Excise Tariff as in the case of the appellant and invoking instead contrary to the law settled by this Court, the provisions of Section 4 of the Central Excise and Salt Act for determining the assessable value due to mere suspicion without any proof that the appellant had not made proper declaration of the Invoice value in terms of the Notification no. 120/1975 CE *ibid*,”

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G Several other factual and legal contentions were taken challenging the legality and correctness of the order passed by the CEGAT.

In Civil Appeal No. 4672/1997

H This appeal is filed by Parle (Exports) Pvt. Ltd. Here again, the appellants engaged in the manufacture of Non-Alcoholic Beverage Bases (NABBs).

NABB is sold by the appellants to bottlers who are Franchise holders. The Bottlers/Franchise holders manufacture aerated waters under the trade name of Thums Up, Gold Spot etc. from NABB sold to them by the appellants. There are 55 such bottlers/franchise holders all over the country. The bottlers/franchise holders decided that a cooperative and consolidated advertising campaign should be organised on an All India basis on their behalf for which initially the appellants and subsequently M/s. Advance Advertisement & Services Pvt. Ltd. were to act as monitoring agencies. The advertisement campaign was in respect of the finished products, namely, aerated water being sold under the Trade name of Gold Spot, Thumps Up etc. for which proportionate contributions were made by the bottlers/franchise holders. A show cause notice was issued by the Collector of Central Excise, Ahmedabad, to the appellants alleging that the amounts of the advertising expenses were includible in the assessable value of the NABB. The appellants filed their written explanation denying the allegation made in the show cause notice. The Collector, Central Excise, Ahmedabad, by his order dated 29.3.1990 confirmed the demand for duty and also imposed penalty. The appellants preferred an appeal and the CEGAT by its order dated 18.2.1997 partly allowed the appeal of the appellants while holding that the cost of advertisement expenses in respect of finished products, namely, aerated waters incurred by the bottlers/franchise holders was liable to be included in the sale price of the appellants. The CEGAT also upheld the larger period of limitation in the appellant's case.

The present civil appeal was filed by the appellants against the order of the CEGAT questioning the legality and correctness of the said order.

Before the CEGAT, several judgments were cited by the counsel appearing on either side. Several legal contentions were also taken by the appellants. According to the appellants/assesses, the CEGAT has grossly erred in law in holding that the amount of advertising expenses incurred by and/or on behalf of the purchasers of NABB, was liable to be loaded on to the assessable value of the NABB manufactured by the appellant and that the CEGAT failed to appreciate that the said advertising expenses were incurred in respect of aerated waters which were a distinct and different manufactured product as compared to the product manufactured by the appellant-Company, i.e., NABB.

It was further submitted that the advertisement expenses were not incurred for or on behalf of the appellants or on the appellants' product NABB but in order to advertise the products manufactured by the appellants'

A customers, the bottlers and for and on their behalf.

In Civil Appeal No. 4762/1997

This appeal is filed by the appellants — Parle International Ltd. against an Order No. 260/1997-A dated 18.2.1997 of the CEGAT, New Delhi in Appeal
B No. E-1020/90-A. Here again, the appellants are engaged in the manufacture of non-alcoholic Beverage Bases (NABBs) which is sold by the appellants to bottlers who are franchise holders. This case stands on identical footings as that of Civil Appeal No. 4672/1997. In the present appeal, this Court on 9.2.1998 passed an interim order which reads as under:

C “In view of the order of the Customs, Excise and Gold Control Appellate Tribunal dated 18.2.1997, the Commissioner shall determine the demand for duty for the balance period as set out in paragraph 13 of that order within four weeks from today after notice to both sides. The appellants shall deposit 50% of the amount so determined and give bank guarantee
D for the balance amount to the satisfaction of the Commissioner. In the event of there being any existing deposit or bank guarantee, the credit for the same shall be taken while furnishing the deposit or bank guarantee provided the bank guarantee or guarantees are kept alive till the disposal of the present appeals.”

E This interim order will be subject to the final outcome of the judgment and order that may be passed by the CEGAT on remand by this Court.

It was submitted that the CEGAT upheld and confirmed the said addition of the advertisement expenses to the appellants’ sale price of the ‘NABB’, even though the said advertisement expenses were not incurred in respect of
F NABB at all but were incurred only in respect of aerated waters which are an entirely distinct and different manufactured product, which is produced by the bottlers and not by the appellants. Further, the said addition to the assessable value has been upheld by the CEGAT even though the Department had not even alleged, much less established that there was any binding legal
G obligation cast on the bottlers to incur the said advertisement expenses.

We heard Mr. A.K. Ganguli, learned senior counsel, Mr. D.N. Mehta, Mr. U.A. Rana, learned counsel, Mr. Joseph Vellapally and Mr. D.A. Dave, learned senior counsel and Mr. P.H. Parekh, learned counsel. Learned counsel for the respective parties reiterated before us the contentions raised by them in their
H respective appeals. We have perused the order passed by the CEGAT in Civil

Appeal Nos. 2357-2361/2002 and the orders passed in other three appeals. In Civil Appeal Nos. 2357-2361/2002, the CEGAT passed the judgment and order against the Revenue and in favour of the assessee whereas a contrary view was taken by the CEGAT in the other three appeals holding in favour of the Revenue and against the assessee. A

At the time of hearing, learned counsel appearing on either side placed strong reliance on the following judgments for and against : B

1. *Government of India and Ors. v. Madras Rubber Factory Ltd. and Ors.*, [1995] 4 SCC 349
2. *Philips India Ltd. v. Collector of Central Excise, Pune*, [1997] 6 SCC 31 C
3. *M/s. Ujagar Prints and Ors. (III) v. Union of India and Ors.*, [1989] 3 SCC 531
4. *Pepsi Foods Ltd. v. CCE, Chandigarh*, (2003) 111 ECR 776 SC = JT (2003) 9 SC 595 D
5. *Union of India and Ors. v. Bombay Tyre International Ltd. and Ors.*, [1984] 1 SCC 467
6. *Assistant Collector of Central Excise and Ors. v. Madras Rubber Factory Ltd. etc.*, [1986] Supp SCC 751 E
7. *Assistant Collector of Central Excise and Ors. v. Madras Rubber Factory Ltd.* [1989] 3 SCC 238
8. *Collector of Central Excise, Madras v. T.I. Millers Ltd., Madras and T.I. Diamond Chain, Madras*, [1988] Supp SCC 361
9. *Collector of Central Excise, Hyderabad v. M/s Jayant Oil Mills Pvt. Ltd.*, [1989] 3 SCC 343 F
10. *Cosmic Dye Chemical v. Collector of Central Excise, Bombay*, (1995) 75 ELT 721 SC
11. *Amco Batteries Ltd. v. Collector of Central Excise, Bangalore*, (2003) 153 ELT 7 SC G

We have carefully perused the judgments and orders passed by the CEGAT which are impugned in these appeals. As rightly contended by the counsel appearing on either side, the CEGAT failed to appreciate the arguments advanced before it by the counsel appearing on either party in its proper H

A perspective. In fact, in Civil Appeal Nos. 13400/1996, 4672/1997 and 4762/1997, the CEGAT failed to appreciate that in several earlier judgments, the CEGAT consistently held that the advertisement expenditure incurred by a manufacturers' customer can be added to the sale price for determining the assessable value, only if the manufacturer has an enforceable legal right against the customer to insist on the incurring of such advertisement expenses by the customer.

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C In some cases, the CEGAT failed to appreciate that the appellants have acted honestly and under bona fide belief that the NABB were exempted from excise duty by such offence and that the appellants' claim for exemption, in fact, upheld by the CEGAT itself in its appellants' own case in *Parle Exports (P) Ltd. v. CCE, 1987 (27) ELT 349*. The CEGAT in the orders impugned in these appeals have also failed to appreciate and follow the ratio of several judgments of this Court wherein it has been laid down that if the assessee acts honestly and under the bona fide belief and manufactured products are exempted from duty, the longer period of limitation is not attracted.

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E We, therefore, feel that these matters require reconsideration by the CEGAT in the background of several judgments cited, relied on and referred to in this judgment to arrive at a correct finding on the issues involved. All the appeals are remitted back to the respective Tribunals to consider the matters afresh in the light of the judgments relied on by the parties. Both parties are at liberty to file additional pleadings and, annexures and records, if any, in respect of their respective claim.

All the appeals stand disposed of accordingly with the above direction. There will be no order as to costs.

K.K.T.

Appeal disposed of.