

A COMMNR. OF CENTRAL EXCISE, ALLAHABAD

v.

M/S. SOMAIYA ORGANICS (INDIA) LTD.

NOVEMBER 12, 2007

B [DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

Central Excise Act, 1944—s. 4 (1) (b)—Ethyl Alcohol Denatured (SDS)—Used for manufacture of specified products by the other manufacturing unit of the assessee—Excise duty on—Payment of on costing basis in terms of r. 6 (b)(i) of Valuation Rules, by the assessee—Revenue demanding on the basis of 6 (b)(i) at the highest price at which SDS was sold by other manufacturers on a particular date—CEGAT setting aside the levy holding that adoption of highest price not correct—On appeal, held: CEGAT was required to determine the appropriate price—Since it was not determined, matter remitted for fresh consideration—Central Excise Valuation Rules, 1975—r. 6 (b) (i) and (ii).

Respondent-assessee was having two manufacturing units. One was distillery where they used to manufacture Ethyl Alcohol-Denatured (SDS). The stock of SDS was transferred to their other unit i.e. a chemical factory for manufacture of specified chemicals. They were paying excise duty at the time of transferring the stock of SDS to their other unit and MODVAT credit of the duty paid was availed in the other unit (chemical factory). The value had been arrived at by the assessee for the purpose of Section 4 (1) (b) of Central Excise Act, 1944, on costing basis in terms of Rule 6 (b) (ii) of Central Excise Valuation Rules, 1975 during the relevant period. Show Cause Notice was issued to the assessee, alleging that assessable value was to be fixed in terms of Rule 6 (b) (i) and not under 6 (b) (ii) and it was proposed to fix the assessable value on the basis of the highest price at which SDS was sold by other manufacturers on particular dates. Differential duty was demanded. Commissioner of Central Excise confirmed the demand.

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COMMNR. OF CENTRAL EXCISE, ALLAHABAD v. M/S. 1069
SOMAIYA ORGANICS (INDIA) LTD.

Appeal of the assessee was allowed by Customs, Excise and Gold (Control) Appellate tribunal (CEGAT) holding that the Department adopting the highest price was unsustainable in law. Hence the present appeal.

Partly allowing the appeal and remitting the matter, the Court

HELD: CEGAT appears to have taken the stand that one day high price cannot be applied even though Rule 6(b) (i) may apply. CEGAT had come to the conclusion that no principle has been formulated and expressly no reason has been given. The stress is on nearly ascertainable equivalent as the expression 'ascertainable' means ascertained. There may be different rates for different periods. There may be cases where even for the periods the highest and the average prices may be taken. CEGAT has not determined what would be the appropriate price. By merely discarding the price fixed by the assessing authority the issue does not get solved. What was required to be seen is as to whether there was any ascertainable price and on what basis it can be ascertained. Even for a period, the highest or the average can be taken. That has to be done on the basis of the judicial discretion of the assessing officer which can also be decided by the appellate authority by finding out whether there is any rationale in the fixation done. In that view of the matter, the approach of the CEGAT is not legally tenable.

[Paras 9 and 10] [1073-F, G; 1074-A, C, D, E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4975 of 2002.

From the final Order No. 71/2002-A dated 20.2.2002 of The Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi in Appeal No. E/467/2001-A.

Nagender Rai, Aruna Gupta and B.K. Prasad for the Appellant.

V. Lakshmi Kumaran, A.R. Madhav Rao, Tarun Jain, Monish Panda and Rajesh Kumar for the Respondent.

The Judgment of the Court was delivered by

A **DR. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to the judgment of the Customs, Excise, and Gold (Control) Appellate Tribunal, New Delhi (in short the 'CEGAT') allowing the appeal filed by the respondents (hereinafter referred to as the 'assessee'). Before the CEGAT challenge was to the order passed by the Commissioner of Central Excise, B Allahabad.

2. Factual background in a nutshell is as follows:

The respondents are having two manufacturing units- a distillery at Captainganj and a chemical factory at Barabanki. In their distillery the respondents manufacture Ethyl Alcohol-Denatured (for short 'SDS'). The stock of SDS is transferred to their Barabanki unit where it is wholly consumed in the manufacture of specified chemicals. Under the order of the adjudicating authority the differential duty demand of Rs.14,89,61,104.00 was confirmed on the entire quantity of SDS D transferred from Captainganj unit to Barabanki unit during the period from April 1994 to December 1999. Aggrieved by the above, the assessee filed the appeal before CEGAT.

Show cause notices were issued for different periods as follows:

| E | <u>S.No.</u> | <u>Show cause notice No.</u> | <u>Dt. Period</u> | <u>Differential duty</u> |
|---|--------------|--|--------------------------|--------------------------|
| | 1. | C.No.VI(MP) Demand(12) ADJ -116/98/3149 dt.26.3.99 -SCN No.12/Commnr.-AUD- 99/26.3.99 | April, 94 to Feb., 99 | Rs.14,59,49,158.65 |
| F | 2. | C.No.20 CE/Somaiya/SBZ/99 /550 dt. 31.8.99 | March, 99 to July, 99 | Rs.25,12,528/- |
| | 3. | C.No.20-CE/Somaiya/SBZ/61 dt. 18.1.2000 | August, 99 to Dec, 99 | Rs.4,99,417/- |

G 3. Excise duty was levied on SDS for industrial consumption w.e.f. 1.3.94. The respondents were paying excise duty at the time of transferring the stock of SDS to their Barabanki unit and modvat credit of the duty paid was availed in the Barabanki unit. The assessable value had been

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COMMNR. OF CENTRAL EXCISE, ALLAHABAD v. M/S. 1071
SOMAIYA ORGANICS (INDIA) LTD. [PASAYAT, J.]

arrived at by the respondents on costing basis in terms of Rule 6(b)(ii) of the Central Excise Valuation Rules, 1975 (in short 'Valuation Rules') during the relevant period. In the show cause notice, it was alleged that the assessable value has to be fixed in terms of Rule 6(b)(i) and not under Rule 6(b)(ii). It was then proposed to fix the assessable value on the basis of the price at which SDS was sold by the following manufacturers for different years:-

| Period | Other manufacturers Messrs | Applicable date per ltr./Bl. | Value |
|---------|-------------------------------------|---------------------------------|----------|
| 1994-95 | Saraya Distillery Gorakhpur | 13.6.1994 | Rs.20.00 |
| 1995-96 | -do- | 20.6.1995 | Rs.12.90 |
| 1996-97 | -do- | 10.3.1997 | Rs.14.00 |
| 1997-98 | -do- | 20.11.1997 | Rs.14.75 |
| 4/98 to | | | |
| 2/99 | Kisan Sahkari Chini Mills, Ghosi | 1.12.1998 | Rs.15.50 |
| 3/99 to | | | |
| 7/99 | -do- | 20.3.1999 | Rs.14.25 |
| 8/99 to | | | |
| 12/99 | -do- | 10/99 | Rs.14.25 |

4. Thereafter, by a corrigendum dated 14.1.2000 sale price fixed at Rs.14.25 was corrected as Rs.15/-. On this basis, the differential duty demand, as mentioned, was made. The respondents contended before the adjudicating authority that the entire quantity of SDS manufactured at its distillery is being consumed at Barabanki unit for manufacture of specified articles. Molasses which is the major raw material for manufacture of SDS was obtained by the respondents at controlled rate in terms of the provision of U.P. Molasses Control Order, 1964 but other distilleries manufacturing Ethyl Alcohol for non-specified purposes had to purchase molasses at market determined prices. Therefore, there could be no comparison between the cost of production of SDS by the

A respondents and M/s. Saraiya Distillery, one of the manufacturers whose selling price had been relied upon in the show cause notice. Respondents determined the assessable value of SDS for the purpose of Section 4(1)(b) of the Central Excise Act, 1944 (in short the 'Act') on costing basis as it had no sale of SDS. The cost fixation was undertaken annually on the basis of the previous year's Balance Sheet for determining the value and discharge duty since the Balance Sheets are finalised only in the month of September for the year ending on 31st March. On receipt of the finalised Balance Sheet in September, the value determined on the basis of the earlier Balance Sheet was being revised. If the revision was upward, differential duty was discharged on the increased value. The price declarations filed effective from 1.3.1994 along with the questionnaire was approved by the Central Excise authorities. With effect from 1.4.1994, when Rule 173C of the Central Excise Rules, 1944 (in short the 'Rules') was amended the respondents filed the declarations under Rule 173C also.

D 5. The actual value on which the respondents cleared SDS during the period in question is as under:

| | | |
|---|----------------|-------------------|
| | 1994-95 | Rs.5.85 per ltr. |
| | 1995-96 | Rs.5.50 per ltr. |
| E | 1996-97 | Rs.5.50 per ltr. |
| | 4/97 to 11/97 | Rs.8.30 per ltr. |
| | 12/97 to 11/97 | Rs.12.41 per ltr. |
| F | 4/98 to 3/99 | Rs.13.52 per ltr. |
| | 4/99 to 7/99 | Rs.17.43 per ltr. |
| | 8/99 to 12/99 | Rs.17.43 per ltr. |

G 6. The respondents further contended that proposal in the show cause notice to fix the assessable value on the basis of the highest price at which one of the manufacturers sold SDS on particular date is totally illegal. It was further contended that for the period from April 1999 to December 1999 the respondents had paid on a higher assessable value than what was proposed in the show cause notice. Therefore, there is no

COMMNR. OF CENTRAL EXCISE, ALLAHABAD v. M/S. 1073
SOMAIYA ORGANICS (INDIA) LTD. [PASAYAT, J.]

basis for demanding differential duty during this period. The adjudicating authority did not accept the contentions raised by the respondents. The Commissioner of Central Excise, therefore, confirmed the differential duty demand of Rs. 14,89,61,104/- and imposed penalty amount equal to the duty demand by invoking Section 11AC

7. Considering the rival submissions CEGAT held as follows:

“There is no reason given by the Revenue as to on what basis the highest price of particular day in each year was taken into consideration for the purpose of fixing the assessable value in the case of the SDS cleared by the appellant. Choice of the highest price on a particular day will not satisfy the requirement of nearest ascertainable equivalent. Section 4(1)(b) provides that “where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed”. Therefore, even when clause (i) of sub-rule (b) of Rule 6 is applied, the endeavour must be to determine nearest ascertainable equivalent. We have no hesitation to hold that such an exercise has not been done in the present case. The department adopting the highest price is unsustainable in law”.

8. It is to be noted that while revenue relies on Rule 6(b)(i) of Valuation Rules the assessee relies on Rule 6(b)(ii). Section 4(1)(a) of the Act is applicable when the buyer is not a related person. Section 4(1)(b) relates to a case where the price is not ascertainable.

9. Stand of the appellant is that comparable price is available because there were two units at Captainganj and Barabanki. The assessee tried to make a distinction by submitting that the product was captively consumed. CEGAT appears to have taken the stand that one day high price cannot be applied even though Rule 6(b)(i) may apply. There is no dispute relating to the period from April 1999 to December 1999. For the period from April 1994 to February, 1999 the same was covered by a show cause notice dated 26.3.1999 and for the period March 1999 it is covered by a show cause notice dated 31.8.1999. CEGAT had come to the conclusion that no principle has been formulated and expressly no

A reason has been given. The stress is on nearly ascertainable equivalent as the expression 'ascertainable' means ascertained. There may be different rates for different periods. There may be cases where even for the periods the highest and the average prices may be taken. The proviso to Rule 6 (b) (i) is relevant:

B "on the value of the comparable goods produced or manufactured by the assessee or by any other assessee:

C Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods"

D 10. It appears that the CEGAT has not determined what would be the appropriate price. By merely discarding the price fixed by the assessing authority the issue does not get solved. What was required to be seen is as to whether there was any ascertainable price and on what basis it can be ascertained. Even for a period the highest or the average can be taken. That has to be done on the basis of the judicial discretion of the assessing officer which can also be decided by the appellate authority by finding out whether there is any rationale in the fixation done. In that view of the matter, the approach of the CEGAT is not legally tenable. We set aside the order of CEGAT and remit to CESTAT, which has come in place of CEGAT, for fresh consideration.

F 11. The appeal is allowed to the aforesaid extent. There will be no order as to costs.

K.K.T.

Appeal Partly allowed.