(2010) 12 SC CK 0056

Supreme Court of India

Case No: Civil Appeal No''s. 1921 and 1923 of 2003

Commnr. of Central Excise, Chandigarh	APPELLANT
Vs	
Pepsi Foods Ltd.	RESPONDENT

Date of Decision: Dec. 10, 2010

Acts Referred:

- Central Excise Rules, 1944 - Rule 173(C)
- Central Excise Tariff Act, 1985 - Section 4(1), 4(2), 4(4)
- Central Excises and Salt Act, 1944 - Section 11A(2), 11AC, 35(L)

Citation: (2011) 183 ECR 180 : (2010) 260 ELT 481 : (2011) 1 SCC 601 : (2011) 30 STT 284

Hon'ble Judges: H. L. Dattu, J; D. K. Jain, J; Asok Kumar Ganguly, J

Bench: Full Bench

Advocate: R.P. Bhatt, D.K. Thakur, Rashmi Malhotra, Vibhav Misra, B.K. Prasad and Anil Katiyar, for the Appellant; B.L. Narsimhan and Alok Yadav, for the Respondent

Final Decision: Allowed

Judgement

Asok Kumar Ganguly, J.

These statutory appeals (Civil Appeal Nos. 1921-1923 of 2003) have been filed u/s 35L(b) of the Central Excise Act, 1944 (the Act), against the judgment and final Order No. 353-355/2002-A, dated 8th August, 2002, passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Bench-A, New Delhi.

2. The material facts are that the Respondent-Assessee, M/s. Pepsi Foods Ltd. is engaged, inter alia, in the manufacture of edibles, marketed under the names of Potato Chips, Baked Cheetos Balls, Monster Munch, etc. These are covered under Chapter Sub-Headings 2001.10 and 1904.10 of the Central Excise Tariff Act, 1985 (Act 5 of 1986). Uptill 12th January, 1998, as much as 96% of these products manufactured by the Respondent, were sold to M/s. Frito-Lay India, a ''related person'', and the balance of 4% were sold to independent wholesale buyers. From

12th January, 1998, the sale pattern between the two was changed, wherein M/s. Pepsi Foods Ltd. started manufacturing the aforesaid products on behalf of M/s. Frito-Lay India.

3. By a communication dated 15th December, 1997 addressed to the Assistant Commissioner, Central Excise, Division Jalandhar, the Respondent stated that it had been paying excise duty on its manufactured excisable goods after taking into account inter alia, the costs of raw materials, packing materials, conversions and their profit margin. Subsequently it calculated and paid the differential duty, on the price at which the final products were sold by M/s. Frito-Lay India to its wholesale dealers. It enclosed certificate of a chartered accountant in support of its calculations. In its submission of Annexure-A as required under Rule 173C (3A) of Central Excise Rules, 1944, it mentioned that the sale of the products occurred at its factory gate. It was also evident from the letter that the final products were entering the market stream when they were being sold by M/s. Frito-Lay India to their wholesale dealers.

4. The Revenue, however, accepted the incidence of sale at the time of purchase of the final products by the whole sellers from M/s. Frito-Lay India and not, as submitted by the Respondent-Assessee, at the factory gate. Resultantly, a show-cause notice dated 13th November, 1998 was issued to the Respondent and to that the Respondent showed cause stating inter alia that the sale to the whole sellers was being effected from the depot of the related person, viz. M/s. Frito-Lay India. Dissatisfied with the reply, the Revenue demanded duty of Rs. 12,26,215/-.

5. Aggrieved, the Respondent moved the Commissioner of Central Excise (Appeals), Chandigarh. The Commissioner, however, held that the freight charges arising between the factory of the Respondent and the depot of the related person were to be included in the sale price as the place of removal of the goods was the depot of the related person.

6. Aggrieved thereby, the Respondent appealed to the Central Excise and Gold (Control) Appellate Tribunal, New Delhi. The Tribunal overruled the decision of the Appellate Authority inter alia stating that "...Merely because a deeming provision as contained in the 3rd proviso has to be applied regarding the price of the goods sold in the course of wholesale trade to a related person, it cannot be contended that there was no sale at all to the related person at the factory gate, as alleged by the Revenue. The place of removal, therefore, continues to be the Assessee''s factory. The depot premises of the related person from where the goods are sold cannot be treated as place of removal for the purpose of Section 4(4)(b). Therefore, the Appellant is fully justified in contending that the cost of transportation from the place of removal, namely, factory to the place of delivery shall be excluded from the price to arrive at the assessable value in terms of Section 4(2)."

7. Thus aggrieved, the Revenue appealed before this Court u/s 35L(b) of the Act.

8. It is an admitted fact here that M/s. Frito-Lay is "related person" of the M/s. Pepsi Foods Ltd. (Snacks Foods Division). The expression "related person" has been specifically defined in Section 4(4)(c):

4. Valuation of excisable goods for purposes of charging of duty of excise.-

(1) ...

(2) ...

(3) ...

(4) For the purposes of this section, -

(a) ...

(b) ...

(c) "related person" means a person who is so associated with the Assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the Assessee, and any sub-distributor of such distributor.

Explanation.- In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956 (1 of 1956).

9. The transaction between M/s. Pepsi Foods Ltd. and M/s. Frito-Lay India has to be understood as one where sale price cannot be known. In situations where the Assessee sold its goods to a related person, it was prudent to understand that the price in such a sale would be deliberately understated so as to evade taxation within the scheme of the Act. It was to dissuade such sales that the legislature had decided to deem the price of the goods at the time of their sale by the related persons to wholesale market. The ''normal price'' is mentioned in Section 4(1)(a) of the Act. The provision of Section 4(1)(a) is 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 value, such value shall, subject to the other provisions of this section, be deemed to be-

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the Assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that-

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the Assessee at different prices to different classes of

buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in Clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the Assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in Clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the Assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the Assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

10. In these appeals the Revenue contends that in a sale of excisable goods between an Assessee and a related person u/s 4(1)(a) (iii) of the Act (as it was prior to its amendment in 2000) the ''normal price'' for the sale is deemed to be the one at which the goods are ordinarily sold by the ''related person'' to the whole sellers. Therefore, the place of removal for such goods should be the depot of the related person from where the goods are sold to the whole sellers, instead of the factory gate of the Assessee. The Revenue contends that an obvious corollary to this is that the freight charges so arising between the factory gate of the Assessee and the place of removal at the depot of the related person should constitute the value of the goods for the purposes of computation of excise duty. It further contends that since, the ''place of removal'' is not the Assessee''s factory gate but rather the depot of the related person, the price is known, only at the price at which goods are sold to whole sellers by the related person.

11. Opposing the same, the learned Counsel for the Respondent contended that M/s. Frito Lay India is not a subsidiary of the Respondent. The brand names of the products are held by Pepsi Co. Inc. USA. Respondent''s case is that 96% of the products manufactured by it are sold to M/s. Frito Lay India and only 4% to independent whole sellers. Originally the assessable value of the items manufactured by the Respondent was arrived at on the basis of price at which the Respondent sold them to M/s. Frito Lay India by taking into account the costs of raw materials, packing materials, conversions and the profit margin. Their further case is that Pepsi Co. Inc. USA is a holding company and the Respondent and M/s. Frito Lay India are neither holding companies nor subsidiary companies inter se. The Respondent wants the assessment to be made at the price at which M/s. Frito Lay India sold the products to its wholesale dealers. That is why they claim deduction

towards freight and transportation charges from the factory gate of the Respondent to the depot of M/s. Frito Lay India. The learned Counsel for the Respondent also submitted that the transaction between Respondent and M/s. Frito Lay India was on a jobwork basis and that the assessment of value should be guided by the principles laid down in the case of 286906 .

12. The learned Counsel for the Appellant submits that the instant case is covered by the three judge Bench decision of this Court in 288804 . It appears that in the instant case the period in question is between 1st November 1997 and 28th February 1999. Almost the same period was considered by this Court in its decision in Akay Cosmetics (supra). In the present case it is not disputed by the Respondent that M/s. Frito Lay India is its related person u/s 4(4)(c). The facts discussed in Akay Cosmetics (supra) substantially resemble the facts of this case, except of course the difference in the items manufactured. In para 25 of Akay Cosmetics (supra) (page 774 of the report) this Court formulated the key question, which is: "how and when the assessable value of the manufactured product is to be determined?

13. Having posed that question, the learned judges answered the same in para 28, (page 777 of the report) inter alia, holding as follows:

Under Section 4(2), it was provided that where the price of the excisable product for delivery at the place of removal was not known and the value was determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery had to be excluded from such a price. The reason is important. Section 4(2) is a residuary section and applied only to cases where the price at the place of removal was not known and the taxable value of the excisable product had to be determined with reference to the price for delivery (sale) at a place other than the price of removal. u/s 4(2), the cost of transportation from the place of removal to the place of delivery was deductible, provided that the assessable value (taxable value) was not known at the factory gate and had to be determined with reference to another place. If the goods were manufactured at place "X" but the assessable value was determined with reference to place "Y", the cost of transportation had to be deducted.

14. In coming to the said conclusion, the learned judges relied on this Court''s decision in Union of India and Ors. v. Bombay Tyre International Limited and Ors. (1984) 1 SCC 467. In para 31 of Akay Cosmetics (supra), the learned judges summed up the essence of the question by saying, inter alia, "therefore the article became an object of assessment when it was sold by the manufacturer."

15. It is not in dispute in the instant case Section 4(2) does not apply. What applies is the provision of Section 4(1)(a)(iii) as it stood at the relevant time. The rationale of the proviso (iii) was explained in Akay Cosmetics (supra) as follows:

... The implication of the manufacturer, the Assessee and the buyer being related to each other was that the price charged to the related person was presumed to be

understated and to dissuade such sales, the legislature had introduced the said proviso as anti-evasion measure. Hence, to give deductions to the Assessee as claimed, would defeat the very object of the third proviso. Under all three provisos, the manufacturer remained the Assessee, the "object" of the assessment remained the same and neither the identity of the manufacturer nor the identity of the excisable goods underwent any change. Even the place of removal remained unchanged, under the third proviso, the basis of assessable value alone changed when the price of the related person was adopted as the basis of the valuation. Therefore, proviso (iii) did not break the nexus between price and value u/s 4(1)(a) of the Act." (Para 33, page 779 of the report)

16. The learned Counsel for the Respondent tried to distinguish the present case from the ratio of Akay Cosmetics (supra) by relying on the facts in that case by referring to paras 2 and 7 of the judgment in Akay Cosmetics (supra). The learned Counsel submitted that in Akay Cosmetics (supra), freight charges claimed was the one between the depot of the related person to the place of the unrelated dealer. Obviously there are some factual differences that are noted in para 2 of the said judgment, but that does not impinge upon the ratio on the interpretation of Section 4(1)(a)(iii) of the Act which is quoted above.

17. Therefore, the finding of the Customs, Excise and Gold (Control) Appellate Tribunal, Bench-A, New Delhi, which is quoted above and which upholds the contention of the Respondent that it is justified in claiming exclusion of freight charges arising between the factory gate of the Respondent to the depot of the related person, cannot be sustained. This Court finds that in the facts and circumstances of this case, Section 4(2) is not applicable. This Court, therefore, affirms the order-in-original but with a rider.

18. In the instant case in the order-in-original a penalty has been imposed which is equal to the amount of duty. Such penalty has been imposed in exercise of power u/s 11AC of the Act. Section 11AC of the Act as it stood at the relevant point of time runs as under:

11AC. Where any duty of excise has not been levied or paid or has been short- levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under Sub-section (2) of Section 11A, shall also be liable to pay a penalty equal to the duty so determined:

Provided that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account.

19. From a perusal of the aforesaid section, especially the underlined portion, it is clear that in order to attract the penalty provision u/s 11AC, criminal intent or ''mens rea'' is a necessary constituent. In the reply to the show cause notice the stand which has been taken by the Respondent is that it has been paying the duty and there is no malafide intention on its part to evade the payment of duty. The further stand is that the goods were cleared from the factory only on payment of duty. This stand which has been taken in the reply to the show cause notices was not found to be incorrect in the order-in-original. As such the imposition of penalty of the equal amount of duty under the order-in-original cannot be sustained.

20. It is well settled that when the statutes create an offence and an ingredient of the offence is a deliberate attempt to evade duty either by fraud or misrepresentation, the statute requires ''mens rea'' as a necessary constituent of such an offence. But when factually no fraud or suppression or mis- statement is alleged by the revenue against the Respondent in the show cause notice the imposition of penalty u/s 11AC is wholly impermissible.

21. The Court in this connection may remind itself of the fundamental principle "that an accused person cannot be convicted without proof of mens rea, unless from a consideration of the terms of the statute and other relevant circumstances it clearly appears that that must have been the intention of Parliament." (See the decision of the House of Lords in Vane v. Yiannopoullos (1964) 3 All ER 820, and the opinion of Lord Reid at page 823).

22. In Vane (supra), the word ''knowingly'' was used in the statute as a condition of creating liability.

23. The aforesaid dictum of Lord Reid has been followed by this Court also. A reference in this connection may be made to the decision in 266611 . This Court considering Section 11AC of the Act held in para 19 at page 12 of the report as follows:

19. From the aforesaid discussion it is clear that penalty u/s 11AC, as the word suggests, is punishment for an act of deliberate deception by the Assessee with the intent to evade duty by adopting any of the means mentioned in the section.

24. Following the aforesaid well settled principles, this Court quashes that part of the order-in-original which imposes penalty without any finding of fraud or mis-statement against the Respondent. This part of the order-in-original is quashed. Save as aforesaid, the order-in-original is upheld. These appeals filed by the revenue are allowed to the extent indicated above. No costs.