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C.A.No. 2228 OF 1998

ITEM No.101 (Part-Heard)Court No.5

SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No.2228/1998

M/S GTC INDUSTRIES LTD.

Appellant (s)

VERSUS

COMMNR. OF CENT. EXCISE, BARODA

Respondent (s)

(With office report)

Date : 13/01/2004 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.N. VARIAVA

HON'BLE MR. JUSTICE H.K. SEMA

For Appellant (s)Ms. Nisha Bagchi, Adv.
Mrs. Rohini Nath,Adv.
Mr.Umesh Kumar Khaitan, Adv.

For Respondent (s)Mr. Ranjit Kumar, Sr. Adv.
Mr. Sanjiv Sen, Adv.
Mr. B. Krishna Prasad, Adv.

UPON hearing counsel the Court made the following
O R D E R

Heard parties for one and a half hour.

The appeal stands dismissed in terms of the signed order. There will, however, be no order as to costs.

(K.K. Chawla)
Court Master

(Prem Prakash)
Court Master

[Signed order is placed on the file]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2228 OF 1998

M/S GTC INDUSTRIES LTD.

Appellant (s)

VERSUS

COMMNR. OF CENT. EXCISE, BARODA

Respondent (s)

O R D E R

This Appeal is against the Order dated 12th January, 1998 of the Customs, Excise & Gold (Contr ol) Appellate Tribunal.
Briefly stated, the facts are as follows:

Prior to 1st March, 1979, duty was levied on un-manufactured tobacco. With effect from 1st March, 1979, that duty was withdrawn. A Notification bearing No.30/79-CE dated 1st March, 1979 was issued which, inter alia, provided as follows:

"In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods) of Special Importance) Act, 1957 (58 of 1957) (hereinafter referred to as the Additional Duties of Excise Act), the Central Government hereby exempts cigarettes of the description specified in column (1) of the Table hereto annexed, and falling under sub-item II (2) of Item No.4 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) (hereinafter referred to as the Central Excises Act), from so much of the duty of excise leviable thereon both under the Central Excises Act and the Additional Duties of Excise Act, as is in excess of the duty specified in the corresponding entry in column (2) thereof.

THE TABLE

Description
Rate of duty

(1)
(2)
Cigarettes of which the value per one thousand -

(i) does not exceed rupees ten
One hundred and fifty per cent. ad valorem plus twenty-one rupees per one thousand

(ii) exceeds rupees ten but does not exceed rupees thirty-five
One hundred and fifty per cent. ad valorem plus ten per cent. ad valorem for every additional rupee or part thereof in excess of a value of rupees ten per one thousand, plus twenty-one rupees per one thousand.

(iii) exceeds rupees thirty-five
Four hundred per cent. ad valorem plus twenty-one rupees per one thousand:

Provided that -

(i) if it is proved to the satisfaction of an officer not below the rank of an Assistant Collector of Central Excise that any cigarettes have been manufactured wholly from unmanufactured tobacco falling under sub-item I (1) or sub-item I (4) of Item No.4 of the First Schedule to the Central Excises Act, on which the appropriate amount of duty of excise as leviable thereon on or before the 28th February, 1979 both under the Central Excises Act and the Additional Duties of Excise Act has already been paid, the duty of excise leviable on such cigarettes as specified in the Table annexed to this notification, shall be reduced by an amount equivalent to the amount calculated at the rate of five rupees and fifty paise per one thousand cigarettes;

The Appellants claim that in respect of cigarettes manufactured from duty paid tobacco, they were entitled to reduce the amount of duty calculated at the rate of Rs.5.50/- per thousand cigarettes at the stage when the duty is payable. According to the Respondent the reduction of Rs.5.50/- is to be allowed at the stage when the assessable value is to be worked out.

All the authorities below have held against the Appellants. It has been held that the reduction of Rs.5.50/- has to be at the stage when the assessable value is being worked out.

It is submitted that on this interpretation full effect to the reduction of Rs.5.50/- is not being allowed. It is submitted that on such an interpretation the manufacturer effectively gets benefit of only Rs.1.57. In support of this submission reliance is placed on calculations which read as follows:-

Determination of Assessable value of Cigarettes from selling price by Manufacturer to W/B by using duty paid raw-tobacco or fully exempt raw-tobacco

Narration

GTC/Department's point

GTC's point of view

Department's point of view

(Cigarettes made out of non-duty paid tobacco)

(Cigarettes made out of duty paid tobacco)

(Cigarettes made out of duty paid tobacco)

Rupees
Rupees
Rupees

A
W/B price inclusive of PME for 1000 Cig.
85.600
85.600
85.600

B
Les 0.72% PME
0.616
0.616
0.616

C
CUM DUTY PRICE
84.984
84.984
84.984

D
Specific Rate of Duty
21.000
21.000
15.500
(Rs.21-Rs.5.5)*

E
AV+ADVALOREM
63.984
63.984
69.484

F
Assessable Value of 1000 Cig.
18.281
18.281
19.852

G
Advalorem Duty @ 250%
45.703
45.703
49.632

H
Duty payable on 1000 cig. i.e. D + G
66.703
66.703

65.132

5.500

61.203

*(1) Duty on raw tobacco was Rs.5.50 per kg. (2) from 1 kg. Tobacco, approx. 1000 cigarettes are manufactured.

On behalf of the Appellants it is submitted that the Notification has to be read in terms of Section 4 (4)(d) of the Central Excise Act which reads 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 :-

.....

(4)For the purposes of this section, -

(d)"value" in relation to any excisable goods:-

.....

[Explanation: For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of -

(a)the effective duty of excise payable on such goods under this Act; and

(b)the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods,

and the effective duty of excise on such goods under each Act referred to in clause (a) or under clause (b) shall be, -

(i)in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, [or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid] on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii)in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods]."

It was submitted that Notifications may be of different types. It was submitted that there can be a Notification which provides for exemption. It was submitted that there could also be a Notification which reduces the rate of duty. It was submitted that Explanation (1) to Section 4(4)(d) specifically provides that the duty payable is to be reduced to that set out in the Notification granting exemption provided the Notification does not grant exemption for giving credit or deduces the rate of duty. It was submitted that as per Explanation 1 to Section 4(4)(d) Notifications which grant exemption are to be taken into consideration but Notifications reducing rate of duty are not to be considered for arriving at the assessable value. It is submitted therefore that the first portion of Notification bearing No. 30/79 provides exemption and thus this must be taken into consideration in arriving at the assessable value. It is submitted that thus the higher slab would be 400% plus Rs. 21/-. According to the Appellants the sum of Rs. 21/- must, therefore, be deducted whilst calculating the assessable value and thereafter, at the time of levy of duty, a sum of Rs. 5.50/- has to be deducted.

In support of their submission reliance was placed upon the case in Kirloskar Brothers Ltd. v. Union of India reported in 1992 (59) E.L.T. 3 (S.C.). In this case it was held that the deduction had to be made at the time of payment of duty and not at the time of arriving at the assessable value. However this finding is based upon the wording of the exemption Notification in that case which read as follows:-

"Provided that:-

(i)Where the aforesaid pumps on which the duty of excise is leviable are fitted with duty paid internal combustion engine falling under sub-item (ii) of Item No.29 or Electric motors falli

ng under sub-item 2 (ii) of Item No.30 of the First Schedule to the aforesaid Act such power driven pumps shall also be exempted from so much of the duty of excise leviable thereon as is equivalent to the duty of excise leviable thereon as is equivalent to the duty of excise or the additional excise duty under Section 2A of the Indian Tariff Act, 1934 (32 of 1934) as the case may be already paid on such internal combustion engine or Electric Motors."

The wording of that Notification were entirely different from the wording of the Notification which is under consideration in this case. In this case the wording of the Notification No.30 /79-CE dated 1st March, 1979 is very clear. It exempts cigarettes from duty of excise leviable thereon as is in excess of duty specified in column 2 of the table. Thus, as per this Notification the duty has to be as specified in column 2 of the table. The wording of the proviso is also very clear. In respect of cigarettes manufactured out of duty paid tobacco the duty of excise as specified in the table would stand reduced. Thus whatever rate is mentioned in the table gets reduced by a sum of Rs.5.50 per thousand cigarettes. As a result in respect of cigarettes manufactured out of duty paid tobacco the rate of duty would not be 400% plus Rs.21/- but would be 400% plus Rs.15.50/-.

It could not be denied that the rates specified in column 2 of the table were rates which were to be taken into consideration for working out the assessable value of the goods. Thus, as per this Notification, in respect of cigarettes manufactured from duty paid tobacco, the rate mentioned in the table would be 400% plus Rs.15.50/-. This is the rate which is to be taken into consideration for working out the assessable value.

Even otherwise, in our view, this question is fully covered by the decision of this Court in the case of Asstt. Collector of Central Excise And Others v. Bata India Ltd. reported in (1996) 4 SCC 563. In this case in respect of an identical Notification an identical submission was negated and it has been held as follows:-

"6.We are unable to uphold this contention because the normal price charged by the manufacturer at the time and place of removal of goods to the wholesaler is treated by the Act to be the value of the goods. Sub-section 1(a) of Section 4 makes it clear that "such value shall ... be deemed to be 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...". Therefore, the normal wholesale price of the goods must be deemed to be the value of the goods. It is not necessary to refer to the various types of prices that may be charged from the buyer set out in the proviso to Section 4(1)(a). But there cannot be any dispute that excise duty will be levied on the value of the excisable goods and the basic rule is that the normal wholesale price is the value of the goods. The normal wholesale price is the cum-duty price which the wholesaler has to pay to the manufacturer. The cost of production, estimated profit and the taxes on manufacture and sale of the goods are usually included in the wholesale price of the goods. It is only because the wholesale price is usually the cum-duty price that sub-section (4)(d) lays down that 'value' will not include duty of excise, sales tax and other taxes, if any, payable on the goods. But if a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty at all. He is really increasing the profit element included in the wholesale price in another guise. In such a situation, there cannot be any question of deduction of duty payable on the goods from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price.

8.Clause (d) of sub-section (4) of Section 4 lays down that 'value' will include the cost of packing of the goods when the goods are sold in packed condition in certain cases. Sub-clause (ii) of clause (d) provides that the value will not include "the amount of duty of excise..., if any, payable on such goods". Otherwise, there will be tax upon the amount of tax which forms part of the price of the goods. But in a case where the wholesale price is not inclusive of any duty payable on the goods, then no question of deduction of any duty for determination of value will arise. Sub-clause (ii) of clause (d) specifically states that what will not be included in the value "is the amount of duty of excise, ... if any, payable on such goods". The phrase "if any" signifies that if no duty is payable, nothing will be deducted from the wholesale price. It is only when excise duty is actually payable that the duty element can be excluded from the wholesale price. Sabyasachi Mukharji, J. (as his Lordship then was) pointed out in the case of Hindustan Polymers v. CCE (1989) 4 SCC 323, that the two sub-clauses of Section 4(4)(d) dealt with abatements or deductions in respect of actual burdens, either by way of an expenditure or discount, borne by the assessee. If the assessee has not allowed any trade discount, he cannot ask for deduction of the same from his price. If he does not have to pay any tax as a matter of fact, he cannot ask for it to be deducted from the wholesale price for calculating the value of the goods. In such a case, the normal price, that is the wholesale price will be deemed to be the value of the goods.

10.For the purpose of excise duty, the manufacturer has to submit a price list to the excise authority before removal of the goods from the factory. He has to indicate in the forms and documents relating to assessment, the value of the goods and the amount of duty which will form

part of the prices at which such goods are to be sold. Costs and estimated profits are included in the price of the goods. Inclusion of the anticipated amount of the excise duty in the wholesale price is the last part of the pricing mechanism. The manufacturer has to calculate the value on which duty would be payable, estimate the amount of duty payable and add that amount to the value of the goods to arrive at the wholesale price. It is on the value of the goods and not the cum-duty price that the duty is paid to the excise authority before the clearance of the goods. If, as in this case, before adding any amount by way of excise duty, the manufacturer found that the value of the footwear was Rs.60.00 per pair or less, no question of payment of excise duty could arise. There was no necessity to add anything on account of tax to raise the price of the goods to above Rs.60.00 per pair. The wholesale price of Rs.62.00, Rs.64.00 and Rs.66.00 given in the chart included costs, estimated profits, etc. but could not have included any amount by way of excise duty because footwear valued up to Rs.60.00 per pair was exempt from duty." (emphasis supplied)

This decision is not only binding on us but we are in full agreement with it. The duty element is only 400% plus Rs.15.50/- per one thousand cigarettes where they are manufactured out of duty paid tobacco. The Appellants do not have to pay Rs.21/- for such cigarettes. Thus, there can be no deduction of Rs.21/- at stage of working out the assessable value. In this view of the matter, we see no infirmity in the impugned Judgment. The Appeal stands dismissed. There will, however, be no order as to costs.

.....J.
(S.N. Variava)

.....J.
(H.K. Sema)
New Delhi;
January 13, 2004.