

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CIVIL APPEAL NOS.7187-7188 OF 2002

Commissioner of Central Excise, Kanpur

Appellant(s)

VERSUS

KOTHARI PRODUCTS LTD. & ANR.

Respondent(s)

(With appln(s) for stay and office report)

Date: 15/07/2008 These Petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN
HON'BLE MR. JUSTICE V.S. SIRPURKAR

For Appellant(s) Mr. K.Radhakrishnan, Sr. Adv.
Ms. Shweta Garg, Adv.for
Mr. P.Parmeswaran, Adv.

For Respondent(s) Mr. V.Lakshmikumaran, Adv.
Mr. Alok Yadav, Adv.for
Mr. Rajesh Kumar, Adv.

UPON hearing counsel the Court made the following
ORDER

The Appeals are dismissed in terms of the signed order.

(Parveen Kr. Chawla)
Court Master
[Signed Order is placed on the File]
IN THE SUPREME COURT OF INDIA

(Kanwal Singh)
Court Master

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7187-7188 OF 2002

Commissioner of Central Excise, Kanpur ..Appellant

versus

Kothari Products Ltd. & Another ..Respondent

ORDER

This Appeal has been filed by the revenue under Section 35(1)(b) of the Central Excise Act, 1944 against the judgment and final order dated 5.4.2002 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short 'the Tribunal') whereby the Tribunal has allowed the appeals filed by the assessee by setting aside the impugned

order passed by the Commissioner.

The issue involved in this appeal is regarding the correct assessable value of the respondent's products and the suppression of the said correct assessable value by the respondents.

Facts:

Respondents are engaged in the manufacture of Pan Masala falling under Chapter Sub heading 2106.00 of the first Schedule to the Central Excise Tariff Act, 1985 (for short 'the tariff Act'). According to the revenue, respondents were restoring to under valuation of goods for the purpose of payment of central excise duty during the period 01.01.1995 to 28.09.1996. They were issued a show cause notice dated 4.2.2000 asking them to show cause as to why central excise duty amounting to Rs.1,93,83,911/- may not be demanded under proviso to section 11A(1) of the Act and why penalty should not be imposed under Section 11-AC read with Rule 173Q of Central Excise Rules, 1944(for short 'the Rules'). They were also required to show cause as to why interest on duty so evaded should not be demanded under Section 11-AB of the Act on the ground that they were clearing the goods at different discounts and deductions varying from State to State which they termed as regional discounts during the relevant period. Sri Deepak Kothari, Managing Director of the company was also required to show cause as to why penalty should not be imposed upon him under Rule 209 of the Rules for his involvement in evasion of payment of central excise duty.

The authority-in-original confirmed the demand of central excise duty and penalty of equal amount was also imposed. It also imposed a penalty of Rs.1,00,000/- upon Sri Deepak Kothari under Rule 209-A of the Rules. It was also directed that the respondents shall pay interest on the amount of duty confirmed.

Being aggrieved by the order of authority-in-original, respondents filed appeals before the Tribunal. The Tribunal has set aside the order-in-original on the ground that the respondents were earlier issued seven show cause notices between March, 1994 to October, 1995 for the period August, 1993 to July, 1995. It was alleged in those show cause notices that different prices for dealers situated in different regions cannot be

considered as different class of buyers. It was alleged that all the dealers should be treated as the same class of buyers. Accordingly, differential duty was proposed to be demanded. Respondents resisted the show cause notices. The case of the respondents was that different prices for dealers situated in different regions is permissible in law. However, the Assistant commissioner confirmed the demands as proposed in the show cause notices.

Aggrieved against the order of the Assistant commissioner, respondents filed appeal before the Commissioner(Appeals), Allahabad. The Commissioner vide his order dated 28.11.1997 set aside the order passed by the Assistant commissioner and allowed the appeal. It was held as under:

"I have carefully gone through the case records, ground of appeal, submissions made during personal hearing and various case laws relied upon by the appellants. The appellants are engaged in the manufacture of Pan Masala falling under heading No.2106.00 of Central Excise Tariff Act, 1985. They sell the product directly from the factory to the dealers situated in different States/Regions. The appellants also stock transfer some quantity to the C & F. Agents situated in some of the States/Regions. The ultimate consumer price is uniform all over the country. The price to be charged by the whole sale buyer to the retailers is also uniform. In order to ensure that the wholesale buyers get a uniform discount, expressed as a percentage over the landed cost, as also to take care of the varying rates of Sales Tax prevalent in the respective States, the appellants fix the basic prices by working backwards from the wholesale price. In other words the appellants explained that from the wholesale prices, they exclude the margin to the dealer and thereafter the Sales Tax to be suffered by the dealer and thereafter deduct the freight element which is charged on equalised basis and also the turnover tax if any payable. Thus the basic price plus excise duty is arrived at. This is bifurcated into basic price (assessable value) and excise duty. Thus while raising the sale invoices for the goods sold, the appellants raise the invoices for basic price (assessable value), excise duty and the equalised freight. The Central Sales Tax is also charged on the same. The appellants do not charge and recover any other amount over and above the amounts indicated in the respective sales invoices. In the proceedings also there is no such allegation raised either in the show cause notice or in the order-in-original."

This order of the Commissioner(Appeals) was confirmed by the Tribunal in appeal. Revenue did not carry any further appeal meaning thereby that it has attained finality.

In the present case, the Tribunal has set aside the order-in-

original passed by the Commissioner and held that in view of the earlier decision given by the Tribunal, revenue was not justified in issuing a fresh show cause notice and the same was barred by limitation as well as by the principle of res judicata. The Tribunal has dismissed the appeal by observing thus:

"All the facts and the evidence relied upon in the present proceedings were fully known to the departmental authorities when the seven show cause notices were issued to the appellants demanding duty of Rs.6,09,75,357.23 covering the period from August, 1993 to July, 1995. There are no fresh investigation undertaken which would entail issue of this show cause notice. The relationship between the appellants and their dealers/consignment agents are covered by the agreements entered into by these parties. The agreements were with the department right from the beginning when the earlier proceedings were initiated against the appellants, yet at no stage it was either felt or alleged that the prices of the goods as declared in the invoices issued by the appellants under rule 52A at the time of removal of the goods from the factory to these places (Hyderabad, Bombay and Trichy) was not normal value/price of the goods and hence not acceptable. We are clear in our mind that the issue in the present appeal is fully covered by the decision of the Tribunal in the earlier proceedings in favour of the appellants and the Revenue are barred by limitation as well as on the principle of res judicata against raising the same issue again. Therefore, we allow these appeals by setting aside the impugned order passed by the Commissioner."

We agree with the order passed by the Tribunal that in view of the earlier order passed by the Tribunal which has attained finality, department was not justified in issuing the present show cause notice and the same is barred by limitation as well as by the principle of res judicata.

The Appeals are dismissed accordingly.

.....J.
[ASHOK BHAN]

NEW DELHI;
JULY 15, 2008

.....J.
[V.S.SIRPURKAR]