

MAHALAKSHMI GLASS WORKS (P) LTD.
v.
COLLECTOR OF CENTRAL EXCISE, BOMBAY

JULY 26, 1988

[SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.]

Central Excises and Salt Act, 1944: Section 4(4)(d)(i)—Assessing of value in relation to excisable goods—Whether price includes cost of packing—Arrangement between buyer and assessee for return of such packing is essential to determine the includibility.

The appellant manufactured various types of glass bottles which were assessed to duty under Item No. 23A of the Central Excise Tariff. It sold the glass bottles to the customers on wholesale basis packed in gunny bags and cartons which were durable and returnable. According to the appellant it has been paying duty on glass bottles on the basis of the assessable value which included the cost of packing material, namely, the gunny bags and cartons. The returned gunny bags and cartons were re-used by the appellant.

The appellant submitted for approval, price list in regard to the glass bottles manufactured by it showing separately the price at which the goods were actually sold and the cost of packing. Returning the price list duly approved, the Superintendent of Central Excise noted therein that the price should be inclusive of the cost of packing and packing charges in terms of Section 4(4)(d) of the Act. The appellant was paying duty on the cost of packing under protest and lodged claims of refund. As the appellant did not receive either the refund or any intimation rejecting the claim for refund, it filed a writ petition before the High Court which remanded the case back to the Assistant Collector for deciding the matter after giving the appellant fair and adequate opportunity to adduce evidence.

The Assistant Collector, after considering the written statements filed by the appellant rejected the appellant's claim for refund and demanded duty for the subsequent period. The appellant filed an appeal before the Collector of Central Excise (Appeals) which was rejected. The appeal filed before the Customs Excise and Gold (Control) Appellate Tribunal was also dismissed. This appeal under Section 35L of the Act is against the Tribunal's judgment.

Dismissing the appeal,

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HELD: 1. In view of the facts of the case, and the expressions used in Section 4(4)(d)(i) of the Act, there being no evidence of the agreement that the cartons and gunny bags were returnable, the Tribunal was right in coming to the conclusion that the cartons and gunny bags were not returnable in the accepted sense of the term. [592G, B-C]

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2.1 The appellant manufactured glass bottles and delivered these in two types of packing, namely, in open crates and in cartons and gunny bags. So far as the crates were concerned, the same belonged to the appellant. The customer was billed for the cost of glass bottles only. The crates were returnable to the appellant within 30 days. The revenue has not included the cost of such crates in the assessable value. The revenue has also not included the cost of packing, if any, supplied by the customer himself. There was no dispute about these packings. So far as the packings in cartons and gunny bags were concerned, it was noted by the Tribunal, that these belonged to the appellant but their cost was realised from the customer along with the cost of glass bottles. It cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned. Actual return or extent of return is not relevant. What is necessary is that if the buyer chooses to return the packing, the seller should be obliged to accept it and refund the stipulated amount. In this case there was no clause about returnability of the cartons and gunny bags. [591B-F]

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2.2. So far as the question of durability is concerned, there cannot be such controversy about it, but a question has been raised as to what is the meaning and connotation of the word "returnable". What Section 4(4)(d)(i) excludes from computation in cost of packing which is of a durable nature and is returnable by the buyer to the assessee. The packing must be one which is returnable by the buyer to the assessee and obviously that must be under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in that event, the words "by the buyer to the assessee" need not have found a place in the section; they would be superfluous. [592D-F]

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K. Radhakrishnaiah v. Inspector of Central Excise and others, [1987] 2 SCC 457 referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1037

H of 1988.

From the Order dated 14.12.1987 of the Customs Excise and Gold (Control) Appellate Tribunal New Delhi in Appeal No. 469/87-A Order No. 807/87-A.

S.N. Kackar, R.K. Habbu, P.G. Gokhale, Ms. Sushma Manchanda and B.R. Agarwal for the Appellant.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. This is an appeal under section 35 L of the Central Excises and Salt Act, 1944 (hereinafter called 'the Act'). The Superintendent of Central Excise returned the price list of the appellant with a covering letter stating that the price should include all the cost of packing and packing charges in terms of section 4(4)(d)(i) of the Act.

The appellant, a private limited company, manufactured various types of glass bottles which were assessed to duty under Item No. 23A of the Central Excise Tariff. According to the appellant, it sold to the customers on wholesale basis the glass bottles manufactured by it, packed in gunny bags and cartons which it purchases from the market. According to the appellant further, it has been paying duty on the value of the glass bottles including the cost of gunny bags or the cartons in which these are packed at the time of sale. It appears, therefore, according to the appellant, that it has been paying duty on glass bottles on the basis of the assessable value which included the costs of packing material, namely, the gunny bags and the cartons. The case of the appellant further is that the glass bottles are normally sold by it in the packing consisting of gunny bags which are durable and returnable and in several cases the gunny bags are returned by the buyers and are used by the appellant again for packing the glass bottles. It is only when the customers specifically ask for delivered in cartons instead of in gunny bags that the appellant delivered the glass bottles packed in cartons which are also durable and returnable. Towards the end of 1977 and early 1978 the appellant submitted price list in regard to the glass bottles manufactured by it for approval by showing separately the price at which such goods were actually sold in the course of "wholesale trade" and "the cost of packing". By his letter dated 10th January, 1978, the Superintendent of Central Excise returned to the appellant the price list duly approved but nothing therein that the price should be inclusive of the cost of packing and packing charges in terms of section 4(4)(d) of the Act. Section 4(4)(d)(i) as it stood read as follows:

- A “(4) For the purposes of this section:
- (a) ‘assessee’ means the person who is liable to pay the duty of excise under this Act and includes his agent;
- (b) ‘place of removal’ means—
- B (i) & (ii) x x x
- (c) x x x
- (d) ‘value’, in relation to any excisable goods,—
- C (i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.
- D Explanation:—In this sub-clause, ‘packing’ means the wrapper, container, bobbin, pirn, spool, reel or wrap beam or any other thing in which or on which the excisable goods are wrapped, contained or wound,”

E Since then the appellant has been paying duty on the cost of packing under protest and lodging claims of refund. The appellant, however, did not receive any refund nor any intimation that the claims of refund are or were being rejected. Various representations made by the appellant were in vain. The Assistant Collector of Central Excise wrote a letter dated 8th March, 1980 advising the appellant to file an appeal before the Appellate Collector if the appellant felt aggrieved.

F Feeling aggrieved, the appellant filed a writ petition under Article 226 of the Constitution in the High Court of Bombay. The High Court passed an interim order on 18th July, 1984 remanding the case back to the Assistant Collector of Central Excise and to decide the matter after giving the appellant fair and adequate opportunity to adduce evidence.

G After considering the written statements filed by the appellant, the Assistant Collector passed an order on 29th April, 1986 rejecting the appellant's refund claim for about Rs. 17 lakhs for the period from 1st January, 1978 to 31st December, 1980 and demanding duty for the period 6th January, 1981 to 31st December, 1985 in terms of the bank

H guarantees executed by the appellant. There was an appeal before the

Collector of Central Excise (Appeals). The Collector on 21st January, 1987 rejected the appeal and upheld the order of the Assistant Collector. The appellant filed an appeal before the Customs Excise and Gold (Control) Appellate Tribunal (hereinafter called 'CEGAT'). CEGAT dismissed the appeal. Aggrieved thereby the appellant filed the appeal in this Court.

The Tribunal noted that the appellant manufactured glass bottles. It delivered these in two types of packing, namely, in open crates and in cartons and gunny bags. So far as the crates were concerned, the same belonged to the appellant. The customer was billed for the cost of glass bottles only. The crates were returnable to the appellant within 30 days. The revenue has not included the cost of such crates in the assessable value. The revenue has also not included the cost of packing, if any, supplied by the customer himself. There was no dispute about these packings. So far as the packings in cartons and gunny bags were concerned, it was noted by the Tribunal, that these belonged to the appellant but their cost was realised from the customer along with the cost of glass bottles. The appellant's case was that these packings were also returnable and in many cases they were actually returned and re-used by the appellant. There was no evidence about the durability of the cartons and gunny bags but nothing to show that these were returnable. The position seems to be as follows: The Tribunal has rightly applied the returnability test. In *K. Radha Krishnaiah v. Inspector of Central Excise and others*, [1987] 2 S.C.C. 457, this Court observed that it cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned. Therefore, such arrangement has been established. Actual return or extent of return is not relevant. What is necessary is that if the buyer chooses to return the packing, the seller should be obliged to accept it and refund the stipulated amount. In this case after examining the facts, the Tribunal found that there was no clause about returnability of the cartons and gunny bags. The appellant invited the attention of the Tribunal to the following clause in their standard contractor. It reads as follows:

"6. All packing cases, other than such as may be supplied or paid for by buyer, shall be returnable in good order and condition within 30 days after receipt."

The Tribunal was of the view that the above clause related to "cases". It could have meant only the crates which belonged to the appellant and for which the customers had not paid anything. The

- A property in the crates having remained with the appellant all along, the buyers were naturally obliged to return them to their rightful owners. But that was not the case with the cartons and gunny bags. The buyers pay for these and the property in these pass on to the buyers. They could be asked to return them to the appellant only under a term of sale and on payment of the agreed amount and not for the free. No such contract or agreement was forthcoming. The Tribunal was not convinced that in the normal course of business anyone could be asked to part with its property, and in addition incur return freight therefor too for nothing. In those circumstances, the Tribunal held that the cartons and gunny bags were not returnable in the accepted sense of the term. The Tribunal further noted that since the statute insisted on the packing being returnable, in addition to being durable, the authorities are bound to see whether the transaction fulfilled the tests of returnability as per the Supreme Court and High Court judgments.
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In that view of the matter, the Tribunal dismissed the appeal.

- D As noted above, this Court has considered the meaning of the expression "returnable" in the Section in *K. Radha Krishnaiah's* case (supra). This Court held that so far as the question of durability is concerned, there cannot be such controversy about it, but a question has been raised as to what is the meaning and connotation of the word "returnable". Does it mean physically capable of being returned or does it postulate an arrangement under which the packing is returnable. While interpreting this word, we must bear in mind that what section 4(4)(d)(i) excludes from computation is cost of packing which is of a durable nature and is "returnable by the buyer to the assessee". The packing must be one which is returnable by the buyer to the assessee and obviously that must be under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in that event, the words "by the buyer to the assessee" need not have found a place in the section; they would be superfluous.
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- G In that view of the matter we are of the opinion that in the facts found and the expressions used in section 4(4)(d)(i) of the Act which have been set out hereinbefore, there being no evidence of the agreement that the cartons and gunny bags were returnable, we are of the opinion that the Tribunal came to the correct conclusion. This appeal fails and is rejected accordingly.