CASE NO.:
Appeal (civil) 43-44 of 1998

PETITIONER:
M/s Alembic Glass Industries Ltd.

RESPONDENT:
The Commissioner of Central Excise

DATE OF JUDGMENT: 14/08/2006

BENCH:
ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T
(WITH CIVIL APPEAL NOS.4234-4247/1999)

ARIJIT PASAYAT, J.

Challenge in these appeals is to the orders passed by the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Bombay (in short 'CEGAT'). While appellate order dated 13.6.1997 is the subject-matter of challenge in Civil Appeal No.43 of 1998, the other appeal relates to the order dated 28.11.1997 passed on an application for rectification of errors filed by the appellant.

Background facts in a nutshell essentially are as follows:

The appellant-company, incorporated under the Companies Act, 1956 is a manufacturer of glass and glassware. It holds license issued under the Central Excise Act, 1944 (in short the 'Act') read with the Central Excise Rules, 1944 (in short the 'Rules'). The dispute relates to the period 1.1.1988 to 28.2.1990. The articles manufactured by the appellant are classified under Chapter 70 of the Central Excise Tariff Act, 1985 (in short ''Tariff Act'). There was a prolonged strike in the factory of the appellant in 1987, which according to the appellant resulted in closure of the appellant's factory and came to a standstill position so far production is concerned. The appellant decided to cut down expenditure in areas like labour, packing, inventory, advertisement etc. M/s Darshak Ltd. who was a bulk purchaser of the appellant's products started advertising to boost its sales in respect of glass and glassware purchased from the appellant. Inquiries were conducted by the Central Excise Authorities regarding expenditure on publicity and sales promotion incurred by M/s Darshak Ltd. on the goods purchased from the appellant. Statements of some of the officials of M/s Darshak Limited and Executive Director of the appellant were recorded during investigation. The appellant received show-cause notice dated 4.4.1991 from the Central Excise and Customs Directorate, Baroda proposing to recover duty amounting to Rs.18,79,775.31 under proviso to Section 11A(1) of the Act. The notice was issued by the Collector, Central Excise and Customs, Baroda. The substance of the notice was that the appellant had gradually transferred the expenditure on sales promotion and/or publicity of its product to M/s Darshak Ltd. The amount spent by M/s Darshak Ltd. was to be included in the assessable value declared by the appellant

and, therefore, on the amount spent by M/s Darshak Ltd. being Rs.71,61,049 the duty payable was Rs.18,79,775.31. The appellant submitted its reply to the show-cause notice. It was submitted that the show-cause notice was barred by time; the appellant has been carrying on all of its activities within knowledge of the excise authorities; at every stage of changing the market pattern Department was a party; all sales were being made on principal to principal basis i.e. the appellant and M/s Darshak Ltd. are not related persons. Request was made to examine or cross-examine some persons. A further reply was filed on 21.11.1991 pointing out that the price list submitted by the appellant had been approved by the Department. The stand of the appellant was not accepted by the Collector and order in original confirming the show-cause notice was passed. Reference was made to the statement of Mr. R.S. Guard, General Manager Marketing of M/s Darshak Ltd. to the effect that upward trend in expenses for publicity was attributable to increase in sales. Though the buyer was not incurring any advertisement expenses on their behalf under any express or implied instructions, yet the fact that the advertisement expenses by the appellant were reduced/stopped indicated that the same was part of a well thought out policy. M/s Darshak Ltd. was a customer of the appellant since 1985. Expenses for advertisement and sales promotion were exclusively made by M/s Darshak Ltd. which led to increase in volume of sales. Expenses on advertisement are unavoidable for marketing the goods irrespective of the fact as to who incurs the expenses. It was held that once it is established that the expenses for advertisement are additional considerations, the question of related person is immaterial. It was a case of implied instruction and, therefore, the assessable value was required to be accordingly fixed, and the expenses were required to be included in the assessable value under Rule 5 of the Central Excise (Valuation) Rules, 1975 (in short the 'Valuation Rules'). Demand was confirmed under Section 11A of the Act and penalty of Rs.10 lakhs under Rule 173Q(1) of the Rules was imposed. Land, buildings, plant and machinery belonging to the appellant was confiscated under Rule 173Q(2) of the Rules. However, option was given to pay fine of Rs.2 lakhs in lieu of confiscation.

Appellant preferred appeal before the CEGAT.

It was the appellant's stand before the CEGAT that there was no special relationship between the appellant and M/s Darshak Ltd. The former was selling goods at the same price to other dealers also. Therefore, there was a factory gate price for the products and that was the assessable value under Section 4 of the Act. Reference was made to the assessee's own case in Commissioner of Central Excise, Vadodara v. Alembic Glass Industries Ltd. (1996) 88 ELT 296) in which CEGAT had given a categorical finding that M/s Darshak Ltd. was not a favoured buyer as there was no evidence of discretion or favoured treatment. It was pointed out that admittedly the advertising expenses were incurred only by the customer M/s Darshak Ltd. and up to the point of clearance, the appellant had not incurred any such expenditure.

The expenses incurred towards sales promotion and publicity by both the appellant and M/s Darshak Ltd. were as follows:

Expenditure on Sales Promotion & Publicity

Year	M/s Alembic	M/s Darshak	Volumes of Sales
1986	Rs.11,91,192/-	Rs.1,91,928/-	Rs.2,05,52,607/-
1987	Rs.13,192/-	Rs.2,25,945/-	Rs.22,77,19,769/-
1988-89 (1.1.88 to 31.3.89)		Rs.48,81,732/-	Rs.69,69,18,966/-

Stand of the Revenue was that initially appellant was incurring advertisement expenses which were gradually shifted to M/s Darshak Ltd. who were purchasing about 98% of its product. Reference was made to a decision of the Tribunal where it was noted that there was understanding over sharing advertisement expenses on 50:50 basis and the expenses were to be added to the assessable value.

By the impugned judgment dated 13.6.1997 the CEGAT confirmed the findings of the Revenue authorities on the question of valuation as well as suppression. However, the quantum of penalty was reduced to Rs.2 lacs from Rs.10 lacs. It was noted by the CEGAT that the reasons why M/s Darshak Ltd. came to make a bulk purchases resulted from economic crisis, as bulk purchase was one of the methods of rehabilitation. Brand name "Yera" is owned by the appellant and packing is done by M/s Darshak Ltd. It is clearly indicated that the appellant was the owner. The advertising expenses by M/s Darshak Ltd. are nothing but a deal for revival of the appellant's factory. Reference was made to the accepted position that if M/s Darshak Ltd. was not to make bulk purchases the appellant would have incurred advertisement expenses to promote sales. It was held that if price is not the sole consideration, then additional consideration has to be included in assessable value. Though M/s Darshak Ltd. is not a favoured buyer/related person, that is really of no consequence. Since the response of the appellant was 'No' to question No.19 in questionnaire in the price list, Section 11-A has been rightly invoked. Reference was made by the CEGAT to Rule 5 of Valuation Rules to hold that the expenses on sales promotion and advertisement were to be included in the assessable value of the goods. It was held that demand of duty from the appellant under Section 11-A read with proviso to sub-section (1) was clearly applicable as the appellant had suppressed information with the intention to evade payment of duty. Tribunal found that the circumstances under which M/s Darshak Ltd. had given assurance of bulk purchase and commenced increased outlet advertising the appellant's product clearly indicated that it was a package deal for revival of the appellant's factory arrived at between them and M/s Darshak Ltd., and was a part of the cost reduction exercise of the appellant. An application for rectification was filed which was dismissed. The appellant's argument in support of the rectification application was that the CEGAT did not consider the various judgments which were cited before it and there was no suppression of facts because the assessee had submitted its Balance Sheets and other documents. Stand of the Revenue that no case for rectification was accepted the rectification application was dismissed.

In support of the appeal, learned counsel for the appellants submitted that the methodology of working out

assessable value has been highlighted by this Court in many cases. In Union of India v. Bombay Tyre International Ltd. (1984 (1) SCC 467), it was held that the value of an excisable article for the purpose of levying excise was to be taken to be the price at which the excisable article is sold by the assessee to a buyer at arms' length in the course of wholesale trade at the time and place of removal.

Learned counsel for the Revenue on the other hand supported the orders of CEGAT. Relying on a decision of this Court in Commissioner of Central Excise, Surat v. Surat Textiles Mills Ltd. and Ors. (2004 (5) SCC 201) he contended that Tribunal's conclusions are in terra firma.

In the instant case CEGAT held that the Collector's view that the expenditure on advertisement and sale promotion incurred by M/s Darshak Ltd. forms additional consideration to be added to the sales price under Rule 5 of the Valuation Rules is well founded. It was held that addition was not being done on the ground that M/s Darshak Ltd. is favoured buyer or that they are related persons to the appellant. In Collector of Cenetral Excise, Baroda v. Besta Cosmetics Ltd. (2005 (3) SCC 792) this Court held that where advertisement cost is incurred by the manufactures/customers compulsorily or mandatorily and where manufacturer has enforceable legal right against the customers to insist on incurring of such advertisement expenditure by the customers, the advertisement cost would be includible in the assessable value. In Besta Cosmetics case (supra) it was observed by a three-Judge Bench that without affirming the view taken in CCE v. Surat Textile Mills Ltd. (2004 (5) SCC 201) it is clear even on the basis of the judgment that the agreement should give the manufacturers/marketing agent, the discretion whether or not to advertise the assessee's product. There was no enforceable legal right with the assessee to insist on the advertisement under the agreement. In the instant case there was no finding recorded by CEGAT that the assessee had any enforceable legal right. On the contrary the CEGAT proceeded on the basis that till 1987 the assessee was incurring the expenses. The circumstances under which M/s Darshak Ltd. gave an assurance of bulk purchase and commenced progressively increasing outlay on advertising the appellant's product indicated that it was package outlay or revival of the appellant's factory arrived at between them as a part of cost reduction exercise of the assessee. There was no material before the CEGAT to conclude that there was any tacit understanding which was the stand of the Revenue. No material was placed by Revenue to justify this inferential presumption, which was also not spelt out in the show cause notice.

In Philips India Ltd. v. Collector of Central Excise, Pune (1997 (6) SCC 31), this Court noted as follows:

"2. The learned counsel for the appellant drew attention to the judgment of a Division Bench of the High Court at Madras in Standard Electric Appliances v. Supdt. of Central Excise [(1986) 23 ELT 302 (Mad)]. The Court said that it was common knowledge that when a consumer purchased an article from a dealer, in the case of service facilities he looked to the dealer and not to the manufacturer. For replacement of defective parts also he looked to the dealer

from whom he had purchased and, notwithstanding the fact that the wholesale dealer might ultimately have the parts replaced by it reimbursed from the manufacturer, the service facilities were provided by the wholesaler with a view to earn goodwill and attract customers. The advertising of a product by the wholesaler was one of the well-known methods by which the wholesaler attracted customers and if, as a result of increasing its business, the demand for the product of the manufacturer also increased, the advertising by the manufacturer could not be said to be for and on behalf of the manufacturer.

3. In Union of India v. Mahindra and Mahindra Ltd. [(1989) 43 ELT 611 (Cal)] the High Court at Bombay emphasised the relationship between the parties, being of buyer and seller on principal-to-principal basis. The Court observed that the manufacturer and its distributor had a mutual interest in maximising the sale of the products. The provisions in the contract between them relating to advertising and the like were in furtherance of this desire on the part of both the manufacturer and its distributor and in no way affected the real nature of the transaction which appeared to be of sale on principal-to-principal basis.

5. It seems to us clear that the advertisement which the dealer was required to make at its own cost benefited in equal degree the appellant and the dealer and that for this reason the cost of such advertisement was borne half and half by the appellant and the dealer. Making a deduction out of the trade discount on this account was, therefore, uncalled for.

6. As to the after-sales service that the dealer was required under the agreement to provide, it did of course enhance in the eyes of intending purchasers the value of the appellant’s product, but such enhancement of value enured not only for the benefit of the appellant; it also enured for the benefit of the dealer for, by reason thereof, the dealer got to sell more and earn a larger profit. The guarantee attached to the appellant’s products specified that they could be repaired during the guarantee period by the appellant’s dealers anywhere in the country. Thus, though one dealer might have to repair goods sold by another dealer and incur costs in that regard, he also had the benefit of having the goods he sold reparable throughout the country. The provision as to after-sales service, therefore, benefited not only the appellant; it was a provision of mutual benefit to the appellant and the dealer."

In that case it was noted that advertisement which the purchaser was required to make at its own cost benefited in equal degree the assessee and the purchaser and for that reason the cost of such advertisement was borne equally

and making a deduction out of the trade discount was held to be uncalled for. It was pointed out that while adjudicating the matters such as this, the Excise Authorities would do well to keep in mind the legitimate business considerations.

It is to be further noted that there is no material to show that there is no arrangement for reimbursement. The factual position shows that the transaction was on a principal to principal basis. The findings of this Court in A.K. Roy and Anr. v. Voltas Limited (1973 (3) SCC 503) also throw considerable light on the controversy.

"20. There can be no doubt that the 'wholesale cash price' has to be ascertained only on the basis of transactions at arms length. If there is a special or favoured buyer to whom a special low price is charged because of extra-commercial considerations, e.g. because he is relative of the manufacturer, the price charged for those sales would not be the 'wholesale cash price' for levying excise under Section 4(a) of the Act. A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis. Once wholesale dealings at arms length are established, the determination of the wholesale cash price for the purpose of Section 4(a) of the Act may not depend upon the number of such wholesale dealings. The fact that the appellant sold 90 to 95 per cent. of the articles manufactured to consumers direct would not make the price of the wholesale sales of the rest of the articles any the less the 'wholesale cash price' for the purpose Section 4(a), even if these sales were made pursuant to agreements stipulating for certain commercial advantages, provided the agreements were entered into at arms length and in the ordinary course of business.

22. Excise is a tax on the production and manufacture of goods (see Union of India v. Delhi Cloth and General Mills ([1963] Supp 1 SCR 586). Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profit and that the real value can include only the manufacturing cost and the manufacturing profit. The section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely selling profit. The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the articles. As already stated it

is not necessary for attracting the operation of Section 4(a) that there should be a large number of wholesale sales. The quantum of goods sold by a manufacturer on wholesale basis is entirely irrelevant. The mere fact that such sales may be few or scanty does not alter the true position.

That being so, there is no scope for making any addition as done the Central Excise Authorities and upheld by CEGAT. In view of the above-said findings it is not necessary to consider the question whether the extended period of limitation applied. The appeals deserve to be allowed which we direct by setting aside the impugned orders of CEGAT. No costs.