

CASE NO.:
Appeal (civil) 192 of 2004

PETITIONER:
Commissioner of Central Excise, Ghaziabad.

RESPONDENT:
M/s Apex Traders, Sahibabad

DATE OF JUDGMENT: 27/07/2005

BENCH:
B.P. SINGH & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

KAPADIA, J.

This is an appeal under section 35-L (b) of the Central Excise Act, 1944 (for short "the said Act").

M/s Apex Traders, Sahibabad (hereinafter referred to as "the assessee") were engaged in the manufacture of aerated waters of brands, namely, Thums Up, Limca and Gold Spot in the pack sizes of 500 ml. and 1000 ml. falling under chapter 22 of the schedule to the Central Excise Tariff Act, 1985. The assessee filed its price-list in part-I effective from 1.3.1994 in respect of 1000 ml. and 500 ml. glass bottle packs of durable and returnable nature. They also filed the price-list in part-I effective from 1.3.1994 in respect of plastic bottled packs of 1000 ml. of non-returnable nature of brands, namely, Thums Up, Limca and Gold Spot. The assessee claimed deduction from the wholesale trade price on account of freight and rent on containers (ROC). By Finance Act, 1994, the Central Excise Rules were amended and the practice of filing of price-list was abolished. Therefore, the assessee filed a declaration of assessable value under rule 173-C of the Central Excise Rules, 1944 in respect of aforesaid brands of aerated water effective from 1.4.1994. In this declaration, the assessee claimed deduction from depot sale price on account of equalized freight and on account of ROC on durable and returnable containers i.e. glass bottle packing of 1000 ml. and 500 ml. of the aforesaid brands of aerated water.

The department found that the abatement claimed on account of freight in the price declaration was on the higher side as compared to what was claimed in the price list submitted in March, 1994. Hence, the assistant commissioner ordered provisional assessment of the aforesaid price-declaration filed by the assessee. Ultimately, the assistant commissioner finalized the provisional assessment vide order dated 26.5.1998. The assistant commissioner found that in the case of M/s Coolade Beverages Ltd., Sahibabad, the Commissioner of Central Excise, Meerut vide his order dated 17.6.1997 had held that ROC did not form part of the assessable value and, therefore, relying on the order of the Commissioner dated 17.6.1997, the assistant commissioner in the present case concluded that the ROC was an admissible abatement from the sale price. Accordingly, the abatement claimed by the assessee herein from sale price on account of ROC effective from 1.4.1994 was allowed. At this stage, we may clarify that the

order of the commissioner dated 17.6.1997 was the subject matter of civil appeal No.772 of 2001 preferred by the department which appeal has been dismissed by this Court vide judgment of even date.

On the second issue of equalized freight, the assistant commissioner came to the conclusion that the assessee sold a part of its goods to independent dealers ex-factory and the rest of the goods were sold by the assessee to its depot/branches. The assistant commissioner came to the conclusion that the assessee was clearing its goods at the same price from the factory gate as well as from the depot and since the price at the factory gate and the price at the depot was the same, the assessment had to be done on the said price. In the circumstances, the assistant commissioner held that the wholesale price charged by the assessee at the factory gate should be treated as the assessable value under section 4 of the said Act.

Aggrieved by the aforestated decision on ROC and on equalized freight, the department carried the matter in appeal to the Commissioner (Appeals), Ghaziabad, who took the view that although ROC was admissible as held by this Court in the case of Collector of Central Excise v. Indian Oxygen Ltd. reported in 1988 (36) ELT 730, the burden was on the assessee to provide records / data and certificates to justify the extent of deduction claimed by the assessee for ROC and for equalized freight. According to the appellate authority, the assessee had failed to provide the requisite data justifying the extent of deduction on the aforestated two items. In the circumstances, the appellate authority allowed the department's appeal.

Aggrieved by the decision of the commissioner, the assessee carried the matter in the appeal to the tribunal, which took the view that the issue of ROC was already settled by the decision of the commissioner dated 17.6.1997 in the case of M/s Coolade Beverages Ltd. As regards deduction on account of actual freight, the tribunal took the view that since the assessee had claimed Rs.0.60 per crate as deduction whereas the actual expenditure per crate was Rs.3/- per crate as certified by the Chartered Accountant of the assessee and since the depot price and the factory gate price were the same, the appellate authority had erred in interfering with the order of the adjudicating authority. Consequently, the tribunal restored the order of the assistant commissioner and set-aside the order of the commissioner.

At the outset, we may point out that in this case, we are concerned with the quantum of abatement/deduction claimed by the assessee on account of equalized freight and on account of ROC. We are not concerned with the admissibility of the claim for deduction on account of ROC and equalized freight. When it comes to the question of quantum, the duty is on the assessee claiming deduction to provide requisite data and certificates from Chartered Accountant as well as books of accounts to justify the quantum of deduction. In the present case, on the item of deduction for ROC, the assessee has not produced the requisite data indicating the basis on which ROC is computed. There is nothing to indicate as to when ROC became chargeable. There is nothing to indicate the rate at which ROC was chargeable. There is nothing to indicate whether the amount of ROC was at all reflected in the invoices.

Similarly, on the question of equalized freight, we find that the assessee had sold a part of its goods to independent

dealers ex-factory and the rest of its goods were sold to its depot/branches. In this connection, it may be noted that 25% of the total sales was to independent buyers. In other words, the goods were partly sold at the factory gate and partly from the depot. The assessee has not led evidence to justify the extent of the claim for deduction on account of actual freight. The assistant commissioner has failed to quantify, by actual facts and figures, the actual extent of the freight allowable as deduction.

In the circumstances, we remit the matter to the assistant commissioner to decide the quantum of deduction/abatement from the sale price in wholesale trade on account of freight and ROC, in accordance with law.

Accordingly, the appeal filed by the department stands allowed, with no order as to costs.