
(2015) 08 SC CK 0153

In the Supreme Court Of India

Case No : Civil Appeal Nos. 659-663 of 2006 and C.A. No. 2592 of 2006

Commissioner of Central Excise

APPELLANT

Vs

"J" Foundation

RESPONDENT

Date of Decision : 13-08-2015

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 173Q(2)</ACTRULEORDER> and, 209A
Central Excises and Salt Act, 1944 — Section 11A, 11A(2), 38A, 4, 4(4)

Citation : (2015) 324 ELT 422

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : Jaideep Gupta, Sr. Advocate, Shirin Khajuria, Rupesh Kumar, Sanjay Kumar Pathak, Jitin Singhal and B. Krishna Prasad, Advocates, for the Appellant; Praveen Kumar and Neeru Vaid, Advocates (NP), for the Respondent

Final Decision : Partly Allowed

Judgement

1. These appeals are preferred by the Commissioner of Central Excise, Mumbai-V (hereinafter referred to as the Revenue) in which there are five respondents and the names of these respondents are (1) M/s. "J" Foundation, (2) M/s. "J" Traders (3) M/s. Janata Glass Works (4) M/s. Haldyn Glass Works and (5) M/s. Travin Trading & Investment Pvt. Ltd. The dispute pertains to the transaction value that is to be arrived at in respect of the goods which were exigible to excise duty and were cleared by M/s. Haldyn Glass Works (hereinafter referred to as M/s. Haldyn).

2. These goods were, inter alia, supplied to M/s. J. Foundation, M/s. J. Traders and M/s. Janata Glass works and to the fourth respondent M/s. Travin Trading & Investment Pvt. Ltd.

3. M/s. Haldyn is the joint venture of two groups known as Shetty group and Mehta group who were having shareholding of 52 per cent and 48 per cent respectively in M/s. Haldyn. After going through the records, the Revenue found that the aforesaid four firms/companies to which the goods were supplied by M/

s. Haldyn are the firms of Mehta group and Shetty group respectively. The relationship which was found in this respect is described as under:--

"...Smt. Shakuntala Shetty and Smt. Vinita Shetty, wife and daughter, respectively, of Shri N.D. Shetty were Directors of M/s. Tervin Trading and Investment Pvt. Ltd.; Shri N.D. Shetty was holding shares of M/s. Tarvin Trading alongwith his wife and daughter, when he was holding shares of M/s. Tarvin Trading alongwith his wife and daughter, when he was Director of M/s. Haldyn Glass Ltd. and 92% to 95% of total purchases of glass bottles of M/s. Tarvin Trading and Investment was from M/s. Haldyn Glass Ltd. and there was profit margin of 20% to 25% to M/s. Tarvin Trading and M/s. Tarvin was engaged in the activity of trading in glass bottles since the year 1990.

Thus Shri N.D. Shetty at one end was controlling activities of M/s. Haldyn Glass Ltd. as a Managing Director and at other end activities of M/s. Tarvin Trading as a major shareholder/close relative of Directors, whose major purchases were from M/s. Haldyn Glass Ltd. and there was 20% to 25% profit to M/s. Tarvin Trading.

It is also record that constitution of J. Group of concerns was as under:

1. M/s. Janata Glass Works - started actively in the year 1962:

- a. A.A. Mehta, Partner
- b. H.A. Mehta, Partner
- c. A.H. Mehta, Partner
- d. U.J. Mehta, Partner

II. M/s. J. Foundation - started actively in the year 1991. Stopped actively in the year 1990:

- a. A.A. Mehta, Partner
- b. H.J. Mehta, Partner
- c. Smt. M.H. Mehta, Partner

III. M/s. J. Traders - Started activity in the year 1981. Stopped activity in the year 1990.

- a. H.A. Mehta, HUF, Partner
- b. J.A. Mehta, HUF, Partner
- c. Mrs. R.A. Mehta, Partner
- d. A.A. Mehta, Authorised Signatory"

4. It is seen from the above that insofar as the M/s. Travin Trading & Investment Pvt. Ltd. (hereinafter referred to as M/s. Travin) is concerned, it was a private limited company in which Shakuntala Sherry and Vinita Shetty, wife and

daughter respectively of N.D. Shetty, were Directors. On the other hand, insofar as the other firms are concerned, they belong to Mehta group which are all partnership firms in which family members of Mehta group were the partners.

5. The investigation further revealed that goods were supplied to these firms at much lesser price than the price which was charged from the other buyers. On this basis, the Revenue took the position that the M/s. Haldyn and the aforesaid four purchasers of the goods are related persons with mutual interest in each other and there was price manipulations as well.

6. This resulted in issuance of show cause notice dated 7-2-1989 wherein it was proposed to revise the declared assessable value in case of the supplies made to these concerns by M/s. Haldyn.

7. The Assistant Collector initially passed orders dated 25-4-1989 dropping the proceedings by accepting the contention of the show cause noticee that the goods were sold at a price higher than the price at which they were sold to the wholesale dealer. Against the aforesaid order, the Revenue had preferred appeal before the Collector, who allowed the appeal and directed the Adjudicating Authority to look into the nature of relationship between M/s. Haldyn and "J" Group of concerns. After its remand, fresh show cause notice dated 4-2-1993 was issued in which allegations were made that M/s. Haldyn and the aforesaid purchasers of the goods were related persons and they were sold the goods at depressed prices. Replies were solicited and thereafter, the matter was adjudicated upon and the Commissioner passed Order-in-Original dated 31-3-1995. The proceedings were again dropped by the Commissioner. Revenue approached the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as the CESTAT) and the CESTAT vide its order dated 13-6-2003 allowed the appeal of the Revenue thereby remanding the matter for fresh consideration by the Commissioner. After this remand, the Commissioner passed fresh orders dated 29-4-2004. This time, he confirmed the duty amounting to Rs. 96,54,914.17/- and also imposed penalty amounting to Rs. 25 lakhs on M/s. Haldyn and Rs. 4 lakhs each on the said buyers. The finding which is arrived at by the Commissioner after analysing the evidence on record needs to be stated in detail at this stage which runs as under:--

"As per discussion in pre-paras Shri N.D. Shetty family was holding 52.26% shares of M/s. Haldyn Glass Ltd. and remaining 47.4% shares of M/s. Haldyn Glass Ltd. were held by Shri J.A. Mehta family. After entry of M/s. Tarvin Trading and M/s. J. Group of concern, glass bottles manufactured by M/s. Haldyn Glass Ltd. earlier supplied to industrial consumer directly were sold to said industrial consumers through M/s. Tarvin Trading and M/s. J. Group of concerns. Here to get clear picture extract from para 6.7 of the Show Cause Notice dated 4-2-1993 is reproduced below:

"M/s. Janta Glass Works for several years were trading in glass bottles manufactured by the assessee. In June/July, 1988, Mehta Group joined the

assessee company by acquiring 47.74% shares. Mr. J.A. Mehta was introduced in assessee company's management in the capacity of whole time Director. The assessee also sold their product directly to certain customers including M/s. Centaur Pharmaceuticals Pvt. Ltd. Ms. FDG Ltd. M/s. Paramount Packaging Inds., M/s. Pharmaceuticals and Chemical Industries, M/s. Swift Chemicals Ltd. Etc. The assessee's products were sold to those customers also through M/s. J. Foundation. Assessee sold goods directly to those customers at normal prices whereas to M/s. J. Foundation at lower prices and M/s. J. Foundation sold goods to the said customers at prices substantially higher than both aforesaid prices. To illustrate the assessee sold 32 ml. P.D. Bottles to M/s. F.D.C. Ltd. @ Rs. 365/- per thousand while to M/s. J. Foundation at Rs. 325/- per thousand and M/s. J. Foundation sold the same goods to M/s. F.D.C. Ltd. At Rs. 672/- per thousand. Similarly, assessee sold 200 ml Brute Amber Bottles to M/s. Swift Chemicals Ltd. at Rs. 1200/- per thousand and to M/s. J. Foundation at Rs. 840/- per thousand whereas M/s. J. Foundation sold the same goods to M/s. Swift Chemicals Ltd. at Rs. 1550/- per thousand. Assessee sold G-42 Amber Round Bottles to M/s. J. Traders at Rs. 1120/- per thousand M/s. J. Traders sold the goods to M/s. Janta Glass Works at Rs. 1785/- to Rs. 1850/- per thousand who further sold goods to ultimate customers."

M/s. Haldyn Glass Ltd. have not anywhere claimed that allegation in said para were incorrect. It is clear from said para that 32 ml P.D. Glass Bottles, which were earlier sold to M/s. FDC Ltd. at Rs. 365/- per thousand, were sold to same M/s. F.D.C. at Rs. 672/- per thousand when those were sold through M/s. J. Foundation. Similarly, 200 ml Brute Amber Bottles, which were earlier directly sold to M/s. Swift Chemicals Ltd. at Rs. 1200/- per thousand, were subsequently sold at Rs. 1550/- per thousand when those were sold through M/s. J. Foundation.

It clearly indicates that sale, if it was not effected through M/s. J. Foundation, then duty would have been paid by M/s. Haldyn Glass Ltd. on price Rs. 672/- per thousand of 32 ml P.D. Bottles and price Rs. 1550/- per thousand of 200 ml Brute Amber Bottles instead of Rs. 325/- and Rs. 840/- per thousand bottles. Further, it is on record that all the shares of M/s. Haldyn Glass Ltd. were hold only by Shri N.D. Shetty Family and Shri J.A. Mehta Family, as such, Profit earned by M/s. Haldyn Glass Ltd. was distributed amongst members of those 2 families. Simultaneously entire capital of M/s. Tarvin Trading was held by Shri N.D. Shetty Family and capital of M/s. J. Group of concerns was held by Shri J.A. Mehta Family, as such, profit earned by M/s. Tarvin Trading was distributed amongst members of Shri N.D. Shetty Family and profit earned J. Group of concern was distributed amongst only members of Shri J.A. Mehta Family. In turn, profit whether earned by M/s. Haldyn Glass Ltd. of M/s. Tarvin Trading and/or J. Group of concerns was distributed amongst family members of Shri N.D. Shetty and Shri J.A. Mehta. However, in case of reduction in profit of M/s. Haldyn Glass Ltd. it was affecting payment of Central Excise Duty, whereas increase in profit margin of M/s. Tarvin Trading and M/s. J. Group of concerns was not

affecting Central Excise duty as those were traders. Hence, M/s. Haldyn Glass Ltd. preferred to reduce prices of glass bottles at the factory of M/s. Haldyn Glass Ltd. and increase prices of those bottles while selling to industrial consumers at the stage of M/s. Tarvin Trading and M/s. J. Group of concerns.

In view of the above logical conclusion comes that there was flow back to share holders of M/s. Haldyn Glass Ltd. from Profit earned by M/s. Tarvin Trading and M/s. J. Group of concerns as in all the organisation referred to above, beneficiaries were Shri N.D. Shetty family and Shri J.A. Mehta family as there was no outsider. Further, argument put by the noticee that M/s. Haldyn Glass Ltd. was a company, as such, separate legal entity different from its directors is not sustainable as in M/s. Haldyn Glass Ltd. as well as in M/s. Tarvin Trading and J. Group of concerns only shareholders/contributions/beneficiaries were Shri N.D. Shetty Family and Shri J.A. Mehta Family. In turn judgments in the case of Nagpal Petro-Chem. Limited Vs. Assistant Collector of Central Excise, and Pudukkotal Oxygen (P) Ltd. v. CCE, 2001 (138) E.L.T. 583 (Tri.) are not applicable.

As explained in para 41.1 above there was sale at reduced price to M/s. Tarvin Trading and M/s. J. Group of concerns, as compared to sale effected to other industrial consumers by M/s. Haldyn Glass Ltd. Hence, it cannot be said that M/s. Tarvin Trading and J. Group of concerns were not favoured buyers. In turn reliance cannot be placed on the judgment in case of Union of India (UOI) and Another Vs. Hind Lamp Ltd., . Similarly, extra commercial concerns, since established in above said paragraphs judgments in the case of UOI and others v. Hind Lamps Ltd., Shikohabad, UP - 1989 (8) E.L.T. 11 (Del.) and 1998 (98) E.L.T. A208 (S.C.) and Electric Lamp Manufacturers (India) P. Ltd. Vs. Collector of Central Excise, are not applicable.

As there was no price list in Proforma-1 there was no sale to wholesale buyers and there was no question of trade discount. In turn reliance cannot be placed on judgments in the case of Metal Box India Ltd. Vs. The Collector of Central Excise, Madras, and Hognes India Ltd. v. CCE, 2004 (163) E.L.T. 507 (Tri.) . Further, M/s. Tarvin Trading and J. Group of concerns were not industrial consumers, as such they cannot be called as separate class of buyers. In turn, judgment in the case of CCE v. Japan Mannequin Co. - 1999 (108) E.L.T. 136 (Tri.) is not applicable and as there was sale to related person/favoured buyer judgment in the case of Jay Engineering Works Ltd. and Another Vs. Union of India and Others, and Viacom Electronics (P) Ltd. v. CCE, 2002 (145) E.L.T. 563 (Tri.) are not applicable.

In view of the foregoing discussions conclusion comes that M/s. Tarvin Trading and "J" Group of concerns were related person and favoured buyers of M/s. Haldyn Glass Ltd.; Central Excise duty was not paid on sale price of those related persons; assessable value can be decided by adding 20% to 25% profit margin of those concerns of assessable value declared by M/s. Haldyn Glass Ltd. in respect of those goods; there was suppression of facts and proviso to Section

11A can be invoked; M/s. Haldyn Glass Ltd. are liable to pay duty demanded in the Show Cause Notice and also liable to penalty as proved under then Rule 173Q of Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944. As the proposed penalty is imposed on M/s. Haldyn Glass Ltd. under Rule 173Q of Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944, no separate penalty is imposable on Shri N.D. Shetty as a Managing Director and Shri J.A. Mehta as a Whole Time Director of M/s. Haldyn Glass Ltd. under the provisions of Rule 173Q of Central Excise Rules, 1944 as the penalty imposed on M/s. Haldyn Glass Ltd., in my opinion, will meet the ends of justice.

Considering involvement of Shri N.D. Shetty and Shri J.A. Mehta, Managing Director and Whole Time Director of M/s. Haldyn Glass Ltd. and shareholder/partner in M/s. Tarvin Trading and Investment P. Ltd. and M/s. J. Group of concerns the only conclusion comes that they arranged business of M/s. Haldyn Glass Ltd. through M/s. Tarvin Trading & Investment P. Ltd. and M/s. J. Group of concerns in such a way that profit to individual beneficiary remained same, when there was undervaluation to determine duty liability and there was evasion of duty at factory gate of M/s. Haldyn Glass Ltd. Hence, it is evident that M/s. Tarvin Trading and Investment P. Ltd., M/s. J. Group of concern aided and abated M/s. Haldyn Glass Ltd. in evasion of Central Excise Duty. Hence, M/s. Tarvin Trading and Investment Ltd., M/s. Janata Glass Works, M/s. J. Foundation, M/s. "J." Traders are liable to penalty under the Rule 209A read with Section 38A of Central Excise Act, 1944.

However, no confiscation of the land, building etc. under Rule 173Q(2) of erstwhile Central Excise Rules, 1944 as proposed in the Impugned SCN is ordered, as the said provisions have been deleted w.e.f. 12-5-2000.

In view of the above following order is passed:

ORDER

1. I, confirm Central Excise duty demand amounting to Rs. 96,54,914 (Basic Excise Duty Rs. 89,09,461/- and Special Excise Duty Rs. 7,45,453/- (Rupees Ninety six lakhs fifty four thousand Nine hundred fourteen only) under the provisions of sub-section (2) of Section 11A of Central Excise Act, 1944 and order that it should be paid forthwith.
2. I, impose penalty of Rs. 25,00,000/- (Rupees twenty five lakhs only) on M/s. Haldyn Glass Ltd. under the provisions of Rule 173Q of Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944;
3. I, order recovery of interest at appropriate rate on delayed payment from M/s. Haldyn Glass Ltd.;
4. I, impose Penalty of Rs. 4,00,000/- (Rupees Four Lakhs only) each, on (1) M/s. Tarvin Trading and Investment Pvt. Ltd., (2) M/s. Janta Glass Works, (3) M/s. "J." Foundation and (4) M/s. "J." Traders, under the provisions of Rule 209A of Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944."

8. This time, the respondents who felt aggrieved by the aforesaid order of the Commissioner filed their appeals before the CESTAT. The main plea which was taken by the respondents was that they were not related persons on the application of the definition of "related person" appearing under Section 4 of the Central Excise Act, 1944. This contention of the respondents has been accepted by the CESTAT in its impugned orders dated 17-6-2005 [2005 (191) E.L.T. 1142 (Tri. - Mumbai)]. Challenging the said orders, the Revenue has preferred the instant appeals.

9. A perusal of the order of the CESTAT would show that the CESTAT has not disputed or taken exception to the relationship that is shown between the parties as noted above. However, in the opinion of the CESTAT, the said relationship would not satisfy the test of "related person" inasmuch as it is held that the mutuality of interest principle has not been satisfied in the instant case. To put it otherwise, in the opinion of the CESTAT, the Revenue has not been able to show how the buyers had any interest in the supplier, which also needs to be satisfied necessarily in order to be covered within the definition of "related person".

10. Since the order of the Commissioner has been opposed on the aforesaid ground, let us reproduce here the definition of "related person" which is stated in Section 4(4)(c) of the Act:--

" "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation.--In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956;"

11. The ingredients which are to be satisfied to show that the two persons are related persons, have already been laid down in catena of judgments of this Court. However, we need not take stock of these judgments as this very Bench in a recent decision in the case of Commissioner of Central Excise Vs. Detergents India Ltd. and Others took note of the existing case law and the formulated the test in the following manner:

"12. When we come to the definition of "related person" the legislature has used a well-known technique. It first employs the expression "means" and states that persons who are associated with the assessee so that they have a direct or indirect interest in the business of each other would get covered. The definition then goes on to use the expression "and includes" thereby indicating that the legislature intends to extend the definition to also include various persons that would not otherwise have so been included. These include a holding company, a subsidiary company, a relative and a distributor of the assessee and any sub-distributor of such distributor. The necessity for including holding and subsidiary companies as defined under the Companies Act, 1956 is to lift the corporate veil in order to get to the economic realities of the transaction."

12. In the present case, what emerges from the record is that as far as M/s. Haldyn is concerned, it is owned by the Shetty group and the Mehta group who subscribe 52 per cent and 48 per cent shares respectively in the said company. On the other hand, M/s. Travin, one of the purchasers, is wholly owned by the Shetty group and other three firms are wholly owned by Mehta group. Thus, from the aforesaid, it is argued by Mr. Jaideep Gupta, learned senior counsel appearing for the Revenue, that since M/s. Haldyn on the one hand and the four purchasers on the other hand belong to same group(s), the mutuality test automatically stands satisfied. In support of this submission, he has relied upon the judgment of this Court in Collector of Central Excise, Ahmedabad Vs. I.T.E.C. (P) Ltd., Bombay, and has particularly referred to para 9 thereof which makes the following reading:--

"9. We may now turn to the findings recorded by the Customs, Excise and Gold (Control) Appellate Tribunal. It was found that the respondent and M/s. International were having common Directors and that they were relatives of one another; a further finding was also noted that both the Companies were family concerns and were beneficiaries of their ventures and that the benefits of both the concerns are shared by members of one and the same family. From these findings, it is difficult to resist the conclusion that the respondent and M/s. International have a direct interest, in the business of each other and that the mutuality of interest between the two is apparent. We may point out here that the Tribunal's observation, quoted above, that no evidence regarding mutuality of interest has been brought on record, is inconsistent with the acceptance of the finding of the adjudicating authority, referred to above. Once those findings are accepted, the conclusion that there is mutuality of interest between the two concerns is inevitable. In this view of the matter, we set aside the finding of the Tribunal that the respondent and M/s. International are not related persons."

13. We are of the opinion that the aforesaid judgment squarely applies to the facts of the present case as it holds that where the two companies/firms etc., belong to the same group then the test of mutuality is established and satisfied. In a sense, the Court has torn the corporate veil thereby pointing out that such family concerns would be beneficiaries in the affairs of each other.

14. We are, therefore, of the opinion that the CESTAT was not right in holding that there was no mutuality of interest and, therefore, supplier on the one hand and the purchaser on the other hand were not related persons.

15. Insofar as the price manipulation is concerned, i.e., sale of the goods by M/s. Haldyn to the aforesaid purchasers at a depressed price, the same has been established on record on the basis of plethora of evidence tendered by the Revenue which has been discussed in detail in the order of the Commissioner which we have already reproduced above.

16. In nutshell, it can be discerned from the aforesaid material that where the goods of particular description were sold by M/s. Haldyn to the outsiders at Rs.

1200/- per thousand bottles (200 ml Brute Amber Bottles), these were sold to M/s. J. Foundation at only Rs. 840/- per thousand bottles. It would be further pertinent to point out that after purchasing the bottles from M/s. Haldyn at Rs. 840/- per thousand bottles, M/s. J. Foundation sold the same to M/s. Swift Chemicals Ltd. at Rs. 1550/- per thousand bottles. Likewise another product G-42 Amber Round Bottles were sold by M/s. Haldyn to M/s. J. Traders at Rs. 1120/- per thousand whereas these very bottles were sold to M/s. Janta Glass Works at Rs. 1785/- to Rs. 1850/- per thousand, who further sold goods to the ultimate customers. Therefore, the ingredients of price manipulations also stand satisfied. We, accordingly, set aside the order of the CESTAT and restore that of the Commissioner. The appeals stand disposed of in the aforesaid terms.