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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/2175/2005 - EX[DB] Date **30/05/2012**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S PARLE BISLERI PVT. LTD.
WESTERN EXPRESS HIGHWAY, ANDHERI (EAST)
MUMBAI
400099

M/S PARLE BISLERI PVT. LTD. Appellant

Vs

C.C.E. MUMBAI-IV Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/637 2012 EX|DB|** dated 22/5/2012 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
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115, NEW CENTRAL EXCISE
BUILDING, M.K. ROAD,
CHURCHGATE, MUMBAI
400020

2. Adv. / Consult
MR.BALBIR SINGH
MASTAN & CO,C-5/9,SAFDARJUNG ENCLAVE,N.DELHI

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registra
(Excise Appeal Bran

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision: 22.5.2012

Central Excise Appeal No.2175 of 2005

Arising out of the order in appeal No.BR/37/M-IV/2005 dated 28.3.2005 passed by Commissioner of Central Excise (Appeals), Mumbai IV.

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Parle Bisleri Pvt. Ltd. ... Appellant

Vs.

C.C.E., Mumbai IV .. Respondent

Present for the appellant : Shri Balbir Singh, Advocate
Present for the respondent : Shri S.R. Meena, A.R.

FINAL Order No. A/637/2012-EX (BR)

Per Justice Ajit Bharihoke (Oral):

Appellant M/s Parle Bisleri Pvt. Ltd. (formerly known as M/s Parle Beverages Ltd.) was engaged in the manufacture of aerated water and edible syrup with effect from October 1996 to February 1999.

2. The appellant ,at the relevant time, was having three distributors, namely, Parle Marketing Services, Parle Sales Services

and K.R. Sales to whom they were marketing. Besides supply to said three distributors, the appellant was also supplying edible syrup to Hard Castle Restaurant (HCR) who are running the chain of McDonald's family restaurant.

3. The appellant was charging different rates for clearance of the edible syrup at their factory gate from the said three distributors and HCR. The rate charged from HCR was 30% less than the rate charged from the other three distributors.

4. The Department issued show cause notice dated 26.7.1999 to the appellant invoking extended period of limitation demanding differential excise duty on the supplies effected to HCR by taking transaction value as the value charged from the other three distributors.

5. The appellant contested the show cause notice and vide letter dated 15.9.1999 claiming that the appellant was justified in charging lesser rate from HCR because it was bulk purchaser. The plea of the appellant did not find favour with the adjudicating authority and the duty demand to the tune of Rs.10,78,120/- for the period from October, 1996 to February, 1999 was confirmed against the appellant with interest and penalty of equal amount was imposed. The appellant preferred the appeal against the order in original. The Commissioner (Appeals) confirmed the order in original.

6. The appellant feeling aggrieved by the order of the Commissioner (Appeals) preferred an appeal before the Tribunal and the Tribunal remanded the matter back to the Commissioner (Appeals) directing him to rehear the appeal on merits as well as on the point of limitation.

7. Commissioner (Appeals) vide impugned order dated 28.3.2005 rejected the plea of the appellant on the question of limitation as well

as on merits and reconfirmed the duty demand confirmed by the order in original.

8. Feeling aggrieved by the impugned order, the appellant has preferred the instant appeal.

9. Shri Balbir Singh, learned Advocate appearing for the appellant has drawn our attention to Section 4 of the Central Excises and Salt Act, 1944 as it then existed which is reproduced thus –

> " ***Section 4. Valuation of excisable goods for purposes of charging of duty of excise.*** *- (1) where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value , shall, subject to the other provisions of this section, be deemed to be –*
>
> *(a) The normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale:*
>
> *Provided that –*
>
> *(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;*

10. Learned Counsel for the appellant submits that proviso (i) to Section 4(1) makes it clear that the assesee at the relevant time could sell his goods at a different price to different class of buyers and pay excise duty on the amount charged subject to the condition that the buyer to whom the goods were sold at a lesser price was not a related person and there was no extraneous consideration for charging lesser price. Learned Counsel submits that in the instant case, there is no evidence on record to bring the appellant i.e. M/s

HCR within the definition of "related person" as defined in Section 4(3)(c) as under:

> *4(3) (c) "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 distributor of the assessee, and any sub-distributor of such distributor.*

Leaned Counsel for the appellant has drawn our attention to letter dated 1.9.1996 addressed by the Regional Accounts Manager ,West Coca Cola to the General Manager, Parle Beverage Limited , Bombay wherein it is stated that McDonand's which is an international fast food chain, is likely to open an outlet at Linking Road at Bombay and since M/s Coca Cola India has a tie -up with McDonand's Worldwide, a special rate would have to be offered to them in view of large volume of syrup they would consume. In the context of this letter, the learned Counsel has submitted that special rates were offered to HCR which owns McDonald's family restaurant chain for the reason that they were considered as bulk purchasers of syrup accounting for more than 75% of total production. Thus, it is contended that the appellant was justified in selling the edible syrup to M/s HCR at a lesser rate than the supplies made to other three distributors and he had rightly paid the duty of the transaction value in terms of Section 4 as it then existed. Learned Counsel expanding on the argument has referred to the report of the Range Superintendent which would show that the supply to McDonald's family restaurant chain during the period in question was within the range of 29.01% to 29.3%. Thus, it is contended that the impugned order confirming the demand has been passed in violation of the provision of Section 4 of the Central Excises and Salt Act, 1944 as it then existed and is liable to be set aside.

11. Learned Shri S.R.Meena, A.R. , the Departmental representative on the contrary has canvassed in favour of the impugned order. He submits that Commissioner (Appeals) was right in confirming the demand for the reason that McDodald's could not be termed as bulk purchaser as they were only other distributor to whom the appellant was supplying edible syrup. Shri Meena, in respect of the sale figures of the supplies to McDonald's Restaurant submitted that from the sales figures , it is evident that almost 75% of the remaining product was being picked up by other three distributors of the appellant company and as such, there was no distinction between the three other distributors and M/s HCR in terms of the quantity supplies. He, therefore , pleaded that M/s HCR cannot be called a special class of buyer and the price charged from them cannot be taken as the normal price. Thus, it is contended that the appellant, in respect of their sales to M/s HCR ought to have paid excise duty on the price which was being charged from the other three distributors.

12. Shri Meena further submits that lesser price has been charged by the appellant from M/s McDonald's chain of restaurant for extraneous consideration, i.e. McDonald's Chain of Restaurant was having international tie-up with the appellant's parent company M/s Coca Cola and HCR the owner of McDonald's chain of restaurant was also bottling aerated water for M/s Coca Cola India. Learned Shri S.R. Meena further submits that plea of the appellant that he was given special concessional rate being different class of customers is difficult to believe in view of the fact that with effect from 24.2.99, the appellant company started selling its entire stock of edible syrup to M/s Hindustan Coca Cola Bottling Company at assessable value of Rs.984.24 and Rs.492.12 for 18 Litres and 9 Litrues at pack respectively which was the rate equivalent to the higher rate charged from other three distributors during the period, in question. This

knocks down the theory that the that bulk purchase was the basis of charging lesser price. Thus, it is contended that the duty demand has rightly been raised on the difference of the price charged from the other three distributors and the lesser price charged from McDonald's. In support of his contention Shri Meena has relied upon the judgment of the Supreme Court in the case of C.C.E., Calcutta II vs. TISCO Ltd. - 2004 (174) ELT 307 (SC).

13. We gave considered the rival contentions and perused the record. It is not disputed that during the period in question, the appellant charged lesser price for the edible syrup supplied to HCR as compared to the rate charged from other distributors. It is also not in dispute that the appellant in respect of supplies made to HCR paid excise duty on the price charged from them.

14. On reading of the proviso (i) to Section 4(1)(a) of Central Excises Act, 1944 as it was applicable at the relevant time, it is evident that during the period in question, there was no bar on the assessee to sell the goods at different price to different classes of buyers and pay excise duty on the basis of the price charged, if buyer was not a related person and there was no extraneous consideration for charging lesser price. Thus, the main question for determination in this appeal is whether the appellant and M/s HCR can be termed as 'related person' or whether there was some extraneous consideration for charging lesser price or M/s HCR could not be termed a different class of buyer as compared to the other three distributors.

15. On going through the" related person" reproduced above, it is apparent that a person can be termed as 'related person' to the assesee if he was associated with the assessee and that the assessee have interest, directly or indirectly, in the business of each other and to includes a holding company , a subsidiary company, a related and distributor of the assessee and any sub-distributor of such distributor.

There is no evidence on record to bring M/s HCR or McDonald's Restaurant within the definition of 'related persons'. It is not the case of the Department that M/s HCR after purchasing edible syrup from the assessee were marketing the same to someone else except to McDonald'schain of Restaurant , therefore, HCR cannot be termed a distributor or sub-distributor of the assessee. Thus, in the absence of any evidence in this regard, M/s HCR cannot be termed as a related person vis-à-vis the appellant.

16. The next question which requires consideration is whether HCR can be termed as a different class of buyer as compared to the three distributors of the appellant company. Undisputedly, the distributors M/s Parle Marketing Services, M/s K.R. Sales and Parle Sales Services are the marketing companies who after purchasing the edible syrup from the appellant market the same to the retail consumers. However, the case of HCR is different for the reason that M/s HCR admittedly had purchased edible syrup not for marketing but for captive consumption for McDonald's Chain of restaurant .Thus it is evident that HCR is different class of buyers as compared to the three distributors of the appellant company. Further from the records it is evident that M/s HCR is bulk purchaser which on average picked up almost 30% or more of the production of the appellant . By this standard also M/s HCR falls within the distinct class of buyer and as such the appellant was well within its right to clear the edible syrup at a price less than the price charged from the other distributors and was justified to avail of the benefit of proviso (i) to Section 4(1)(a) of the Central Excises and Salt Act, 1944 as it then existed.Thus, the finding of the Commissioner denying the benefit of the aforesaid proviso to the appellant is not sustainable in law.

17. The next factor for consideration is whether lesser rate was charged from HCR out of some extraneous consideration. Shri S.R.

Meena, the learned D.R. has submitted that the appellant has charged lesser rate from HCR not because the HCR was a bulk purchaser but because of admitted international business tie-up between McDonald's Chain of Restaurant and M/s Coca Cola , the parent company of the appellant. We are not convinced with this argument. Merely because there was international tie-up between the parent company of the appellant and M/s McDonald's Chain of Restaurant, it cannot be said that the appellant had sold edible syrup to M/s HCR for extraneous consideration. In order to establish extraneous consideration, the Department has to establish that some extraneous arrangement was worked out between the appellant and M/s HCR with a view to evade payment of excise duty under the garb of proviso (i) to Section 4(1)(a) of the Central Excises and Salt Act, 1944. On perusal of the record, we find that there is no evidence on record to justify such conclusion . Thus, in our view, the denial of benefit of the above referred proviso to the appellant is not sustainable.

19. Coming to the judgment of the Supreme Court in the matter of Commissioner of Central Excise Calcutta II vs. TISCO Ltd. relied upon by Shri Meena, in the aforesaid matter, the Supreme Court while dealing with issue of price list in the context of levy of excise duty has observed thus –

> "**6.** *We are unable to agree with the reasoning. Merely because parties are not related persons does not mean that each buyer becomes a class within itself. The normal rule, under Section 4, is that the value which shall be deemed to be the price at which such goods are ordinarily sold by the assessee in the wholesale trade, where the buyer is not a related person and the price is the sole consideration for sale. Admittedly, in this case the normal price was the price in list 1. This was the price at which the goods were proposed to be sold in the wholesale trade. The proviso to this Section is an exception to the general rule. The proviso comes into play in cases (a) where there is a normal practice in the wholesale trade in such goods and (b) such goods are sold by the assessee at different prices to different class of buyer. To claim benefit of this proviso, a trade practice must be averred and shown to exist and it must be shown that there is a different class of buyer. As set out above, the Collector (Appeals) notes :-*

"Whether a particular buyer constitutes a class of buyers or not, will depend upon the trade practice."

Yet the Collector (Appeals) then ignores the fact that there is no averment nor proof of any trade practice. Further, the observations of the Collector (Appeals) that the price charged to a buyer treating it as a different class of buyer should be the normal price unless there is an evidence to hold that such buyer is a related person of the assessee, is a wrong proposition of law. Cogent reasons must be shown as to how the buyer is a different class of buyer. There can be various reasons why a buyer becomes a different class of buyer. A bulk purchaser or persons situated in different locations or different industries for example one being a car manufacturing industry and another being a heavy duty machinery manufacturing industry or third being an electric motor manufacturing industry could all be different classes of buyers. But these are facts which must first be averred and then proved. It is only on the basis of facts averred and shown that a conclusion can be reached that the sale is to a different class of buyer. In this case except for broadly stating that the sale is to a different class of buyer the Collector (Appeals) has not given any 'reason as to how he concludes that TELCO was a different class of buyer. The only reason for concluding that the TELCO was a different class of buyer appears to be because a different price was charged from it. That by itself is not sufficient. On the facts of this case it is clear that there was no material to show that TELCO was a different class of buyer."

On reading of the above, it is evident that as per the finding of the Supreme Court, the assessee can pay excise duty at lesser transaction price at which the goods were sold to one category of buyer provided he is able to show cogent reason as to how the buyer fall within different class of buyer. Supreme Court has held that this factor must be averred and then proved. Admittedly, the appellant filed a reply to the show cause notice issued by the Department. In para (F) of the reply, the appellant, inter alia, averred thus -

" (F) We further say that the allegation on that M/s HCR cannot be considered as different class of buyers is erroneous as each of the buyers are class of buyers themselves in view fo our charging different price based on various rational commercial considerations like regional different taxes, quantity off-take, presence of competitors, future demand etc. etc.

On reading of the above, it is evident that in its response to the show cause notice, the appellant had denied the allegation in the show cause notice that M/s HCR cannot be considered as a different class of buyer to entitle the appellant to claim the benefit of proviso (i) to Section 4(1)(a) of Central Excises and Salt Act, 1944.Thus, in the instant case, the appellant not only averred that HCR was treated as different class of buyer but this fact is established from the record. In view of the discussion above, the judgement of the Supreme Court is of no avail to the Department.

20. In view of the discussions above, we are of the view that the impugned order of Commissioner (Appeals) is based upon incorrect appreciation of fact and law. As such, we find it difficult to sustain. The appeal is accepted and the impugned order is set aside.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/