A COLLECTOR OF CENTRAL EXCISE, PUNE

v.

M/S. BAJAJ TEMPO LTD.

FEBRUARY 7, 2005

B [S.N. VARIAVA, DR. AR. LAKSHMANAN AND S.H. KAPADIA, JJ.]

Central Excise Act, 1944—Section11A(1)—Reimbursement of advertisement expenses initially incurred by manufacturer from dealers—
C *Whether includible in the assessable value under extended period of limitation—Collector holding it to be includible—Tribunal applying certain decisions and without discussing evidence, setting aside the order—On appeal, held: Decisions applied by the Tribunal does not pertain to the matter in issue and as such Tribunal wrongly applied the decisions—Hence, order of Tribunal and that of adjudicating authority set aside—Matter remitted back to Adjudicating*
D *Authority for fresh decision—Precedent—Wrong application of.*

Respondent - assessee is a manufacturer of motor vehicles. Appellant - Department issued show cause notice to the assessee demanding duty on the advertisement expenses initially incurred by the assessee and subsequently reimbursed from the dealers since such reimbursement is
E **includible in the assessable value. It invoked extended period of limitation since the assessee did not disclose to the Department about the reimbursement of expenses. Adjudicating Authority upheld the demand holding that the advertisement expenses were incurred by the assessee and charged to the dealers in addition to expenses incurred by the assessee**
F **and as such were includible in the assessable value. Assessee filed an appeal. Tribunal allowed the appeal, applying the ratio in** ***Philips India Ltd.*** **v.** ***Collector of Central Excise, Pune and Mahindra & Mahindra Ltd*** **v.** ***Collector of Central Excise, Bombay,*** **without discussing the evidence on record. Hence the present appeal.**

G **Allowing the appeal and remitting the matter to the Adjudicating Authority, the Court**

HELD: In the instant case, the fundamental point is whether the reimbursements claimed by the manufacturer are includible in the assessable value and whether such reimbursement would constitute

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"advertisements by the dealers on their own account" or whether they would fall in the category of "advertisements solely made by the assessee on their own account" for computing the assessable value. These questions were not the subject matter of the decisions in *Philips India Ltd. and Mahindra & Mahindra Ltd.* Thus, the Tribunal was wrong in applying the decisions to the facts of the instant case. Hence, the impugned judgments of the Tribunal as well as of the Adjudicating Authority are set aside and the matter is remitted back to the Adjudicating Authority for fresh decision in accordance with law. [1121-H; 1122-A-B; 1122-C]

Philips India Ltd. **v.** *Collector of Central Excise, Pune,* **(1997) 91 ELT 540 and** *Mahindra & Mahindra Ltd* **v.** *Collector of Central Excise, Bombay,* **(1998) 103 ELT 606, distinguished.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3840 of 1999.

From the Judgment and Order dated 9.3.1999 of the Central Excise Custom and Gold (Control) Appellate Tribunal, New Delhi in A.No. E/1125/91-A in F.O. No. 320 of 1999-A.

K.P. Pathak, Additional Solicitor General, G. Umapathy, P. Parmeswaran, S. Gowthaman and B. Krishna Prasad him for the Appellant.

S. Ganesh, Thomas Vellapally, P. Venugopal, P.S. Sudheer and K.J. John for the Respondent.

The Judgment of the Court was delivered by

KAPADIA, J. The short question which arises for determination in this civil appeal filed by the Department under section 35L(b) of the Central Excise Act, 1944 is - whether reimbursement of advertisement expenses by the manufacturer from the dealers, after initially incurring the same, is includible in the assessable value.

M/s Bajaj Tempo Ltd., the respondent herein is engaged in the manufacture of motor vehicles falling under Chapter 87 of Central Excise Tariff Act, 1985. On 18.10.1989, show-cause notice was issued to M/s Bajaj Tempo Ltd. (hereinafter referred to for the sake of brevity as "the assessee") by the department demanding Rs. 4,73,690.76 for the period 1984-85 to 1988-89 by invoking extended period of limitation. In the show-cause notice, it was alleged by the department that the assessee had failed to disclose and

A had failed to pay appropriate duty on the expenses incurred on its publicity/ advertisement which in turn promoted the marketability of the goods. In the said notice, it was further alleged that the dealers' commission included the cost of selling the product, the cost of meeting the service obligations to the customers, the cost of advertisement and cost of sales promotions. In the said show-cause notice, it was further alleged that the assessee had recovered B from its dealers part of the advertisement expenses, initially incurred by the assessee which was not disclosed to the department and, therefore, the department was entitled to invoke the extended period of limitation under the proviso to section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to for the sake of brevity as "the 1944 Act"), as it stood at the material time.

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Vide reply dated 20.12.1989, the assessee denied the aforestated charges levelled against it in the show-cause notice. The assessee contended that its price-list was approved and consequently, the department was not entitled to invoke the extended period of limitation; that the assessee had recovered advertisement expenses from its dealers only in cases where the assessee had D initially incurred such expenses on behalf of the dealers and at the request of the dealers. It was further submitted that all the expenses incurred by the assessee towards advertisement were already included in the assessable value. It was further submitted that the question of including such expenses on account of advertisement would only arise if the assessee had claimed E deduction and since the assessee had not claimed deduction for such expenses, the department was not entitled to include such expenses in the assessable value. According to the assessee, the said advertisement charges were incurred by the dealers on their own account and, therefore, such charges were not includible in the assessable value. It was further submitted that in any event, the goods in question have been sold to all the dealers at the same price and F all the dealers were treated equally and, therefore, such charges were not includible in the assessable value. It was further submitted that the correct manner to assess excisable goods was to ascertain whether there was any allied activity or whether there was any implicated activity. It was contended that any profit accruing to the manufacturer in any allied activity cannot be G subjected to levy of excise duty. It was urged that in the present case the assessee had given video cassettes to the dealers which was the allied activity and, therefore, recovery made on this account by the assessee from the dealer cannot be subjected to duty of excise. On the question of limitation, it was submitted that there was no suppression of facts and, therefore, the department was not entitled to invoke the proviso to section 11A(1) of the 1944 Act.

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By order dated 29.4.1991, the Additional Collector (hereinafter referred to for the sake of brevity as the "Adjudicating Authority") found that the assessee had incurred advertising charges initially and had got themselves reimbursed through debit notes which were not disclosed by the assessee to the department at the time of approval of the price-list. The Adjudicating Authority further found that the assessee was undertaking advertisement in national and regional papers on behalf of the dealers for which the assessee used to charge the dealers for such expenses over and above the wholesale margin allowed to the dealers. According to the Adjudicating Authority, these facts were evident from the debit notes. According to the Adjudicating Authority, such expenses incurred by the assessee constituted additional consideration. According to the Adjudicating Authority, such additional consideration was incurred by the assessee and charged to the dealers in addition to expenses incurred by the dealer on their own and, therefore, such charges were includible in the assessable value. Accordingly, the Adjudicating Authority confirmed the show-cause notice.

Aggrieved by the order passed by the Adjudicating Authority, the assessee preferred appeal No.E/1125/94-A to the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to for the sake of brevity as "the Tribunal"). By the impugned judgment and order dated 09.3.1999, which is a cryptic order, the Tribunal without discussing the evidence on record allowed the appeal on the ground that the matter was covered by the judgments of this Court in *Philips India Ltd.* v. *Collector of Central Excise, Pune,* reported in (1997) 91 ELT 540 and *Mahindra & Mahindra Ltd.* v. *Collector of Central Excise, Bombay,* reported in (1998) 103 ELT 606. Hence, this civil appeal by the department.

At the outset, we may point out that there is conceptual difference between "expenses" and "reimbursement". This difference has not been taken into account by the Tribunal. In the present case, it appears from the decision of the Adjudicating Authority that the Company had initially incurred advertisement expenses which expenses were subsequently reimbursed by them from their dealers. It is not clear from the decision of the Adjudicating Authority as to at what stage the reimbursement took place. It is not clear from the decision of the Adjudicating Authority as to whether the reimbursement was at the end of the year by way of adjustment of accounts or whether the reimbursement had taken place within a short interval of time from the date of the advertisement. The fundamental point however in the present case is whether such reimbursements by the manufacturer are includible

A in the assessable value and whether such reimbursement would constitute "advertisements by the dealers on their own account" or whether they would fall in the category of "advertisements solely made by the assessee on their own account" for computing the assessable value. These questions were not the subject matter of the decisions in *Philips India Ltd.* (supra) and *Mahindra & Mahindra Ltd.* (supra). The Tribunal was wrong in applying the aforestated B two decisions to the facts of the present case.

For the aforestated reasons, the appeal is allowed; the impugned judgments and orders of the Tribunal as well as of the Adjudicating Authority are set aside and the matter is remitted to the concerned Adjudicating Authority C for fresh decision in accordance with law, both on merits as well as on the point of limitation. However, in the facts and circumstances of this case, there will be no order as to costs.

N.J. Appeal allowed.