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THE COMMISSIONER OF CENTRAL EXCISE, MEERUT

v.

M/S. UNIVERSAL GLASS LTD., SAHIBABAD (GHAZIABAD)

MARCH 11, 2005

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

Central Excise Act, 1944/Central Excise (Valuation) Rules, 1975—Rule 6(b)(ii)—Excise duty—Price declaration by assessee regarding sale to a buyer on the basis of sale to other buyers—Demand of duty by invoking Rule 6(b)(ii) in absence of availability of comparable price—Finding by Revenue that assessee guilty of creating artificial buyers—No other manufacturer of similar goods available—Goods sold to other buyers were different from the goods sold to the buyer—Calculation of assessable value based on the profit of buyer and not the assessee—Tribunal held invoking of Rule 6(b)(ii) not justified—On appeal, held : Invoking of Rule 6(b)(ii) was justified as in the facts of the case no comparable prices were available for determining the normal price—However, assessable value should have been calculated on the basis of profit of the assessee—Hence to this extent matter remitted to the Commissioner of Central Excise.

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Respondent-assessee was in the business of manufacturing glass bottles and jars. Assessee-Company was a division of another Company (JIL) which was in the business of manufacturing liquor and food products. Assessee-Company filed its price list for assessment purpose valuing the bottles supplied to JIL for captive consumption relying upon the prices charged by assessee to other companies. Revenue demanded differential duty, invoking Rule 6(b)(ii) of Central Excise (Valuation) Rules, 1975. Comparable prices were not available and that the assessee had, with the intention to evade duty, willfully and deliberately filed incorrect price declarations. Upholding the demand, Commissioner held that Revenue was right in invoking Rule 6(b)(ii) as it was not possible to determine the nearest ascertainable value of the bottles under Rule 6(b)(i). The prices of bottles supplied to JIL for captive consumption could not be compared to the price of bottles supplied to either the franchisees of JIL, or to M/s ASA because the franchisees were not independent buyers as the packing cost was borne by JIL and they were put up to create an

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A artificial market because the bottles sold to M/s. ASA were re-sold to JIL and it was set up by the assessee to create an artificial gate price. There were also no comparable manufacturers of the bottles in the vicinity in terms of capital investments, shape and size of the bottles etc. That in most of the cases, price lists were filed by the assessee either in part-I or B Part-II without sales in fact taking place and yet such price list were relied upon by the assessee for clearance of bottles to JIL. However, it held that the sale of bottles to other buyers would form the basis of ascertainable value as they were independent buyers. Hence in their case Rule 6(b)(ii) was not invokable. Accordingly the duty demanded was reduced and confined to sales to JIL, their franchisees and to M/s. ASA C by applying Rule 6(b)(ii).

In appeal, Customs Excise and Gold (Control) Appellate Tribunal held that Rule 6(b)(ii) was not invokable as comparable goods were available; and that there could not have been intention to evade duty as the assessee was entitled to exemption vide Notification No. 217/86 and as D the goods were madvatable.

In appeal to this Court the questions for consideration were— Whether the price lists of bottles sold by the assessee to JIL for capitive consumption were comparable with the prices of the bottles sold to "other E independent buyers"; and whether the bottles made by the assessee were comparable with the bottles made by other manufacturers.

Assessee *inter alia* contended that the costing method adopted by the Commissioner was faulty inasmuch as the assessable value calculated by him was based on the profits of JIL and not on the profits of the F assessee.

Allowing the appeal, the Court

HELD : 1. Comparable goods under rule 6(b) should be, as far as possible, identical goods. Simply because two goods are known by the G same name or by the same genre, does not mean that they are comparable goods. Even if they are assumed to be comparable, all relevant differences as far as possible should be recognized. In the present case, even if the capacities of the bottles supplied to JIL on one hand and bottles supplied to "other buyers" on the other hand are the same, still the size and the shape of the bottles would make the relevant difference. Therefore, the H shape and size of the bottles supplied to JIL cannot be compared with the

shape and size of the bottles supplied to other buyers. Rule 6(b)(i) casts a duty on the department to approve the assessable value and it is for the department to find out whether there are goods comparable to the assessee's goods. However, the proforma of the price list in part VI(a) under the heading "comparable goods, if known to the assessee" indicates that the particulars of comparable prices have to be given by the assessee. In terms of rule 6(b)(i), such value has to be of comparable goods manufactured by the other assessees. [741-E-H; 742-A]

2. The Department has found that there were no other manufacturers of similar bottles. Moreover, in the present case, the department found price manipulation. Prices of bottles sold to JIL were lower than the prices of bottles sold to other buyers. The price increase of bottles sold by the assessee to JIL was lesser than the price increase of bottles sold to other buyers. The costing data supplied by the assessee to the department indicated that the bottles supplied to JIL and their franchisees were under-priced as the selling and organizational expenses and bill discounting expenses were not included in the assessable value of the goods and, therefore, such prices were not comparable with prices of the bottles sold to other buyers. The costing done by the assessee itself indicates the price differential. The price lists filed by the assessee under part VI(a) were illusory as they were based on sales which did not exist or which were meagre. The price lists under part VI(a) filed by the assessee during 1991-92 had no comparable price lists. All supplies shown under gate passes/invoices in favour of M/s ASA were actually destined for JIL. Further, as found by the Commissioner, the franchisee agreements between JIL and the franchisee holders were not on principal to principal basis, particularly when the cost of packing was to be borne by JIL. The Commissioner was right in holding that the assessee was guilty of creating artificial buyers. The bottles sold to "other buyers" were different from the bottles supplied to JIL; in view of the circumstances, the Tribunal should not have interfered with the well reasoned order of the adjudication passed by the Commissioner. [742-B-G]

3. Since there were no comparable prices available for determining the normal price under rule 6(b)(i), the only alternative was to decide the value under rule 6(b)(ii) by adopting the best judgment principle based on the cost of production and the profits which the assessee would have earned. In the circumstances, when the assessee submitted before the commissioner its profit and loss account on 22.10.1996, due weightage

A **ought to have been given to such accounts. It was not open to the Commissioner to do the costing on the profits of JIL, particularly, when the figures relating to profits of the assessee were available. Only to this extent, the matter is remitted to the Commissioner of Central Excise, to decide this limited issue in accordance with law. However, this exercise of recalculating the profits shall be limited to under-priced bottles alone.**
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[743-C-E]

United Glass v. *Collector of Central Excise,* **in (1995) 75 ELT 209, referred to.**

4. The dispute was regarding the correct price declaration. There
C **was no dispute of classification. Therefore, the reliance placed by the Tribunal on the exemption notification no. 217/86-CE as also on the product being modvatable was totally ill-founded. [740-H; 741-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 894 of 2000.
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From the Judgment and Order dated 13.8.1999 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. No. 1145/99-A in A. No. E/1251 of 1997-A.

K. Swamy, T.A. Khan, B.K. Prasad and P. Parmeswaran for the
E Appellant.

R. Parthasarthy, Alok Yadav and Rajesh Kumar for the Respondent.

The Judgment of the Court was delivered by

KAPADIA, J. The issue involved in this civil appeal filed by the
F department under section 35L(b) of the Central Excise Act, 1944 is – whether M/s Universal Glass Ltd. (assessee herein) was right in valuing the bottles manufactured and supplied by them to M/s Jagatjit Industries Ltd., Kapurthala (for short "JIL") by relying upon the prices charged by the assessee to companies, like Dabur, Hamdard, Maaza, Kissan etc. (hereinafter referred to
G as the "other buyers") under rule 6(b)(i) of the Central Excise (Valuation) Rules, 1975 (hereinafter referred to as "the 1975 Rules").

The assessee herein is a division of JIL. It is in the business of manufacturing glass bottles and jars at its factory in Meerut. During the relevant period, 50% of its total production was captively consumed by JIL
H (holding company) and the remaining was sold to industrial consumers,

namely, Dabur, Hamdard, Maaza, Kissan etc. JIL are in the business of manufacturing liquor and food products. A

By show-cause notice dated 30.12.1994, differential duty of Rs. 4.33 crores (approximately) for the period December 1989 till March 1994 was demanded mainly on the ground that the assessee had, with the intention to evade duty, wilfully and deliberately filed incorrect price declarations during the aforestated period; that a deliberate attempt was made to show that an independent market existed in respect of the said bottles by filing price lists in part-I and part-II, when in fact there existed no such market; that the sales under parts I & II were not on principal to principal basis; and that the assessee had filed price lists in the case of supplies to JIL for captive consumption by relying upon the prices charged by the assessee to others, namely, Dabur, Hamdard, Maaza, Kissan etc. knowing fully well that there was a difference between the variety of bottles supplied to JIL and the bottles supplied to Dabur, Hamdard, Maaza, Kissan etc. in terms of shape and size. The assessee was called upon to show-cause, under the aforestated circumstances, as to why the department should not invoke rule 6(b)(ii) of the 1975 Rules and determine the assessable value afresh on the costing method, particularly when comparable prices were not available. B C D

By the impugned order dated 27.3.1997, the Commissioner rejected the contention of the assessee that the prices of the bottles supplied to JIL for captive consumption were comparable to the prices of the bottles supplied to the said "other buyers" for the following reasons. According to the Commissioner, M/s Ashoka Sales Agency (for short "M/s ASA") was a buyer set up by the assessee to create an artificial gate price for jars and jugs of "Maltova" and "Viva". That, the so called "franchisees" were not independent buyers, who were put up to create an artificial market. In this connection, it was found that the packing costs were borne by the JIL, which circumstance, indicated complete control of JIL. That, sale prices of the bottles supplied to JIL were not revised though there were periodic revisions for bottles supplied to "other buyers". During 1992-93, 24 types of bottles were supplied to JIL out of which there were no sales for 19 types. During 1993-94, there were no sales for 16 types out of 19 types of bottles. That, in most of the cases, price lists were filed by the assessee either in part-I or in part-II without sales in fact taking place and yet such price lists were relied upon by the assessee for clearances of bottles to JIL. The Commissioner further found that there were no comparable manufacturers of the bottles in the vicinity in terms of capital investments, shape and size of the bottles etc. That, the assessee had E F G H

A sold Maltova and Viva jars to M/s ASA and placed reliance on price lists in part-II which the assessee could not have done as the bottles sold to M/s ASA were re-sold to JIL. In the circumstances, the Commissioner came to the conclusion that the entire exercise undertaken by the assessee was with the intention to defraud the department by under-invoicing the prices of the bottles supplied to JIL. According to the Commissioner, it was not possible B to determine the nearest ascertainable value of the bottles manufactured by the assessee under rule 6(b)(i) and, therefore, the department was right in invoking rule 6(b)(ii) of the 1975 Rules.

The Commissioner found that the buyers namely, Dabur, Hamdard, C Maaza, Kissan etc. were independent buyers and, therefore, the prices realized under such sales could form the basis of ascertainable value and, therefore, for this category, the Commissioner held that the rule 6(b)(ii) was not invokable.

Accordingly, applying rule 6(b)(ii), the duty demanded under the show- D cause notice stood reduced and confined to sales by the assessee to JIL, their franchisees and to M/s ASA, amounting to Rs. 1,00,33,321.73 by applying rule 6(b)(ii).

Aggrieved by the decision of the Commissioner, the matter was carried in appeal to the Customs, Excise and Gold (Control) Appellate Tribunal, E New Delhi (hereinafter referred to as "the tribunal").

By impugned decision dated 13.8.1999, the tribunal held that since comparable goods were available, the department was not entitled to invoke rule 6(b)(ii). According to the tribunal, there could not have been the intention F to evade duty on the part of the assessee as the assessee was entitled to exemption vide notification no. 217/86 and as the goods were modvatable. Consequently, the assessee's appeal was allowed by the tribunal. Hence, this civil appeal.

Mr. K. Swamy, learned counsel appearing on behalf of the department, G made the following submissions. According to the learned counsel, no sales were made against the prices declared in part-I. That, the prices declared by the assessee in part VI(a) could not be compared with the prices mentioned in part-I. That, part VI (a) prices were not comparable with part-II prices under contracts with the franchisees of JIL as these prices were not genuine. That, the tribunal had failed to appreciate that although the agreements entered H

into were between JIL and their franchisees and though the bottles were physically dispatched to the franchisees, the packing costs were borne by JIL. Hence, the prices of the bottles directly supplied to JIL could not be compared with the prices of the bottles supplied to the franchisees. Learned counsel further submitted that out of 24 types of glass bottles and jars supplied to JIL during 1992-93, 19 types of bottles were supplied without any sales contracts; that sales to M/s ASA were no sales as bottles meant to be supplied to M/s ASA were dispatched to JIL. Hence, according to the learned counsel, the prices at which the bottles were supplied to M/s ASA could not form the basis for assessment of the bottles supplied to JIL. Learned counsel further submitted that the bottles covered by sales to JIL, M/s ASA and franchisee holders could not be compared with the sales to "other buyers" like Dabur, Hamdard, Maaza, Kissan etc. It was contended that no comparable goods were available at the material time. That, in some cases, bottles were sold at the prices below their costs and, therefore, such prices could not have formed the basis for assessment. It was urged that the Commissioner had examined the matter from each and every angle including costing and, therefore, interference by the tribunal was uncalled for.

Shri R. Parthasarthy, learned advocate for the assessee submitted that there were four categories of buyers, namely, JIL, their franchisees, M/s ASA and "other buyers" like Dabur, Hamdard, Maaza, Kissan etc.; that 50% of the total production was supplied to JIL; that in respect of bottles supplied to JIL, the assessee was right in filing the price list under part VI(a) by comparing the prices with the price lists in respect of sales made by the assessee in favour of independent buyers like Ganganagar Sugar Mills Ltd., HPSIDC as well as Dabur, Hamdard, Maaza, Kissan etc.; that the prices charged and the comparable prices listed in part VI(a) represented the correct value of the bottles and, therefore, the valuation in respect of bottles supplied to JIL for captive consumption was correctly done under rule 6(b)(i). According to the learned counsel, the department was wrong in coming to the conclusion that the franchisee agreements were dictated; that the terms and conditions of the agreements were not unusual but they were normal in the trade; that the franchisees were independent buyers and the prices charged to them were similar to prices charged to the other independent buyers; that the franchisee agreements between the JIL and the franchisees were in respect of liquor and not for bottles; that M/s ASA was an independent dealer and, therefore, the prices charged for jugs and jars to JIL were comparable with the prices charged from M/s ASA; that JIL had bought jars and jugs from other manufacturers also and, therefore, the prices charged from M/s ASA were

A comparable with the prices charged by the assessee from JIL in respect of such jars and jugs; that M/s ASA was not a small trader; that the duty paid on such jars and jugs was modvatable and, therefore, there could not have been any intention to evade duty; that in any event, the department had failed to take into account the prices of bottles made by other manufacturers; that the prices for jars and jugs to JIL were the same as the prices charged to M/ B s ASA; that the prices of bottles sold to the Dabur, Hamdard, Maaza, Kissan etc. represented the correct value and, therefore, the comparable sale instances were available in the present case and consequently, the department had erred in invoking rule 6(b)(ii).

C The basic controversy in this civil appeal is – whether the price lists of bottles sold by the assessee to JIL for captive consumption were comparable with the prices of the bottles sold to "other buyers" namely, Dabur, Hamdard, Maaza, Kissan etc.; and whether the bottles made by the assessee were comparable with the bottles made by other manufacturers.

D The concept of "value" in the 1944 Act, as it then stood, was related to the price at which goods were capable of being sold. The said value was not restricted to the manufacturing costs plus net-profits but it covered various expenses on components which contributed to the increase in the market price, that is to say, expenses on components which contributed to "value addition". For determination of the value, where the normal price was not E ascertainable for the reasons that such goods were not sold in the market or for any other reason, the nearest ascertainable equivalent thereto was required to be taken into account, in the manner prescribed, and accordingly in the case of captive consumption, the "value" for assessment of duties had to be equivalent to "the normal price" as defined under section 4(1)(a) of the Act. F Accordingly, the 1975 Rules had to be applied for computing the value of the bottles manufactured by the assessee and consumed by JIL.

Under rule 6(b) of the said 1975 Rules, applicable to this case, the first option was to value the goods on the normal price of comparable goods and if that was not possible, then, alone in the alternative, rule 6(b)(ii) had to be G applied in order to compute the normal price and consequently, all expenses like selling and organizational expenses, bill discounting expenses etc. which formed an integrated part of the sale invoice, in respect of sales on principal to principal basis, formed the part of the assessable value of such goods.

In the present case, the dispute was regarding the correct price H declaration. There was no dispute of classification. Therefore, the reliance

placed by the tribunal on the exemption notification no. 217/86-CE as also on the product being modvatable was totally ill-founded. A

Moreover, the impugned judgment of the tribunal is perfunctory. It has not given any reason whatsoever for setting aside the detailed order passed by the Commissioner. There is no discussion on any of the aspects like difference in the variety of bottles supplied to JIL *vis-à-vis* bottles supplied to other buyers like Dabur, Hamdard, Maaza, Kissan etc. There is no discussion on the nature of franchisee agreements. In passing the tribunal says that the goods were comparable. There is no discussion with regard to the shape and size of the bottles supplied to JIL. There is no discussion as to how the bottles supplied to JIL were comparable to the bottles supplied to the "other buyers", like Dabur, Hamdard, Maaza, Kissan etc. The tribunal has not even considered the resale of bottles by M/s ASA to JIL. The tribunal has not even examined the aspect of under invoicing of sale prices. As stated above, there were instances of sale price charged to JIL being lower than the cost price which have not been discussed. In the circumstances, the tribunal had erred in interfering with the adjudication done by the commissioner. B C D

Valuation and the prices get revised from time to time even within the unit. They are the factors which are known only to the management. These factors cannot be ascertained by site inspection by the department. Comparable goods under rule 6(b) should be, as far as possible, identical goods. Simply because two goods are known by the same name or by the same genre, does not mean that they are comparable goods. Even if they are assumed to be comparable, all relevant differences as far as possible should be recognized. In the present case, even if the capacities of the bottles supplied to JIL on one hand and bottles supplied to "other buyers" on the other hand are the same, still the size and the shape of the bottles would make the relevant difference. JIL is a liquor manufacturer whereas Kissan, Dabur, Hamdard etc. are manufacturers of food and medicinal preparations. Therefore, the shape and size of the bottles supplied to JIL cannot be compared with the shape and size of the bottles supplied to Kissan, Dabur, Hamdard etc. Even the thickness of the glass of the bottles supplied to a liquor manufacturer would be different from the thickness of the glass of the bottles supplied to a manufacturer of drugs/food products. Rule 6(b)(i) casts a duty on the department to approve the assessable value and it is for the department to find out whether there are goods comparable to the assessee's goods. However, the proforma of the price list in part VI(a) under the heading "comparable goods, if known to the assessee" indicates that the particulars of comparable prices have to be given E F G H

A by the assessee. In terms of rule 6(b)(i), such value has to be of comparable goods manufactured by the other assessee.

In the present case, the department has found that there were no other manufacturers of similar bottles. Moreover, in the present case, the department found price manipulation. Prices of bottles sold to JIL were lower than the B prices of bottles sold to other buyers like Dabur, Hamdard, Maaza, Kissan etc. Further, the department found that the price increase of bottles sold by the assessee to JIL was in the range of 30 to 48% whereas the price increase of bottles sold by the assessee to other buyers like Dabur, Hamdard, Maaza, Kissan etc. was in the range of 50 to 92%. Further, even the costing data C supplied by the assessee to the department indicated that the bottles supplied to JIL and their franchisees were under-priced as the selling and organizational expenses and bill discounting expenses were not included in the assessable value of the goods and, therefore, such prices were not comparable with prices of the bottles sold to Dabur, Hamdard, Maaza, Kissan etc. The costing done by the assessee itself indicates the price differential and consequently, D prices of the bottles sold by the assessee to companies like Dabur, Hamdard, Maaza, Kissan etc. were not comparable with the prices of the bottles captively consumed by the JIL. Further, as found by the Commissioner, the price lists filed by the assessee under part VI(a) were illusory as they were based on sales which did not exist or which were meager. Further, as found by the E Commissioner, the price lists under part VI(a) filed by the assessee during 1991-92 had no comparable price lists. Further, all supplies shown under gate passes/invoices in favour of M/s ASA were actually destined for JIL. Further, as found by the Commissioner, the franchisee agreements between JIL and the franchisee holders were not on principal to principal basis, particularly when the cost of packing was to be borne by JIL. The commissioner was F right in holding that the assessee was guilty of creating artificial buyers. Further, the commissioner found that the bottles sold to "other buyers" like Dabur, Hamdard, Maaza, Kissan etc. were different from the bottles supplied to JIL; that although the capacity of a few bottles were common, they were different in terms of shape and size; they were also different in terms of cost G of production; that there were no other manufacturers of similar bottles in terms of technology and in terms of capital investment and thus the prices of similar goods were not available. Under the above circumstances, the tribunal should not have interfered with the well reasoned order of the adjudication passed by the commissioner.

H Before concluding, we may refer to one of the arguments advanced on

behalf of the assessee. It was urged that the costing method adopted by the commissioner was faulty inasmuch as the assessable value calculated by him was *inter alia* based on the profits of JIL and not on the profits of the assessee. It was urged that the assessee was a division of JIL. That, the assessee had submitted its profit and loss account with its written submission on 22.10.1996 which accounts have been brushed aside by the commissioner stating that they were prepared after the earlier round of litigation and, therefore, reliance cannot be placed on such accounts.

As stated above, in the present case, since there were no comparable prices available for determining the normal price under rule 6(b)(i), the only alternative was to decide the value under rule 6(b)(ii) by adopting the best judgment principle based on the cost of production and the profits which the assessee would have earned. In the circumstances, when the assessee submitted before the commissioner its profit and loss account on 22.10.1996, due weightage ought to have been given to such accounts. It was not open to the Commissioner to do the costing on the profits of JIL, particularly, when the figures relating to profits of the assessee were available. Only to this extent, we remit the matter to the Commissioner of Central Excise, Meerut, who is directed to decide this limited issue in accordance with law. However, this exercise of recalculating the profits shall be limited to under-priced bottles and not to the bottles which have been found to be correctly valued in the impugned order of the Commissioner [See : *United Glass* v. *Collector of Central Excise,* reported in (1995) 75 ELT 209.

Subject to above, the appellant succeeds, the impugned judgment of the tribunal dated 13.8.1999 passed in Appeal No. E/1251/97-A is set aside, with no order as to costs.

K.K.T. Appeal allowed.