COMMISSIONER, CENTRAL EXCISE, MEERUT

v.

M/S. MONSANTO MANUFACTURE PVT. LTD.

(Civil Appeal Nos. 5216-17 of 2003)

NOVEMBER 26, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Central Excise Rules, 1944-r. 9(A) / Central Excise Act, 1944 – s. 11A – Manufacturer-assessee entering into sourcing agreement with a company – Assessee declaring the price of manufactured product on the basis of the agreement – Duty paid on the declared price – Department alleging suppression of material facts against the assessee and demanding additional duty with penalty and interest – Held: The assessee had not suppressed material facts as the source agreement was within the knowledge of the Department – Assessee had not received any direct and indirect consideration over and above as was agreed under the agreement– The show-cause notice was also time-barred.

The respondent-assessee company along with other companies, collectively entered into a sourcing agreement with a company. On the basis of the said agreement, the assessee declared the price of its manufactured product to the Department. The excise duty was paid on the basis of the price so declared.

The Department alleged that the assessee received additional consideration over and above the assessable value declared by it and issued show-cause notice for demand u/r. 9(A) of Central Excise Rules, 1944 r/w s. 11A of Central Excise Act, 1944. The assessee replied that there was no suppression of material facts as the sourcing agreement, on which the entire transaction was being

A carried on, was made available to the Department; and that the show-cause notice issued in respect of the period from February, 1995 to February, 1999 was barred by limitation. The Commissioner held that the show cause notice was not barred by limitation and that there was suppression
B of material facts on the part of the assessee. In appeal, the Tribunal, relying on its own decision passed in *Kwality Ice-Cream* case, held that there was no direct and indirect consideration received by the assessee as alleged by the Department; and that the show-cause notice was barred
C by limitation. Therefore, the instant appeals were filed.

Dismissing the appeals, the Court

HELD: The Department was not justified in invoking the extended period u/s. 11A of the Central Excise Act, 1944. The entire transaction between the parties was on
D the basis of the agreement which was within the knowledge of the Department from March-April, 1995. It is not the allegation in the show-cause notice that the assessee received any direct and indirect consideration over and above as to what has been agreed under the
E agreement. The Court has noticed in the connected matter (**M/s. Kwality Ice Cream*) that the price fixation was in accordance with the formula agreed to between the parties which has been specifically incorporated in the source agreement. The factum that the source agreement
F was filed by the assessee and was within the knowledge of the Department from March-April, 1995 is not in dispute. Thus, the show-cause notice issued on 27.3.2000 was barred by limitation. On the facts of the instant case, the Tribunal has taken the correct view in the matter. [Para 9]
G [408-D-G]

**Kwality Ice Cream Co. vs. CCE, Chandigarh* Judgment datedNovember 26, 2010 passed by Supreme Court – relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No.
H 5216-17 of 2003.

From the Judgment & Order dated 08.01.2003 of the Customs Excise &Gold (Control) Appellate Tribunal, New Delhi in Final Order No. 14-15/2003-NB (A), in Appeal No. E/1157/201-A & E/1457/2002/A.

WITH

C.A. Nos. 8456-63 of 2002.

K. Swami, B.J. Prasad, B. Sunita, Priya Bhatnagar, Anil Katiyar for the Appellant.

Ravinder Narain, Sonu Bhatnagar, Ajay Aggarwal, Mallika Joshi, Ranjan Narain for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. M/s. Monsanto Manufactures Pvt. Ltd. was the manufacturer of ice-cream falling under sub-heading no. 2105.00. During the period for 1994-95 to 1998-99 (upto 2/99) manufactured item was leviable to Central Excise Duty at advalorem rates. On 14.10.1994, M/s. Monsanto along with other companies (which are collectively referred to as "K-NORTH") entered into an agreement with Brooke Bond Lipton India Ltd. (for short 'BBLIL') and Unilever Industry Pvt. Ltd. known as the sourcing agreement. Under the said agreement BBLIL was to place an order on K-NORTH which including M/s. Monsanto for manufacture of the ice-cream. The products were to be sold by M/s. Monsanto as per a formula agreed between the parties expressly incorporated in the said agreement. The agreement came into force w.e.f. 1st January, 1995. Ever since the agreement came into force M/s. Monsanto stopped marketing their products through their dealers and started selling their production of ice-cream to BBLIL subsequently merged with M/s. Hindustan Lever Ltd. (for short 'HLL'). The ice-cream so manufactured was marked with the brand name "Kwality Walls". On the basis of the said agreement, M/s. Monsanto filed price list w.e.f. 1.1.1995 in respect of the manufactured product with the Department. Price declared was on the basis of its manufacturing cost plus manufacturing profits. Duty was paid on the basis of price so declared.

A 2. The Department vide show cause notice dated 27.3.2000 required M/s. Monsanto as to why differential duty should not be demanded under Rule 9(A) of Central Excise Rules 1944 read with Section 11A of the Central Excise Act, 1944 (for short 'the Rules and Act') together with penalty and interest. B The allegation in the show cause notice was that M/s. Monsanto received additional consideration over and above the assessable value declared by it and additional consideration flowing to it from BBLIL and/or HLL in several forms like non-competition reserve, interest free deposit, consideration for sale C of marketing undertaking, interest on deposits as security advances received by it, value of the brand name etcetera. M/s. Monsanto raised its objections to the allegations and averments made in the show cause notice both on the merits and as well as on the ground of limitation inter alia contending that the D transaction between M/s. Monsanto and BBLIL/HLL was on a principal to principal basis with price as a sole consideration for the sale of the manufactured products. It was also contended that the sourcing agreement dated 14th October, 1994, on which the entire transaction was being carried on, was made available to the Department in March-April, 1995. There was no suppression E of facts on the part of the assessee. The contention was the show cause notice issued in respect of a period from February, 1995 to February, 1999 was barred by limitation.

3. The Commissioner rejected all the contentions raised by F M/s. Monsanto on the issue of limitation. The Commissioner took the view that full details of settlement between the parties to the source agreement was not made available to the Department and merely furnishing a copy of the agreement was not enough. The Commissioner thus concluded that there was suppression G of material facts.

4. M/s. Monsanto carried the matter in appeal inter alia contending that the issue on merits was covered by the Tribunal's decision in *Kwality Ice Cream Co. vs. CCE, Chandigarh*

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[2002(145) ELT 584] in its favour. The Tribunal in the said case after considering the terms of the very same agreement dated 14.10.1998 held that the pricing in terms of the agreement may not lead to conclusion that the transaction was not one between a principal to another principal. It was however, contended by the Department that the price declared by the assessee was not rejected on the ground that parties were related persons and its case was that there was direct and indirect consideration flowing to the assessee from BBLIL/HLL.

5. The Tribunal after elaborate consideration of the matter, relying on its own decision referred to (supra), held that there was no direct and indirect considerations received by M/s. Monsanto as alleged by the Department. Each of the items was the subject matter of debate in the decision referred to (supra) and the same was applicable to the facts on hand. The Tribunal, accordingly, proceeded to consider whether the Department was justified, in the given facts and circumstances, in invoking the extended period of limitation under Section 11A of the Act. The Tribunal found that the show cause notice issued on 27.3.2000 was hopelessly barred by limitation. The Tribunal found that the agreement entered into by and between the parties was made available to the Department and all transactions between the parties thereto were on the basis of the agreement which were within the knowledge of the Department from March-April, 1995. The Tribunal found that there was no material available on record that the assessee has received either directly or indirectly any consideration from any source outside the agreement. Hence, these appeals under Section 35-L(b) of the Act.

6. The learned counsel for the appellant submitted that mere filing of the agreement by the assessee was not enough as it had failed to disclose the full and complete particulars of its receiving direct and indirect consideration in several forms such as interest free deposit, consideration for sale of marketing undertaking, interest on deposits as security advances received by it, value of the brand name etcetera. Therefore, show cause notice issued was not barred by limitation. This was the main thrust of

A the submission of the learned counsel for the appellant. Learned counsel for the respondent supported the impugned judgment.

7. We have carefully considered the submissions made by the learned counsel for the parties.

B 8. That so far as the question of receiving direct or indirect consideration, it is squarely covered by the Tribunal's decision in *Kwality Ice Cream Co.* (supra) as has been held by the Tribunal itself. We have by a separate order upheld the view taken by the Tribunal, therefore, this issue need not detain us any C further.

9. We do not find any merit in the submission of the learned counsel for the appellant that the Department was justified in invoking the extended period under Section 11A of the Act. The entire transaction between the parties was on the basis of the D agreement which was within the knowledge of the Department from March-April, 1995. It is not the allegation in the show cause notice that the assessee has received any direct and indirect consideration over and above as to what has been agreed under the agreement. We have noticed in the connected matter (M/s. E Kwality Ice Cream) that the price fixation was in accordance with the formula agreed to between the parties which has been specifically incorporated in the source agreement. The factum that source agreement was filed by the assessee and was within the knowledge of the Department from March-April, 1995 is not F in dispute. In such view of the matter, we find no difficulty, whatsoever, to accept the contention of the assessee and the view taken by the Tribunal that the show cause notice issued on 27.3.2000 was barred by limitation. On the facts of this case, we are satisfied that the Tribunal has taken the correct view in the G matter.

10. For the aforesaid reasons, we do not find any merit, whatsoever, in these appeals preferred by the Department. The appeals are, accordingly, dismissed.

H K.K.T. Appeal dismissed.