IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CEA No.93 of 2014
Reserved on:25.03.2015
Date of decision:15.05.2015

Maruti Suzuki India Ltd.

....Appellant

Versus

Commissioner of Central Excise-Delhi-III

......Respondent

CEA No.94 of 2014

Maruti Suzuki India Ltd.

....Appellant

Versus

Commissioner of Central Excise-Delhi-III

......Respondent

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE G.S.SANDHAWALIA

Present: Mr.V.Lakshmikumaran, Advocate,
Mr.Aman Pratap Singh, Advocate,
Mr.Amrinder Singh, Advocate,
Mr.R.K.Hasija, Advocate and
Mr.Shobit Phutela, Advocate, for the appellant.

Mr.Kamal Sehgal, Advocate, for the respondent.

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G.S.Sandhawalia J.

1. This judgment shall dispose of CEA Nos.93 & 94 of 2014, filed under Section 35G of the Central Excise Act, 1944 (for short, the 'Act'), filed by the manufacturer, since common questions of law and facts are involved and by a common impugned order passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short, the 'Tribunal') dated 15.10.2014 (Annexure A-1), the lis has been decided.

2. The Tribunal, vide order dated 15.10.2014, directed the appellant-manufacturer to deposit a sum of ₹150 crores, within 8 weeks and that the balance amount of duty interest and penalty shall remain stayed, subject to the deposit, while deciding the stay application of the appellant.

3. The following four questions of law have been framed by the appellant for the decision by this Court:

> "(i) Whether in facts and circumstances of the present case, the Appellate Tribunal is correct in directing the Appellant to deposit Rs.150 crore out of Rs.240 crore (approx) demand as a pre-condition to hear the Appeal on merits when the entire case is covered in favour of the Appellant by rulings of the Hon'ble Supreme Court and the Bombay High Court?
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> (ii) Whether in facts and circumstances of the present case the Appellate Tribunal is correct in directing the Appellant to make a pre-deposit as a pre-condition to hear the Appeal on merits when the entire case is covered by order of the Appellate Tribunal in Appellant's own case; thus, breaching the doctrine of judicial discipline and judicial propriety?
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> (iii) Whether in facts and circumstances of the present case the Appellate Tribunal is correct in directing the Appellant to make a pre-deposit as a pre-condition to hear the Appeal on merits, when the Hon'ble Tribunal has failed to pass an order after reserving the judgment for more than five months without considering the submissions of the Appellants and deciding the matter on facts and issues which were never part of the proposed demand in the Show Cause Notice?
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> (iv) Whether in facts and circumstances of the present case the Appellate Tribunal is correct in directing the Appellant to make a pre-deposit when substantial period of demand is time barred nd beyond the period of limitation?

4. A perusal of the paperbook would go on to show that vide a show cause notice dated 19.06.2009 (Annexure A-7) and five other notices, the Revenue, on the basis of an audit conducted from 11th to 15th November, 2008, noticed that the appellant-manufacturer was giving dealership margins to the respective dealers for vehicles being sold by them, over and above the assessable value and taxes, as declared in the invoices. The appellants were also permitting different incentive schemes as corporate discounts, free insurance for the sale of the vehicles under the brand name 'Maruti' by way of regular advertisement. The advertisement provided the details of the offers and also gave the names and

telephone numbers of the dealers through whom the schemes could be availed. After going through the advertisement and investigation done on the ground that the show cause notice was got issued on the ground that the promotional schemes should be included in the assessable value, as per the definition of transaction value, given under Section 4(3)(d) of the Act, which provided for determination of demand of customs or the central excise duty of transaction value. Investigations were made, accordingly, and correspondence *inter se* the appellants and the dealers and a conclusion was *prima facie* arrived at that the schemes were conceived and prepared by the manufacturer and the dealers were not party to the schemes and the stand taken that the schemes were launched by the dealers, was not correct. The dealers were bound to implement the schemes and the considerations pertaining to the dealers' contribution was liable to be added in the assessable value to arrive at the transaction/assessable value. Accordingly, quantifying the total discounts given by the manufacturer and the central excise duty payable on the same, the said show cause notice was issued.

5. The defence taken by the appellants was that whatever discounts were passed to the end consumers as the customers had bought the vehicles from the dealers and had got maximum savings and no loss had been incurred by the dealers. The discounts were advertised and known prior to the removal of the goods. Reliance was placed upon the judgment of the Apex Court in ***Union of India & others Vs. Bombay Tyres International Ltd. 1984 (17) ELT 329***. The demand was denied and it was pleaded that the demand duty was barred under Section 11A of the Act. The balance-sheet and profit and loss accounts of the entire period of dispute had been shown and it was submitted that there was no suppression of facts and statements and that the investigation on the extended period of limitation was perverse and contrary to the facts and time-barred.

6. The adjudicating authority, vide order dated 10.01.2013 (Annexure

A-9), by taking into account the defence of the appellants, came to the conclusion that the period relates to the evaluation of vehicles from June, 2004 to March, 2012. The provisions of Section 4(3)(d) of the Act were taken into consideration to hold that the discounts given by the dealers of the manufacturer would be includible in the assessable value of the goods. The objection raised by the appellants that the dealers were not incurring any expenditure and the discounts were being borne by them on their own accord, was taken into consideration and it was held that under the dealership agreement, they were to follow the promotional schemes as issued by the manufacturer. Accordingly, by holding that the manufacturers have legally enforceable rights upon the dealers, the amounts of discounts were held to be included in the transaction value. It was further held that the manufacturer had wilfully mis-stated that the promotional scheme had been launched and rather the promotional schemes were formulated and launched by the manufacturer and therefore, proviso under Section 11A had been rightly invoked. Resultantly, the dealers' contribution and consumers' promotion scheme provided from the dealers' margins had been included in the assessable value, which was quantified as ₹15,70,21,54,908/- and the central excise duty was quantified at ₹240,57,84,802/-. Recovery of interest were also ordered under Section 11AB and penalty to the tune of an equivalent amount of ₹240,57,84,802/- was levied, while giving the benefit upon the institutional discounts and spot discounts which were not to be included in the assessable value.

7. The appellant-manufacturer, filed an appeal before the Tribunal along with an application for waiver of the pre-deposit and taken the plea that there was no fraud and no wilful mis-statement and the demand was time-barred. Vide the impugned order, the Tribunal came to the conclusion that the only issue involved was whether the amount of dealers' margin which had been offered as

part of the promotional discount, was includible in the assessable value, for the purpose of payment of central excise duty or not, in view of the definition of Section 4(3)(d) of the Act, wherein, transaction value had been defined. It was, accordingly, held that it would form part of the assessable value of such goods and would be an indirect consideration, received by the assessee in clearance of the products manufactured by him. The promotional scheme being mandatory upon the dealers, the manufacturer's contention that they were doing on their own accord, was rejected on the ground that the agreement was liable to be terminated. Reliance was placed upon the judgment of the larger Bench of the Tribunal in ***Maruti Suzuki India Ltd. Vs. CCE, Delhi-III 2010 (257) ELT*** wherein it had been held that the provision of running pre-delivery inspection and three free after sale services were also part of the price of goods. The judgment of the Bombay High Court in ***Tata Motors Ltd. Vs. UOI 2012 (286) ELT 161 (Bom.)***, was referred to but not taken into consideration on the ground that the appellant would be provided opportunity to argue on its ratio during regular hearing. Other judgments relied upon were rejected on the ground that the transaction value came into force w.e.f. 01.07.2000 and the judgments were prior to that point of time.

8. Another factor which weighed with the Tribunal was that the dealers were also charging handling charges, over and above the ex-showroom price and the manufacturer had no control over the dealers in this regard. Thus, the handling charges were being recovered by the dealers which range from ₹6000/- per vehicle and thus, had been suppressed from the Department and therefore, the extended period of limitation had rightly been invoked. The discount was being compensated from handling charges, collected by the dealers, indirectly and thus, the appellants were undervaluing the excisable goods while delivering to the dealers.

9. Counsel for the appellants has, thus, submitted that in view of the judgment of the Bombay High Court in **Tata Motors Ltd.** (supra), the circular dated 01.07.2002 had been quashed and therefore, while placing reliance upon ***Benara Sales Ltd. Vs. Commissioner of Central Excise 2006 (207) ELT 513***, argued that once a *prima facie* case was made out, it would be undue hardship to the appellant to deposit the amount and therefore, the conditions imposed to deposit the sum of ₹150 crores, was not justified. It was further submitted that dispensation of deposit was to be allowed as there was two views possible while placing reliance upon the Division Bench judgment of the Allahabad High Court in ***ITC Ltd. Vs. Commissioner (Appeals) Customs 2005 (184) ELT 347 (All.)***.

10. Counsel for the Revenue, on the other hand, submitted that in view of the amendment made in the section, the transaction value would include the value of the concession given by the dealers and the interest of the Revenue was to be protected. In the absence of any financial hardship being faced by the appellant-company, the discretion exercised by the Tribunal is not lightly to be interfered with, in the facts and circumstances and out of the ₹240,57,84,802/- of duty along with penalty of the equivalent amount and interest etc., only a sum of ₹150 crores had been asked to be deposited.

11. The provisions of Section 35F of the Act provide that the Appellate Tribunal should take into account the factum of undue hardship of the appellant and may dispense with such deposit, subject to the conditions it may deem fit, to impose, so that the interest of the Revenue can be safeguarded. The said provisions read as under:

> "SECTION 35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous

of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue."

12. The facts have already been noticed in detail above. The Tribunal, *prima facie,* after taking into account the fact that in view of the provisions of Section 4(3)(d), has come to the conclusion that the transaction value means the price paid or payable for the goods once sold. The same has been held to be inclusive of the amount charged, which the buyer of the vehicle is liable to pay, in connection with the sale and whether the same is payable at the time of the sale regarding advertisement marketting and selling expenses. The factum of the issue being decided against the assessee itself by the larger Bench of the Tribunal in **Maruti Suzuki India Ltd.** (supra), is also not disputed wherein the point taken into consideration was whether the charges incurred towards pre-delivery investigation and after sales service by the dealers from the buyers of car, were to be included in the assessable value, as per the definition of transaction value, given in the Act. The same reads as under:

"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 their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not

> sold, be the value determined in such manner as may be prescribed.
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> xxxx xxxx xxxx
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> (d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

13. As regards the judgment of the Apex Court in **Bombay Tyres International Ltd.** (supra), the Tribunal noticed that the amendment to Section 4 which came into force on 01.07.2000, incorporating the value of the excisable good, for the purpose of charging the duty on excise to the transaction value and as per their definition, the price actually paid would include in addition to the price charged which the buyer was liable to pay, in connection with the sale regarding the amount charged for advertising, publicity, marketing and selling.

14. A perusal of the judgment of the Bombay High Court in **Tata Motors Ltd.** (supra) would also go on to show that the issue in challenge therein was to the circulars dated 01.07.2002 and 12.12.2002, issued by the Revenue, pertaining to the cost of the pre-delivery inspection and free further sales service incurred which had been included in the assessable value. The Court came to the conclusion that the circulars issued by making reference to Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, had wrongly been invoked and linked with the expenses of publicity. Clause 7 of the circular dated 01.07.2000 was, accordingly, held to be not in conformity with the provisions of Section 4(3)(d) and accordingly, held to be illegal and void. That

the pre-delivery inspection and free further sales service charges could be included in the transaction value only when they are charged by the assessee from the buyer and thus, it was held to be a question of fact. It was also noticed that the adjudication order was not under challenge and whether the adjudicating authority was justified, would be decided in appeal. In the present case, there is no circular, as such, which is subject matter of challenge and the demand has been raised on the basis of the provision itself and therefore, reference to the said judgment is without any basis.

15. Once the whole issue *prima facie* has been considered by the Tribunal and has been decided against the appellants, the Tribunal, thereafter, has given the benefit of reducing the deposit to the tune of ₹150 crores, out of the duty of ₹240,57,84,802/-, levied along with equal amount of penalty plus interest. Though the Tribunal also took into account the handling charges issue, which was not subject matter of the notice, but it has on merits also *prima facie* discussed the main issue of transaction value for the purpose of deciding the stay application and therefore, in the absence of any question of law arising, this Court would not interfere in the discretion which has been exercised, keeping in view the facts and circumstances of the present case. The authorities have came to the conclusion that the demand was within the limitation, on account of the fact that an attempt had been made earlier that the dealers, at their own level, had been trying to promote the same by way of advertisement to get out of the ambit of transaction value. However, on a closer examination by the authorities, it revealed that the said fact was not correct and rather, the company was organising the advertisements and the dealers had to comply with the said terms and conditions, in view of the mandatory provisions of the agreement.

16. Under Section 35G of the Act, this Court would only interfere if there is a substantial question of law involved and the appeal is only to be heard

on the questions so formulated. Keeping in view the above discussion, this Court is of the opinion that the substantial questions of law which have been raised by the appellant, do not arise for consideration of this Court in an appeal against an order of pre-deposit. The issues raised require consideration at the hearing of the appeal as to the judgments relied upon by the appellant. Moreover, needless to clarify that the observations herein and in the impugned order would not affect the parties at the hearing of the appeal.

17. In such circumstances, this Court is not inclined to interfere with the discretion which has been exercised and where the benefit of pre-deposit has been restricted to a reasonable amount, in favour of the appellant-manufacturer. However, since an interim order had been passed in favour of the appellant-company by this Court, it is granted 3 months' time to deposit the amount, as per the direction of the Tribunal, from the date of this order.

18. The appeals are, accordingly, dismissed.

(S.J.Vazifdar)
Acting Chief Justice

(G.S.Sandhawalia)
Judge

15.05.2015
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