

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4228 OF 2006

M/S ANDAMAN TIMBER INDUSTRIES

... Appellant

VERSUS

COMMISSIONER OF CENTRAL EXCISE, KOLKATA-II

... Respondent

O R D E R

The appellant-assessee has a factory at Bamboo Flat, South Andamans and its head office is in Calcutta. The assessee is manufacturing ply-woods and related products in its factory at South Andamans. Some of these products are sold from the factory premises in South Andamans only to certain buyers. However, major portion of the products manufactured there are sold to other dealers from their numerous depots which are situated at different places in the country. The assessee had filed its declaration under Section 173C of the Central Excise Rules showing the price of the goods at which they were sold ex-factory and delivery basis. The respondent-Revenue found that there was a lot of price difference between the goods sold at ex-factory and delivery basis in comparison with the goods which were sold to the buyers from their depots. Investigation was carried out. Statements of two buyers, viz., Sri Sreeram Tekriwal, partner of M/s. Sreeram Santosh Kumar, Calcutta and Sri Mahendra Laxmidas Panchmati, partner of M/s. Laxmidas Brothers, Bombay were recorded and on that basis, Show Cause

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Notice dated 03.05.1995 was served upon the assessee stating as to why the price at which the goods were sold to these customers from the depots may not be the basis for determining the value for the purpose of excise duty. The respondent contested the aforesaid Show Cause Notice by furnishing its reply wherein various defences / justifications were given. Among others, it was stated that on the same ground, proceedings were taken earlier which resulted in favour of the assessee by the decision of the Tribunal and that decision of the Tribunal was accepted as no further appeal was filed by the Department thereagainst. The assessee also questioned the correctness of the statements of the aforesaid two witnesses and demanded right to cross-examine them. The matter was heard. Thereafter, the Adjudicating Authority passed the order confirming the demand in the Show Cause Notice. The Adjudicating Authority also took into consideration the price list of the assessee maintained at its depots which was treated as the price for the purposes of levying the excise duty.

The appellant filed appeal against the aforesaid order of the Adjudicating Authority. However, this appeal is also been dismissed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'Tribunal'). The perusal of the order of the Tribunal would demonstrate that it had taken note of the plea specifically raised by the assessee that the normal ex-factory sale price should be treated as normal price by virtue of the provisions of

Section 4 of the Central Excise Act and to which only transportation cost could be added. Number of judgments were cited in support of this proposition which are taken note of by the Tribunal. However, on two grounds, the Tribunal rejected the appeal of the assessee. These are: -

(1) The ex-factory sale was hardly 2 percent and most of the sales, i.e., to the extent of 98 per cent, were from the depots of the assessee which are situated at other places and not at the place of factory, i.e., South Andamans.

(2) Though the price at which sales were made ex-factory at South Andamans remains the same over a period of time as far as sales to depots are concerned, the price increased from time to time.

Insofar as the plea of the appellant that it was not allowed to cross-examine the dealers whose statements were relied upon by the Adjudicating Authority in passing the orders, the Tribunal rejected its plea in the following manner: -

"6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders."

Challenging the aforesaid order, the present appeal is

preferred by the appellant-assessee.

We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the

Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause

Notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.

No costs.

....., J.
[A.K. SIKRI]

....., J.
[ROHINTON FALI NARIMAN]

New Delhi;
September 02, 2015.

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No. 4228/2006

M/S ANDAMAN TIMBER INDUSTRIES

Appellant(s)

VERSUS

COMMR.OF CENTRAL EXCISE,KOLKATA-II

Respondent(s)

(With office report)

Date : 02/09/2015 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s)

Mr. Kavin Gulati, Sr. Adv.

Mr. Praveen Kumar, Adv.

Mr. Avi Tandon, Adv.

Ms. Sunaina Kumar, Adv.

For Respondent(s)

Mr. K. Radhakrishnan, Sr. Adv.

Mr. T. M. Singh, Adv.

Ms. Aruna Gupta, Adv.

Ms. Alka Agarwal, Adv.

Mr. B. Krishna Prasad, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeal is allowed in terms of the signed order.

(Nidhi Ahuja)
COURT MASTER(Renu Diwan)
COURT MASTER

[Signed order is placed on the file.]