IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

WEST ZONAL BENCH AT MUMBAI

COURT NO. III

Appeal No. E/1658/05

(Arising out of Order-in-Appeal No. P-III/82/2005 dated 17.2.2005 passed by the Commissioner of Central Excise & Service Tax (Appeals), Pune-III).

For approval and signature:

Hon'ble Shri S.S. Garg, Member (Judicial)

Hon'ble Shri Raju, Member (Technical)

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1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.	Whether order is to be circulated to the Departmental authorities?	:	Yes

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M/s Rathi Transpower Pvt. Ltd. **...Appellant**

Vs.

Commissioner of Central Excise, Pune-III **...Respondent**

Appearance:

Shri S. Narayanan, Advocate for Appellant

Shri V.K. Shastri, AC (AR) for Respondent

CORAM:

SHRI S.S. GARG, MEMBER (JUDICIAL)

SHRI RAJU, MEMBER (TECHNICAL)

Date of Hearing: 03.02.2016

Date of Decision: 10.02.2016

ORDER NO.

Per: Raju

The appellants are manufacturer of excisable goods and were selling the products to various distributors and dealers. The appellants had agreement with some of the dealers and distributors in which they were sharing the cost of advertisement on optional basis. The clauses (6), (8) & (9) of the said agreement read as follows: -

> (6) As far as advertisement expenses, RTPL do not have any legal right against the dealer/distributor to enforce and necessarily incur such advertisement expenditure and it is purely at the option of the said dealer/distributor to do the same, which could be done at his own free

will, for the purpose of increasing its business and its sale of own business which is done in an independent capacity and dealer/distributor cannot bind the manufacturer on any account as sale is on principal to principal basis.

(7) ...

(8) In order to maintain uniformity in advertisements, etc, if the dealer/distributor desires to have such advertisements carried out to promote his own business, if need be, can contact RTPL who based on requirements can share the advertisement material and the costs of which will be recovered from the said dealer/distributor who exercises such an option and the sharing of costs in mutual interest of business will be done according to the percentage mentioned in the relevant clause. In such cases, RTPL shall provide various promotional materials like product leaflet, calendar to the dealers/distributors, for sales promotion activities and dealer/distributor by sharing such costs in their own business interest gets benefited in equal degree.

(9) In order to maintain uniformity in the advertisements of products to ensure that customer do not understand the product sold differently, in terms of quality and nature and commercial aspects of products sold and including the manner, style, and standard of sales promotion measures which needs to be consistent with business ethics, RTPL suggests in mutual interest of business, prior approval of the mode and message of the advertisement.

2. A demand show-cause notice was issued to the appellant seeking to add the amount recovered from the dealers in respect of the advertisements cost to the assessable value. The demand was confirmed by the lower authorities on the ground that the transaction value as defined under Section 4(3)(d) includes cost of advertisements or publicity. Aggrieved by the said order, the appellants are in appeal before us.

3. Learned Counsel for the appellant relied on the aforesaid clauses of the agreement to assert that the advertising and publicity material taken by the dealers is purely on their own option. The appellants are in fact giving the said

material to the dealers at 50% of the cost. It was argued that sharing of cost is only subject to the requirement of the advertising material by the dealers and it happens only in respect of few of the dealers. Learned Counsel relied on the decision of Hon'ble Supreme Court in the case of Philips India Ltd. 1997 (91) ELT 540 (SC). He also relied on the decision of the Tribunal in case of Ford India Pvt. Ltd. 2007 (216) ELT 530 (Tri-Chennai) and Maruti Suzuki India Ltd. 2008 (232) ELT 566 (Tri-Del). It was asserted that in all these decisions, it has been held that unless cost of advertising is recovered from the dealers mandatorily as a condition of dealership, the same cannot be added to the assessable value.

4. Learned AR relies on the impugned order.

5. We have gone through the rival contentions. We find that the terms of agreement are very clear that it is an option to the dealer to obtain advertising materials from the appellant at 50% of the cost. It is not disputed that only some of the dealers are availing these option. That being so, it can safely be concluded that it is not mandatory for the dealers to take the advertising materials from the appellants and to share the cost of such materials. In these circumstances, the Tribunal□s decision in case of Maruti Suzuki India Ltd. (supra) becomes squarely applicable. Para 9 and 10 of the said decision reads as follows: -

> *9. A perusal of the various judgments relied upon, on behalf of appellants, leads as to the following conclusion on the points of law. The advertisement for any product manufactured may fall under Rule 3 broad categories. First category is the advertisement done by the manufacturer on their own and at their own expenses. Such advertisements make the product visible and known to the prospective buyers. Such advertisement not only benefits the manufacturer but also the dealers. As such advertisements make the job of selling relatively easier. There are also advertisements which may be done exclusively by the dealer in their area out of margins received by them. Even such advertisements benefit both the dealers and to some extent the manufacturer. The joint advertisements are, therefore, can be considered to benefit both the dealers and the manufacturer. Such joint advertisement arises out of legitimate business consideration; this arises out of the mutual interest in maximizing the sale of products. Sharing of expenses on the joint advertisement, campaign is normal. The issue to be considered is whether the dealer's share of expenses can be considered as consideration/additional*

consideration for sale and added to the assessable value. When the contract envisages such incurring of expenses by the dealer and failure to incur such expenses give a right to the manufacturer to get the advertisement done on their own and recover the expenses from the dealer, such an arrangement cannot be considered as an option. Such expenses by the dealers would be payment basically on behalf of the manufacturer and requires to be added to the assessable value.

10. In the present case, relating to M/s. Maruti Suzuki India Limited, we find it has been claimed that the advertisements are not done by all the dealers; and even in respect of dealers undertaking such advertisements, the extent of expenses does not get linked to or proportionate to number of vehicles sold by them; it was claimed that the dealers have incurred expenses varying from 0.0070% to 0.2333% of total sale value. In view of the above, it appears that these advertisements cannot be held to have been carried out by the buyers on behalf of the manufacturer; that the assessee has no enforceable legal right to insist on incurring such advertisement expenditure. The contention of the Department that there is no option available to the dealers does not stand proved. The stand of the department that the failure on the part of the dealer may lead to the cancellation of dealership and therefore there is a enforceable legal right is acceptable. Such cancellation cannot enable recovery of dealer□s share of cost of advertisements. Therefore, this case is squarely covered by the decisions of the Hon□ble Supreme Court in the cases of Philips India Ltd. v. CCE, Pune reported in 1997 (91) E.L.T. 540 (S.C.) and the decision of Surat Textile Mills [2004 (167) E.L.T. 379 (S.C)] cited supra wherein it has been held that □the advertisement expenditure incurred by a manufacturers□ customer can be added to the sale price for determining the assessable value, only if the manufacturer has an enforceable legal right against the customer to insist of the incurring of such advertisement expenses by the customer.

Respectfully following the ratio of the aforesaid decision, the appeal is allowed and the impugned order is set aside.

(Pronounced in Court on 10.02.2016)

(S.S. Garg) (Raju)

Member (Judicial) Member (Technical)

Sinha

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