CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 55842 of 2013

[Arising out of Order-in-Original No. 105-106/SA/CCE/2012 dated 25.10.2012 passed by the Commissioner of Central Excise, Delhi-III]

Suzuki Motorcycle India Private Limited **……Appellant**
Village Kherki Daula, Badshahpur,
NH 8 Link Road,
Gurgaon, Haryana 122004

VERSUS

Commissioner of Central Excise, Delhi-III **……Respondent**
Plot No. 36-37, Sector 32,
Gurgaon, Haryana 122021

APPEARANCE:

Present for the Appellant: Ms. Krati Singh and Sh. Aman Singh, Advocates

Present for the Respondent: Sh. Narinder Singh and Sh. Yashpal Singh, ARs

CORAM:

HON'BLE Sh. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Sh. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO. 60117/2024

DATE OF HEARING: 01.03.2024
DATE OF DECISION: 19.03.2024

PER : S. S. GARG

The present appeal is directed against the impugned order dated 25.10.2012 passed by the Commissioner of Central Excise, whereby the learned Commissioner has confirmed the demand of duty of Rs.1,16,23,572/- under Section 11A(4) of the Central Excise

Act, 1944 (hereinafter referred to as the 'Act') along with interest and also imposed equivalent penalty under Section 11AC of the Act.

2.1 Briefly stated facts of the case are that the appellant is engaged in the manufacture of 'motorcycle, scooters and parts thereof' falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985 and is availing facility of Cenvat Credit under the Cenvat Credit Rules, 2004. The appellant sells their final product through a network of dealers appointed by them through dealership agreement. The appellant undertakes advertisements in media viz. Television, Newspapers etc for promoting their products. The dealers also undertake publicity and advertisements by way of inserting ads in local newspapers, hoardings, magazines, bills etc. Expenses in respect of such advertisement and publicity to the extent of 50-70% are reimbursed by the appellant and the balance advertisement expenses are incurred and borne by the dealers only. The appellant was including the advertisement expenses borne by them in value of the products and discharging excise duty on that and there is no dispute with regard to that.

2.2 An audit was conducted of the records of the appellant, wherein the appellant was directed to deposit the excise duty by including the value of advertisement expenses borne by the dealers (not reimbursed by the appellant) in the assessable value of the goods. On these allegations, two show cause notices dated 07.10.2011 and 07.05.2012 were issued to the appellant to demand excise duty of Rs.1,16,23,572/- paid short, along with interest and penalty. The

appellant filed detailed reply to the show cause notices. After following the due process, the learned Commissioner adjudicated both the show cause notices by the impugned order dated 25.10.2012 and confirmed the demand of excise duty of Rs.1,16,23,572/- under Section 11A(4) of the Act along with interest and also imposed equivalent penalty under Section 11AC of the Act. Aggrieved by the said impugned order, the appellant has preferred the present appeal.

3. Heard both the parties and perused the records.

4.1 The learned Counsel for the appellant submits that the impugned order is bad in law and is liable to be set aside as the same has been passed without properly appreciating the facts and the law and also the terms and conditions of the dealership agreement.

4.2 She further submits that the only amount realized by the appellant from the dealers for sale of vehicles is sale-price of the vehicles and no other amount, directly or indirectly, has been received by the appellant from the dealers. The advertisement expenses incurred by the dealers are not in connection with the sale between the appellant and the dealers.

4.3 She further submits that the expenses incurred by the dealers, which are in dispute and are included in the assessable value by the Department, have been incurred by the dealers on their own accord and not for or on behalf of the appellant as the dealership agreement

does not provide for any such advertisement expenses to be incurred by the dealers on behalf of the appellant.

4.4 She further submits that reading of the various clauses in the dealership agreement shows that the appellant does not have any enforceable right against the dealers if such advertisements are not undertaken by them.

4.5 She also submits that whether the dealers incur the expenses for advertising or not, the price at which the vehicles are sold by the appellant to the dealers remains the same. Therefore, the expenses incurred by the dealers are not includible in the assessable value of the vehicles cleared by the appellant.

4.6 She further submits that the expression *"any amount that the buyer is liable to pay to"* under Section 4(3)(d) of the Act is of significance and the said expression shows that at the time when the sale of the goods is made, apart from the price of the goods, the buyer is also made liable to pay an additional amount to the manufacturer.

4.7 She also submits that the advertisement expenses cannot be termed as additional consideration to the price charged by the appellant which would require inclusion in their assessable value for the purpose of Section 4 of the Act. These expenses are not in the nature of any amount that the dealer is "liable to pay to, or on behalf" of the manufacturer by reason or in connection with the sale of motor vehicles.

4.8 She further submits that this issue has been considered by various benches of the Tribunal and has consistently held that advertisement expenses incurred by the dealers are not to be included in the assessable value for the purpose of payment of duty. In support of her submission, she relies on the following case laws:

a) ***Commissioner of Central Excise, Mysore vs. TVS Motors Co. Ltd. - 2016 (331) E.L.T. 3 (S.C.)***

b) ***Commissioner of Central Excise & Customs, Aurangabad vs. Skoda Auto India Pvt Ltd. - 2020-TIOL-362-CESTAT-MUM***

c) ***Commissioner of Central Excise, JSR vs. Tata Steel Ltd. - 2018 (11) TMI 345 CESTAT KOLKATA***

d) ***Kiroloskar Oil Engines Ltd. vs. Commissioner of Central Excise, Pune-III - 2018 (4) TMI 1023 CESTAT MUMBAI***

e) ***Ford India Pvt Ltd. vs. Commissioner of Central Excise, Chennai-III - 2017 (6) G.S.T.L. 273 (Tri. - Chennai)***

f) ***Honda Seils Power Products Ltd. vs. CCE - 2015 (317) ELT 510 (Tri-Del.)***

g) ***Hero Honda Motors Ltd. vs. CCE - 2015 (324) E.L.T. 404 (Tri.-Del.)***

h) ***Honda Motorcycle & Scooter India Pvt Ltd. vs. CCE, Gurgaon - 2017 (6) TMI 372 CESTAT CHANDIGARH***

i) ***Hero Honda Motors Ltd. vs. CCE, Delhi-III, Gurgaon (Vice-Versa) - 2017 (3) TMI 408 CESTAT CHANDIGARH***

j) ***Maruti Suzuki India Ltd. vs. CCE, Delhi-III - 2016 (8) TMI 119 - CESTAT CHANDIGARH***

k) ***Escorts Limited vs. CST, Delhi-IV, Faridabad (Vice-Versa) - 2017 (358) E.L.T. 300 (Tri.-Chan.)***

l) ***Yamuna Motors India Pvt Ltd. vs. CCE - 2014 (301) E.L.T. 524 (Tri.-Del.)***

m) ***Maruti Suzuki India Ltd. vs. CCE - 2008 (232) E.L.T. 566 (Tri.-Del.)***

n) ***Royal Enfield vs. CCE - 2010-TIOL-1416-CESTAT-Mad.***

4.9 She also submits that the main reason for the dealers to undertake such advertisement is to promote their own business and the fact that incidentally the appellant is also benefited by way of increased sale of vehicles is not at all relevant and it does not in any way mean that the value of advertisement expenses shall be included in the value of sale of excisable goods.

4.10 She further submits that these expenses are purely optional at the hands of the dealer and the dealer may decide whether to incur such advertisement expenses or not. The appellant has also produced certain list of the dealers who opted to incur and who did not opt to incur the advertisement expenses in their additional submissions. Further, she submits that this issue has also been considered by various benches of the Tribunal and it has been held in favour of the assessee in the following decisions:

a) ***Amco Batteries Ltd. vs. Commissioner of Central Excise, Bangalore - 2006 (196) E.L.T. 436 (Tri.-Bang.)***

b) ***Commissioner of Central Excise, Nagpur vs. Diffusion Engineering Ltd. - 2016 (331) E.L.T. 153 (Tri.-Mumbai)***

c) ***Luminous Electronics Pvt Ltd. vs. CCE - 2016-TIOL-931-CESTAT-Del.***

d) ***Catvision Products Ltd. vs. Commissioner of Central Excise, Noida - 2006 (194) E.L.T. 126 (Tri.-Del.)***

4.11 She also submits that the extent of advertisement expense which stands reimbursed by the appellant to the dealers are already factored in the assessable value of the goods and this fact has not been disputed by the Department. In respect of the balance

advertisement expenses, which are incurred and borne by the dealers, is not to be includible in the assessable value of the vehicles cleared by the appellant.

4.12 She further submits that the judgments relied upon by the Adjudicating Authority in the impugned order can be distinguished on facts as there, the question was regarding inclusion of expenses borne by the assessee itself and therefore, those judgments are not applicable to the facts of the present case.

4.13 She also submits that the demand has been wrongly confirmed by invoking extended period of limitation. Also, she submits that the advertisement expenses incurred by the dealers have been dealt with by various judicial forums, which clearly shows that the issue involves interpretation of law and legal provisions and therefore, extended period cannot be invoked. In this regard, she places reliance on decision of the Hon'ble Supreme Court in the case of ***International Merchandising Company, LIC vs. Commissioner of Service Tax, New Delhi -2022 (67) G.S.T.L. 129 (S.C.)*****.**

4.14 She further submits that for the purpose of invocation of extended period, the Department needs to establish fraud, collusion, wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules with an intent to evade the payment of tax; whereas, the Adjudicating Authority has clearly failed to establish any of these ingredients on the part of the appellant.

Therefore, as per the learned Counsel the demand pertaining to extended period of limitation for the period until September 2010, is liable to be set aside.

4.15 Further, she submits that when demand is itself not sustainable, the interest and the penalty do not arise.

5.1 On the other hand, the learned DR for the Revenue reiterated the findings of the impugned order and submitted that perusal of various terms and conditions of dealership agreement shows that the expenses on advertisement by the dealers have been incurred on behalf of the appellant and therefore, the same are includable in the assessable value for determining the sale-price of the vehicles.

5.2 The learned DR took us through the various clauses of the dealership agreement to buttress his argument that the dealer is legally bound to incur these expenses on the advertisement, failing which the appellant-manufacturer will cancel his dealership and therefore, these expenses have been incurred by the dealer on behalf of the appellant-manufacturer and therefore, the same needs to be included in the assessable value as per Section 4(3)(d) of the Act.

5.3 The learned DR also took us through the judgment of the Hon'ble Supreme Court in the case of ***TVS Motors Company Ltd – 2016 (331) ELT 3 (SC)*** and also the judgment of Hon'ble Bombay High Court in the case of ***Tata Motors Limited – 2012 (286) ELT 161 (Bom.)*** and submitted that the issue relates to advertisement and publicity charges borne by the dealers has not been dealt by the

Hon'ble Supreme Court in the case of ***TVS Motors Company Ltd (supra)*** and by the Hon'ble Bombay High Court in the case of ***Tata Motors Limited (supra)*** and therefore, these judgments do not help the appellant in any way.

5.4 The learned DR further submitted that though certain decisions of the Tribunal relied upon by the appellant decided the issue in their favour, but against all those judgments, the Department has filed appeal before the Hon'ble Apex Court, but there is no stay granted by the Apex Court in favour of the Department.

6. We have considered the submissions made by both the parties at length and perused the material on record. According to us, the only issue in the present case relates to the inclusion of advertisement and publicity expenses incurred by the dealers as per the terms and conditions of the dealership agreement mutually agreed between the appellant and their dealers, in the assessable value of the vehicles sold by the appellant. The case of the Department is that the price at which the appellant sold the vehicles to the dealers is not the sole consideration and that is the reason that the learned Commissioner in the impugned order confirmed the demand of duty by treating the expenses borne by the dealers on advertisement and publicity as additional consideration liable to be included in the assessable value, on which duty was not paid by taking resort to the provisions of Section 4(1)(b) of the Act read with Rule 6 of the Central Excise Valuation Rules, 2000. Here, it is

relevant to reproduce the provisions of Section 4(1)(b) and 4(3)(d) of the Act and Rule 6 of the Central Excise Valuation Rules, 2000 :

> *"**Section 4(1)(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."*
>
> ***"Section 4(3)(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"*
>
> *"**Rule 6 of the Central Excise Valuation Rules, 2000** : Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.*
>
> *[Provided that where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to such assessee, the value of such goods shall be deemed to be the transaction value.]*
>
> *[Explanation 1] - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or*

indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely :- (i) value of materials, components, parts and similar items relatable to such goods; (ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods; (iii) value of material consumed, including packaging materials, in the production of such goods; (iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods."

7. Further, we find it appropriate to reproduce the relevant clause of the dealership agreement which deals with advertising as provided in clause 36, which is reproduced herein below:

*"**36. ADVERTISING***

***36.1**. The Dealer shall always spend best efforts to establish a high and prestigious image of the Products and the brand, shall follow SMIPL's policy and guidelines that may be given, issued suggested and announced by SMIPL from time to time.*

***36.2.** The Dealer shall display the entire range of Products in its Showroom/Outlet and shall at its own expense advertise and/or promote Products, Genuine Parts and Service facilities in such a manner as to secure adequate and effective publicity for the Products and/or Genuine Parts to the satisfaction of SMIPL.*

***36.3.** In order to prohibit the Dealer engaging in any type of Unfair and Restrictive Trade Practices, it is mandatory that the Dealer should not engage in any form of sales promotion or publicity (including participation in any event and / or exhibition) or release any advertisement without the prior written approval of SMIPL The Dealer shall indemnify SMIPL against all losses and/or claims resulting from any unauthorized publicity or advertisement.*

***36.4**. The Dealer will not advertise or promote the Products, Genuine Parts and/or Services in such a way as may hinder, harm, injure or detract from SMIPL or any of its other dealer's business interest and/or reputation, and/or cause*

any injury to the Products. Genuine Parts and/or Services Should SMIPL consider that any advertisement, announcement or other advertising or promotional material to be undesirable, the Dealer shall immediately withdraw the same at its expense and not repeat it. The decision of SMIPL in this regard shall be final.

36.5. *All expenses incurred in the promotion and advertisement of Products and/or Genuine Parts shall be borne by the Dealer except for those expenses which SMIPL had given a prior agreement in writing to bear a part of such expenses."*

The perusal of various clauses of the dealership agreement shows that the expenses incurred by the dealers, have been incurred by them on their own accord, and not for or on behalf of the appellant because the dealership agreement does not provide for any such expenses to be incurred by the dealers on behalf of the appellant.

8. Further, we find that the price of the vehicles remains the same and is not dependent upon whether the dealers are incurring expenses on advertisement or not. No doubt that the main reason for undertaking advertisement by the dealers is to promote their own business and incidentally the appellant is also benefitted by increase sale of the vehicles, but it cannot be the only ground for inclusion of advertisement expenses incurred by the dealers to the assessable value for the purpose of determining the duty payable from the sale of the excisable goods.

9. We also find that perusal of various terms and conditions shows that such expenses are purely optional at the end of the dealers and they have to decide whether to incur such expenses or not, because we find that there are certain dealers who do not opt for incurring

such expenses and a list of those dealers has also been given by the appellant in their additional submissions.

10. We also find that there is no dispute with regard to the advertisement expenses which stands reimbursed by the appellant to the dealer, which already stands factored in the assessable value of the goods.

11. We also find that this issue has been considered by various benches of the Tribunal and some of the judgments relied upon by the appellant, specifically held that the advertisement expenses incurred by the dealers on their own accord, is not to be included in the assessable value for the purpose of payment of excise duty. In this regard, we may refer to the decision of this Tribunal in the case of ***Honda Seils Power Products Ltd- 2015 (317) ELT 510 (Tri-Del.)***, wherein the identical issue was involved and the Tribunal, after considering the submissions of both the parties, held as under in para 5 and para 6, which are reproduced herein below:

> ***"5.*** *We have considered the submissions from both the sides and perused the records. The undisputed facts are that:-*
>
> *(a) the appellant's agreements with their dealers only have a clause which require the dealers to make efforts for promoting the sales of the appellant's products; and*
>
> *(b) during the period of dispute, the dealers had incurred expense on advertisement and publicity, a part of which had been reimbursed by the appellants to the dealers.*
>
> *The point of dispute is as to whether the expenses on advertisement and publicity expenses incurred by the dealers, which were borne by them, are to be added to the assessable value of the goods or not. On this point, it is seen that the Apex Court in case of C.C.E., Surat v. Surat Textile Mills Ltd., reported in 2004 (167) E.L.T. 379 (S.C.) has held*

in clear terms that only when a manufacturer has enforceable legal right against his customers/dealers to insist on incurring of expenses on advertisement, the advertisement expense incurred by the dealers can be added to the assessable value. Same view has been taken by the Tribunal in case of Maruti Suzuki India Ltd. reported in 2008 (232) E.L.T. 566 (Tri.-Del.).

6. *On going through the appellant's agreements with their dealers, we find that there is nothing in their agreements from which it can be concluded that appellants had enforceable legal right against the dealers to insist on incurring of certain amount of expenses on advertisement and publicity of the appellant's products. Just a Clause in the agreements requiring the dealers to make efforts for promoting sales of the appellant's products cannot be treated as a clause imposing legal obligation on the dealers to incur certain level of expenses on advertisement. In view of this, we hold that the impugned orders are not sustainable. The same are set aside. The appeals are allowed."*

Similarly, in the case of ***Hero Honda Motors Ltd - 2015 (324) E.L.T. 404 (Tri.-Del.)***, wherein also the identical issue was involved and after considering the various submissions of both the parties, the Tribunal in para 6 and para 7 held as under:

"6. *The appellant sell the two-wheelers and their spare parts to their dealers all over India under an all-India price list. In terms of the appellant's agreement with their dealers, every dealer shall vigorously promote, develop and maintain sales of the products and parts to the satisfaction of and in the manner required by the appellant and the dealer shall place firm orders for such products and parts as per the sales targets and will give estimates for the forward requirements for such period and in such form as may be required by the appellant from time to time. Each dealership agreement also has clause that if a dealer fails to perform any obligation under this agreement, his agreement can be cancelled by the appellant. There is no dispute that the dealers on their own organized advertisements of the appellant's product in their respective area by incurring their own expenses. The department is not insisted on including these expenses incurred by the dealers in the assessable value. The dispute is only in those cases, where the dealers, for certain reasons,*

cannot organize the advertisement of the appellant's products in their respective areas and in this regard, they approach the appellant and the appellant, in view of the dealers' request, organize the advertisement in the areas of those dealers by incurring certain expenses and since, the advertisements also mention that dealers' name and address and promote the dealers' sales also, a part of the expenses, up to about 40 per cent, are recovered from those dealers by the appellant. The point of dispute is as to whether in such cases, the advertisement expenses incurred by the appellant would be includible in the assessable value to the extent the same have been recovered from the dealers. In our view, when it is not disputed that the advertisement of the appellant's products in the areas of the respective dealers also mention the dealers' name and address and those advertisements have also benefitted the dealers, the amount being recovered by the appellant from the dealers cannot be said to be for the reason of or in connection with the sale of goods, as this amount would be for the advertisement and publicity effort of the appellant which has benefitted the dealer. Moreover, an identical issue was involved in the appellant□s own case in the previous period declared vide judgment reported in 1998 (100) E.L.T. 468 (Tribunal), in the para 3 of the judgment of which the Tribunal has held that the advertisement expenses incurred by the appellant would not be includible in the assessable value to the extent, the same were recovered from the dealers, as when the dealer is not in the picture and the advertisement campaign is conducted by the manufacturer, that can certainly be regarded as contribution wholly or exclusively to the marketability of the product, but where there is a dealer in the picture and the advertisement helps the dealer also, apart from helping the product of the manufacturer, the matter has to be looked at from slightly different angle. In this regard, para 2 and 3 of the judgment are reproduced below :

> *2. It appears appellant was conducting advertisement campaign in newspapers for the Hero Honda Motor Cycles and by an arrangement with the wholesale dealers printing the names and addresses of wholesale dealers also and collecting proportionate charges form the wholesale dealers. The same position obtained in regard to posters, cinema slides and other media of advertisement.*

Appellant was receiving security deposits from the wholesale dealers and the contribution of the wholesale dealers for the advertisement campaign was being adjusted. According to the show cause Rs. 12,50,000/- or so was thus collected from the wholesale dealers. Both the lower authorities held that the advertisement campaign contributed to the marketability of the product and therefore, the charges collected were to be added to the assessable value.

3. Advertisement no doubt contributes or enhances the marketability of the product. Where the dealer is not in the picture and the advertisement campaign is conducted by the manufacturer, that can certainly be regarded as contribution wholly or exclusively to the marketability of the product but where there is a dealer in the picture and the advertisement helps the dealer apart from helping the product of the manufacturer the matter has to be looked at from a slightly different angle. Our attention has been inivited to a decision of the Tribunal in Racold Appliances v. COCE [1994 (69) E.L.T. 312]. Under an agreement between the manufacturer and the dealers, the dealers were to spend upto 2% of the total purchases for advertisement and 1.5% was to be returned by the dealers to manufacturer and the dealers were to bear 0.5%. The department took the stand that this amount of 0.5% should be added to the assessable value. The Tribunal did not accept this view as correct. The advertisement through newspaper media, cinema slides and the like was basically for the manufacturer and the finished product. The names of the dealers were to be furnished in these materials. This would certainly go to enhance the goodwill of the dealers. It is not unknown for dealers to advertise their business activities so as to attract more customers and to enhance their business. When they do so and in the absence of anything else on record, it cannot be said that the cost of such advertisement which also in a way enhances the marketability of the product should be added to the assessable value.

6.1 *The above judgment of the Tribunal has been affirmed by the Apex Court by dismissal of the civil appeal vide judgment reported in 1999 (105) E.L.T. A126 (S.C.). In our view, the ratio of the above judgment of the Tribunal is squarely applicable to the facts of this case. Though the*

above judgment of the Tribunal is in respect of the period prior to 1-7-2000 and w.e.f. 1-7-2000, the Section 4 has been substituted by a new section based on transaction value concept, as discussed above, in our view when the advertisements organized by the appellant which have also benefitted the dealers, the amount recovered by the appellant from the dealer would be for the advertisement effort of the Appellant, which has promoted the sales of the dealers and the same cannot be said to be the amount received by the Appellant for the reason of or in connection with the sale of the goods.

7. *Moreover, in terms of the judgments of the Apex Court in the case of CCE, Baroda v. Besta Cosmetics Limited (supra) and CCE, Surat v. Surat Textiles Mills Ltd. (supra) cited by the ld. DR, the advertisement expenses incurred by the dealer would be includible in the assessable value of the goods only when the assessee manufacturer has an enforceable legal right in respect of the dealers' making it obligatory for the dealers' to incur certain specified quantum of expenses on the advertisement of the assessee's products. In the present case, in the dealership agreements, there is no such clause requiring the dealers to incur certain specified quantum of expenses on the advertisement and publicity of the appellant's product. The clauses of requiring the dealers to vigorously promote, develop and maintain sales of the product and parts to the satisfaction of and in the manner required by the appellant cannot be treated as the clause which gives an enforceable legal right to the appellant to insist on incurring of certain quantum of expenses on advertisement by the dealers. For this reason also, the advertisement expenses recovered from the dealers would not be includible in the assessable value."*

Further, in the case of ***Honda Motorcycle & Scooter India Pvt Ltd - 2017 (6) TMI 372***, on identical issue, the Tribunal after considering the various clauses of the dealership agreement and by relying upon the decisions in the cases of ***Honda Seils Power Products Ltd (supra)*** and ***Maruti Suzuki India Ltd (supra)***, has set aside the impugned order and allowed the appeal of the assessee.

Further, in the case of ***Maruti Suzuki India Ltd - 2008 (232) E.L.T. 566 (Tri.-Del.)***, on identical issue, the Tribunal has observed in para 9 and para 10 as under:

> ***"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."

12. We also find that against all these decisions cited supra, the Department has filed appeal before the Hon'ble Apex Court, but there is no stay, and therefore, the ratio in above mentioned decisions is still binding.

13. By following the ratio of the above said decisions, we are of the considered view that the advertisement expenses incurred by the dealers are not to be included in the assessable value unless there is a enforceable legal right of the appellant to insist on incurring of certain quantum of expenses on advertisement by the dealers which is not the facts in the present case.

14. Further, with regard to extended period of limitation, we find that the issue relates to interpretation of the complex provisions of

law and the fact, and further that various benches of the Tribunal have considered and decided the said issue, clearly shows that there is no intention to evade payment of duty. Moreover, for invoking the extended period of limitation, the Department is required to establish fraud, collusion, wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules with an intent to evade the payment of tax. There is nothing in the impugned order that any of these ingredients stand proved. Hence, we hold that substantial demand up to September, 2010 is barred by limitation.

15. In view of the discussion above and by following the ratio of the decisions cited supra, we are of the considered opinion that the impugned order is not sustainable in law and therefore, we set aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

(Order pronounced in the court on 19.03.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(RAJEEV TANDON)
MEMBER (TECHNICAL)

RA_Saifi