(1991) 07 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 156 of 1981

Advani Oerlikon Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 02-07-1991

Acts Referred:

COMPANIES ACT, 1956 — Section 43A
Constitution of India, 1950 — Article 226

Citation : (1991) 55 ELT 486

Hon'ble Judges : M.L. Pendse, J;A.V. Savant, J

Bench : Division Bench

Advocate : Shri Ashok H. Desai, Mr. E.P. Bharucha and Mr. Nimish R. Kothare, instructed by M/s. Nanu Harmasjee and Co, for the Appellant; Shri M.I. Sethna and Sh. J.P. Devadhar, for the Respondent

Judgement

Pendse J.

1. The Petitioner No. 1 is a deemed Public Company by virtue of provisions of Section 43(A) of the Companies Act, 1956 and manufactures and markets welding electrodes. The Petitioner Company has seven factories in India including a factory situated at Bhandup. The Company normally sells welding electrodes to its wholesale dealers spread all over the country at uniform prices. The wholesale dealers buy the goods in the course of wholesale trade and, they in turn sell the goods to the consumers. The Company''s business consists of two distinct activities, viz. (a) manufacturing welding electrodes and (b) marketing and selling the same. The company makes two types of sales, viz. (1) sales from the factory direct to dealers and (2) sale from the factory to its area offices/godown wherefrom sale to dealers and customers take place. The Company makes all sales ex-factory in the course of wholesale trade in large bulk entirely on a principal to principal basis and the same are evidenced by conditions of sale which represent normal commercial arrangements. The transactions between the Company and the wholesale dealers are at arm''s length and in the usual course of business and do not involve any consideration other than the price of the

goods.

2. The manufacture of welding electrodes is liable to payment of duty in accordance with Tariff Item No. 50 of the First Schedule to the Central Excise Tariff and ad valorem excise duty is payable in accordance with the assessable value approved by the Excise Authorities. The Company was manufacturing welding electrodes since the year 1954 and till the beginning of year 1980 submitted price lists to Excise Authorities. It is the claim of the Company that the post-manufacturing expenses incurred towards freight, sales promotion, advertisements were erroneously included while determining the assessable value with the result that the excess duty was paid to the Department. The Company claimed that the excess duty paid is liable to be refunded and accordingly made demand for refund of Rs. 20,03,535.74 by letter dated April 3, 1978 addressed to the Assistant Collector of Central Excise. The Assistant Collector declined to accept the claim holding that the post-manufacturing expenses claimed by the Company were inadmissible. The Company also submitted a fresh price-list and claimed that the post-manufacturing expenses amounted at 9% of the assessable value mentioned in the certificate dated March 22, 1978 issued by the Assistant Collector of Central Excise. The Company requested the Assistant Collector to approve the revised price-list by deletion of post-manufacturing expenses claimed by the Company. The Assistant Collector declined to accede to the claim and informed that the price-list will be approved without accepting the deduction claimed by the Company in respect of alleged post-manufacturing charges. The Company preferred an Appeal against the Order dated August 19, 1978 passed by the Assistant Collector of Central Excise before the Collector, Central Excise (Appeals), but the Appeal ended in dismissal except modification in respect of certain items. The Company thereupon filed Revision Application before the Government of India on July 31, 1979. The Revision Application remained pending for a considerable length of time and thereupon, the Company preferred the present Petition under Article 226 of the Constitution of India in this Court on February 3, 1981. The Petition was duly admitted on March 2, 1981. The Petitioners claimed that the Department is liable to pay a large amount of refund and sought an interim relief that the Department should deposit an amount of Rs. 49,32,569.54 in this Court and liberty should be given to the Company to withdraw the same. While admitting the Petition, this Court directed the Respondents to deposit the said amount and the Company was given liberty to withdraw the same on furnishing Bank Guarantee. Accordingly, the Department deposited the amount and the Company withdrew the same on November 2, 1982. The refund amount of Rs. 49,32,569.54 was in respect of period commencing from March 1, 1975 to September 30, 1980. The principal question which was raised by the Company in the Writ Petition was about the items which are to be taken into consideration as post-manufacturing expenses while determining the assessable value of the welding electrodes.

3. During the pendency of the Petition, the Supreme Court delivered judgment in the case of Union of India v. Bombay Tyre International Limited reported in 1983

(14) ELT 1896 examination the entire ambit of the issue of post-manufacturing expenses. The Supreme Court subsequently issued clarificatory orders from time to time laying down the principal for determining the assessable value of manufactured article for the purpose of payment of excise duty. After the decision of the Supreme Court, the Petition was posted before one of us (Pendse J.) on December 14, 1983 and directions were issued to the Assessing Authority to permit the Company to submit statement of deductions in respect of price-lists already filed and claim in respect of refund claims. The Company sought deductions under four headings : (1) Fright, (2) Insurance in transit, (3) Discounts and commission, and (4) Interest on Book Debts. The Assessing Authority was directed to examine the claim with reference to the judgment and order delivered by the Supreme Court in the case of Bombay Tyre International. The Company was directed to file statement and documents in support of the claim and the Company was directed also to file such documents as would be required by the Assessing Authority. The direction was also given that the Company shall pay back to the Department a sum of Rs. 32,00,000/- with interest at 12% per annum to be calculated from the date of the Order till payment. The Bank Guarantee was to stand proportionately discharged. The direction was given that Petition should come up for further direction on March 29, 1984, i.e. after the assessing authority records a fresh finding.

In pursuance of the directions given by this Court, the Company filed fresh statements before the Assessing Authority and the Assistant Collector of Central Excise, Division V, Bombay II. The Company''s claim for deduction under four heading was turned down. The Assistant Collector held that the Company is liable to pay an amount of Rs. 49,32,669.54 which was recovered by the Company in accordance with interim order passed by this Court. The Assistant Collector further held that the Company is also liable to pay a sum of Rs. 35,64,729.94 towards duty in respect of the goods cleared during the period March 22, 1981 and ending with April 1983. The Company thereafter amended the Petition and challenged the impugned Order dated August 13, 1984. The Petition is now placed before us for final disposal.

4. In view of the circumstances which transpired during the pendency so the Petition, it is obvious that the original claim made in the Petition is no longer required to be examined and the short question which falls for determination is whether the Assistant Collector, Central Excise, was justified in concluding that the claim for deduction made by the Company under four heads was not justified. In view of the decision of the Supreme Court in Bombay Type International, it is now clear as to which expenses incurred by the manufacturers can be excluded on account of post-manufacturing expenses while determining the assessable value. Shri Desai, Learned Counsel appearing on behalf of the Petitioners, submitted that the finding recorded by the Assistant Collector in respect of four items for which deduction was claimed is erroneous and unsustainable. We will examine the claim under each of the headings.

The first deduction claimed by the Company is on account of equalized freight. The claim has been made for the Accounting Years 1975-76 to 1979-80. It is not in disputes that the amount of freight incurred on the movement of finished goods from the place of removal to the place of delivery is to be exclude while determining the assessable value. The claim made by the Company on this count is turned down by the Assistant Collector by holding that the claim was not substantiated by documentary evidence. While recording this finding, the Assistant Collector observed that the High Court directed by Order dated December 14, 1983 that the Company shall produce documents as demanded by the Assessing Authority in support of their claim. The Assistant Collector observed that the Company was called upon on more than three occasions to substantiate the claim by production of all the relevant freight bills. The Assessing Authority observed that initially, the Company stated that the bills will be produced after the lockout of Bhandup factory was raised but subsequently an excuse was set up that it is difficult to produce vouchers and freight bills as demanded. The Assistant Collector had demanded the freight bills and vouchers only for the period commencing from October 21, 1979 and ending with October 30, 1980. The failure to produce the freight bills and the vouchers led the Assistant Collector to reject the claim holding that the claim was not substantiated by documentary evidence.

Shri Desai submits and, in our judgment, with considerable merit that the approach of the Assistant Collector was not proper. The Learned Counsel urged that though it is undoubtedly true that the Company was bound to produce the documents as demanded by the Assistant Collector, the claim could not have been thrown out for inability of the Company to produce the freight bills. The Learned Counsel urged that the Company produced more than sufficient documentary evidence to substantiate the claim and there is not even a suggestion that the documentary evidence produced by the Company is of dubious character. The Company had produced Trial Balance-sheet and the Consignor Notes for the period running from year 1975-76 onwards and it is impossible even to suggest that these documents were manipulated to suit the claim made before the Assistant Collector. The Company was not even aware as to what the Supreme Court would hold to be expenses which can be considered as post-manufacturing expenses in the year 1983 while preparing the trial Balance-sheet and Consignor Note between 1975 and 1980. Shri Sethna, Learned Counsel appearing on behalf of Department, very fairly stated that there cannot be any dispute about the genuineness of the Balance-sheet and the Consignor Notes produced by the Company. Shri Desai submitted that in addition to these documents, the Company produced certificate issued by the Chartered Accountant. The Learned Counsel invited our attention to circular dated December 3, 1983 issued by Government of India, Ministry of Finance, Department of Revenue addressed to all the Collectors of Central Excise in respect of Valuation proposed to be carried out in pursuance of the Supreme Court judgment in Bombay Tyre International. The circular, inter alia, recites that in respect of deductions like equalized freight/average freight, taxes, etc. claimed by the manufacturers for the past periods, it would be very difficult to verify the same with reference to each and every voucher/bill issued by the carrier to the manufacturers in transporting the goods. The circular advises the Collectors to request the manufacturers to give a consolidated statement explaining the expenses incurred towards freight, taxes, etc. duly verified and certified by Chartered Accountants. The circular advises that such statements may be accepted without going into much details with regard to the verification the individual/voucher etc. Shri Desai submits that in accordance with the instruction issued in circular dated December 3, 1983, the Company had produced a consolidated statement duly verified and certified by Chartered Accountant and, therefore, it is not correct for the Assistant Collector to turn down the claim only on the ground that each and every voucher and freight bill issued by the Company between the period October 21, 1979 and October 30, 1980 was not produced. In our judgment, the submission is correct and deserves acceptance. The provisions of Indian Evidence Act make it clear that a thing can be proved by various modes and when the original documents are not available, the parties relying upon the same can certainly produce secondary evidence. The Assistant Collector could not have denied the relief to the Company only on the ground that the freight bills were not produced when the issuance of the freight bills and the existence thereof could be easily gathered by perusal of trial balance-sheets and consignor notes. It was not incumbent upon the Assistant Collector to examine each and every voucher or the freight bill and in accordance with the instructions issued by the Government of India, the Assistant Collector would have been justified to rely upon the certificate issued by the Chartered Accountants. It is undoubtedly true that it is within the domain of the Assistant Collector to determine whether the documentary evidence produced by the Company is genuine or otherwise and whether the same is sufficient to grant the claim for deduction, but it is not permissible for the Assistant Collector to turn down the claim for deduction, but it is not permissible for the Assistant Collector to turn down the claim solely on the ground that the freight bills as demanded by the Assistant Collector were not produced. In our judgment, the Assistant Collector was bound to examine the documentary evidence produced by the Company and reach the conclusion. The Assistant Collector was not right in turning down the claim by reference to the direction given by this Court on December 14, 1983 that the Company should produce the documents as directed by the Assistant Collector. The direction of this Court could not have been read to mean that as soon as the documents demanded by the Assistant Collector are not produced, then the Assistant Collector can proceed to reject the claim without examining the other documentary evidence produced by the Company. In these circumstances, it is necessary to direct the Assistant Collector to re-examine the claim made by the Company on this count.

TUESDAY, THE 2ND JULY 1991.

5. The second claim of deduction sought by the Petitioner Company is on account

of insurance in respect of goods in transit. The claim was made by the Company for the Accounting Years 1975-76 to 1979-80. The Company in support of the claim that the goods in transit were insured produced a certificate from the insurers i.e. M/s. New India Assurance Company. The Certificate indicates that the Company had paid from time to time insurance on goods in transit. The Assistant Collector, Central Excise, did not dispute that the Company is entitled to claim deduction on this count but declined to grant relief by holding that the Company failed to produce copies of the insurance policies and vouchers and receipts for payment of the amount from time to time. Shri Desai complains and in our judgment, with considerable merit that the Assistant Collector was in error in discarding the claim of deduction on this count by refusing to examine the certificate and insisting that in absence of vouchers or receipts for payment of the insurance money, the claim could not be verified. We are unable to appreciate why the Assistant Collector felt helpless to verify the claim when the certificate issued by M/s. New India Assurance Company was produced. The Insurance Company is a Nationalized one and the Assistant Collector need not doubt the veracity of the certificate. In these circumstances, in our judgment, the Assistant Collector was in error in declining to examine the claim of the Company for deduction in respect of insurance amount paid for goods in transit. It is necessary to direct the Assistant Collector to re-examine the claim on this count, also.

6. The third claim of deduction sought by the Company is in respect of amount of discounts and commissions. Deduction was sought in respect of discounts and commissions for the entire period commencing from year 1975-76 to year 1979-80. The Company in support of the claim produced the credit notes for verification before the Assistant Collector. The Assistant Collector by letter dated March 14, 1984 called upon the Company to produce all the invoices for the period commencing from October 21, 1979 and ending with October 30, 1980. The Assistant Collector informed the Company that the dealer''s total off-take during the year 1979-80 could be verified from the invoices only. The Assistant Collector rejected the claim for deduction in respect of discounts and commissions by holding that the Company failed to produce invoices for verification. The Assistant Collector observed in the impugned Order that allowance and nature of the discount was not known at the time of making payment or prior to the removal of the goods and, therefore, the claim for deduction suffers from basic lacunae. The Assistant Collector concluded on the strength of the observation made in the judgment of the Supreme Court in the case of Union of India & Ors. v. Bombay Tyres International Pvt. Ltd. reported in 1984 (12) ELT 329. The Supreme Court observed :

"Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price".

Relying on the observation of the Supreme Court, the Assistant Collector held that as the Company failed to produce any material on record to indicate that the allowances and nature of the discount was known at the time of or prior to the removal of the goods, the Company is not entitled to claim deduction. Shri Desai complains that the Assistant Collector overlooked that the Petitioners are claiming deduction on the basis of trade practice which is followed for over several years. Shri. Desai submitted that the Company used to grant discount and commission for last over several years though the circular in that respect was sent at the end of year, i.e. by the time of Diwali. The Learned Counsel urged that the Company could lead evidence that the fact that the allowances and discount are granted was known to the customers at the time of removal or prior to the removal of the goods. Apart from this consideration, Shri Desai submits that in case the Company successfully establishes the existence of the trade practice followed by the Petitioner Company over several years, then the Assistant Collector could not have refused the claim of deduction on this count. The submission is correct and deserves acceptance. The Assistant Collector could not have turned down the claim only on the basis that the invoices for the period sought by the Assistant Collector were not produced. The Assistant Collector had not addressed to the issue as to whether there exists trade practice of grant of commission and discount and whether the Petitioners followed that practice for over several years. In case the Company is able to establish such practice, then the Company is entitled to claim commission and discount in accordance with decision of the Supreme Court. In our judgment, this aspect of the matter is not examined in depth by the Assistant Collector and, therefore, refusal to grant deduction on this count is required to be set aside with the direction to the Assistant Collector to re-examine the issue in proper prospective. We make it clear that we are not accepting the claim of the Company that deduction should be granted because of existence of prior practice and that issue is left for determination of the Assistant Collector.

7. The last claim of deduction made by the Company is in respect of Interest on Book Debts. The Company claimed before the Assistant Collector that interest is an expense which is incurred after the removal of the goods and, therefore, amounts to post-manufacturing expenses. The Assistant Collector turned down the claim by holding that the claim is not admissible as the interest on Book Debts does not fall within the expression "post-manufacturing expenses". Shri Desai submitted that the assumption of the Assistant Collector that the Interest on Book Debts is not an item in respect of which deduction can be granted is incorrect and in support of the submission relied upon the decision of the Supreme Court in the case of Assistant Collector of Central Excise and Others Vs. Madras Rubber Factory Ltd., . In paragraph 16 of the judgment, the Supreme Court considered the deduction in respect of interest on receivable (sundry debtors for sales). The Supreme Court observed by reference to the earlier

decision of Bombay Tyres International that the interest, cost and expenses on sundry debtors or interest on receivables is an expense subsequent to the date of sale and removal or delivery of the goods and the manufacturer is eligible to claim deduction on this count. Shri Desai urges that in view of the decision of the Supreme Court, the finding recorded by the Assistant Collector cannot be sustained. We are unable to accede to the submission of the Learned Counsel for more than one reason. In the first instance, the decision in the case of Madras Rubber Factory Limited relied upon by Shri Desai is no longer good law in view of the Order passed by the Supreme Court on May 1, 1989 and Assistant Collector of Central Excise and Others Vs. Madras Rubber Factory Ltd., . The Supreme Court on the Review Petition filed by the Revenue recalled the earlier Order and directed that the matter should be posted for fresh hearing. In view of the Order passed by the Supreme Court granting review and recalling the decision, it is not permissible for Shri Desai to rely upon the judgment Assistant Collector of Central Excise and Others Vs. Madras Rubber Factory Ltd., . The said judgment is no longer in existence in the eyes of the Law in view of the Order of recall passed by the Supreme Court and consequently, the Order of the Assistant Collector holding that the Interest on Book Debts is not an item in respect of which the Company can claim deduction need be disturbed.

There is another stronger reason to discard the submission urged by Shri Desai on this count. The company had raised the contention about entitlement of deduction under the heading "Interest on Book Debts" by filing Writ Petition under Article 226 of the Constitution of India in this Court. The point was squarely put in issue in this position and was turned down by the decision of the Division Bench reported in Advani Oerlikon Ltd. and another Vs. Union of India and another, . It is not in dispute that the Company did not challenge the Order of the Division Bench had become final. In view of the decision of the Division Bench, it is no longer open for Shri Desai to re-agitate the identical contention in the present Petition. The doctrine of res judicata or the principle analogous to the doctrine squarely applies to the contention urged on behalf of the Company on this count. In our judgment, the finding of the Assistant Collector that the Company is not entitled to claim deduction under the heading "Interest on Book Debts" is correct and is not required to be disturbed.

8. In view of our decision that the finding recorded by the Assistant Collector on the first three counts is not in accordance with Law, it is necessary to remit the proceedings back to the Assistant Collector, Central Excise, Bombay II, for fresh determination in accordance with the observations made in this judgment in respect of claims of deduction :

(a) on account of equalized freight;

(b) on account of insurance on goods in transit;

(c) on account of discounts and commissions.

The Assistant Collector is directed to give fresh opportunity to the Petitioner to produce whatever evidence is available in support of their claim and then dispose of the claim in accordance with Law. Any observation in the judgment shall not be construed as determination of claim by this Court on merits.

9. Accordingly, the Order dated August 13, 1984 passed by the Assistant Collector, Central Excise, Division V, Bombay II, is partly set aside and the proceedings are remitted back for re-consideration of claim of deduction on three counts. Both the counsel agree that in view of this Order, the Petition no longer survives and accordingly the Petition stands finally disposed of. It is open for the parties to adopt appropriate proceedings in appropriate forum in case fresh Order to be passed by the Assistant Collector is not to their satisfaction. In the circumstances of the case, there will be no Order as to costs.