(1986) 12 BOM CK 0007

In the Bombay High Court

Case No : Writ Petition No. 2718 of 1981

Ballarpur Industries Ltd. and another APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 19-12-1986

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1987) 13 ECC 214 : (1987) 30 ELT 267 : (1985) MhLj 182

Hon'ble Judges : S.W. Puranik, J;G.C. Loney, J

Bench : Division Bench

Judgement

1. The petition as originally filed, challenges the order dated 8-12-1981 rejecting the price list and the basis of assessment of the goods of purpose of Excise duty. Subsequently, during the period of pendency of this petition, another order of assessment came to be passed on 19-8-1986 as directed by the interim order of this Court dated 3-3-1986. This order is also challenged by the petitioner.

2. The petitioner no. 1 is a Company registered under the provisions of the Companies Act, 1956 having its Registered office at Ballarpur, District Chandrapur, State of Maharashtra. The petitioner Company is carrying on the business of manufacturing paper of various qualities inter alia at its factory situated at Ballarpur. The second petitioner is a shareholder of the Company. The first respondent is the Union of India, while the second respondent is the Central Board of Excise and Customs, New Delhi and the third respondent is Collector, Central Excise and Customs, Nagpur. The Fourth and Fifth respondents are the Assistant Collector and Superintendent of Excise and Customs concerned with the relevant orders.

3. Under the decisions rendered by the Supreme Court as well as various High Courts in India, the assessable value of the goods had to be based on the manufacturing cost plus manufacturing profits of the goods. This was as per the interpretation of the old Section 4 of Central Excises and Salt Act, 1944. In other words, from the wholesale cash price all elements of cost pertaining to non-

manufacturing or post manufacturing operations (P.M.E. and P.M.P.) had to be excluded. Reference may be made to A.K. Roy and Another Vs. Voltas Limited, . In 1975, however, the High Court of Bombay in India Tobacco Co. v. Union of India 1979 ELT (J476) held that under old section 4 of the Act assessable value of the goods had to be based on the manufacturing cost and manufacturing profit. Various P.M.E. were held to be deductible from the wholesale cash price. This was also the view taken by number of High Courts in India, except Gujarat and Punjab.

4. The old section 4 was substituted by new section 4 by an amendment brought into force on 1-10-1975 and the basis of assessment of goods was the "normal price" of the goods as sold by the assessee in the course of his trade from the factory gate.

5. In spite of new section 4, Bombay High Court in the case of Bombay Tyres International v. Union of India 1979 ELT 625 held that the basis of assessment had to be on the manufacturing cost and manufacturing profit of the goods. In other words, from the normal price of goods, post manufacturing expenses had to be deducted to arrive at the assessable value. The Union of India, thereafter preferred appeal to the Supreme Court. The said judgment is reported in Union of India vs. Bombay Tyres International 1983 ELT 869. By this judgment, the Supreme Court rejected the contention of the assessee that the assessable value under both old section 4 and new section 4 had to be based on manufacturing cost and manufacturing profit. The Supreme Court held that the basis of assessment had to be the normal price of goods subject to deductions permissible statutorily as well as those initially itemised in the order. A brief operative part of the order was available to all the parties some time in May 1983, but the detailed judgment was subsequently reported in November/ December 1983 vide Union of India vs. Bombay Tyres International 1983 ELT 1986. The Supreme Court itemised the deductions permissible from the normal price such as Freight whether actual or averaged, Transit Insurance and Special Secondary Packing requested by the buyers. The other statutory deductions were also permissible from the normal price.

6. A clarificatory order was issued in the same case by the Supreme Court as reported subsequently in Union of India vs. Bombay Tyres International 1984 (17) ELT 329. Certain additional deductions were held permissible such as trade discount etc.

7. Lastly, in a later judgment in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., the Supreme Court by a majority held that cost of secondary packing employed for the smooth delivery of the goods or for facilitating the transport of the goods without damage in transit was permissible as a deduction from the normal price. The Supreme Court in another later judgment in Moped India Ltd. Vs. Asstt. Collector of Central Excise, Nellore and Others, held that "commission" given to wholesale dealers even if described as such would be a "trade discount" and permitted as a deduction under new section 4, provided

however that the dealings were on a principal to principal basis at arm''s length.

8. It would thus be observed and as rightly contended by Shri Hidayatullah for the petitioners that the petitioner Company had filed their price-list and claimed assessment on the value of different types of papers manufactured on the manufacturing cost and manufacturing profit as per the law laid down up to that date. Yet, however, the Assistant Collector by the first order of assessment dated 8-1-1981 rejected the price-list of the petitioner Company and it was this order which was initially impugned by the petitioner.

9. This Court passed interim orders dated 14-12-1981 and 13-1-1982 allowing the petitioner to clear its goods on the basis of assessable value declared in the price-list from time to time. The petitioner company has not only paid most of the taxes on the said basis, but has also furnished Bank Guarantees amounting to over Rs. 3 crores.

10. After section 4 was amended in 1975 and during the pendency of the Court case, the Supreme Court having delivered its judgment in Bombay Tyres International case, also laid down a binding procedure for dealing with pending cases. In pursuance with that, this Court had passed a format order on 3-3-1986 giving directions to both parties - the petitioners and the respondents. In pursuance of the said directions, the petitioners filed fresh statements and claimed deductions from the normal price on the ground of;

(i) Normal discount;

(ii) Dealers commission (not reflected in the invoices);

(iii) Additional discount (not reflected in the invoices);

(iv) Special packing.

11. Item nos. (ii) and (iii) were not reflected according to the petitioner in the invoices, but were given by issuing credit notes in favour of the dealers. Those credit notes were however duly reflected in the books of accounts as well as the account books of the dealers. This aspect can also be verified by the Assessing Authorities.

12. By the "second impugned order" dated 19-8-1986, the Assistant Collector rejected all claims of deductions except normal discount. The petitioners have, therefore, suitably amended the petition challenging the validity of the "second impugned order" also.

13. During the hearing, both parties conceded that in law and in fact, the earlier impugned order has merged into the second impugned order and it is this second impugned order which is being challenged by the petitioner.

14. We have gone through the second impugned order which has been filed by the respondents and we find that the deductions on account of dealers commission has been rejected only on the ground of judgment of the High Court

in Moped India vs. Assistant Collector 1985 (18) ELT 249 . However, the Assessing Authority has apparently overlooked the fact that Andhra Pradesh High Court judgment has been overruled on this very aspect by the Supreme Court in Moped India Ltd. Vs. Asstt. Collector of Central Excise, Nellore and Others, . The Assistant Collector has not even referred to the Supreme Court''s judgment. Obviously, therefore, the order of Assistant Collector rejecting the deductions on dealers commission has to be struck down.

15. Admittedly the transaction between the petitioner Company and its dealers is on principal to principal basis and pertains to transactions at arm''s length. That is why the petitioners right from 1975 have been asked to file price-list in Part-I and not in Part-II which relates to the concept of a related person. The principal to principal basis has been categorically stated in Moped India case by the Supreme Court. The terms and conditions of the transactions are found on the reverse of the invoices raised by the petitioner Company. All risk is to be borne by the dealers after delivery of goods to carriers. All documents and bills are to be retired by the dealers through Banks. It is in these circumstances, we find that the second impugned order in respect of the dealers commission will have to be struck down. The ground that the dealers commission was not reflected in the invoices is also irrelevant now in view of the clarificatory order of Supreme Court in Bombay Tyres International case reported in 1984 (17) ELT 329 which expressly holds that the discount need not be reflected in the invoices or be given at the time of delivery of goods.

16. Insofar as deductions on the ground of additional discount is concerned, the Assistant Collector has drawn aspersions on the petitioners by stating that the additional discounts were given in June 1983 taking the benefit of the Supreme Court judgment. We do not find that this allegation has any justification. We have already observed that in June 1983 only the operative part of the brief order was reported, whereas it was as late as Nov. 1983 that the detailed order was reported in 1984 (17) ELT 329. We have also seen that the credit notes were issued from time to time even prior to June 1983 and these credits can be seen duly reflected in the account books of the Company and the dealers. Further the contention of the respondents that such deductions were not claimed earlier is also patently irrelevant, because the law as laid down prior to the Bombay Tyres International case (supra) was that price-list has to be on the basis of manufacturing cost and manufacturing profit only. It was only after the format order was passed by this Court that the petitioner Company could legitimately claim those deductions. For these reasons also, we find that the rejection of the claim of deductions on additional discount deserves to be struck down. It must, however, be observed that the Assessing Authority must verify the relevant account books of the Company.

17. As regards the claim for special packing, it is again obvious that the Assessing Authority has not taken into consideration the Supreme Court judgment in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., There

the Supreme Court by majority has held that cost of secondary packing employed solely for facilitating the transport of goods to the dealers or for effecting smooth delivery to the dealers can be excluded from the normal price.

18. From the various judgments of the Supreme Court and particularly those latter decisions given in Bombay Tyres International and Godfrey Philips (supra), it is clear that six types of packing have been judicially recognised. The cost of some of these is permissible as a deduction from normal price, while in some cases it cannot be deducted. They may be itemised as follows;

(a) Cost of primary packing, which cannot be deducted.

(b) Cost of Secondary packing which cannot be deducted.

(c) Cost of primary packing which is "durable and returnable" can be deducted.

(d) Cost of secondary packing which is "durable and returnable" which can be deducted.

(e) Cost of special secondary packing requested for by the buyers which can be deducted.

(f) Cost of secondary packing which is employed solely for facilitating transport which can be deducted.

19. The Secondary packing employed by the petitioners, in our view, falls under category (f) and its cost is permissible as a deduction. The second impugned order, therefore, also deserves to be struck down on this ground.

20. Having held that the second impugned order suffers from various irregularities and illegalities particularly because of non-application of the relevant case law, we have no hesitation to hold that the same deserves to be struck down in its entirety. It must, however, be observed that the Assessing Authority should re-assess the duty payable after the due verification of all the items from the account books of the petitioner company in respect of those deductions which are not directly reflected on the invoices. If necessary, the Assessing Authority may have a cross check on the relevant dealers accounts books. The claim for deduction of the petitioners on the ground of dealer''s commission, additional discounts or discounts not shown in invoices and secondary packing, therefore, deserves fresh consideration and re-assessment.

21. Lastly, it must also be observed that apart from directing re-assessment after due verification in the light of the law as declared the second impugned order as stated in Column 7(a) and 7(b) calculating differential duty claimed on primary packing and based on the value declared by the petitioner in the return and its higher value declared by the petitioners'' sister unit located in Haryana also deserves re-consideration because that issue is sub judice and is pending before the Collector, Central Excise (Appeals), Bombay. At any rate, no duty should be demanded on this aspect at this stage.

22. Before we part with this case, it is to be noted that the respondent has filed an application claiming for interest on the total assessment. We do not find that there is any statutory provision for claiming such interest on the amounts due unlike the one available under Income Tax Act, 1961. It is further to be noted that in the interim directions given by this Court after due hearing given to the respondents on 14-12-1981 and 13-1-1982, no such directions regarding the interest was given by this Court. The format which was issued in pursuance to the directions of the Supreme Court and the language adopted therein cannot afford a right to demand interest on the respondents, since the respondents never pressed for interest during the entire pendency of this petition. Moreover, the relief of interest is discretionary. We however, find that there has been a bona fide dispute between the parties regarding the correct assessment and also in view of the changing law laid down by the Supreme Court from time to time. We have also observed that the petitioners have furnished not only Bank Guarantees, but have paid full assessment of Excise Duty and have made payments worth several crores of rupees from time to time. It is in these circumstances, that we feel no order needs be made in respect of the claim of interest made by the respondent, particularly because we have taken a decision and have struck down the second impugned order the assessment and have directed fresh assessment in the light of the observations made above.

23. Above are the reasons, therefore, whereby we have passed the operative order dated 19-12-1986 as follows;

"Rule is made partly absolute as detailed above. There shall be no order as to costs".

