(1986) 01 BOM CK 0010

In the Bombay High Court

Case No : Misc. Petition No. 1534 of 1979

Bombay Tyres International Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 07-01-1986

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4(4)

Citation : (1989) 21 ECR 43 : (1989) 39 ELT 544

Hon'ble Judges : S.P. Bharucha, J

Bench : Single Bench

Judgement

1. This writ petition under Article 226 impugns the order of the 3rd respondent dated 1st November 1974 rejecting the petitioners'' application for refund of a part of the excise duty paid upon their product ''tread rubber'', also called ''camel back''; the appellate order of the 2nd respondent dated 9th October 1975; and the 1st respondent''s order in revision dated 1st December 1978.

2. The petitioners paid excise duty upon the tread rubber manufactured by them including in the value thereof its packing cost. In January 1974 the petitioners learnt of the decision of the Appellate Collector of Central Excise, Madras, dated 8th June 1973 in the case of the Madras Rubber Factory Ltd., that the packing cost of tread rubber was to be excluded in computing the excisable value. On 17th January 1974 the petitioners made an application to the Superintendent of Central Excise, Bombay, for refund of the excise duty on the cost of packing the tread rubber manufactured by them during the twelve months ended 31st December 1973. The claim for refund was in the sum of Rs. 1,26,329/-. On 27th July 1974 the amount of the claim for refund was revised.

3. On 1st November 1974 the 3rd respondent passed an order rejecting the claim for refund. He noted that the petitioners had contended in their letter dated 3rd April 1974 that although the tread rubber could be sold in the condition in which it had been wound in roll form, it was packed in cardboard cartons or wooden cases to facilitate handling and despatch by lorry or goods

train. This was not correct as the tread rubber rolls were first placed in polythene or cellophane paper, then packed in cardboard cartons or wooden cases and then delivered to the customers. The petitioners had nowhere mentioned that the tread rubber was actually being sold without any packing. It, therefore, meant that the packing was required before the tread rubber was delivered to customers. Its cost, therefore, had to be included in the value of the tread rubber.

4. In appeal the petitioners contended that the type of packing used in connection with the tread rubber consisted of cardboard cartons or wooden cases more to facilitate handling and dispatch by lorry or goods train to the petitioners'' district offices or depots in the country and it was more in the form of a customer service to the ultimate user of the tread rubber than as an essential protective material. In his order rejecting the appeal, the 2nd respondent gave only this reason : that since the tread rubber was cleared in a packed condition, he did not see any reason to interfere with the order passed by the 3rd respondent.

5. In the petitioners'' revision application to the 1st respondent it was stated that tread rubber was strong and hardy and, therefore, no question could arise of its suffering breakage or deterioration in quality when it was not packed. Thus, the tread rubber was capable of being delivered without being packed. It was packed only to facilitate commercial handling and transportation rather than for preserving the goods. It was more in the form of a customer service to the ultimate user of the tread rubber than as an essential protective item. In the 1st respondent''s order in revision it was observed that the amount of the packing charges was neither separately identifiable nor separately invoiced. Even if there was some amount which had been incurred by the petitioners on account of packing charges, the same had become an integral part of the assessable value in the absence of separate identification and invoicing. In the circumstances, the revision petition was rejected.

6. Mr. Talyarkhan, learned counsel for the petitioners, drew my attention to the judgment of the Supreme Court in Union of India & Ors. v. Bombay Tyres International Ltd., 1983 E.L.T. 1896. Analysing Section 4(4)(d)(i) of the Central Excises and Salt Act and nothing that the position was the same before and after its amendment, the Supreme Court observed that the packing of which the cost was included in the assessable value was the packing in which the goods were wrapped, contained or wound when the goods were delivered at the time of removal. In other words, it was the packing in which the goods were ordinarily sold in the course of wholesale trade to the wholesale buyer. The cost of primary packing, that is to say, the packing in which the article was contained and in which it was made marketable for the ordinary consumer fell within Section 4(4)(d)(i). Secondary packing was of different grades. In the degree of secondary packing which was necessary for putting the excisable article in the condition in which it was generally sold in the wholesale market at the factory gate was the degree of packing whose cost could be included in the value of articles for the purpose of the excise duty. To that extent, the cost of secondary packing could

not be deducted from the wholesale cash price of the excisable article at the factory gate.

7. The question of secondary packing was considered again by the Supreme Court in the case of Union of India & Ors. v. Godfrey Philips India Ltd. & Ors., 1985 E.L.T. 360. The Court was divided, the majority view being taken by Pathak and A.N. Sen, JJ. and the minority view by the learned Chief Justice. The majority view was expressed by A. N. Sen, J. Thus :

"On a proper construction of Section 4(4)(d)(i) of the Act read with the Explanation, I am of the opinion that any secondary packing done for the purpose of facilitating transport and smooth transit of the goods to be delivered to the buyer in the whole-sale trade cannot be included in the value for the purpose of assessment of excise duty."

Pathak J. considered whether the containers which were used were employed for the purposes of avoiding damage or injury during transit. If so, they were not necessary for selling the articles in the wholesale market at the factory gate and were in the nature of secondary packing.

8. Mr. Talyarkhan submitted that the cardboard cartons or wooden cases in which the tread rubber was placed were in the nature of secondary packing whose cost was not includible in the value of the tread rubber.

9. The tread rubber as packed has been produced before me. The tread rubber itself is a strip of rubber approximately 6" wide and about 1" thick which is tightly wound into a roll. Each roll weighs between 15 Kgs. and 40 Kgs. The roll is not held together by any means. The roll is inserted into a loose and open polythene bag. That bag also cannot hold the roll together. The bag is placed in a cardboard carton or a wooden case. The cardboard carton is held together by rubber bands. The wooden case is nailed shut.

10. There is no doubt in my mind that a roll of tread rubber cannot be sold without the cardboard carton or the wooden case. These are what hold the roll together. The cardboard cartons or the wooden cases are, on the petitioners'' own showing, before the authorities and in the petition, the packing in which the tread rubber is sold in the course of wholesale trade. In any event, the cardboard cartons or the wooden cases are not employed merely for the purpose of facilitating transport or smooth transit. They are necessary for selling the tread rubber in the wholesale trade and are not secondary packing materials whose cost must be excluded from the assessable value of the trade rubber.

11. It was urged by Mr. Talyarkhan that inasmuch as the authorities had, in passing the impugned orders, not considered this aspect of the matter, there should be an order of remand to the 3rd respondent to consider the petitioners'' refund application afresh in the light of the afore-mentioned Supreme Court judgments. It was also pointed out by him that in the order passed by the Collector of Central Excise, Madras, in the case of the tread rubber manufactured

by the Madras Rubber Factory Ltd. a different view had been taken. It was the manufacturer''s case there that sales of tread rubber had taken place with no packing whatsoever. ...... In the instant case, it has been repeatedly stated by the petitioners both before the authorities as well as in the petition that the packing in the cardboard cartons and the wooden cases was done as a courtesy to their customers. It is not the petitioners'' case that they have sold their tread rubber except in the cardboard cartons or the wooden cases.

12. Since I have no doubt that the cardboard cartons and the wooden cases are not such secondary packing materials as can be excluded in computing the assessable value of the petitioners'' trade rubber, there is no reason to remand the petitioners'' refund application to the 3rd respondent.

13. In the result, the petition is dismissed.

14. There shall be no order as to costs.

15. Rule discharged.

