

(1986) 01 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No's. 2500 and 1928 of 1982 with 1837, 2250, 779 and 2275 of 1983

Central India Spinning, Weaving and Manufacturing Co. Ltd.,
Bombay and others

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 29-01-1986

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 3, 4, 4(4)

Citation : (1986) 2 BomCR 455

Hon'ble Judges : V.A. Mohta, J;Qazi, J

Bench : Division Bench

Judgement

Qazi, J.—By Writ Petition No. 2500 of 1982, the other Writ Petition Nos. 1837/1983, 2250/1983, 779/1983, 1928/1982 and 2275/1983 also stand disposed of since the question involved is common in all these petitions. The petitioner in Writ Petition No. 2500 of 1982 is a Limited Company registered under the Companies Act, 1956 carrying on its business of spinning, weaving and manufacturing of cloth at Nagpur. It is popularly known as "Empress Mills, Nagpur". Since about November, 1978 the petitioner established at Nagpur a Division known as paper Division where the petitioner manufactures Kraft paper. The Kraft paper is classified for the purpose of Central Excise duty under Item 17(2) of the Central Excise Tariff. In exercise of the powers under Rule 8 of the Central Excise Rules, the respondent 1 by Notification No. 128/1977, dated 18-6-1977 exempted certain categories of papers manufactured in paper mills of the type described in the table to the notification from so much of the duty of excise leviable as specified in the schedule.

2. On or about 25th September, 1980 the officers of the Central Excise, Preventive Department, Nagpur in the course of their preventive checks on Nagpur-Kamptee road intercepted a truck No. MRL 4187 which was loaded in Kraft paper. The truck was going from Nagpur towards Kamptee. On investigation it was found that the said truck was transporting 37 packages of Kraft paper

manufactured by the petitioner and the driver was not carrying the relative gate pass evidencing the clearance of the goods on payment of excise duty. As a follow up action the officers of the preventive department visited the premises of the petitioner Paper Mills for verification and checking of the accounts. At the premises they noticed another truck No. MHB 3702 loaded with 26 packages of Kraft paper. This truck was ready to leave the factory premises while the officers were checking the bonded store-room of the petitioner mills; the said truck No. MHB 3702 also left the factory premises. The officers found that the original of the gate pass No. 242 covering the consignments of 37 packages found in the truck No. MRL 4187 as also the original of gate pass No. 243 covering 26 packages which were in truck No. MHB 3702 were in the gate pass book of the petitioner. The officers of the Central Excise preventive department thereafter intercepted the truck No. 3702 on Kamptee road.

3. In the course of the investigation it was revealed inter alia that although the petitioner was paying excise duty on Kraft paper at the concessional rate they were recovering from the customers the duty at the tariff rate. Consequently a show cause notice was issued to the petitioner by the Assistant Collector of Central Excise alleging the contravention of the various provisions of the Central Excise Rules, 1944 and the Central Excises and Salt Act, 1944 and the petitioner was called upon to show cause why duty amounting to Rs. 1,78,862.91 should not be recovered from it u/s 11A of the Central Excises and Salt Act, 1944. The petitioner replied the said show cause notice. As desired by the petitioner personal hearing was granted to it by respondent 2 the Collector. The Collector held that the petitioner was guilty of violating the various provisions of the Central Excise Rules. The Collector further directed the Company to pay an amount of Rs. 1,78,862.91 u/s 11-A of the Central Excises and Salt Act, 1944 on the excess value during the period from 1-1-1980 at 25-9-1980.

4. The petitioner preferred an appeal before the Central Board of Excise and Customs, New Delhi. The appellate authority found favour with the petitioner in respect of various breaches of the Central Excise Rules, 1944 and completely exonerated him in respect of those breaches. It, however, confirmed the finding of the Collector in respect of the payment of the amount of Rs. 1,78,862.91 u/s 11-A of the Act on the excess value. It is this finding which is being challenged before us.

5. According to the petitioner, the excise authorities must compute and calculate the excise duty on the assessable value as declared by the petitioner in its price list which do not include the element of duty which is separately charged to the customers in the invoices. As the prices of the petitioner do not include any payment of excise duty the same cannot be added to the price declared by the petitioner by a national inclusion. It has further submitted that the price as declared by the Company in its price list has been approved by the Excise authorities for the purpose of assessable value u/s 4 of the Act. Once this price list is approved and the duty paid thereon by the Company after taking into

account the benefit under the Notification, the quantum of duty charged to the Customer by the Company, which is of the scheduled rate, is an irrelevant consideration for determining the assessable value. The duty which was charged, according to him, is a matter entirely between the customer and the Company.

6. Mr. Bobde, learned Counsel for the petitioner further submitted that wherever excise duty is chargeable, ad valorem, the value of the goods must be determined first. It is only after such determination that it is possible to find out the amount of excise duty that is levied under the Act. According to him, this amount of excise duty is not and can never be a component of the value of the goods. As much as excise duty is not a component of the value fixed by the Central Government u/s 3(2) it cannot be a component of the value u/s 4 even if such Section 4 had not expressly provided for exclusion of the amount of excise duty. The exclusion u/s 4(4)(d)(ii) is made ex-abundanti cautela. In short, the argument of Mr. Bobde was that the approach of the department amounts to denial of the benefit of the Notification No. 128/77, dated 18-6-1977 to the Company and it renders the notification nugatory and infructuous.

7. Mr. Bobde has referred to several decisions and submitted that there is no decision as yet which says that the taxes recovered be added to the price. According to him, there is no mechanism by which there can be any addition. He emphatically argued that there are only deductions but no addition.

8. We have given our anxious consideration to the submissions of Mr. Bobde. We do not think it is necessary to discuss all the decisions cited before us, since they are not directly on the point. In our view, the decision of this court reported in B.K. Paper Mills Pvt. Ltd. Vs. Union of India (UOI) and Others, is a direct authority. The controversy involved in that decision is stated in para 6 of the judgment which reads as under :-

"In or about November, 1976 the Excise authorities orally intimated to the petitioners that under the first notification of 1973 the petitioners were required to pass on the benefit of exemption from excise duty to their customers. If the said benefit was not passed on to the customers, the assessable value of paper as declared by the company in its price list would have to be revised by including the quantum of benefit retained by the Company (under the first Notification of 1973) in the value of the goods for calculation of excise duty. Accordingly a show cause notice dated 9/15 March, 1977 was issued by the Superintendent of Central Excise calling upon the petitioners to show cause why an amount of Rs. 26,968.77 alleged to be short levied should not be recovered from the company under Rule 10 of the Central Excise Rules in respect of its clearance of paper from 16th March, 1976 to 30th June, 1976. The petitioners replied to the show cause notice. Ultimately an order was passed against the petitioners by the Assistant Collector on 8th October, 1977."

The findings are recorded in paras 15 and 16 of the judgment. They are as under :-

"It is not possible to accept this interpretation of Section 4(4)(d)(ii). The amount of excise duty "payable" on goods necessarily has a reference to the duty of excise payable on the goods by the assessee. u/s 4(1)(a), for example, the normal price is described as the price at which such goods are ordinarily sold by the assessee in the course of wholesale trade. Similarly in Section 4(1)(a)(i) there is a reference to goods being sold by the assessee to different type of buyers. Sub-section (ii) also has a reference to goods sold by the assessee; as also sub-section (3). In the same manner in Section 4(4)(d)(ii) also the duty of excise payable on such goods must have a reference to the duty payable on such goods by the assessee. Excise duty payable by the assessee, therefore, may or may not be determinable only with reference to the tariff entry. If there is any exemption notification which applies either to the type of goods manufactured by the assessee or to the assessee by virtue of his being the type of manufacturer covered by the exemption, the duty of excise payable has to be computed with reference to such exemption notification also. The amount covered by Section 4(4)(d)(ii) is the amount of excise duty which is payable by the assessee on the goods in question. It necessarily refers to the actual quantum of excise duty payable on the goods in question by the assessee. In my view Section 4(4)(d)(ii) does not refer to the duty leviable under the relevant tariff entry without a reference to any exemption notification that may be in existence in connection with that entry as contended by the petitioners."

"16. This position is now made clear by virtue of an "explanation" which has been added to Section 4(4)(d)(ii) with retrospective effect from 1st October, 1975 u/s 47 of the Finance Act of 1982. The explanation sets out what is meant by "the amount of duty of excise payable on any excisable goods." By "the amount of the duty of excise" is meant the effective duty of excise payable on such goods under the Act. The effective duty of excise is explained as follows : In a case where there is an exemption notification, the duty of excise computed with reference to the rate specified in the Act in respect of such goods as reduced so as to give a complete effect to such exemption. The effective duty of excise, therefore is the duty of excise which is calculated on the basis of the prescribed rate as reduced by virtue of an exemption notification. This alone is excluded from normal price u/s 4(4)(d)(ii)."

Section 3 of the Central Excises and Salt Act, 1944 is the charging section whereas Section 4 provides for the determination of the value for the purpose of charging the duty of excise under the Act. It is in the nature of machinery provision. The material part of the Sections 3 and 4 reads as under :-

"Section 3(1). There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India..... as, and at the rates, set forth in the First Schedule....."

Provided that

Explanation 1

Explanation 2

(1A)

(2) The Central Government may, by notification in the Official Gazette, fix for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3)

Section 4. Valuation of excisable goods for purposes of charging of duty of excise

(1) Whereunder this Act, the duty of excise is chargeable on any excisable with reference to value, such value shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -

(i) where

such goods are sold by the assessee at different prices to different buyers etc.

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force, or at a price being the maximum, fixed under any such law, then, notwithstanding anything contained in Clause (iii) of this proviso, the price or the maximum price, as the case may be, as fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;

(b)

(2) to (3)

(4) For the purpose of this section

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means -

(i) - (ii)

(c)

(d) "Value", in relation to any excisable goods, -

(i)

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

Explanation - For the purpose of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of

(a) the effective duty of excise payable on such goods under this Act; and

(b)

and the effective duty of the excise on such goods under the Act referred to in Clause (a) or Clause (b) shall be, -

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of any duty of excise on such goods equal to, any duty of excise already paid on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii)"

9. It appears to be quite obvious from the above provisions that the value of excisable goods is the normal price i.e. the price at which the goods are ordinarily sold by the assessee to the buyers in the course of wholesale trade. Therefore, the value for the purpose of excise duty is the normal price but not including the duty of excise payable. Normally the price under the Sale of Goods Act may contain several ingredients. It may consist of the cost of the raw material, cost of labour, cost of advertisement, cost of packing and so on. But excise duty is not levied on these different items. It is levied only on the normal price of the goods. But if such normal price includes excise duty payable then such amount of excise duty is to be excluded from the price for arriving at the value of the goods for the levy of the excise duty. We have already shown above that from Notification No. 128/1977, dated 18-6-1977 as also from the

explanation to Section 4(4)(d)(ii) it is clear that when the effect of exemption notification is a reduction in the rate prescribed in the Act, it is the reduced rate of excise duty which is to be excluded u/s 4(4)(d)(ii). The explanation referred to above, in our view makes it clear that the exclusion u/s 4(4)(d)(ii) is only of the duty of excise as reduced by the exemption notification. Thus, in our view, the authorities below were justified in holding that what was being collected by the Company as excise duty from the customers is not excise duty but the clause in substance of the goods. The Company is realising from its customers excise duty worked out on tariff rates while it is actually paying duty to Government at concessional rate. It is true that according to Section 4(4)(d)(ii) of the Act the value does not include the amount of the duty of excise, if any payable on such goods, but in view of the explanation to Section 4(4)(d)(ii) of the Act, the duty of excise means the duty payable in terms of the Central Excise Tariff read with Exemption Notification issued under Rule 8 of the Central Excise Rules. In this view of the matter, the only deduction that is permissible is of the actual duty paid or payable while fixing the assessable value.

10. Shri Bobde has invited our attention to several decisions, but most of them have already been discussed by this Court in *B.K. Paper Mills Pvt. Ltd. Vs. Union of India (UOI) and Others*, and have been rightly distinguished. Hence it is not necessary to discuss the same over again. Suffice it to say that they do not deal with the point which is directly in issue in our case.

11. Shri Bobde has placed the copy of the judgment of the Karnataka High Court, disposing of Writ Petition No. 3548 of 1978 and Writ Petition No. 4766 of 1981 on 3rd October, 1985, *Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others*, . In this case the Collector of Central Excise had issued a Trade notice purporting to clarify the levy of excise duty on goods manufactured by the petitioners as detailed in Exemption Notification No. 198/76-CE. On the basis of the Trade Notice, duty was demanded from the petitioners, who paid the duty under protest. The Karnataka High Court has expressed thus :

"(35) What emerges from the above discussion is that in determining the assessable value of manufactured goods governed by the exemption granted by the Government either partial or whole, only that amount of duty actually paid or payable by such manufacturer should be excluded and the benefit of such exemptions cannot be denied on the ground that the extent such exemptions either in whole or in a part had not been passed to the customer."

The Karnataka High Court has also referred to the decision of this Court in *B. K. Paper Mills Pvt. Ltd., (supra)* and expressed thus :

"We are of the view that this enunciation made by the learned Judge is in accord with what we have expressed earlier. We are of the view that it is unnecessary to examine the other questions that were decided in that case."

In view of what we have stated above, it is difficult to appreciate how this

decision supports Shri Bobde.

12. Lastly, Shri Bobde urged a question of limitation in Writ Petition No. 2250 of 1983 based on the statement of show cause notices (Annexure II) at Serial Nos. 12 and 13 as barred by limitation under Rule 10 of the Rules inforce framed under the Central Excises and Salt Act, 1944. The authorities below have dealt with this aspect and, in our view, rightly. We see no reason to take a view different from the one that has been taken by the authorities below.

13. To conclude, all the petitions are dismissed with costs. Rule discharged.