(1991) 06 BOM CK 0047

In the Bombay High Court

Case No : Writ Petition No. 1762 of 1981

Colridge Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 13-06-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 36(2)

Citation : (1991) 37 ECR 183 : (1992) 57 ELT 387

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

Bench : Division Bench

Advocate : Shri D.B. Shroff, instructed by M/s. Crawford Bayley and Co, for the Appellant; Shri S.M. Shah, for the Respondent

Judgement

Pendse, J.—The petitioners are a Company registered under the Companies Act, and inter alia, manufacture diverse kinds of packaging materials, including tubes popularly known as ''Aluminium Collapsible and Rigid Tubes'' at their factory situated at Thane. The aluminium tubes manufactured by the petitioners are liable for payment of excise duty under Tariff Item No. 27(e) of the Central Excise Tariff. A dispute arose between the petitioners and the Excise Authorities in respect of assessable value of the extruded tubes. The petitioners claimed that it was not permissible to take into account costs of post-extrusion operations while determining the assessable value of the aluminium extruded tubes. To post-manufacturing operations related to lacquering, coating and printing of the aluminium tubes, and also the costs of the plastic caps fitted on the tubes. The Department on the other hand claimed that post-extrusion operations are part of the manufacturing activities and the costs should be included while determining the assessable value.

2. The petitioners filed Misc. Petition No. 771 of 1973 under Article 226 of the Constitution of India in this Court seeking a direction to the Department not to include the assessable value of the extruded aluminium tubes by including the costs or charges relating to the coating or printing of the tubes and the value of

the plastic caps. The petition was decided by judgment dated July 24, 1979 delivered by one of us (Pendse, J.) and the claim of the petitioners was upheld. An identical issue arising in companion petition, being Miscellaneous Petition No. 511 of 1973 between Metal Box Company of India and Union of India was also decided. The Department preferred appeal No. 417 of 1980 before the Division Bench of this Court challenging the conclusion recorded in favour of the petitioners by the Single Judge. The appeal was summarily dismissed by the Division Bench by order dated August 22, 1980. The Department then filed SLP before the Supreme Court and the matter is pending hearing.

3. In accordance with the decision of the Single Judge, the petitioners were entitled to refund of duty erroneously recovered by the Department between the period of June 2, 1973 and January 20, 1974. The petitioners while approaching this Court by filing petition under Article 226 of the Constitution had also applied for refund of the duty for the relevant period before the Superintendent of Central Excise. The claim was rejected by the Assistant Collector and the petitioners had preferred appeals before the Collector of Central Excise (Appeals). The appeals remained pending in view of the petition filed by the Company in this Court. After the decision was recorded by the learned Single Judge on June 24, 1979, the Collector of Central Excise (Appeals) took up the appeals for hearing and by order dated December 21, 1979 directed refund of an amount of Rs. 9,70,989.15 in accordance with directions of the High Court.

On December 12, 1980 the Government of India, Ministry of Finance served show cause notice upon the petitioners in exercise of powers vested u/s 36(2) of the Central Excises and Salt Act to show cause why the order passed by the Appellate Collector awarding refund should not be set aside. The show cause notice recites :

"4. On examination of the records of the case the Central Government are tentatively of the view that the impugned order in appeal is not proper. In this case the assessee had filed a writ petition in the High Court of Bombay apart from the appeal they filed before the Appellate Collector of Central Excise, Bombay. The judgment of the Court was delivered before the passing of the order-in-appeal. Under these circumstances it would appear that it was not proper on the part of the Appellate Collector to allow the appeal following the High Court decision and pass the impugned order inasmuch as the appeal was rendered infructuous with the passing of the High Court judgment. It would appear that Appellate Collector should have correctly dismissed the appeal as infructuous instead of passing any orders on the appeal, thereby leaving scope for the lower authorities to deal with the matter exclusively in the light of Bombay High Court judgment or the judgment of the Supreme Court in case an appeal was preferred against decision of the High Court in Supreme Court; more so because the judgment of the Bombay High Court in the case of Metal Box Co. which was relied upon by the Court in deciding the particular writ petition of the assessee, has already become subject-matter of an SLP before the Supreme

Court."

The issuance of the show cause notice is under challenge in this petition filed under Article 226 of the Constitution of India.

4. The petition was admitted on December 7, 1989 and the hearing of the review show cause notice was stayed. This Court also directed that the entire amount of refund found due by the appellate authority should be deposited in this Court and the petitioners were permitted to withdraw the said amount on furnishing bank guarantee. It is not in dispute that the petitioners did withdraw the amount after furnishing guarantee.

Shri Shah, learned Assistant Government Pleader appearing on behalf of the respondents, submitted that on July 3, 1987 the petition was placed before Mr. Justice Suresh and the hearing of the petition was adjourned sine die because the appeal preferred by the Department before the Supreme Court against judgment of the Single Judge delivered on July 24, 1979 in Miscellaneous Petition No. 771 of 1973 was pending along with the judgment in Metal Box''s case. We called upon Shri Shah to show us the order passed by the learned Single Judge and Shri Shah very fairly stated that neither the copy of the order is available with him nor the original order is available on record of the case. We also find that the order is not written down either in the Farad of the petition or in the Minutes maintained by the Associate of the Court. This Court is a Court of record and we decline to take into consideration any alleged oral direction given by the Single Judge. Apart from this consideration, we do not see any reason why the hearing of the present petition should be withheld merely because the appeal preferred by the Department is pending in the Supreme Court and where admittedly the Department has not secured stay of enforcement of the judgment of this Court.

5. Shri Shroff, learned Counsel appearing on behalf of the petitioners, submitted that exercise of powers u/s 36(2) of the Central Excises and Salt Act on the facts and circumstances of the case is entirely misconceived and the show cause notice issued by the Government of India should be struck down. We find considerable merit in the submission of the learned Counsel. The reasons given for exercise of powers as set out hereinabove clearly indicate that the Government of India does not consider that the order passed by the Appellate Collector granting refund is in any way erroneous on merits. The objection seems to be only as to the modality of passing the order. In our judgment the exercise of jurisdiction in such circumstances is entirely uncalled for. The idea seems to prevent the petitioners from claiming refund merely because the appeal preferred by the Department is pending in the Supreme Court. In our judgment, the exercise of powers u/s 36(2) of the Excise Act is not bona fide. It was open for the Department to seek stay of operation of the order passed by this Court by filing appropriate proceedings before the Supreme Court, but either such application was not made or was turned down by the Supreme Court. Shri Shah was unable to enlighten us as to whether the Department applied for stay or

whether the stay was refused by the Supreme Court. In these circumstances, in our judgment, issuance of show cause notice was entirely illegal and the notice is therefore required to be struck down.

6. Accordingly, petition succeeds and rule is made absolute in terms of prayer (a). The respondents shall pay the costs of the petitioners.

7. The bank guarantee furnished by the petitioners in pursuance of the interim order passed by this Court to stand discharged.