

(1986) 07 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition No. 1250 of 1980

Devidayal Electronics and Wires Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 16-07-1986

Acts Referred:

Central Excise Rules, 1944 — Rule 11
Central Excises and Salt Act, 1944 — Section 11B, 4
Constitution of India, 1950 — Article 226

Citation : (1986) 10 ECC 89 : (1986) 25 ELT 638 : (1985) MhLj 120

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Judgement

1. The petitioner is a company incorporated under the Companies Act being engaged in the business of manufacturing various types of copper and aluminium winding wire and copper cables, which are classifiable under item 33B of the First Schedule to the Central Excises and Salt Act, 1944, hereinafter referred to as "the Central Excise Act". At all times the petitioner, like other manufacturers of excisable goods, had paid excise duty on the wholesale price as demanded by the Excise authorities. In November 1979 a judgment of the Gujarat High Court declared that excise duty was not liable to be imposed on post-manufacturing expenses which formed part of the wholesale price. Similar view has been taken by other High Courts also.

2. The petitioner says that it became aware, under this judgment, of the mistake of law under which it had paid extra excise duties. In the wholesale price, on which excise duty had been paid by the petitioner several post-manufacturing expenses have been included which, naturally, had resulted in the payment of inflated excise duty to the respondents. The petitioner, therefore, addressed a letter dated 23rd November, 1979 to the Assistant Collector of Central Excise pointing out that the prices submitted by it till that day were inclusive of diverse post-manufacturing expenses such as sales expenses, distribution expenses, administrative expenses, freight charges etc. It is also mentioned in the said

letter that the said price-lists for determination of the assessable value of the various products were submitted under a misapprehension of the correct legal position without realising that those expenses ought not to have been included in the assessable value. In this letter the judgment of the Gujarat High Court, which formed the basis of the claim of the petitioner, was referred to. Accordingly the Excise authorities were informed that in view of the correct legal position the petitioner would not be in a position to submit price-lists for determination of the assessable value of its products excluding therefrom the manufacturing costs and manufacturing profits. If the authorities insisted upon, it was stated in the letter, duties of excise in respect of its various products would be paid under protest.

3. Subsequently on 19th April 1980 refund claims in respect of the post-manufacturing expenses which were included in the wholesale price for the periods (1) January 1977 to 30th June, 1978 and (2) 1st July, 1978 to 30th June, 1979 were filed by the petitioner. By the order dated 22nd of May 1980 the Superintendent of Central Excise rejected the claims by mentioning that the judgment of the Gujarat High Court could not be made the basis of every refund claim. It was also stated that the petitioner's claim related to a period prior to the letter of protest and therefore it could not be said that the payments had been made under protest.

4. The petitioner, therefore, approached this Court under Article 226 of the Constitution of India by means of this writ petition which was filed in September, 1980. During the pendency of this petition the judgment of the Supreme Court in *Union of India v. Bombay Tyre International Limited* 1983 (14) E.L.T. 1896 was pronounced. As is well known, in that decision it was held that several post-manufacturing expenses deserved to be included in the wholesale price on which excise duty was payable u/s 4 of the Central Excise Act.

5. Naturally the petitioner therefore could not press its claim on the basis of the judgment of the Gujarat High Court. Nevertheless, the petitioner contended that even in the light of the judgment of the Supreme Court in the *Bombay Tyre International's* case it was entitled to the refund of excess duty paid on certain items which were permitted to be deducted by the Supreme Court. In the light of this submission, on 9th of December 1983 Pendse J. noticed that the petitioner was not entitled to the relief sought in terms of prayer clause (a) of the petition in view of the Supreme Court decision in the *Bombay Tyre International's* case. It was also noticed that several items which the petitioner claimed were deductible were not in fact deductible in view of the judgment of the Supreme Court. Thereafter Pendse J. gave a direction in paragraph 4 of the order that "the assessing authorities shall permit the assesseees to submit their statement of deductions/amendments in respect of the price lists already filed for a proper determination of excise duty liability in respect of deductions claimed under the headings (i) interest on credit sales and (ii) freight and insurance charges together with further claims, deductions or heads of expenditure beyond those dealt in the judgment or order of the Supreme Court, if otherwise admissible".

6. After this direction was given, the Assistant Collector of Central Excise took up the case of the petitioner and by his judgment and order dated 16th of March 1984 upheld the claim of the petitioner in so far as it related to the deduction on account of freight and octroi. The amount in this respect was Rs. 57,074.48 for the refund period January 1977 to June 1978 and Rs. 54,781.79 for the refund period July, 1978 to June, 1979. The Assistant Collector refused to allow interest on cash credit as deductible item. Similarly, he refused to allow interest on fixed deposits as a deductible item and Mr Bharucha, the learned Advocate appearing in support of this petition, has not pressed the claim in respect of interest on fixed deposits. The Assistant Collector also upheld the contention of the petitioner that it was entitled to deduct the additional tax on sales tax from the wholesale price. An amount of Rs. 3,218.28 for the refund period January 1977 to June 1978 and an amount of Rs. 2,381.81 for the refund period July 1978 to June 1979 would become payable on this account.

7. Despite the fact that he upheld the claims of the petitioner on three items, namely freight, octroi and additional tax on sales tax, the Assistant Collector rejected both the refund claims on the ground that they were barred by time. While taking this view he notice that u/s 11B of the Central Excise Act a refund claim has to be made within a period of six months. It has been brought to my notice that at the time when the refund claims were filed the relevant provision in the field was Rule 11 and not Section 11B, but it should be noted that the period of limitation in both these provisions is the same, namely, six months from the date of the cause of action, for refund. It is this order of the Assistant Collector of Central Excise which has been challenged by incorporating certain amendments in the petition.

8. In view of the fact that the Assistant Collector of Central Excise himself has upheld the petitioner's claim on at least three items, it has not become necessary to examine the merits of the claims of the petitioner. The only ground on which the claims have been rejected is that they were barred by time. If this petition is strictly treated as a petition against the order dated 16th March 1984 passed by the Assistant Collector of Central Excise, as Mr. Lokur, the learned Advocate appearing for the respondents, wants me to do, then since no error is detectable in that order this Court cannot interfere with the same and, therefore, no relief can be given to the petitioner. But one should not forget that the petitioner has approached this Court as early as in 1980 making a grievance about the refusal of the refund claims by the authorities on a ground which was totally different from the one which is mentioned in the impugned order. The petition was kept pending. Several interim orders were passed not only in this petition but also in several other petitions and ultimately a direction was given by this Court on 9th of December, 1983 to get the matter adjudicated by the officer of the department, who has now done it and given findings in favour of the petitioner at least on three points. If this is so I do not see how this petition can be dismissed on the ground that technically the order dated 16th March, 1984 does not disclose an error of law. This petition must be treated as petition for the

purpose of enforcing the refund of excess excise duty paid by the petitioner under a mistake of law which mistake was discovered by it sometime in November, 1979 and which mistake further underlined as far as the petitioner is concerned in respect of at least three items. I, therefore, proceed to treat this as a petition for the purpose of compelling the respondents to refund to the petitioner the amount of excess excise duty paid by it, which the petitioner is found to have paid even by the officer himself of the concerned department under a mistake of law. In that case the dismissal of the claims by the Assistant Collector of Central Excise on the ground of limitation mentioned either in Rule 11 or in Section 11B presents no hurdle at all to this Court in granting the relief.

9. Mr. Lokur has, however, contended that the petitioner could not be give relief in respect of a period which is more than three years prior to the date on which the petition has been filed. Several authorities have been cited for the purpose of demonstrating that in a writ petition, especially of this type where the petitioner's claim is for refund of money paid under a mistake of law, the Court must consider whether the petitioner had approached the Court as expeditiously as possible, whether the claim which the petitioner is making in the writ petition would have been barred if a suit for recovery of the same had been filed, and the extent to which the claim ought to be granted. Mr. Lokur placed reliance on *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, and invited my attention to the following to be found in paragraph 9 of the said judgment :-

"whether relief should be granted to a petitioner under Article 226 of the Constitution where the cause of action had arisen in the remote past is a matter of sound judicial discretion governed by the doctrine of laches. Where a petitioner who could have availed of the alternative remedy by way of suit approaches the High Court under Article 226 of the Constitution, it is appropriate ordinarily to construe that any unexplained delay in the filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as unreasonable. This rule, however, cannot be a rigid formula. There may be cases where even delay of a shorter period may be considered to be sufficient to refuse relief in a petition under Article 226 of the Constitution. There may also be cases where there may be circumstances which may persuade the court to grant relief even though the petition may have been filed beyond the period of limitation prescribed for a suit. Each case has to be judged on its own facts and circumstances touching the conduct of the parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public etc."

10. If it is contended that in a Petition where the petitioner claims refund of the amount paid under a mistake of law no relief can be given for a period of three years next before the institution of the petition, that contention cannot be accepted in view of what is stated by the Supreme Court in the case of *Shri Vallabh Glass Works*. On the facts of the case, however, the Supreme Court held

that the claim of the factory could not be decreed for a period of three years prior to the filing of the writ petition. There is no hard and fast rule, that is what the Supreme Court itself has said in that judgment.

11. Apart from that, I do not see how any part of the claim of the petitioner in the instant case can be defeated on the ground of limitation. If it is accepted, as I am inclined to accept, that the cause of action accrued to the petitioner in November 1979 when for the first time it was made aware that post-manufacturing expenses were deductible, then it could have filed a suit within three years after that date. The petitioner has in fact filed this writ petition within one year from the accrual of the cause of action to it. Even if a period of three years is calculated from September 1980 the petitioner's claim would be a claim from September 1977. I do not see how the remaining claim for the period of eight months before it could be rejected on a ground which has not been approved as a rule of universal application by the Supreme Court in the case of Shri Vallabh Glass Works. I am, therefore, of the opinion that as far as the items on which the contentions of the petitioner have been upheld by the Assistant Collector of Central Excise, no part of the claim can be defeated on a plea of limitation.

12. Mr. Bharucha then contended that interest on cash credit or on bills of exchange is an expense which is incurred by the manufacturer and this ought to have been deducted from the assessable value for excise duty. It is not claimed by Mr. Bharucha that this formed part of the manufacturing expense, but looking to the definition of "wholesale price" mentioned in Section 4 of the Central Excise Act he contends that the normal price of an excisable article is the one at which it is sold by the assessed to a buyer in the course of wholesale trade for delivery at the time and place of removal. According to Mr. Bharucha, whenever a wholesaler purchases goods from the petitioner company, if he pays the price in cash the question of incurring any additional expenditure does not arise. However, there are several buyers who only give bills of exchange which are discounted by the petitioner in which process the petitioner has naturally to bear the cost of interest to be paid to the bank. This is an expenditure which is incurred by the assessee at the time and place of removal of the excisable article and the petitioner in such circumstances is entitled to deduction of the same from the wholesale price.

13. In this connection he has relied upon a judgment of this Court in Jenson and Nicholson (India) Limited and another Vs. Union of India and others, The facts of that case disclosed that the price list prepared by the petitioner showed that 4 per cent of the total price was allowed as discount if the payment was made in cash. From this it was found that the discount was allowed under the terms of sale. It was also found that the nature of the discount was known to the parties concerned prior to the actual removal of the goods because it was only for the payment made in cash that the discount was payable. It was in these circumstances that the Division Bench in Jenson and Nicholson's case took the

view that the claim made by the petitioner in respect of cash discount was admissible irrespective of whether each customer availed of the said discount or not. I am not convinced that the facts in Jenson and Nicholson's case are anywhere similar to the facts in the present case. In the case of the present petitioner there is no pricelist which specifically mentions what discount should be allowed and in what circumstances. Nor is the nature of the discount known to the parties concerned prior to the actual removal of the goods. It is only in those cases where a party is unable to pay the price in cash that the petitioner extends to him the credit facility. This is a development which takes place wholly after the sale has actually taken place. In fact it is a term of the payment which is accepted in the case of particular purchasers. I am, therefore, of the opinion that interest on bills of exchange is not an item which could be legitimately deducted from the wholesale price before arriving at the assessable value of the commodity.

14. In the result, this petition is partly allowed. The petitioner is entitled to refund of the amount claimed by it for the two years in question in respect of freight, octroi and additional tax on sales tax. The petitioner is not entitled to refund for having paid interest on bills of exchange. The view taken by the Assistant Collector of Central Excise on this item is correct.

There will be no order as to costs.