

(1987) 07 BOM CK 0033

In the Bombay High Court

Case No : Writ Petitions No"s. 1248 and 1249 of 1980

Extrusion Processes Pvt. Ltd. and others

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 03-07-1987

Acts Referred:

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

Citation : (1988) ECR 218 : (1987) 31 ELT 866

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

1. Both these petitions can be disposed of by a common judgment. These two petitions were filed in the wake of various judgments that practically allowed post-manufacturing expenses of every sort, deductible from the excise duty and on the basis of that, deductions were sought on every conceivable item whether legally claimable or not, as post manufacturing expenses. However, the legal position appears to have been set at rest by the judgment in the case of Union of India & Ors. etc. etc. v. Bombay Tyre International Ltd. etc. etc., reported on 1983 ELT 1896 (S.C.). Technically speaking, in view of this judgment of the Supreme Court, these two petitions cannot survive. However, it appears that the Supreme Court as also our High Court and perhaps certain other High Courts had passed orders which have been described by the Bar as "Format Orders", whereby subject to certain directions given by the Court, all the items in respect of which the petitioners claimed deduction on the basis of earlier judgments, were referred to the Assistant Collector for the purpose of assessment and quantification. Mr. Ganesh, appearing for the petitioners in these two matters, submitted that here also I must follow the same approach. In fact he had prepared a draft of such a Former Order and he thought he could have the respondents persuaded for such an approach. However, Mr. Sethna, appearing for the respondents, pointed out that the judgement of the Supreme Court had decided as far back as on October 7, 1983 and thereafter number of such matters have been disposed of by passing Format Orders in the year 1983-84.

He submitted that these two matter somehow remained and it will not be proper, at this stage, to pass such a Format Order. He pointed out that the order envisages that after the decision of the Assistant Collector he would be required to make a report to this High Court and the only meaning that can be given to such an order would be that the Court would consider the report and finally give its judgment, on the basis of such report. Mr. Sethna submitted that as a result of these orders, matters have been still pending in this High Court and in some cases the reports have been received but the reports have not been considered so far. When I enquired with the advocates as to whether there is any mandate of the Supreme Court that in every such matter similar Format Order should be passed, the Bar informed me that there is no such mandate but there appears to be some direction given to some of the Courts, with regard to such orders, However, I take it that there is no such order in any event in respect of these matters which are before me.

2. I am not inclined to keep these two matters alive and it is not necessary. It is true that if I were to dismiss the matters on the basis of the Supreme Court judgment, referred to above, perhaps there would be total injustice to the petitioners. Therefore, it may become necessary to make certain observations with regard to items of controversy as to whether the claim is legally tenable or not and on the basis of my observations the Assistant Collector will have to quantify the duty payable on these items. Thereafter certainly it is open to the petitioners to avail of such remedy as they want, either by way of appeal to the Collector of Central Excise (Appeals) or if they so desire, they can even file a fresh writ petition. But certainly no report need be called, to this Court on any item.

3. In these petitions the petitioners have filed their price list and in that they have enumerated the items of post-manufacturing expenses. It is these items which are in controversy. The items broadly relate to the cost of caps and capping charged, the cost of cartons and partitions and packing charges, freight and transport charges, sales tax, sole selling agent's commission etc. I will deal with each of these items as argued at the Bar.

4. The petitioners are manufacturers of aluminium extruded tubes and containers. The petitioners say that they do not manufacture caps or the packing materials that are used by them in connection with these aluminium extruded tubes or containers. The caps and packing material are purchased by the manufacturers from the outside suppliers. They further say that extruded tubes produced by them are a complete manufactured item the moment they come into existence as such, and without their being fitted with caps and without their being packed. The said extruded tubes are freely marketable without the said caps and packing material. They also say that they themselves are selling extruded tubes without caps and, therefore, they submit that these caps or packing materials do not merge with or become a part of the extruded tubes or containers. However, as and by way of providing special facility to the customers

and for meeting their requirements they purchase the caps and incur and capping charges. The cost of these charges are recovered by the petitioners from the customers by adding the same to the selling price of the extruded tubed and containers. In effect they are doing the re-sale of the caps.

5. Initially, when the petition was filed, the petitioners had stated that they were claiming expenses relating to caps and capping charges as an item of post-manufacturing expenses and, therefore, they claimed deduction on that basis. However, the petition expressly refers to a case decided by this High Court being the case of Metal Box Co. of India Ltd. v. Union of India and others, (Misc. Petition No. 511 of 1973) decided by Mr. Justice Pendse, by his order dated July 24, 1979. The learned Judge, in that case, had come to the conclusion that while assessing these aluminium extruded tubes and containers, it is not possible for the department to take, the cost of caps or fitting the caps, into consideration for the purpose of excise duty. The learned Judge has gone into all aspects of the matter and had come to the conclusion that the caps and capping charges would not come within the scope of Item 27(e) of the Tariff. An appeal filed against this judgment was summarily rejected by a Division Bench later on. Even though this judgment was referred to in the petition, as the petition stood earlier, the claim was on the basis that this was also one of the post-manufacturing expenses. Mr. Ganesh submitted that that was done as everybody else had done on the footing that having regard to the judgments prevailing at that time, every item beyond the strict process of manufacturing could be claimed as an item of post-manufacturing expenses and, therefore, the same could be deducted. However, on February 6, 1983, the petition was amended wherein the petitioner have clarified the position and they have claimed deduction on the basis that caps and packing materials are not apart of extruded tubes or containers and, therefore, in any event the same would not come within the excisable Item of 27(e) of the Tariff, Mr. Ganesh, therefore, submitted that in any event the judgment by Mr. Justice Pendse in Metal Box Company's case is still good law and, therefore it is not open to the department, even otherwise, to demand any duty on cost of caps and capping charges.

6. As against this Mr. Sethna appearing for the respondents submitted that the Metal Box Company's case is no longer good law after the decision of the Supreme Court and in this connection he drew my attention to paragraphs 47 to 49 of the said judgment (Bombay Tyre International Ltd.'s case). He also referred to a cryptic order passed by Mr. Justice Jahagirdar when he dismissed a writ petition being writ petition No. 1104 of 1980 in the case of Shalimar Textile Mfg. P. Ltd. v. Union of India and ors., wherein in respect of the caps and capping charges the learned Judge had said this...

"In view of the decision of the Supreme Court in Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, , there is no merit in the petition."

Mr. Sethna had brought the original writ petition before me and he submitted that there also the advocates had referred to and relied upon the judgment given

by Mr. Justice Pendse, and also on the fact that the appeal against the said judgment was summarily rejected, and in spite of this, the learned Judge, has dismissed the said writ petition. He, therefore, submitted that I must follow the same course inasmuch as, it is possible for this Court to take a view that the item of caps and capping charges have been covered by the said judgment of the Supreme Court.

7. I am afraid, I cannot accept this argument of Mr. Sethna. The judgment in Bombay Tyre International Ltd. deals, essentially, with the scope of Section 4 of the Central Excises and Salt Act, and the questions relating to what items can be and what items cannot be taken into account, as items of post-manufacturing expenses. Certainly, it does not deal with the question of classification under any heading of the Tariff. The question whether an item is an item of manufacture so as to bring the same under any heading of the Tariff, did not arise in that case at all. Justice Pendse's judgment essentially deals with an items under Item 27(e) of the Tariff and he has discussed the scope and ambit of that item. While considering the item of "Extruded shapes and sections including extruded pipes and tubes", he came to the conclusion that caps and capping would not come within the scope of that item at all. The Supreme Court has not dealt with this aspect of matter at all.

8. It is true that in the present case initially as the petitions were filed, that was treated as one of the items of post-manufacturing expenses. However, the position has been clarified when the petitions were amended and it has been expressly contended that caps and capping charges cannot be considered for the purpose of determination of the duty under Item 27(e) of the Tariff. It appears that this Tariff item was amended in 1980, so as to include the cost of lacquering and printing. But certainly, even at that point of time also, caps and capping charges have not been included in this item. Therefore, in my view even after the amendment in 1980 and even after the judgment of the Supreme Court in the case of Bombay Tyre International Ltd., the judgment given by Justice Pendse in Metal Box case still holds good.

9. However, Mr. Sethna submits that as against the dismissal of appeal by the Division Bench in Metal Box case, the department has taken the matter to the Supreme Court and the matter is pending. But till such time, Metal Box is reversed, the petitioners are entitled to claim deductions in respect of costs of caps and capping charges.

10. This takes me to the next item viz. the item relating to the cost of cartons and partitions. Mr. Ganesh has submitted that u/s 4 sub-section (4)(d)(i) of the Central Excises and Salt Act, where the goods are delivered at the time of removal in a packed condition, the cost of such packing would be included except the cost of packings which is of a durable nature and is returnable by the buyer to the assessee. In the present case when the petitioner filed their price-list and claimed deductions, they had claimed this on the basis that this is also one of the post-manufacturing expenses and, therefore, they are entitled to deduction in

any event. However, Mr. Ganesh submits that he should now be permitted to lead evidence before the Assistant Collector that these cartons and partitions are durable and they are returnable and, therefore, the cost of cartons and partitions cannot be included. He submitted that in that behalf it would be necessary for him to lead such evidence as is available. He also referred to a case of Sathe Biscuits and Chocolate Company Ltd. and another Vs. Union of India and others, and in particular he pointed out para 11 of the said judgment.

11. As against this Mr. Sethna submitted that no direction should be given in respect of this item inasmuch as there is no change in law with regard to this aspect of the matter by the Supreme Court. He submitted that under the law if there was any packing material of durable nature and the same was returnable by the buyer to the assessee, at the time they filed their returns of the price-list, as that time only they could have claimed deduction and should have led evidence as was available at that time. He, therefore, submitted that the petitioner cannot be allowed, now, to lead evidence that the cartons and partitions were of durable nature. He contended that they are estopped from claiming any deduction on that basis.

12. Technically, Mr. Sethna is right inasmuch as the petitioners had an opportunity to claim such a deduction at the time when they filed returns or the price list. But it appears that they were all carried away by the interpretation of law as it stood then that every item beyond the stage of actual manufacture was called as post-manufacturing expenses. However, Mr. Ganesh drew my attention that in the statement filed before the Assistant Collector they have referred to these cartons and partitions as of durable nature and they are returnable and they cannot form part of the excisable goods. I think it would be unfair on my part to deny this change to the petitioners. I am also not in a position to hold that this is an after-thought, as they had referred to these materials as of durable nature and returnable, before the Assistant Collector, earlier. Therefore, with regard to these cartons and partitions also I must say that it will be open to the petitioners to lead such evidence as they think proper to the effect that the goods are returnable and durable and they can do so when the matter goes back to the Assistant Collector.

13. However, there are two other items which have been referred to in these petitions as secondary packing and special packing. The law has been clarified in Bombay Tyre International and in a subsequent case of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., . The legal position that emerges from these authorities is to the effect that secondary packing or special packing done for the purpose of facilitating transport and smooth transit of the goods to be delivered to the buyer in the wholesale trade cannot be included in the value for the purpose of assessment of excise duty. Similarly, any special packing done at the instance of the buyer also cannot be included for the purpose of assessment of excise duty. Therefore, in respect of these items if the petitioners have any material to show that these special packings or secondary packings have been

done either for smooth transit or delivery or at the instance of purchaser, all as explained by the Supreme Court, those items cannot be taken into account and it is open to the petitioners to lead evidence in that behalf before the Assistant Collector.

14. The next item to be considered is the item relating to freights. Here again subject to the guidelines in the judgment of Bombay Tyre International, particularly in paragraphs 49 and 50, it is open to the petitioner to claim deduction.

15. The next item in respect of which the petitioners seek deduction is with regard to the additional sales tax. Mr. Ganesh relied upon Section 4 sub-section (4)(d)(ii) of the Act and he submits that the duty cannot include sales tax and other taxes payable on such goods and, therefore, it is certainly open to the petitioner to claim such deduction. He also relied upon a clarification issued by the Supreme Court in this behalf which we find in 1984 (17) E.L.T. 329 and the relevant directions are at page 330. Certainly the Assistant Collector will take into account this fact as and when proper material is placed before him by the petitioners

16. The next items on which the petitioners claimed deduction are the items relating to interest and customers' credit. These items have not been spelt out in the petitions at all. Mr. Ganesh says that the Supreme Court while passing Format Orders had also directed the department to take into account all such other items which are permissible in respect of which deduction can be claimed. In that connection he referred to a recent judgment of the Supreme Court in the case of Assistant Collector of Central Excise and Others Vs. Madras Rubber Factory Ltd., , and in particular he drew my attention to paragraphs 14 and 16 of the said judgment. Para 14 relates to interest on finished goods until goods are sold and delivered at the factory gate and interest on finished goods from the date of the delivery at the factory gate upto the date of delivery at the sales-depot. The former item would be included but the latter would be an expense incurred after the date of removal from the factory gate and that cannot be included for the purpose of duty. So also para 16 of judgment relates to interest on borrowings. The interest cost and expenses on sundry debtors of interest on receivables is an expense subsequent to the date of sale and removal or delivery of goods and that again can be claimed for the purpose of deduction on this count. If the petitioners have such material they can claim deduction before the Assistant Collector.

17. Mr. Ganesh had advanced two more items viz. latexing and confiscation. As far as latexing is concerned the same has been referred to in the petitions but as far as confiscation is concerned it has not been referred to in these petitions. Mr. Ganesh submits that latexing is covered by the judgment given by Justice Pendse in the case of Metal Box. The process of latexing is not different from capping, and the amendment of law in any event does not include latexing. He further submitted that this latexing is done at the instance of the clients of the

petitioners. Without latexing, the process of manufacturing tubes and containers is complete. Therefore, he submits that the petitioners should be allowed to lead evidence with regard to latexing before the Assistant Collector and to that extent the petitioners should be asked to claim deduction. Mr. Sethna submitted that this would amount to widening the scope of enquiry. However, I am not inclined to agree with Mr. Sethna. Particularly, if the matter is going back to the Assistant Collector for assessment of the duty payable by the petitioners, it is better that all excludible items are considered once for all, instead of compelling the parties to litigate once again. Since latexing is not very different from capping, insofar as it relates to the process of manufacturing extruded tubes, I am of the view that the ratio of Metal Box would apply and the cost of latexing will have to be excluded for the purpose of calculating duty under Tariff Item 27(e) of the Act.

18. Conifcation is the other items. It is a process invented since about two years back. Mr. Ganesh submits that conifcation is a method of packing done for the purpose of easy transport and has nothing to do with the manufacture of tubes and containers. I think the petitioners will also have liberty to take up the matter of conifcation and lead evidence and, on the same principle as governing packing, the petitioners would be entitled to deduction.

19. This practically completes the various items which are to be considered by the Assistant Collector of Central Excise for the purpose of proper valuation. As regards the claim of deduction with regard to sole selling agency commission, the petitioners have conceded that the same is not includible (excludible) ? However, Mr. Ganesh submitted that the petitioners should also be allowed to claim deduction on items not specified earlier as such. I think it would be very difficult when the matter is left at large with regard to other items. In one of the petitions there is a list of such other items at page 48 in respect of which the petitioners claim deduction on the basis that the items are post-manufacturing items. About 18 items have been set out. In that Mr Ganesh has made it clear that they will not claim any deduction with regard to motor car expenses, repairs and maintenance to other assets, auditor's remuneration, donation and charities, interest on fixed assets on purchase price, postage, telephone and telegram, rent, rates and taxes, general charges, legal and professional charges. With regard to other items Mr. Ganesh says that it would not be possible for him to give up and it depends upon the nature of the evidence available.

20. I think if in respect of those items which are not given up, if the petitioners consider that the same would fall within the scope of Bombay Tyre International Ltd., it is possible for the petitioners to lead evidence as they think proper before the Assistant Collector.

21. I, therefore, pass the following order :

I direct that the concerned assessing authority (i.e. the Assistant Collector) shall permit the petitioners to submit their statement of deduction in respect of those items referred to above, and such statement of deduction should be filed within a

period of twelve weeks from today. The petitioners shall also file all their documentary evidence within the same period before the assessing authority, and the assessing authority will also give opportunity to the petitioner to lead evidence in respect of their claim for deduction. The assessing authority will subject to the observations as contained above, finalise the price list and the claim relating to deductions within a period of another twelve weeks thereafter. The assessing authority will be at liberty to assess the evidence in his own way and come to such conclusion as he thinks proper. If thereafter the assessing authority makes a final assessment, it is for the petitioners to pay the same, subject to such rights as the petitioners may avail of either by way of appeal to the Collector of Central Excise or by way of a writ petition as would be advised. I only hope that if the claim of the department is heavy, a reasonable attitude would be adopted by the department, with regard to time for payment. Final assessment will take into account all the amount which the petitioners have already paid so far.

22. Having regard to the order passed above, naturally, the earlier order passed by the Assistant Collector being Ex. No. I in both the petitions stand set aside.

23. In the circumstances of the case, there will be no order as to costs.