

(2014) 09 AHC CK 0330

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 868 of 2005 and Central Excise Appeal No. 226 of 2010

Fair Banks Morse India Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-09-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35L(b)

Citation : (2014) 9 ADJ 444 : (2014) 310 ELT 246

Hon'ble Judges : Tarun Agarwala, J;Dr. Satish Chandra, J

Bench : Division Bench

Advocate : Bharatji Agarwal, Piyush Agarwal, Subham Agarwal and Nishant Mishra, Advocate for the Appellant; A.N. Shukla, A.S.G.I., K.C. Sinha and Ashok Singh, Advocate for the Respondent

Judgement

Tarun Agarwala, J.—The issue involved in both the petitions are common and are being decided together. For facility, the facts in Writ Petition No. 868 of 2005 are being taken into consideration. The petitioner is a manufacturer of Power Driven Pumps (hereinafter referred to as the "PD Pumps") falling under Chapter heading 84.13, i.e., Vertical Turbine Pump. The petitioner also manufactures parts and components for captive use in the manufacture of PD Pumps. By notification No. 155/86, dated 1.3.1986 as amended by notification Nos. 277/86 dated 24.4.1986 and 365/86 dated 29.7.1986 exemption was granted under Rule 8(i) of the Central Excise Tariff Rules from payment of Central Excise Duty on deep tube well turbine pumps.

2. During the period 1.3.1986 to 24.4.1986 it is alleged that the petitioner contravened the provisions of Rule 173-C and 173-F of the erstwhile Central Excise Rules 1944 and, accordingly, a show-cause notice dated 24.9.1987 was issued to show-cause as to why central excise duty amounting to Rs. 61,710/- for the period 1.3.1986 to 2.4.1986 should not be demanded and recovered from them on clearance of column and shaft assembly and discharge head assembly.

3. Another show-cause notice dated 11/12.1.1989 was issued to the petitioner to show-cause why duty at appropriate rate on column and shaft assembly and discharge head assembly should not be made upon the petitioner. The petitioner, being aggrieved by the issuance of the show-cause notice, filed Writ Petition No. 492 of 1989, which was eventually dismissed by an order dated 16.8.2000, on the ground of alternative remedy. During the pendency of the writ proceedings several show-cause notices were issued to the petitioner for various periods ranging from 1.3.1986 to December, 2000. After the dismissal of the writ petition, the petitioner filed a reply to the show-cause notices contending that the vertical turbine pump, which is being manufactured by them consist of--

(1) bowl assembly

(2) column and shaft assembly, and

(3) discharge head assembly.

4. The petitioner contended that these assemblies when fitted together performs the function of a pump by which water is lifted from one point to another point by a rotating action of the shaft and the impeller. The contention of the petitioner is, that the bowl assembly alone could not perform the principal function of a pump, which is to lift the water from a deep tube well in the absence of a column and shaft assembly as well as discharge head assembly. It was contended that in the absence of these two assemblies the bowl assembly could not rotate or convert the mechanical energy into kinetic energy and that the bowl assembly could only perform the function of a pump only with the help of column and shaft assembly as well as discharge head assembly when water is lifted from the deep tube well to the ground level. The contention of the petitioner was that the bowl assembly cannot perform the principal function, namely, lifting of the water without the help of the column and shaft assembly and discharge head assembly.

5. The submission of the petitioner did not find favour with the Deputy Commissioner, who after granting an opportunity of personal hearing passed the order in original dated 28.6.2002 and 6.8.2002 confirming the demand of Rs. 1,21,84,011.00 under Section 11-A of the Central Excise Act, 1944 alongwith interest under Section 11-AB. The petitioner, being aggrieved, filed an appeal, which was dismissed by the Commissioner (Appeals) by an order dated 26.9.2003 affirming the demand. The petitioner still being aggrieved filed an appeal before the Tribunal. The Tribunal by its order dated 15.4.2005 dismissed the appeal holding that column and shaft assembly and discharge head assembly are to be treated as accessories of the vertical turbine pump and are not eligible to exemption under the notification No. 236/86, dated 3.4.1986. The petitioner, being aggrieved by the said order, has filed the present writ petition.

6. We have heard Sri Bharatji Agarwal, the learned senior counsel assisted by Sri Nishant Mishra and Subham Agarwal, the learned counsel for the petitioner and Sri Ashok Singh, the learned counsel for the respondents.

7. The learned counsel for the respondents raised a preliminary objection, namely, that the writ petition as well as the appeal is not maintainable in view of Section 35L(b) of the Central Excise Act, 1944. The learned counsel contended that since the issue basically relates to the determination and changeability of rate of duty, the Supreme Court alone has the power to decide such issues. The submission of the learned counsel for the petitioner is untenable. In the first instance, from a perusal of the impugned orders, a demand has been raised, the validity of which has been questioned in the present petitions. We are accordingly of the opinion that the petitions are maintainable.

8. Even otherwise, the petitions were entertained and admitted in the year 2005. Affidavits have been exchanged and therefore, at this stage, it would not be appropriate to relegate the petitioner to the remedy of an alternate appeal. This view of ours is in consonance with the principles enunciated by the Supreme Court in *Dhampur Sugar Mills Ltd. v. Union of India*, 2000 (122) ELT 333. In the light of the aforesaid, the preliminary objection is overruled.

9. Sri Bharatji Agarwal, the learned senior counsel contended, that a power driven vertical turbine pump is a composite machine consisting of a bowl assembly, column and shaft assembly and a discharge head assembly and that bowl assembly is sub-merged deep in the well, which is connected to a driving motor at the top of the discharge head assembly on the top of the well, which is connected and joined by a column and shaft assembly. It was contended that the bowl assembly performs the function of lifting water from the tube well by action of rotating the shaft and impeller by a mechanical power in order to create water pressure for the purpose of lifting the water from the deep tube well to the ground level. The learned counsel contended that the vertical turbine pump comprising of all the three components can effectively function only if all the above three components are fitted together for performing the function of the pump, namely, to lift the water from underground to the surface level. The learned counsel contended that the bowl assembly by itself cannot perform the principal function of the pump, namely, lifting of the water and that the principal function is facilitated by the column and shaft assembly as well as the discharge head assembly and, therefore, all the three components put together only can be classified as a pump.

10. The learned senior counsel further contended that the Tribunal has not considered Note 3 and 4 to Section XVI of the Schedule to the Central Excise Tariff Act, which clearly clarifies that where composite machines consisting of two or more machines are fitted together to form a composite machine adopted for the purpose of performing a function, such composite machine would be classified as if consisting only of that component or as being that machine, which performs the principal function.

11. In the light of Note 3 and 4, the learned senior counsel contended that the three components of the power driven vertical turbine pump, when put together, alone performs the function of a vertical turbine pump and absence of any one of

these components would not make the vertical turbine pump function as a pump nor would it be capable of performing the function of a vertical turbine pump. The learned counsel contended that in terms of Note 3 to Section XVI composite machine is to be classified under the heading of "machine" which performs the principal function and, consequently, the bowl assembly alongwith the column and shaft assembly and discharge head assembly put together performs the principal function of lifting the water and, consequently, are to be classified alongwith the "machine", namely, the bowl assembly performing the principal function and are, therefore, required to be classified under heading 84.13 of the Central Excise Tariff Act.

12. The learned senior counsel further contended that as per Note-4 of Section XVI a "machine", which includes a combination of machines, consist of individual components, which put together are intended to contribute to a clearly defined function, then the combination of machine would be classified in the heading appropriate to that function and, therefore, if Note 4 is applied, all the three components put together are to be classified as a PD pump under heading 84.13. In this regard, the learned counsel placed reliance upon the Board circular No. 224/58/96-CX , dated 26.6.1996, which placed reliance upon Note 3 and 4 of Section XVI of the Central Excise Tariff Act clarifying that PD Pump set is classifiable under heading 84.13.

13. In the light of the aforesaid circular, the learned senior counsel contended that the power driven pump consisting of various components when put together are to be classified alongwith the machines performing the principal function. The learned senior counsel contended that reliance by the Tribunal upon the decision of the Gujarat High Court in the case of Jyoti Limited Baroda Vs. Union of India and Another, affirmed by the Supreme Court, reported in 1997 (96) ELT (A73) was not applicable as it was under the old Tariff Act and that the present dispute is under the new Tariff Act in which Note 3 and 4 has been issued, which is binding and applicable upon the authorities.

14. Having heard the learned counsel for the parties, we find that the present dispute can be narrowed down to the question, namely, whether the column and shaft assembly and discharge head assembly is liable for payment of excise duty or whether these components are entitled for exemption being a composite machine to the power driven pump. The petitioner claims exemption of notification No. 155/86, dated 1.3.1986, as amended by notification No. 277/86 dated 24.4.1986 and notification No. 365/86 dated 29.7.1986, which relates to Chapter heading 84.13 of the Schedule to the Central Excise Tariff Act, 1985. In order to appreciate the submission of the learned counsel, it would be appropriate to peruse the entry 84.13 under Chapter 84 of the Central Excise Tariff Act. For facility, the said provision is extracted hereunder:

15. A perusal of the aforesaid entry indicates that "deep tube-well turbine pumps" comes under the description "power driven pumps designed for handling water", for which the rate of duty is nil, meaning thereby that it is exempted

from payment of central excise duty.

16. At this stage, it is essential to know what exactly is a power driven pump. A PD Pump consists of three assemblies, namely, bowl assembly, column and shaft assembly and discharge head assembly.

17. Note 3, 4 and 5 of Chapter 16 of the Central Excise Tariff Act, 1985 provides the guidelines for the applicability of the entry 84.13. For facility, Note 3, 4 and 5 are extracted hereunder:

"3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function converted by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

5. For the purposes of these Notes, the expression "machine" means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or Chapter 85."

18. A circular dated 26.6.1996 was issued by the Central Board of Excise and Customs clarifying Note 3 and 4. For facility, the said circular is extracted hereunder:

Circular No. 224/58/96-CX, dated 26-6-96 [From F. No. 154/16/94-CX.4]

Government of India Ministry of Finance(Department of Revenue) Central Board of Excise and Customs, New Delhi

Subject: CE- Classification and excisability of Power Driven Pump Sets for handling water - Regarding.

I am directed to say that the Confederation of Indian Industry has pointed out about divergence in practice of classification of Power Driven Pump Sets for handling water. A P.D. pump set may be a pump having an inbuilt prime mover designed and built as a complete unit, called a mono block pump-set, or a pump and a prime mover being two separable units whether coupled or not put/intended to be put on a common platform. It has been represented that it is classified in some Commissionerates under Chapter Heading 84.13 extending the benefit of Notification No. 56/95, dated 16.3.1995 (previous Notification No. 46/94, dated 1-3-994) either fully or partially whereas, other Commissionerates are classifying this product under Chapter Heading 84.79 hereby denying the benefit of exemption.

2. The matter has been examined in depth. Board in its F. No. 151/13/92-CX.4 (Pt.) (Circular No. 11/11/94 dated 2.2.94) has held that electric motors or rotors or stators are component parts of P.D. Pumps, following the same analogy, the prime mover, i.e. I.C. Engine may be treated as an integral part of P.D. Pump. The Board takes note of Note 3 of Section XVI of Central Excise Tariff which states that composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function. As the principal function of a pump set is that of the pump, the pump set is rightly classifiable under Chapter sub-heading 84.13.

3. Hence, the Board is of the view that Power Driven Pump Sets are classifiable under Chapter Heading 84.13 and if such Power Driven Pump Sets are primarily meant for handling water, the benefit of Notification No. 56/95 dated 16.3.95 will be admissible to the whole pump set."

19. According to the learned counsel for the petitioner, the said circular is binding and in view of Note 3 and 4, composite machines consisting of two or more machines fitted together would be covered under Entry 84.13 and, therefore, the "column and shaft assembly" as well as the "discharge head assembly" would be exempted from payment of excise duty.

20. A perusal of Note 3 and 4 indicates that where composite machines consisting of two or more machines are used to perform complementary or alternative function, the composite machine is to be classified under the heading of "machines", which performs the principal function. Note 5 indicates that for the purpose of these Notes, the expression "machine" means any machine, machinery, plants, equipment, apparatus or appliance cited in the heading of Chapter 84 or Chapter 85.

21. Undoubtedly, in the instant case, the bowl assembly performs the principal function of lifting the water. The other two components, namely, the column and shaft assembly and discharge head assembly enables the bowl assembly to perform as a vertical turbine pump by lifting the water from the deep tube-well.

22. According to the learned senior counsel, by applying Note 3 both column and shaft assembly and discharge head assembly are to be classified as "machines" performing the principal function under heading 84.13 of the Central Excise Tariff Act. Further, under Note-4, the combination of machines consisting of individual components, which put together and intending to contribute a clearly defined function would again fall in the heading appropriate to that function and according to the learned counsel the bowl assembly alongwith the column and shaft assembly and the discharge head assembly and all the three components put together only contributes to the main functions of a power driven pump and therefore, all the three components is required to be classified as a power driven pump under heading 84.13.

23. The submission of the learned senior counsel appears to be attractive, but, only on a closer scrutiny, the Court finds that such contention cannot be accepted. Note 3 and 4 as well as the circular dated 26.6.1996 only indicates that "composite machines" is to be classified under the heading of "machines" which performs the principal function. The question to be answered in the instant case is, whether column and shaft assembly and discharge head assembly is a machine or not. Note 5 defines the expression "machine" as any machine, machinery, plant, equipment, apparatus or appliances.

24. Collins Co-build Dictionary, 2004 edition defines "machine" as a piece of equipment, which uses electricity or an engine in order to do a particular kind of work.

25. Webster's Dictionary defines "machine" as an apparatus, made of organised, interacting parts, which takes in some form of energy, modifies it, and delivers it in a more suitable form for a desired function.

26. Oxford Dictionary, 2013 edition, defines "machine" as a piece of equipment with moving parts that is designed to do a particular job and usually needs electricity, gas, steam, etc. in order to work.

27. The meaning of "machine" defined in Note 5 is in relation to machine, machinery, plant, equipment, apparatus or appliance points to one direction, namely, that the machine must do a particular kind of work, whether it is a machinery or a plant or an equipment or an apparatus or an appliance, which can only function with the use of energy.

28. The function of a pump is to lift the water from one point to another. By a rotating action of the shaft and the impeller, a mechanical energy is converted into kinetic energy and water is forced out by a pressure from the pump itself. This rotating action in the bowl assembly is done when an electrical energy is supplied to the bowl assembly. The column and shaft assembly and the discharge head assembly merely enables the water to pass out from the bowl assembly to the surface. The discharge head and the column and shaft assembly merely keeps the bowl assembly suspended at the appropriate depth so that water could be forced out.

29. From the aforesaid mechanism it is obvious that what is driven by power/energy/electricity is the impeller in the bowl assembly or to put it aptly, the parts of the bowl assembly. The column and shaft assembly and the discharge head assembly provides the casing through which water rushes out. The column and shaft assembly remains stationary and the discharge head assembly merely keeps the column assembly and bowl assembled suspended at the appropriate depth so that water could be forced out.

30. It is thus clear that what is driven by the power is the parts of the bowl assembly. The column and shaft assembly and discharge head assembly remains stationary and are therefore accessories and not "machine". In a vertical turbine

pump, energy is supplied by electricity. The electric motor converts the electrical energy into a mechanical energy which is injected through the parts of the bowl assembly, namely, the vanes of the impellers which converts the mechanical energy into kinetic energy making the water move up under pressure built by the impellers.

31. In the light of the aforesaid, the bowl assembly performs the function of a power driven pump and that the column and shaft assembly as well as the discharge head assembly does not perform the function of a power driven pump. At best, the column and shaft assembly as well as the discharge head assembly only contribute to the effectiveness of the bowl assembly, which by itself is not sufficient to claim exemption as a machine under entry 84.13. The contention that all the three components put together can alone be classified as a pump is an irrelevant consideration. For the reasons stated aforesaid, both the writ petition as well as the appeal fails and are dismissed. Interim order, if any, stands vacated.