

(1993) 03 BOM CK 0087

In the Bombay High Court

Case No : Writ Petition No. 1184 of 1980

Goodlass Nerolac Paints Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-03-1993

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11D, 4, 4(2)

Citation : (1994) 1 BomCR 128 : (1993) 65 ELT 186

Hon'ble Judges : Sujata V. Manohar, J;S.H. Kapadia, J

Bench : Division Bench

Advocate : Mr. A. Hidayatullah, Mr. D.B.S. Shroff, Ms. P. Bhandari and Mr. H.C. Daruwalla, instructed by M/s. Crawford Bayley and Co, for the Appellant; Mr. M.I. Sethna and Mr. H.V. Mehta, instructed by , M/s. Ambubhai and Diwanji, for the Respondent

Judgement

Mrs. Sujata Manohar, J.—In this Writ Petition, the petitioners Goodlass Nerolac Paints Ltd., have challenged certain show cause notices issued to them by the Superintendent, Central Excise and also certain orders dated 19th October, 1979, 8th July, 1980, 19th July, 1980 and 15th July, 1980, passed by the Assistant Collector of Central Excise against them. They have also asked for a direction for approving the price-lists as set out in the petition and for permitting the petitioners to clear their goods upon payment of excise duty calculated on the basis of the price-lists submitted by the petitioners. By an amendment, they have further prayed that various claims for deductions made by the petitioners from the assessable values of their products should be granted and the amounts of duty payable by and refundable to them should be calculated on that basis. During the pendency of the petition, by an interim order dated 9-12-1983, the assessing authorities were directed to permit the assessee to submit the statements of deductions/amendments in respect of price-lists already filed for a proper determination of excise duty liability in respect of deductions either given on the invoices or issued by way of credit note at a later date, claiming under the headings : (1) trade discount; (2) bonus discount; (3) annual turn-over rebate;

(4) product rebate; (5) additional product rebate; (6) free supply scheme; (7) incentive discount; (8) cash discount; (9) regular payment discount; (10) clearance, freight and octroi; and (11) turn-over tax and surcharge, sales tax together with any other claims for deductions which may be admissible. The order directs the assessing authorities to permit the petitioners to file such documentary evidence as may be necessary and as directed by the assessing authorities to finalise the price-lists/refund claims within the period specified therein and to file in this Court the orders of assessment along with copies of statements of deductions from the price-lists/refund claims. Accordingly, the petitioners have filed with the assessing authorities various documents, including certificates from the Chartered Accountant as specified by the assessing authorities. There is extensive correspondence in this regard.

2. Ultimately, the Assistant Collector of Central Excise, Division C-I, Bombay passed his order dated 6th June, 1984 disallowing various claims for deductions made by the petitioners. Before we deal with each head of claim, it is necessary to note that the petitioners have three factories in different parts of India for manufacturing identical goods. All these goods are sold by the petitioners from their sales depots where the goods are brought from the three factories of the petitioners. Since the goods manufactured are identical, the petitioners have not maintained at each sales depot separate lists pertaining to the goods brought from each of the factories. They have, therefore, claimed the deductions in respect of the goods manufactured at each of the factories by averaging out the deductions over their entire production.

3. The first claim for deduction was in respect of trade discounts shown on the invoices. The petitioners have granted a trade discount of 3% which is generally displayed in the invoices. This has been allowed by the assessing authority. Hence, we need not examine this any further.

4. The next claim of the petitioners was in respect of annual turnover rebate. The petitioners have given an annual turnover rebate at the uniform rate of 2% on the price-list value which is inclusive of the 3% trade discount. This rebate is given on the quantum of total sales of the goods. The assessing officer has observed that the practice is in vogue for a number of years and has allowed this deduction at the uniform rate of 2% in respect of decorative sales. He has, however, not allowed such a discount in respect of industrial sales on the ground that industrial sales constitute a separate class and the petitioners did not give any discount in respect of industrial sales. The petitioners are not able to show us any material on record to establish that they had in fact given this annual turnover rebate in respect of industrial sales. Hence, this claim of the petitioners cannot be sustained.

5. The next item concerns bonus discount. The Assistant Collector has found that the dealers are informed of the availability of such a bonus discount in advance by way of circulars and are informed about the period in respect of which this discount is operative. It is given at the end of the accounting year. Though the

actual quantum is not known at the time of the removal of goods, since it has reference to the total performance of the dealer, the range of benefits is known to the dealers at the time of removal of goods. The Assistant Collector, therefore, has held that the petitioners would be entitled to bonus discount. However, the Assistant Collector has declined to grant such a discount to the petitioners on the ground that the method of calculation is found to be unacceptable. It is not clear from the record what the method adopted by the petitioners was and why the method adopted by the petitioners was found unacceptable by the Assistant Collector. If he had any difficulty with the method adopted by the petitioners, he could have informed the petitioners and asked them to work out the bonus discount by any other method. This does not appear to have been done. The rejection of the petitioners' claim under this head only on the ground that the method adopted by the petitioners was not acceptable to the Assistant Collector does not appear to be sustainable. The Assistant Collector is, therefore, directed to calculate afresh the bonus discount to be granted to the petitioners after calling upon the petitioners to adopt the method which he considers reasonable and proper in the circumstances of the case. He should do this within a period of 12 weeks from today after giving the petitioners an opportunity of producing such material as may be reasonably required and submit such calculation as may be required to be made.

6. The next item of deduction relates to product rebate and additional product rebate. The Assistant Collector has found that these types of discounts are given by way of reduction from the prices indicated in the price-lists. He has also found that the scheme for such discount was formulated by the petitioners well in advance. Yet, he has come to a conclusion that the scheme was not known to the buyers at the time of removal of goods from the factory. Although the reasoning is not very clear and proper, it seems that at the time of removal of goods from the sales godown, the scheme was known to the dealers. However, in this case, the Assistant Collector has made a distinction between removal of goods from the factory and sale of goods from the sales godown. The Assistant Collector has accepted the petitioners' case that no sales have been effected by the petitioners from their factories at all. The goods are first brought by the petitioners from their different factories to their sales godowns and are sold from there. All other discounts have been allowed by the Assistant Collector on the basis that the schemes for such discounts were made known to the dealers when they purchased goods from the sales godown and before removal of goods. There is no reason why the same position should not prevail in the case of product rebate and additional product rebate. The finding of the Assistant Collector that such rebate is not permissible/admissible is, therefore, on the face of it not supported by any principle or logic and must be set aside. The Assistant Collector is directed to calculate this rebate which may be allowed to the petitioners within a period of 12 weeks from today, on the basis of the material before him. In case he requires any further material, it will be open to him to ask the petitioners to furnish such material within such reasonable time as he may

specify.

7. The next item deals with free supply. This is a scheme under which, depending upon the quantum of off-take by the dealers, certain quantity of goods are supplied free of charge. In fact, this is really a quantity discount. The Assistant Collector has held that the quantity of free supply would be known only at the end of the scheme period and as such, it would not be known at the time of clearance of goods from the factory. However, the scheme is well-known in advance. He has disallowed any discount under this head on the ground that this scheme of free supply is not uniformly adopted for all the dealers and for all the territories. The schemes are formulated for particular territories and/or particular period only.

8. The stand taken by the Assistant Collector is contrary to various decisions of our High Court and other High Courts, e.g. in the case of *Union of India v. S. S. M. Bros. Pvt. Ltd. & Anr.* 1986 (24) E.L.T. 269 (Mad.), the Madras High Court has held that for the application of Section 4 of the Central Excises and Salt Act, it is not necessary that the trade discount must be uniform and that such discount must be given at the time of the sale. It matters little whether trade discount is given at the time of a sale or subsequently so long as such discount has been given with reference to the sale. The Gujarat High Court in the case of *Gujarat State Fertilisers Co. Ltd. v. Union of India & Ors.* 1980 (6) E.L.T. 297 (Guj.) and in the case of *Union of India v. Jyoti Limited, Baroda* 1978 (2) E.L.T. (J 238) (Guj.) has held that the trade discount need not be given uniformly in all territories and to all dealers. The Kerala High Court has also taken a similar view in the case of *Toshiba Anand Lamps Ltd. Vs. The Superintendent of Central Excise and Others*, . Our High Court in the case of *Rallis India Ltd. v. Union of India* 1991 (55) E.L.T. 43 (Bom.) has also held that quantity discounts can be allowed notwithstanding variations from region to region and within the same region, from dealer to dealer. The rejection of this discount merely on the ground of non-uniformity is not correct. The Assistant Collector, therefore, was not right when he rejected the claim of the petitioners for discount under this head. He is, therefore, directed to grant to the petitioners discount under this head on the basis of material which is before him within a period of 12 weeks from today. In case he requires any further material from the petitioners, it will be open to him to call upon the petitioners to furnish such material.

9. The next claim of the petitioners is in respect of incentive discount. This discount is given by way of credit notes after the end of the month. This discount is also known to the dealers in advance and before removal of the goods. The discount, however, has been disallowed by the Assistant Collector on the same ground as product rebate and additional product rebate i.e. on the ground that at the time the goods were removed from the factory, the quantum of this incentive discount was not known. This finding is contrary to the Assistant Collector's own finding that the discount was known in advance and the scheme for such discount was also announced well in advance. The schemes were monthly

schemes which may be announced from time to time and were known to the dealers before removal of goods from the sales godowns of the petitioners. Disallowance of this scheme is, therefore, not justified. It is, however, submitted by Mr. Sethna, learned Advocate for the respondents that an incentive discount cannot be considered as a trade discount because it is given by way of credit notes at the end of the month. In our view, the fact that this discount is given at the end of the month does not mean that this cannot be considered as a trade discount. There may be various reasons for granting a discount. So long as it is a discount, it may be taken into account for determination of value u/s 4.

10. The next item of discount relates to cash discount. Under the scheme formulated by the petitioners, if payment in cash was made at the time of or before delivery of goods, 5% cash discount was offered and the same was reflected in the invoices. If the dealer paid the money within one month, the cash discount was reduced to 3.5%. If the dealer paid after 45 days but before 60 days, a discounts of a lower percentage was given. The petitioners claimed a cash discount at the rate of 5% irrespective of whether such discount was given or not in view the ratio of the decision of a Division Bench of this Court in the case of Jenson and Nicholson (India) Limited and another Vs. Union of India and others, . In that case, a Division Bench of this Court considered the clarification given by the Supreme Court in the case of Bombay Tyres International Pvt. Ltd. 1984 (17) E.L.T. 329 (S.C.) and held that the cash discount which was offered in that case viz., 4% of the total price allowed if the payment was made in cash - was known to the parties concerned prior to the actual delivery of the goods and hence, it should be allowed irrespective of whether each customer availed of the said discount or not. In the case, however, of Music India Ltd. and Another Vs. Union of India (UOI) and Others, , a learned Single Judge of this Court expressed his reservations in respect of this finding although he held himself to be bound by the judgment of the Division Bench. The judgment of our High Court in the case of Jenson & Nicholson has been followed by the Madras High Court in the case of Union of India & Ors. v. S.S.M. Bros. Pvt. Ltd. & Anr. 1986 (24) E.L.T. 269 (Mad.) where the Madras High Court has held that cash discount is admissible irrespective of whether each customer avails of the said discount or not. In view of the above judgments which have settled the law since 1984, we do not see any reason why we should disturb the said law in this area. The Assistant Collector was not right in rejecting the judgment of this Court in the case of Jenson & Nicholson. The Assistant Collector is, therefore, directed to grant to the petitioners cash discount in the light of the above judgment in the case of Jenson & Nicholson.

11. The last item which is in dispute relates to freight. The petitioners have claimed freight for transport of goods from their factory to their sales godowns and from the sales godowns to the premises of the local customers. The Assistant Collector has granted freight for transport of goods from the factory to the sales godowns. He has, however, disallowed the freight from the sales godown to the premises of the local customers. Mr. Shroff, learned Counsel for

the petitioners has stated that the petitioners have only taken into account the freight which they actually charged from their sales godown to the local customers. The total amount of freight so charged has been averaged and allocated to each of the factories from which the goods were sent to the sales godown. This has been disallowed. Section 4(2) of the Central Excises and Salt Act clearly provides that where in respect of exciseable goods the price is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price. In view thereof, the petitioners were entitled to deduct from the price, freight for transport of goods from the sales godowns to the premises of the local customers. The reasoning given for excluding such freight charges does not appear to be proper. The Assistant Collector appears to have disallowed this claim on the ground that the actual transport charges in respect of goods manufactured in each of the factories of the petitioners were not available. The petitioners have, however, furnished information relating to the freight charges levied by them in respect of their own goods transported from the sales godowns to the premises of the local customers. In view thereof, this claim ought to have been allowed by the Assistant Collector. Our view is supported by a decision of the Division Bench of the Calcutta High Court in the case of Union Carbide (India) Ltd. Vs. Assistant Collector of Central Excise, . The Assistant Collector is, therefore, directed to grant the petitioners discount in respect of the freight charges :

12. It was urged by Mr. Sethna that the petitioners had not claimed any average freight and hence, there is no question of allowance of such claim. The petitioners have, in fact, only claimed the freight which they have actually charged and they have averaged this freight between their three factories which manufacture the goods of the petitioners, since the goods manufactured are identical and there are no separate records in the sales depots, which distinguish these goods manufactured by one factory of the petitioners from another. This, in our view, is not a ground for disallowing the discount to the petitioners.

13. It has been urged by Mr. Sethna that no legal grounds have been made out for interfering with the order passed by the learned Assistant Collector which is passed on merits after examining the material produced by the petitioners. He has relied in this connection on the ratio of a judgment of our High Court in the case of Britannia Industries Ltd. Vs. Union Bank of India, . The facts in the present case are very different from the facts which were before the Division Bench in the above case. In the case which is before us, in respect of several heads of claim, the Assistant Collector's findings are contrary to law and/or not supported by the material which was before him. The findings, therefore, are not merely erroneous but are not in accordance with law either as laid down by the Supreme Court in the case of Bombay Tyres International or by our High Court and other High Courts as settled law. Some of the findings, as set out above, are also not supported any reason. In these circumstances, this is a fit case where relief can be granted to the petitioners.

14. Mr. Sethna, learned Advocate for the respondents submitted that in view of Section 11-D which has been inserted in the Central Excises and Salt Act, 1944 with effect from 20-9-1991, the petitioners should not be granted any relief in this petition. This point was not raised by the respondents at any time. The respondents have also not filed any affidavit in reply raising such a point. We do not find any material before us which would show whether Section 11D is attracted to this case or not. Hence, it is not possible for us to give any directions u/s 11D as contended by Mr. Sethna. According to the petitioners, they have been allowed by an interim order, to clear the goods on the basis of the price-lists submitted by them which take into account the deductions which are claimed by the petitioners. Hence, there is no question of their having collected any excess duty from their customers, in respect of the items claimed by the petitioners. Since we do not have any material either way before us, we are not going into this question. It will be open for both the parties to take such steps as may be available to them in law in regard to this question.

15. In the premises, Rule is made absolute to the extent as set out earlier. Looking to the circumstances of the present case, there will be no order as to costs.