

(1994) 07 DEL CK 0013

In the Delhi High Court

Case No : C.W.P. No. 619 of 1994

Indian Rayon and Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-07-1994

Acts Referred:

Citation : (1995) 59 ECR 575 : (1994) 73 ELT 25

Hon'ble Judges : Devinder Gupta, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : Shri M.L. Lahoty and Ms. Shipra Khazanchi, for the Appellant; Shri Madan Lokur, for the Respondent

Judgement

D.P. Wadhwa, J.—The petitioner, a public limited company and manufacturer of white cement under the brand name "Birla White", has challenged the circular/ order No. 24/14/93 dated 31st December, 1993 issued by the Central Board of Excise and Customs (for short "the Board") u/s 37-B of the Central Excises & Salt Act, 1944 (for short "the Act") and seeks a writ of certiorari or any other appropriate writ, order or direction for quashing and setting aside the same. petitioner says that the impugned circular was communicated to it by letter dated 25th January, 1994, of the Assistant Collector, Central Excise, Division Jodhpur. The Assistant Collector, Central Excise, who is the second respondent in this petition, informed the petitioner that from perusal of the price lists in Part I it was seen that it was claiming different prices in column 3 and different discounts in column 8 for different States/Union Territories. The petitioner was informed that the Board had issued the impugned circular clarifying that "Wholesale dealers cannot be considered as belonging to different classes simply because they are located in different towns or cities or regions" and that such discounts were not permissible to be deducted to arrive at the assessable value for excise purposes. The petitioner was, Therefore, directed that from the date of issue of order, it shall clear the goods on one value, i.e., which was applicable for the State of Rajasthan as claimed by it in its price lists filed, and that clearances

for other States/Union Territories would be done at that value.

2. There is a preface to the impugned circular and the relevant portion of the impugned circular with which we are concerned is as under :-

"F. No. 6/25/93-CX. I

(CENTRAL BOARD OF EXCISE & CUSTOMS)

New Delhi, Dated the 31st December, 1993

SECTION 37B/ORDER NO. 24/14/93

The trade has represented on the issue of lack of uniformity in the addition/deduction of certain items of expenses in arriving at the assessable value.

2. The Supreme Court of India decided vide their judgments dated 9-5-1983 and 7-10-1983 [1983 (14) E.L.T. 1896 (SC), 1985 (19) E.L.T. 869 (SC)] and their subsequent clarificatory judgments 14-11-1983/15-11-1983 [1984 (17) E.L.T. 329 (SC)] in the case of UOI v. The Bombay Tyre International Ltd. & Others, several aspects of the issue of valuation and prescribed guidelines for deciding several other aspects of valuation.

3. The Supreme Court of India's decision dated 21-12-1986 in the case of UOI v. MRF Ltd. was recalled by the Supreme Court vide their order dated 7-5-1989. Meanwhile, CEGAT and High Courts have been giving decisions relying on the said decision dated 2-12-1986 of the Supreme Court.

4. Lack of uniformity in valuation has brought in disparity in the pricing of the commodities by the assessed with consequent impact on sales and the market economy.

5. Pending a final decision of the Supreme Court in the said MRF case, it would be necessary and expedient in the interest of administration of taxing statute to ensure uniformity in assessment practice.

6. Now, Therefore, in exercise of the powers conferred u/s 37-B of the Central Excises & Salt Act, 1944 (1 of 1944) (henceforth referred to as the Act) and keeping in view, the ratio of decisions so far passed by the Court in conformity to the decisions referred to supra and keeping in view the fact that the MRF judgment has been recalled, the trade practice, statutory provisions under the Act, etc. the Central Board of Excise & Customs hereby orders that the following issues of valuation shall henceforth be dealt with as follows :

xx xx xx xx F :- DISCOUNTS

I. : ISSUE

TAC/WARRANTY DISCOUNT relates to the claims of the customers on account of any defect on goods already sold and assessed to duty. Price of the new supplies get reduced by the amount refundable to customers on account of the defect on

goods already sold.

DECISION

Though TAC/Warranty discount may be established by practice or capable of being decided, it is in the nature of a benefit given to the customers by way of compensation for the loss suffered by them in the previous sale. As it is not in accordance with the normal practice of the wholesale trade at the time of removal of goods in respect of which the claim is made, the discount is not admissible to be deducted for the purpose of arriving at the assessable value.

II. ISSUE

PROFIT PAY NET DISCOUNT is given of the bill is cleared/paid within a specified number of day of the date of invoice.

DECISION

When such prompt payment discount is allowed in respect of all varieties of products cleared by an assessed, the same is permitted to be deducted for the purpose of arriving at the assessable value. However, such prompt payment discount, if allowed in respect of only certain variety of products, the same is not admissible.

III. ISSUE

YEAR ENDING DISCOUNT in respect of certain varieties of goods when the payments are actually received within a specified number of days from the date of invoice, a bonus at the end of the year is given on the basis of declaration received dealer-wise, the allowance of such discount is not known at the time of or prior to the removal of goods. The collections are made at the end of the year and bonus at the specified rate is granted only to a particular class or dealers. It is not in the nature of discount but in the nature of bonus or an incentives much after the invoice is raised and the removal of the goods is complete.

DECISION

Such an year-ending discount discount is not deductible for the purpose of arriving at the assessable value.

IV. ISSUE

CAMPAIGN DISCOUNT is in the form of bonus for invoices during a particular period on specified varieties payable on invoices for which payments were received within the specified number of days. The allowance of the discount is not known at or prior to the removal of the goods. The quantum is ascertained at the point of removal. The discount is not on the wholesale cash price of the articles sold but is based on the total sales effected of a particular varieties of goods.

DECISION

Such campaign discount is to form part of the assessable value as it is for promotion of sale of the particular variety of goods in Question.

V. ISSUE : REGIONAL DISCOUNT/TOWN COMMISSION

Different discounts are being offered, in some cases, to dealers belonging to different regions, towns treating such dealers from a particular region, town as class of buyers. These discounts are being described by names such as regional discounts, town commission etc.

DECISION

Wholesale dealers cannot be considered as belonging to different classes simply because they are located in different towns or cities or regions. Such discounts are not permissible to be deducted to arrive at the assessable value for excise purposes.

VI. ISSUE : SPECIAL DISCOUNTS

There are instances for claiming special discounts which are negotiated by the representatives of the company with the dealers dependent on the target fixed for the dealers. Such discounts are offered for specific periods and for specific regions.

DECISION

These type of discounts which are not known at or prior to the time of removal and are often given for specific regions or specific periods are not deductible for the purpose of arriving at the assessable value.

Board further directs that a copy of this order be sent to all collectors who shall inform the trade and all other officers employed in execution of the provisions of the Act."

3. Mr. Lahoty, learned counsel for the petitioner, said that he was concerned with the issue regarding regional discount/town commission as given in para V of Item "F" of the impugned circular relating to discount. The dispute, Therefore, lies in a narrow compass. Petitioner says this impugned circular is vocative of the statutory provisions as contained in Section 4(1)(a) read with Section 4(4)(c) of the Act.

4. As noted above, the petitioner is engaged in the manufacture of white cement. It has four units for the manufacture of white cement three of which are located in the State of Rajasthan and one in the State of Kerala. By the impugned circular the petitioner has been directed to clear its goods on one value, i.e. by making uniform regional discount for clearances to all other States and Union Territories as per the rate of discount applicable for the State of Rajasthan. One of the contentions also raised was that price list had already been approved and the petitioner was clearing its goods only as per such approved list. However, Mr. Lahoty confined his attack to the validity of the impugned circular itself.

Petitioner contends that the exigency of trade requires distinct and different rates of discount applicable to the class of buyers located regionwise, and because of the geographical, regional and commercial considerations of the particular region, the discount applicable to that region is normally ascertained, and that the factors like the local rates of sales tax, octroi, toll tax and other charges the freight and transport expenses depending upon the distance of the region from the factory, the local consumption and the requirements of market promotion, the competitive prices of other manufacturers were some of the factors which required due consideration in evaluating the regional discounts which could not be uniform all over the country. Mr. Lahoty said that the proviso to Section 4(1) (a) of the Act gives recognition to different pattern of discount for purpose of ascertaining the assessable value, and that it had been consistently held by various high Courts that until and unless the different prices were induced by any extra commercial considerations, the same could not be questioned and on merits the trade consideration might justify different discounts from region to region and from dealer to dealer. He said it was not in the case of the respondents that the different trade discounts for arriving at the assessable value under the Act were given for any extraneous considerations. Section 4(1)(a) in relevant part is as under :-

"4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessed to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessed at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

xx xx xx xx"

Section 4(4)(c) defines "related person" with which we are not concerned. In support of his submission Mr. Lahoty referred to two decisions - one of the Gujarat and the other of the Bombay High Courts. In Gujarat State Fertilisers Co. Limited Vs. Union of India and Others, , the Bench considered the view taken by the excise authorities that the agreement under which regional discount was allowed by the petitioner to wholesale purchasers was not made at arms length or was not in the usual course of business. The court noted that it was an admitted position that the regional discount was not uniformly given by the

petitioner in that case to all wholesale purchasers and that the extent of regional discount depends upon the distance between the petitioner's factory and the region in which the wholesale purchaser carried on his business, and that the regional discount was given on different basis to wholesale purchasers carrying on business in different States or group of States. The Court further noted that "unlike quantitative discount which the petitioner given to all its wholesale purchasers depending upon the bulk of purchases irrespective of the place at which such purchasers carry on their business, regional discount is essentially a discount which might vary as between one purchaser and another or one group of purchasers and another such group of purchases depending upon the region in which they carry on business." Then the court proceeded to record as under :-

"The basis of both the impugned orders, Exhibits "E" and "L", whereunder the claim of the assessed that the net assessable value of the articles in question should be arrived at after making allowance for the regional discount allowed to wholesale purchasers was rejected, is that since such discount is not given uniformly to all wholesale purchasers, no deduction on that account could be made in determining the wholesale cash price of such articles under the provisions of Section 4(a). We do not think, this view is justified on a plain reading of Section 4(a). Since regional discount is indisputably given as a percentage deduction from the list price, it is a trade discount within the meaning of the Explanation to section 4(a). The Explanation does not in terms enact that a trade discount, in order to qualify for deduction there under, should be given on a uniform basis to all wholesale purchasers at the factory gate. Any such view would require the addition of word "uniform" before the words "trade discount" occurring in the Explanation and that is evidently not permissible. It is not permissible to read the requirement of uniformity even by implication..."

5. In 966455--> , the Assistant Collector rejected the claim for quantity/target discount. The court said as under [Para 9] :-

"As far as the last item of quantity/target discount is concerned, the Assistant Collector has observed in para 15 of the Order as under :-

"The quantity discount/target discounts are claimed by the Company on the basis of various amounts paid by them to the dealers which vary from region to region and within the same region from dealer to dealer."

After having observed this, the Assistant Collector proceeded to reject the claim by observing this :-

"The quantum of discounts have to be uniform to all dealers (within the region) for achieving a particular sale target in order to entitle it to be a permissible discounts."

It is difficult to accept this reasoning of the Assistant Collector. If quantity/target discount are admittedly given and if they vary from region to region as also within the same region from dealer to dealer, in our view, no objection can be

taken to such a practice. The only reason assigned by the Assistant Collector for rejecting the claim is that the quantum of discount was not uniform. We are not at all in agreement with the view expressed by the Assistant Collector and we hold that the claim for deduction on account of quantity/target discount will not have to be considered on its own merits irrespective of the fact that the quantum of discount varies from region to region and also within the same region from dealer to dealer. The Assistant Collector was not justified in rejecting the said claim on that ground."

6. Mr. Lahoty also said that the Supreme Court in the cases mentioned in the impugned circular did not lay down any law or made any such observation which led to the issue of the impugned circular. This was disputed by Mr. Madan Lokur, Senior Central Government Standing Counsel. We do not think we need go into that question as the only issue before us is if the impugned circular is in accordance with the Act or violative of Section 4 of the Act as contended by the petitioner. Mr. Lokur submitted that the impugned circular was valid inasmuch as the wholesale buyers constituted one class and that there was nothing unusual or unorthodox in the impugned circular which the petitioner could not comply. He said there have been considerable uncertainty in the manner of arriving at the assessable value of the manufactured goods pursuant to the decision of the Supreme Court and even the Supreme Court felt it necessary to review the matter and give a definitive pronouncement. Mr. Lokur said that in view of the uncertainty as well as the pendency of the review petition in the Supreme Court the trade had also been considerably exercised over the lack of uniformity in the interpretation of the concerned provisions of the Act, and that the trade had represented to the Board on this issue of lack of uniformity in the addition/deduction of certain items of expenses in arriving at the assessable value of the goods, and one of such issues was whether different discounts can be offered to wholesale dealers depending on the region to which they belong. Mr. Lokur said that this issue was examined in detail and it was found that in view of the provisions of Section 4(1) of the Act and various judicial pronouncements on the subject wholesale dealers could not be differentiated from each other merely on the basis of their region/location, and that wholesale buyers formed a distinct class by themselves and deserved to be equally treated as one composite class, and that their place of business was not relevant.

7. We do not think that the stand taken by the revenue is correct. Section 37B of the Act under which the impugned circular had been issued is as under :-

"37B. Instructions to Central Excise Officers. - The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Offices as it may deem fit, and such offices and all other persons employed in the execution of this Act shall observe and follow such orders,

instructions and directions of the said Board :

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate functions."

It will be seen that this section is akin to Section 119 of the Income Tax Act, 1961 under which Central Board of Direct Taxes (C.B.D.T.) can issue instructions to subordinate authorities. That section, in relevant part, may be quoted as under :-

"119. Instructions to subordinate authorities. - (1) The Board may, from time to time, issue such orders, instructions and directions to other Income Tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any Income Tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the exercise of his appellate functions.

xx xx xx Section 119 of the Income Tax Act has been subject-matter of interpretation by the Supreme Court as well as the High Courts. It is not necessary to refer to all these decisions except to note one or two cases. In K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , the court said that the circular issued by the C.B.D.T. was binding on the tax department in administering or executing the provisions of the Act and apart from its binding character it was "clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of the provisions of the Act. The court also referred to its earlier two decisions on the subject in Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, , and Ellerman Lines Ltd. v. C.I.T., [1971] 182 ITR 913 , where also the court had held that circulars issued by the C.B.D.T. u/s 119 of the Income Tax Act were binding on all officers and persons employed in the execution of the Act "even if they deviate from the provisions of the Act." An argument was raised before a Bench of the Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh, Hyderabad Vs. Sahney Steel and Press Works Ltd., , that the Supreme Court had held that though the directions given in the circular issued u/s 119 of the Income Tax Act clearly deviated from the provisions of the Act, yet the court had held that the circular was binding on the Income Tax Officer. It appeared that the circular issued by the Board which was subject-matter of discussion before

the court ran counter to the Income Tax Act and it was argued that it had still to be followed and applied. The court did not agree and said "we are unable to give effect to such extreme contention, which, in our opinion, does not flow from the decision of the Supreme Court."

8. However, as far as the issue involved in the present case before us is concerned we need not consider the binding nature of the impugned circular issued u/s 37B of the Act on the Central Excise Officers as the challenge in the petition is to the validity of the impugned circular itself by the assessed. It is difficult to imagine that a circular issued u/s 37B of the Act which is contrary to the provisions of the Act would be binding on the assessed. That, in our opinion, could not be so. As to under what circumstances circular u/s 37B of the Act can be issued is mentioned in the section itself, namely, "for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods." But that would not mean that for achieving that purpose the Board could deviate from the provisions of the Act itself. When Section 4 of the Act recognises that in arriving at normal price of the goods the assessed could give different discounts to different classes of buyers "in accordance with the normal practice of wholesale trade in such goods", the Board could not say that discount should be uniform in all circumstances for all categories of buyers all over the country. We have referred to the decisions of the Gujarat and Bombay High Courts which recognised discounts on the basis of regions or other factors under the provisions of Section 4(1)(a) of the Act. Of course, these discounts have to be as per the normal practice of the wholesale trade in such goods and discounts cannot be given on extraneous considerations. In this view of the matter, the impugned circular dealing with regional discounts is contrary to the provisions of Section 4(1)(a) proviso (i) of the Act and is, thus, not valid. The issue before us is limited to the regional discounts and we are not concerned with other decisions given in the impugned circular. To the above extent, Therefore, the impugned circular disallowing discounts on the basis of regions as given in para V of Item "F" of the impugned circular is set aside. This petition is, Therefore, allowed. Rule is made absolute. There will be no order as to costs.