
(1983) 07 BOM CK 0014
In the Bombay High Court
Case No : Writ Petition No. 1153 of 1980

I.T.C. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-07-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 4, 8
Central Excises and Salt Act, 1944 — Section 4

Citation : (1989) 20 ECR 241 : (1993) 64 ELT 202

Hon'ble Judges : S.P. Bharucha, J

Bench : Single Bench

Judgement

S.P. Bharucha, J.—To accept the respondents' contention in this petition would be to hold that an Exemption Notification issued under Rule 4 of the Central Excise Rules, 1944, can create the liability to pay higher, not lesser, excise duty.

2. The Exemption Notification in question is dated 1st March 1979. It was issued by the 1st respondent in exercise of the powers conferred by Rule 8. The 1st respondent thereby exempted cigarettes of the description specified in the first column of the table thereof from so much of the duty of excise leviable thereon, both under the Central Excise Act and the Additional Duties of Excise Act, as was in excess of the duty specified in the corresponding entry in the second column of the table. There was a proviso which followed the table which is most relevant here. It read :

"Provided that (i) if it is proved to the satisfaction of an officer not below the rank of an Assistant Collector of Central Excise that any cigarettes have been manufactured wholly from unmanufactured tobacco falling under sub-item I(1) or sub-item I(4) of item No. 4 of the First Schedule to the Central Excises Act, on which the appropriate amount of duty of excise as leviable thereon on or before the 28th February 1979, both under the Central Excises Act and the Additional Duties of Excise Act has already been paid, the duty of excise on such cigarettes as specified in the Table annexed to this notification, shall be reduced by an

amount equivalent to the amount calculated at the rate of five rupees and fifty paise per one thousand cigarettes;

(ii) no such reduction in excise duty as specified in clause (i) shall apply in respect of any cigarettes cleared on or after the 1st day of July 1979;

(iii) the amount of duty so levied shall be apportioned in the ratio of 76 : 24 between the duty leviable under the Central Excises Act and the Additional Duties of Excises Act respectively."

3. On 1st March 1979 the petitioners filed a price-list and a classification list. On 20th March 1979 a gate pass was issued in respect of removals made upto 20th March 1979. The total assessable value of the different brands of the petitioners' cigarettes and the amount of duty in respect of each brand was shown thereon. Relief was sought at the rate of Rs. 5.50 per thousand cigarettes manufactured from duty paid unmanufactured tobacco in accordance with the notification.

4. On 4th October 1979 the petitioners were issued with a notice to show cause by the Superintendent of Central Excise, Bombay. It recorded that the petitioners had cleared cigarettes manufactured out of unmanufactured tobacco on which duty as prevalent prior to March 1979 had already been paid; that the petitioners had availed of relief at the rate of Rs. 5.50 per thousand cigarettes on account of such duty, in terms of the notification, in the aggregate sum of Rs. 7,30,752/- during March 1979. It stated that the petitioners should have determined the assessable values of the cigarettes by applying "the reduced rates of duty for such clearances and duty payable worked out on the basis of such enhanced assessable value". It stated that the petitioners' calculations had resulted in a lower assessable value and a short payment of Rs. 21,69,704.07, details whereof were given in an annexure. The petitioners were required to show cause why Rs. 21,69,704.07 should not be recovered from them. The annexure read thus :

----- "CATEGORY REBATE									
RATE OF DUTY SHORT OF CIGARETTES AVAILED OF DUTY LEVIED (Rs.) (Rs.)									
----- WILLS FT 10 SS									
1,40,206.00	400%	5,60,824.00	BRISTOL	FT	10	SS	2,82,045.50	300%	
8,46,136.50	BERKELY	10	SS	1,21,882.75	250%	3,04,706.87	SCISSORS	10	SS
1,27,987.75	280%	3,58,365.70	FLIGHT	10	SS	58,630.00	170%	99,671.00	
-----		-----				7,30,752.00		21,69,704.07"	

5. The petitioners showed cause. On 25th July 1980 the impugned order came to be passed by the 2nd respondent confirming the demand. He held that the petitioners should have determined the assessable value of the cigarettes in respect of which concession under the notification was availed of by applying the reduced rates of duty. He observed that "they should have worked out the duty payable by them on the basis of assessable values arrived at as aforesaid. The contention of the party that it was difficult for them to understand as to how the demand of three times the amount availed of by them as reliefs as issued to

them is apparently misconceived". The basic issue, he noted, was that the assessable value had not been worked out in accordance with Section 4 of the Central Excises & Salt Act, 1944, after availing the concession provided by the notification.

6. The petitioners had relied upon an order of the Appellate Collector of Central Excise, Bombay, dated 24th September 1979 in an appeal filed by M/s. Golden Tobacco Company in relation to the notification. It wholly supported the petitioners' method of calculation. The 2nd respondent had, in his order, only this to say of it, "In this connection I understand the department is considering review of the above-mentioned order of the Appellate Collector."

7. This petition was filed on 6th October 1980 impugning the 2nd respondent's order.

8. Mr. Desai, learned counsel for the petitioners, submitted that the method of calculation upheld by the impugned order was incorrect for it artificially raised the price of the petitioners' cigarettes whereas, in fact, the price remained the same. He submitted that the notification, issued under Rule 8, was intended to confer a benefit upon the cigarette manufacturer. The impugned order cast a liability upon the petitioners three times higher than the concession availed of by them under the notification.

9. It must be noted that excise duty on cigarettes varies, but is not less than 100% even on the cheapest cigarettes.

10. For the purpose of understanding the method of calculation suggested by the respondents an example needs to be used. Let us assume that the sale price of cigarettes is Rs. 400/- per thousand, and the applicable rate of duty is 300%. Rs. 100/- is then the assessable value of the cigarettes and Rs. 300/- is the excise duty. By virtue of the notification the manufacturer becomes entitled to exemption at the rate of Rs. 5.50 per thousand cigarettes. The respondents suggest that the excise component of the price should, therefore, be reduced to Rs. 294.50 and Rs. 105.50 should become the assessable value. Then excise duty should be calculated at the rate of 300% on Rs. 105.50, which comes to Rs. 316.50. The sale price of the thousand cigarettes would thus notionally become (Rs. 105.50 plus Rs. 316.50 equal to) Rs. 422/- while the actual sale price would remain at Rs. 400/-.

11. In my view, this is not the proper method of calculation. The excise component in the calculation remains Rs. 300/- and the assessable value remains Rs. 100/-. The exemption notification does not lessen the excise duty payable on cigarettes. By reason of it the cigarette manufacturer is given the benefit of an exemption from paying Rs. 5.50 per thousand cigarettes from out of the duty of excise leviable thereon only provided he has manufactured cigarettes from unmanufactured tobacco upon the appropriate amount of excise duty has been paid.

12. The appellate order in the case of Golden Tobacco, which the 2nd respondent brushed aside, puts it tersely and correctly, thus :

"Had the Government's intention been to reduce the effective rate of duty they could have done so straight off by reducing the rates by Rs. 5.50. This has not been done. Instead of that a provision has been included in the notification to give this relief. It would be wrong to reduce or change the effective rate of duty, by reducing it by the amount of relief to be given under this proviso. The correct method of calculating the amount of duty is to arrive at the assessable value and then calculate the amount of duty to be levied according to the effective rate of duty, from which the amount of relief to be deducted is to be calculated at the rate given in the proviso (i) of this Notification."

13. Mr. Dalal, learned counsel for the respondents, placed great reliance upon a judgment of a single Judge of this court [in Misc. Petition No. 309 of 1977 - Tata Oil Mills Company Ltd. Vs. Union of India and others, decided by Aggarwal, J. on 24th July 1980]. The Exemption Notification in that case provided that "such vegetable product as is made from indigenous cotton seed oil is exempt with effect from the 1st March 1962 from the payment of the Excise Duty leviable thereon to the extent of Rs. 7.50 per quintal" subject to conditions with which we are not here concerned. The oil mills manufactured a vegetable product known as "Pakav". Its distribution and sale was controlled by the Vegetable Oil Products Controller, who fixed its price inclusive of the element of duty payable thereon. At the relevant time the wholesale price per 2 kgs. was fixed at Rs. 10.28. The rate of Central Excise duty was 5% on the assessable value. The assessable value was, thus, Rs. 9.79 and the duty included in the price was 49 paise. It was the oil mills case, and this was not disputed, that 0.80 kgs. of cotton seed oil were used in 2 kgs. of Pakav and that, therefore, under the notification, the rebate on the price of cotton seed oil at the rate of Rs. 7.50 per quintal worked out to 6 paise. According to the oil mills, therefore, the net excise duty actually payable was 43 paise per kg. The Superintendent of Central Excise, however, issued a show cause notice to them informing them that the correct method for arriving at the assessable value was to deduct from the sale price, not duty at 5% ad valorem, but the duty actually payable after the rebate on account of cotton seed oil content was adjusted. It said that the method adopted by the oil mills afforded them an unintended benefit. The show cause notice was confirmed and an appeal therefrom was dismissed. The petition was then filed. In the oil mills' affidavit-in-rejoinder it was contended that the notification was intended to confer a benefit as an incentive to encourage consumption of cotton seed oil. Learned counsel appearing for the oil mills based his argument upon Section 4 submitted that the amount of 6 paise was loaded on to the manufacturing cost and profit and this was impermissible. Learned counsel appearing for the authorities contended that the assessable value for the purpose of excise duty was the wholesale cash price less the amount of duty payable at the time of the removal of the goods and the trade discount. The learned Judge considered the notification and held that the exemption was not given to the manufacturer of

vegetable products for making use of indigenous cotton seed oil, nor could it be spelt out from the notification that it encouraged a manufacturer to make use of cotton seeds in indigenous cotton seed oil in the manufacture of vegetable products. He observed that cotton seed oil was probably cheaper and, therefore, the manufacturer was permitted to substitute cotton seed for other oil-seed; therefore, the manufacturer did not stand to lose on the use of cotton seed oil. The learned Judge went on to say that, assuming that he was not justified in taking into consideration that cotton seed oil was cheaper, nevertheless he was unable to accept the submission of the oil mills' counsel that the notification was intended to confer a benefit as an incentive with a view to encourage consumption of cotton seed oil. He accepted the approach of the authorities and dismissed the petition.

14. Two aspects need to be noted. First, that the price fixed by the Vegetable Oil Products Controller remained the same whichever approach was adopted. Secondly, that, as the learned Judge interpreted it, the notification conferred no benefit upon the manufacturer of vegetable products. Since Mr. Dalal placed great reliance upon this judgment I enquired of him upon whom the benefit was intended to be conferred. In reply, Mr. Dalal pointed out that even in this petition the petitioners had alleged that the benefit under the notification was intended to be conferred upon the manufacturer of cigarettes but that this had been denied by the respondents in their affidavit-in-reply. The affidavit-in-reply does not, however, clarify upon whom the benefit was intended to be conferred.

15. I have no doubt that the benefit of the exemption under the notification was intended to be conferred upon the manufacturer who had made cigarettes using unmanufactured tobacco upon which duty at the applicable rate had been paid. It is, then, impermissible for the respondents to so interpret the notification as to deprive the manufacturer of that benefit and, indeed, to place upon him a far greater liability than he shouldered before.

16. Mr. Dalal submitted that the petitioners had rushed to court without availing of the appeal provided for. Having regard to the view taken by the 2nd respondent and his summary brushing aside of the order of the Appellate Collector, it is little wonder that the petitioners chose at the earliest opportunity the forum of a writ court.

17. In view of the fact that I am deciding the petition on the fundamental question, it is unnecessary to go into subsidiary points.

18. The petition is made absolute in terms of prayers (a) and (b), with costs.

Rule accordingly.