

(1981) 11 AP CK 0002
In the Andhra Pradesh High Court
Case No : Writ Appeal No. 65 of 1977

Jay Engineering Works Ltd.

APPELLANT

Vs

Government of India and Others

RESPONDENT

Date of Decision : 05-11-1981

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 4, 4(4)

Citation : (1982) 10 ELT 378

Hon'ble Judges : Rama Rao, J;K. Madhava Reddy, J

Bench : Division Bench

Advocate : Srinivasa Murthy, for the Appellant; K. Subrahmanya Reddy for the Central Govt., for the Respondent

Judgement

Rama Rao, J.—The Writ Appeal is at the instance of the petitioner in the Writ Petition seeking to quash the order No. 1586/73 dated 21-11-1973 of the Government of India, Ministry of Finance confirming the orders of the Controller of Central Excise and Superintendent of Central Excise. The Writ petition is concerned with the validity of levy of excise duty on freight charges, cost of packing material and regulator for the fan and also deduction of permissible discount to determine the assessable balance for determination of excise duty.

The petitioner claimed that the freight charges should not form part of assessable value for the purpose of excise duty. The Collector negated this claim on the ground that the equalised freight is an element of cost and as such no abatement can be given u/s 4 of the Central Excises Act. This order was confirmed in the appeal as well as in the Revision by the Government. The learned signal judge held that as the procedure of equalised freight is adopted, the petitioner is not entitled for deduction of the freight charges. So far as packing material is concerned, the primary authority viz., the Collector held that the petitioner did not disclose the packing charges separately and the element of packing charges is linked with cost price. This order was confirmed in appeal and revision as well. In the writ petition, the learned single Judge held that the cost

of packing material is not post-manufacturing expenditure and as such liable to be included in the wholesale cash price. In this view, the order was confirmed.

2. It is contended by the learned counsel for the appellant that the expenditure towards freight as well as packing material is post-manufacturing expenditure and as such cannot form part of manufacturing cost. We are relieved of the task of dealing with this matter in depth as the issue pertaining to freight charges and packing materials as well is covered by the decisions of this Court reported in *Union of India v. Vazir Sultan Tobacco Co. Ltd.* 1978 (1) AN. W.R. 233 and 1979 E.L.T. 334. It is held by this court that freight and packing material does not form part of the price of the product and as such cannot be included in the assessable value u/s 4 of the Act. We follow the reasoning and the conclusion in the said decisions and uphold the appellants contentions.

3. The other aspect for consideration is, whether the cost of regulator can be included in the price of the fan for the purpose of imposing excise duty payable on ad valorem basis. The primary authority included the value of the regulator and the same was upheld in the appeal by the Collector of Central Excise and affirmed on further revision before the Government of India. The Collector held that the ceiling fans are sold with a regulator only and the practice of trade is to include the cost of regulator in the price of the ceiling fan. The revisional authority held that though the regulator is not an integral part of the ceiling fan, it is considered as one unit with the ceiling fan and this price is included in the cost of the fan and as such the regulator is part and parcel of the fan. In the writ petition, the learned single judge after adverting to the circular of the Central Board of Revenue and Indian Standard Specification held that the regulator is treated as part of the ceiling fan according to the commercial and trade practice and declined to interfere with the orders. The learned counsel for the appellant contended that the regulator cannot be considered as an integral part of the fan and the Indian Standard Institution is not competent to deliberate or describe the commodity and in any event the report of the Indian Standard Institution in this regard has not been considered in proper perspective and the consideration of method of preparing the bill at the time of sale of the fan is extraneous to the levy of excise duty and the Circular of the Board of Revenue is not binding. It is also contended that in view of the amendment to Item 33 of Schedule made with effect from 19-6-1977 roping in the regulator for the purpose of levy of excise duty, the regulator is excluded from the purview of fan and is not exigible to levy of excise duty anterior to 19-6-1977. The learned standing counsel for the Central Government contended that the fan is considered as inclusive of regulator in ordinary parlance and in commercial and trade practice and the report of I.S.I. indicates that the fan should always be understood as comprehending regulator and though the circular of the Board of Revenue is not binding, but is indicative of the intention that the fan comprises regulator also. The learned counsel for the respondent further contended that the amendment made from 19-6-1977 to the effect that the fan includes regulator throws flood of light as the amendment in the context is tantamount to exposition of exiting

state of facts. The relevant portion of Item 33 of Schedule 1 to the Central Excises Act is as follows :

Electric fans including air circulators.....

1. Table, cabin, carriage, pedestal and air circulator fans.
2. All other fans.

This item has been amended with effect from 19-6-1977 and the relevant position is herewith extracted.

33. Electric fans, including regulator for electric fans all sorts :-

1.

2. Electric fans, designed for use in an industrial system.

3. Electric fans, not otherwise specified and regulators.

4. The learned counsel for the appellant contended that fans can be purchased apart from the regulator and the fans as such can be operated without the regulator and the regulator is meant only to regulate the speed of the fan but it cannot be said that the fan does not work without regulator and, therefore, the regulator cannot be considered as integral part of the fan. In support of this contention, the learned counsel for the appellant has profusely relied upon the decision of the Delhi High Court reported in Jay Engineering Works Ltd. v. Union of India 1981 E.L.T. 284 (Del.). Ranganathan, J., speaking for the court observed that the speed regulator is not an integral or indispensable part of the electric fan and it cannot be said that a fan without speed regulator is no fan at all. The learned judge was apparently influenced by the circumstance that the amendment which was inserted with effect from 19-6-1977 including regulators, excluded the regulator from the purview of the fan anterior to 19-6-1977 by implication. We are not inclined to agree with the view of the Delhi High Court. It is too late in the day to say that the ceiling fan is operated without regulator. It may be some times in the past that the ceiling fans were manufactured and they were operated without regulation of speed by a regulator. But, by efflux of time the regulator has been made use for facilitating the working of the fan and thus the regulator has become a necessity and also became an indispensable part of the electric fan. The functioning of the fan is conditioned by the operation of regulator. The regulator is designed to control the speed. If the regulator is at "off" stage the fan does not function. The breeze can be adjusted according to the necessity through regulator. Thus, it is abundantly clear that the regulator is indispensable part of the fan.

5. The electric fan is not defined under the Act and in the absence of the definition recourse to the commercial practice or normal parlance or some other statutes or rules where this expression has been considered will furnish some guidelines. The learned single judge adverted to the C.B.R. Circular dated 28-10-1971 wherein the Indian Standard Specification has been considered.

Though the circular is not binding but however it appears the learned judge adverted to the circular and the reference made to the Indian Standard Specification No. 374/66 therein as indicative of the coverage of fan and it is also made clear by the learned judge that the instructions are not binding on the court and have no legal effect. The learned counsel for the appellant has referred to the statements of object and reasons of the Indian Standards Institution (Certification Marks) Act, 1952 to support his contention that this act is not concerned with the definition or amplitude of any commodity and it is only concerned with the standardisation and specifications for manufacture of goods and as such the reference to I.S.I. specification does not throw any light. In the statement of objects and reasons it is stated that the Indian Standards Institution are finalising standard specifications for most of the commodities and manufactured articles which figure in the export trade and also in the home markets. In the process of finalising such specification it is necessary to describe the commodity or its associated components or delineate the ambit of any expression. The presence of I.S.I. certification mark on the products conveys an assurance that they have been produced in compliance with the requirements of that standard and well defined system of inspection, testing and quality control during production. The relevant portions of the I.S.I. specification 374-76 are set out herein : Item 9.2 states that the regulator shall have an "off" position preferably next to the lowest speed contact. Item 10.1 under the caption "starting" states that the fan shall be capable of starting up from rest with the regulator, if any, at the lowest speed step when 85% of the rated voltage or 85% of the lowest voltage in the voltage range is applied. Item 11.1 says that the motor of the fan of a particular size and model and its associated regulator and set of blades shall be interchangeable such that the performance of the fan keeps within limits specified in this standard. 12.1 provides that precautions shall be taken in the manufacture of fans and regulators to ensure a reasonable degree of silence at all speeds. These specifications clearly disclose that the fan is always understood as being associated or accompanied by a regulator and regulator can be considered as an integral part of fan. The specifications furnish a guidance to several components of the commodity and their functioning. In view of the "off" position fixed in the regulator the fan cannot function unless the regulator is set in motion and as such the regulator is an indispensable part of the fan.

6. In support of the contention that in the absence of definition of "electric fan" under the Act the recourse should be to popular meaning in common parlance or commercial usage, the learned counsel for the respondent relies upon the decisions of the Supreme Court in *State of West Bengal and Others Vs. Washi Ahmed and Others*, ; *Dunlop India Ltd. v. Union of India* AIR 1977 S.C. 597 and *Indo International Industries Vs. Commissioner of Sales Tax, Uttar Pradesh*, . In *Indo International Industries v. S.T. Commissioner*, the issue is whether clinical syringes can be considered as "glassware" falling within Entry 39 of First Sch. of U.P. Sales Tax Act. In considering the connotation of "glassware" the Supreme Court observed as follows at page 1081 :

"It is well settled that the interpreting items in statutes like the Excise Tax Acts of Sales Tax Acts, whose primary object is to raise revenue and for which purpose they classify diverse products, articles and substances resort should be not to the scientific and technical meaning of the terms or expressions used but to their popular meaning, that is to say, the meaning attached to them by those dealing in them. If any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted. In *Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola*, the question was whether "betel leaves" fell within item "vegetable" so as to earn exemption from sales tax and this Court held that word "vegetable" had not been defined in the Act and that the same must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance and so construed it denoted those classes of vegetable matter which are grown in kitchen garden and are used for the table and did not comprise betel leaves within it and therefore betel leaves were not exempt from taxation.

In *State of W.B. v. Washi Ahmed*, the issue is whether the expression vegetable takes in Green ginger also under Sch. I item 6 of Bengal Finance (Sales-tax) Act. The Supreme Court has held as follows at page 1639 :

"It will, therefore, be seen that the word "vegetable" in item (6) of Sch. I to the Act must be construed as understood in common parlance and it must be given its popular sense meaning "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it" and so construed, it denotes those classes of vegetables which are grown in a kitchen garden or in a farm and are used for the table. Now, obviously green ginger is a vegetable grown in a kitchen garden or in a farm and is used for the table. It may not be used as a principal item of the meal but it certainly forms part of the meal as a subsidiary item. It is an item which is ordinarily sold by a vegetable vendor and both the vegetable vendor who every day deals in vegetable and the housewife who daily goes to the market to purchase vegetables would unhesitatingly regard green ginger as vegetable."

The same principle has been reiterated in AIR 1977 S.C. 597(4) *supra*.

7. Bearing in mind the principles enunciated by the Supreme Court, it has to be seen now the fans understood in the popular sense and commercial transactions. In a transaction regarding the fan the purchaser as well as the seller has always in mind the regulator when the expression "fan" is used. It may be in certain circumstances that the ceiling fan is used without a regulator, but these circumstances cannot affect the position that the ceiling fan is usually considered as inclusive of regulator. In ordinary parlance and in commercial practice as well the expression "ceiling fan" is used in association with the regulator invariably.

8. The learned counsel for the appellant contended that regulators for the fans

are made liable to excise duty for the first time with effect from 19-6-1977 and as such it is not open to the authorities to conclude that the expression electric fan at the relevant time and prior to amendment takes in its fold the regulator also. Though the contention at the first blush appears to be plausible but the context and set up of item 33 does not support the contention. The subsequent legislation can be considered as clarificatory in nature some times or may be inserted by way of abundant caution and in certain situations it may be considered as parliamentary exposition of the earlier act when it is not free from ambiguity. The learned counsel for the respondent invited us to the decision of the Supreme Court reported in *Jogendranath v. I.T. Commissioner* - . In this case the question that was considered is whether the Hindu deity falls within the meaning of the word "individual" u/s 3 of the Income Tax Act and can be treated as unit of assessment under that section. In the context of considering this issue, the Supreme Court observed at page 1094 as follows :-

"On a comparison of the provisions of the two Acts counsel on behalf of the appellant contended that a restricted meaning should be given to the word "individual" in Section 3 of the earlier Act. We see no justification for this argument. On the other hand, we are of the opinion that the language employed in 1961 Act may be relied upon as a parliamentary exposition of the earlier Act even on the assumption that the language employed in Section 3 of the earlier Act is ambiguous. It is clear that the word "individual" in Section 3 of the 1922 Act includes within its connotation all artificial juridical persons and this legal position is made explicit and beyond challenge in the 1961 Act."

9. Again in the decision reported in *S.V.R. Cement Co. v. G.M.S. Pvt. Ltd.* AIR 1976 S.C. 2521, the Supreme Court held that the parliamentary exposition as revealed in the later Act can be considered to clarify any doubt or ambiguity in the prior Act in the context of considering whether a Head lessee in respect of mines and minerals under an Indenture of lease executed prior to the date of vesting of mines under Bihar Land Reforms Act, does not become a tenure-holder consequent on vesting under the Act. At page 2527 the Supreme Court observed as follows :-

"We also find ourselves unable to accept this contention and to disregard the well settled canon that some times light may be thrown upon the meaning of an Act by taking into consideration "Parliamentary expositions" as revealed by the later Act which amends the earlier one to clear up any doubt or ambiguity. This principle has to be followed where, as in the instant case, a particular construction of the earlier Act will render the later incorporated Act ineffectual or otiose or inept. (See *Kirkness v. John Hudson & Co.*, 1955 AC 696 (HL). This view also receives support from the decision of this court in *Yogendra Nath Naskar v. C.I.T. Calcutta*, where approving the authoritative pronouncement in *Cape Brandy Syndicate v. Inland Revenue Commrs* (1921) 2 K.B. 403 that the subsequent legislation may be looked at in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous, it was held

that the language employed in Income Tax Act, 1961 may be relied on as a Parliamentary exposition of the earlier Act (I.T. Act, 1922) even on the assumption that the language employed in Section 3 or the earlier Act is ambiguous."

10. It is a matter of common experience that the fan as such is not used without the regulator and when any customer or a purchaser asks for the fan, he has in his mind invariably the regulator also and the seller also has the same view. In spite of this, some doubt is cast whether the expression "Fan" by itself includes the regulator in view of the circumstances that fans are not invariably associated with regulators in places like cinema halls etc. This doubt has been amply cleared and set at rest by the amendment. Therefore, in the circumstances the concept of parliamentary exposition of an earlier Act can be invoked in this case and the expression "ceiling fan" used in item 33 takes in its fold the regulator also.

11. The other aspect that remains for consideration is regarding the trade discount. The petitioner claimed allowance of a trade discount of 23% given to Usha Sales Private Ltd., Hyderabad and M/s. Nathoo Laljee, Hyderabad. At the outset it must be stated that the factum of giving 23% discount to them is not disputed. The primary authority as well as the appellate and revisional authorities held that uniform discount of 15% only should be allowed to these dealers also like others and there should be no exception regarding these two dealers. The revisional authority held that special discounts are not admissible u/s 4 of the Central Excises and Salt Act, 1944 and therefore the trade discount of 15% only should be allowed. The learned single judge held that 15% discount is normally given and the higher discount of 23% in respect of two cases cannot be treated as normal trade discount and if two different sets of discounts are allowed, it will be tantamount to arriving at two wholesale cash prices and in this view the orders of the authorities have been confirmed. The learned counsel for the appellant contends that there is no embargo on giving different rates of trade discount by the Act or the rules. Explanation to Section 4 of the Act is concerned with the allowance of discount. The expression used therein is "trade discount". As the "discount" is preceded by "trade" the discount must be for the purpose of trade and motivated by commercial expediency. The discount should not be tainted with extra commercial considerations like favouritism and relationship etc. The explanation does not visualise uniform discount only. It may be that varying discounts provoke problem into the affairs but the absence of uniform discount cannot be the basis for denying discount. It is possible that in bulk sales it is profitable for the company to give a higher discount so that they can sell the commodities quickly and have more turnover of the business and the higher discount also will be necessitated for giving fillip to the sales in some areas where the commodities have to be propagated and popularised and it is also possible that in a highly competitive conditions, it is necessary to give more discount even at the risk of low profits to have lucrative business at a later stage and to over-reach the rival competitors. In the business of electrical appliances the off season discount is prevalent and in that view the question of uniform

discount throughout the year is not possible. In support of the contention that the absence of uniform discount cannot be the basis for disallowing the discount the learned counsel for the appellant relied upon the decisions reported in *A.K. Roy & others v. Carona Sahu Co. Ltd.* 1979 ELT 521, *Sharada Silicate & Chemical Industries v. Collector of Central Excise, Coimbatore* 1979 ELT 20, *Standard Electric Appliances v. Supdtd. of Central Excise & another* 1979 ELT 53, *Kerala Ceramics Ltd. v. Asst. Collector of Excise & others* 1979 ELT 453, 1978 ELT 238, 1978 ELT 1224 and 1978 ELT 444. It is not necessary to burden this judgment with facts and principles set out in the said decisions, but suffice to say, it is held that the discount may vary from dealer to dealer, from place to place and from time to time depending upon commercial exigencies. The learned counsel for the respondent contended that the assessable values will be different in the event of allowing different discounts. The discrepancy in the assessable values at a different point of time or depending upon the different types of discount that is given to different dealers is not precluded and there is absolutely no semblance of prohibition against such different discounts under the provisions of the Act. The assessable values can be different depending upon several factors and that cannot be a circumstance for denying the discount. In the event of escalation of prices the assessable values will be certainly different and in such a situation it cannot be countenanced that the excise duty will not be allowed because the assessable values are different. Therefore, the contention that in the event of different discounts the assessable values are different and as such the discount should not be given is devoid of merit. The learned counsel for the respondent relied upon the decision of the Allahabad High Court reported in 1979 ELT 460 for the proposition that the discount must be uniform. The Allahabad High Court held that the deduction of discount cannot be given where it is not uniform. We are not able to discover any principle or rationale for such wide proposition and explanation to section 4 is not susceptible to such an interpretation. The principle of average discount propounded by the Calcutta High Court in 1978 ELT 729 is devoid of any statutory sanction. The learned counsel for the respondent projected a new dimension founded upon the wide coverage of "related person" defined u/s 4(4)(c) of the Act. The learned counsel for the respondent contended that Usha Sales Corporation is a related person as the Directors are common and the Chairman is also common to Usha Sales Corporation and the petitioner company. The learned counsel states that in para 10 of the counter-affidavit of the writ petition it has been stated that the Chairman of the Usha Sales and the petitioner company is common and it is not denied by the petitioner. This contention was not considered by the primary authority or the appellate authorities and even in the writ petition this aspect was not raised or considered and therefore the respondent is precluded from raising this contention at this stage. The learned counsel for the respondent relied upon the decision reported in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, for the proposition that a quasi-judicial order must be tested on the ground on which it is based. This contention as well as the facts connected with this contention have not been mentioned at all in any of the

orders below and therefore the principle enunciated by the Supreme Court squarely applies to the situation. Further the contention founded upon "related person" cannot be extended to the other dealer M/s. Nathoolalji as there is absolutely no allegation of applicability of "related person". Therefore, this contention deserves to be rejected.

12. In the circumstances stated above, the writ appeal is allowed to the extent of excise duty levied in respect of freight and cost of packing material and trade discount and the order in the Writ Petition is quashed to this extent. The order of the learned single judge sustaining the levy of excise duty on the cost of regulator is hereby confirmed. The writ appeal is allowed partly. As the writ appeal is allowed substantially, the appellant will get costs. Advocate's fees Rs. 250.

13. Order : The learned counsel for the respondents moved an oral application for leave to appeal to the Supreme Court.

Leave is granted to the extent the judgment is against the Central Government. Refund of excise duty is stayed for a period of three months.

14. Likewise, the learned counsel for the appellant also moved an oral application for leave to appeal to the Supreme Court. Leave is granted to the extent of levy of excise duty on regulators.