(1991) 09 DEL CK 0036

In the Delhi High Court

Case No : Civil Writ Petition No. 492 of 1977

J.K. Cement Works — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 04-09-1991

Acts Referred:

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

Citation : (1992) 46 DLT 426 : (1992) 37 ECC 23 : (1994) 73 ELT 276

Hon'ble Judges : P.N. Nag, J

Bench : Single Bench

Advocate : Ravinder Narayan and Madan Lokur, for the Appellant;

Judgement

P.N. Nag, J.

(1) The short question involved in this writ petition is whether the cost of packing of cement in gunny bags is not includable in the assessable value u/s 4(4)(d)(i) of the Central Excise & Salt Act 1944 (hereinafter referred to as the Act).

(2) The facts giving rise to this petition are that the petitioners, Ms. J.K. Cement Works (hereinafter referred to as the assessed) manufacture ordinary Portland Cement and clear the same duly packed in gunny bags of 50 Kgs. each on payment of appropriate Central Excise duty on ad valorem basis in terms of Section 4 of the Act (as amended in 1973 and which amendment came into force on 1st October, 1975). It appears that a revised price list w.e.f. 1. 10. 1975 in pursuance of the amended Section 4(4)(d)(i) of the Act for ordinary portland cement, without including cost of packing charges on account of gunny bags at the rate of 40.98 per metric tonne submitted by the assessed to the Superintendent, Central Excise, Chittorgarh was approved on 21.10-1975. However, the Superintendent, Central Excise, Chittorgarh vide letter dated 31st October, 197 5 (annexure D) revised the price list to the extent of cost of packing charges, ie.. Rs. 40.98 were also included in the net assessment value for determining the central excise duty. Consequently, the assessed started paying

central excise duty at the enhanced rate w.e.f. 1,11.1975 "under protest" and continued to pay the duty on the enhanced rate up to 8th January, 1976 Admittedly a notification dated 9.1.1976 has been issued under sub Rule (1) of Rule 8 of the Central Excise Rules, 1944 and under that notification, the Central Government has exempted grey portland cement from so much of the duty as is equivalent to the duty livable with reference to that part of the value hereof which represent the cost of packing in which such cement is delivered at the time of removal from the factory. Thus, from 9th January, 1976 cost of packing is not included in the value of cement for charging excise duty. The assessed, Therefore, has claimed that since he has paid enhanced rate of duty for the period 1.11.1975 to 8.1.1976, which according to him amounts to Rs. 11,16,270,31, it is entitled to refund of this amount. The assessed has further challenged the demand amounting to Rs. 5,23,204.25 for the period 1,10,1975 to 31.10.1975. According to the Assistant Collector, this amount of Rs. 5,23,204.25 for the aforementioned period was not paid as excise duty by the assessed as it has not included the cost of packing charges in the value of the ordinary portland cement and it has paid the excise duty earlier on the revised price list earlier erroneously approved by him on 21.10.1975. It may be mentioned that an appeal filed by the assessed against this order of the Assistant Collector to the Appellate Collector was also dismissed on 4.7.1977 (annexure-J) and the demand made by the Assistant Collector was confirmed. The Assistant Collector and the Appellate Collector were of the view that the assessed is not entitled to exclude the cost of packing gunny bags in the value of the cement for assessing the central excise duty u/s 4(4)(d)(i) of the Act as the gunny bags are not ''returnable'' by the dealers of cement to the assessed as these are not necessarily to be returned by the purchasers to the assessed and the assessed is not obliged to accept them.

(3) In counter affidavit, the respondents have, in substance, adopted the same reasoning of the Assistant Collector and the Appellate Collector and stated that the gunny bags cannot be considered as returnable by the purchasers to the assessed and as such Section 4(4)(d)(i) of the Act is not attracted in this case.

(4) Shri Ravinder Narain, learned Counsel for the petitioner, submitted that u/s 4(4)(d)(i) of the cost of packing in gunny bags has to be excluded from the value of the cement as such packing is ''returnable'' by the buyer to the assessed under an arrangement between the buyer and the assessed, which is evident from the Price Fixation Order dated 1.10.1975 of the cement issued by the Central Government, Release Order dated 1.5.1975 issued by the Ministry of Industries and Civil Supplies to the assessed and other relevant documents placed on the file. The Assistant Collector and the Appellate Collector has mis-interpreted the relevant provisions of the Act and such interpretation goes contrary to the settled principles laid down by the Supreme Court.

(5) In order to appreciate the submission of the learned Counsel for the petitioner, it would be appropriate to reproduce relevant extract of Section 4(4)

(d)(i) as under :

SECTION 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- (ii) where such goods are sold by the assessed in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof; (4) For the purposes of this Section,- (d) "value", in relation to any excisable goods,- (i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessed. Explanation-In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;"

(6) In this case, the controversy has been narrowed down only to the question of interpretation of clause (i) of Section 4(4)(d) of the Act-whether the goods of the assessed comes within the exception provided in this clause. In order to invoke this exception, i.e., whether the cost of packing should not be included for levying excise duty, the following two conditions must be satisfied :-

(I)Packing material is of durable nature; and (ii) It Is returnable by the buyer to the assessed. Insofar as the first condition is concerned, there is no dispute that this condition, that the gunny bags which are used for packing cement are of durable nature, stands fully satisfied. In fact Mr. Madan Lokur, Counsel for the respondents, does not raise this question and rightly so. But what is seriously disputed by him is that these gunny bags which are used for packing of portland cement are not ''returnable'' by the buyer to the assessed and, Therefore, conditions of clause (i) of Section 4(4)(d) of the Act are not satisfied, Therefore, the said provision is inapplicable in the present case. Furthermore, according to him, no arrangement exists between the buyers and the assessed For returning the gunny bags and as such the is no question of these gunny bags being ''returnable''.

(7) It may be noticed here that at the relevant time, the cement was a Government controlled commodity and that the price of the cement was fixed by the Government of India, Ministry of Industries and Civil Supplies vide letter dated 1.10.1975. (Annexure K).

(8) Vide this letter the charges for packing per metric tonne of cement in new as well as old bags, in the ratio of 50 and 50 per cement respectively, for the perlod 1.10.1975 to 31.12.1975 was fixed as Rs. 40.98. Price of ordinary portland cement and masonry cement For destination Railway Station per metric tonne for the aforementioned period was fixed separately for the cement and the packing charges. In other words, factually, the cost of packing charges was not included in the price of the cement. Furthermore, according to this letter, the serviceable second hand jute bags were to be collected by the Bag Collecting Agents of the respective cement factories (to be collected by them at the Consumers Work sites on ''Cash and Carry'' basis) and the resale price for the above period, i.e., 1.10.1975 to 31.12.1975 was also fixed Rs. 92.54 per 100 bags. Release Order dated 1.5.1975 (annexure L) has authorised the assessed to release the same to the purchaser and this authorisation has been made subject to the conditions mentioned on the reverse of that page and one of the conditions is that the issuing authority can revoke the authorisation at any time and the holder shall in that case forthwith surrender the same. Furthermore, one of the important note :o which this authorisation is subject to, is reproduced below : -

"PLEASEpreserve empty cement bags in serviceable condition and return them to the factory of origin or its collecting agent on payment."

These documents clearly show that the control of the commodity lies with the Ministry of Industries and Civil Supplies and the conditions imposed bind down both the assessed and the buyers.

(9) Vide letter dated 30.10.1975 (annexure M), Government of India had decided to permit the use of secondhand heavy cement bags up to 50% only for packing cement for a period of 3 (three) months from 1.10.1975.

(10) A combined reading of the aforementioned documents clearly shows that the purchasers, if they so choose, can return the cement bags and the assessed on the return of such bags are obliged to purchase these bags at the rates specified. This clearly establishes an arrangement between the assessed and the purchasers of cement, under which the gunny bags can be returned by the purchasers to the assessed. Further, in case the buyers choose to return the packing, the assessed will be obliged to accept the same and refund the stipulated amount. In order to attract the provisions of Section 4(4)(d)(i) of the Act, it is not necessary to show that gunny bag packing has actually been returned, and that it is only necessary to show that the packing is returnable by the purchasers to the assessed.

(11) The word ''returnable'' used in Section 4(4)(d)(i) of the Act has been the subject matter of interpretation by the Supreme Court. In K. Radha Krishnaiah Vs. Inspector of Central Excise and Others, , the Supreme Court has laid down that Section 4(4)(d)(i) excludes from computation the cost of packing which is of durable nature and is returnable by the buyer to the assessed. Thus, the packing must be one which is returnable by the buyer to the assessed and obviously that

must be under an arrangement between the buyer and the assessed. It is not the physical capability of the packing to be returned which is the determining factor because in that event the word "by the buyer to the assessed" need not have found a place in Section 4. What is required for the purpose of attracting the applicability of the exclusion clause in Section 4(4)(d)(i) for returnable packing, is that the packing must be returnable by the buyer to the assessed. This decision in K Radha Krishaiah v. Inspector of Central Excise, Gooty & Ors. has been followed by the Supreme Court in Mahalakshmi Glass Works (P) Ltd. Vs. Collector of Central Excise, Bombay, and they have reiterated the interpretation of the word "returnable" that what Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944 excludes from computation is the cost of packing which is of a durable nature and is "returnable by the buyer to the assessed" The packing must be one which is returnable by the buyer to the assessed and obviously that must be under an arrangement between the buyer and the assessed. It is not the physical capability of the packing to be returned which is the determining factor because, in that event, the words "by the buyer to the assessed" need not have found a place in the Section; they would be superfluous. The actual return or extent of return has no relevance. What is necessary is that if the buyer chooses to return the packing, the seller should be obliged to accept and refund the stipulated amount.

(12) The relevant clause, i.e. clause (i) of Section 4(4)(d) of the Act has been the subject matter of interpretation exactly in similar cases and circumstances of packing of cement in gunny bags. In Birla Jute Manufacturing Company Limited v. Union of India and Others 1980 Elt 593, it has been held by the Division Bench of Madhya Pradesh High Court that in order to get the benefit of exception contained in Section 4(4)(d)(i), it is not necessary for the assessed to show that the packing material has been returned or the cost of packing has been refunded which is rather impossible to show at the stage of removal. All that is necessary, is to show that the packing is returnable by the buyer to the assessed under the terms of sale and the question of actual return is entirely irrelevant. The fact that it is not ascertainable at the time of assessment and clearance, whether the same material is returned or not is erroneous. Similarly, it would be wrong to deny the benefit of exception on the ground that it is the petitioner who collects the packing from open market through its authorised agent because the practice of the factories to appoint collection agents for collection of bags is only a convenient mode of giving effect to the term that packing is returnable which does not mean that that purchaser cannot otherwise return the packing, if he likes. The Division Bench of Karnataka High Court in Mysore Cements Ltd. Vs. Union of India, has relied upon the aforementioned judgment of Madhya Pradesh and has also expressed the same view : That is, that the arrangement should exist for returning of the bags, and the proof of actual return of such bags, is not required.

(13) It may be noticed in Century Cement Vs. Union of India (UOI) and Others, , it appears from paragraph 2 thereof that against the decision of Madhya Pradesh

High Court in Birla Jute manufacturing Co. Ltd. v. Union of India and Others (supra) a SLP was filed in the Supreme Court and the same was refused by the Supreme Court and thereby the decision of the Madhya Pradesh High Court was affirmed.

(14) From these judgments, it is clear that in order to invoke the provisions of Section 4(4)(d)(i) of the Act to determine whether the packing material of gunny bags are returnable the only condition which is required to be fufilled is an existence of an arrangement to return and not proof of actual return. In the present case, since the arrangement exists between the assessed and the buyer for the return of the gunny bags, by virtue of the orders of the controlling authorities, which are controlling sale and price of a controlled commodity, i.e cement powder packed in gunny bags, the gunny bags are durable and returnable and the provisions of Section 4(4)(d)(i) of the Act are fully complied with. with the result that the assessed is not liable to pay excise duty on the cost of gunny bag packing.

(15) In view of this, the assessed is entitled to refund of the amount paid by him. The demand for an amount of Rs. 5,23,204.25 (annexures H & J) are required to set aside and the amount already paid by the assessed under protest requires to be refunded. Although the assessed has stated that they have paid Rs 11,16,270.31 for the period 1.11.1975 to 8.1.1976 but there is no material to support his contention. Therefore, the assessed is entitled to refund of this amount subject to verification to be made by the department, of the excessive amount of excise duty paid by the assessed under protest.

(16) In view of the above discussion, the writ petition is allowed and we quash the demand notice of Rs. 5,23,204 25 and orders of the Assistant Collector and the Appellate Collector dated 14th August, 1976 and 4th July, 1977 (annexures H & J) respectively. We further issue a writ of mandamus directing the respondents to refund to the assessed the excise duty of Rs. 11,16.270.31 for the period 1.11.1975 to 8.1.1976 stated to have been paid by the assessed. The refund of this amount, however shall, be subject to verification by the department. In the circumstances, there will be no order as to costs. Petition allowed.

