(1990) 10 BOM CK 0032

In the Bombay High Court

Case No : Writ Petition No. 3019 of 1982

Kirloskar Cummins Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 01-10-1990

Acts Referred:

- Central Excise Rules, 1944 — Rule 11
- Central Excises and Salt Act, 1944 — Section 4, 4(1), 4(4)(c)
- Constitution of India, 1950 — Article 226

Citation : (1991) 33 ECR 344 : (1991) 51 ELT 325

Hon'ble Judges : M.L. Pendse, J;E.D.D. Da Silva, J

Bench : Division Bench

Advocate : Shri Atul Setalvad and Shri. F.H. Talyarkhan, instructed by M/s. Little and Co, for the Appellant; Shri R.V. Desai and Shri P.N. Menon, for the Respondent

Judgement

Pendse, J.—Petitioner No. 1 is a Company incorporated under the Companies Act, 1956 and in their factory at Pune Inter alia, manufacture high horse-power engines for use in heavy duty earth moving machinery. These diesel engines are tailor made to the specification of individual customers. Out of the manufacture of engines 90% are sold to the customers, while approximately 10% diesel engines are sold to a company M/s. Cummins Diesel Sales and Services (India) Limited, which is a wholly owned subsidiary company of Petitioner No. 1, and which acts as an authorised distributors of the products manufactured by petitioner No. 1. The price at which the diesel engines are sold, both to the direct customers and to the subsidiary company are commercial price consisting of manufacturing costs and manufacturing costs and manufacturing profits of petitioner No. 1 Company in respect of diesel engines. The petitioners claim that in no circumstances the price charged and recovered from the subsidiary company is concessional price and the sole consideration for the sale of engines to the subsidiary company is the price which is equal to that recovered from sale to individual buyers.

2. Amended Section 4 of the Central Excises and Salt Act, 1944 came into force with effect from Oct. 1, 1975. Prior to the amendment the Excise Authorities treated the wholesale case price charged by petitioner No. 1 Company to the direct customers as well as to the subsidiary as assessable value of the diesel engines. After Oct. 1, 1975 the Excuse Authorities treated the subsidiary company as ''related person'' under Sec. 4(4)(c) of the Act and declined to accept the price charged by petitioner No. 1 to the subsidiary company as the assessable value. The Excise Authorities determined the assessable value by reference to the price charged by the subsidiary company to their purchasers. The price charged by the subsidiary company to their purchasers are roughly 25% higher than the price charged by petitioner No. 1 company to the subsidiary company.

On December 15, 1975 the Division Bench of this Court delivered judgment in the case of Indian Tobacco Company Limited holding that Section 3(1) was the charging section under which excise duty was levied on the production and manufacture of goods and Section 4 prior to its amendment was only a machinery provision under which the quantum of the assessable value was to be determined and by which the scope of levy of excise duty could not be enlarged. The petitioners thereupon came to know for the first time that excess excise duty had been levied and collected for the period October 1, 1975 to September 30, 1976 by taking into consideration the price charged by subsidiary company to the purchasers as relevant for determination of the assessable value.

3. The petitioners filed refund application dated October 8, 1976 for refund of duty illegally recovered between the period October 1, 1975 to September 30, 1976 and the amount claimed was Rs. 6,81,079.36. The company also informed the assessing authorities that any future payment based on the second stage price would be made under protest. The excise authorities then informed the Company that the refund claim is receiving attention. Second refund application was filed by the Company on February 15, 1980 for the period from October 1, 1976 to September 30, 1979 and the amount claimed was Rs. 18,65,710.04. On August 18, 1980 the Assistant Collector of Central Excise, Pune gave personal hearing in respect of refund claim. The third application for refund was lodged by the Company on January 14, 1981 for the period commencing from October 1, 1979 to September 30, 1980 for the sum of Rs. 26,01,005.58. One more application was filed on April 2, 1982 for the period commencing from October 1, 1980 and ending with September 30, 1981 for the sum of Rs. 17,76,438.40. All these refund applications filed from the year 1976 onwards did not receive any consideration by the Assistant Collector and curiously on April 28, 1982 the Assistant Collector informed the Company that files are not received in his office. The total amount of the refund claim being Rs. 44,65,261.12 and releasing that the Assistant Collector was not giving any attention to these claims the Company filed present petition under Article 226 of the Constitution of India on September 30, 1982.

4. The petition was admitted on October 14, 1982 and direction was given to the Assistant Collector of Central Excise, Pune, to dispose of the refund claim within four weeks. The Assistant Collector sought extension of time and ultimately passed the impugned order dated February 16, 1983 refusing the claim for refund. The Assistant Collector came to the conclusion that the duty charged and recovered from the Company was correctly assessed and the Company had not paid any excess duty and therefore the question of refund does not arise. The petitioners thereafter amended the petition and challenged the order of the Assistant Collector passed on February 16, 1983 and now the question for determination is about correctness of that order.

Shri Setalvad learned counsel appearing on behalf of the Company, Submitted that the Assistant Collector was clearly in error in holding that the price charged by the subsidiary company to their purchasers should be taken not consideration for determination of assessable value of high horse-power diesel engines manufactured by the company. The learned counsel did not dispute that the subsidiary company of the assessee is a related person as contemplated by Section 4(1)(c) of the Act. The expression "related person" means a person who is so associated with the assessee that they have interest directly or indirectly in the business of each other and includes a subsidiary company. It is not in dispute that the subsidiary company is wholly owned by petitioner No. 1 Company and therefore Shri Setalwad very rightly did not dispute the finding of the Assistant Collector that the subsidiary company was a related person. The complaint of Shri Setalvad is that the Assistant Collector was in error in holding that the price charged by the subsidiary company to their purchasers should be taken into consideration for determination of assessable value of engines. The submission of the learned counsel is correct and deserves acceptance.

5. Section 4 of the Act, inter alia, prescribes that the duty of excise of excisable goods shall be determined with reference to value and such value shall be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade and where the buyer is not a related person. Proviso (i) to Sec. 4(1) sets out that where such goods are sold by the assessee at different prices to different classes of buyers, not being related persons, each such price shall be deemed to be the normal price of such goods in relation to each such class of buyers. The provisions of proviso (i) do not come into play in the facts of the present case as the engines were sold by the Company to individual buyers and to the subsidiary company which is undisputably a related person. The Assistant Collector relied upon provisions of Sec. 4 (1)(a)(iii) to hold that the price charged by the subsidiary company to their purchasers should be relevant for determining the assessable value. It is therefore necessary to set out proviso (iii) in its entirely.

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail.

Shri Setalvad complains, and in our judgment, with considerable merit that proviso (iii) is not attracted to the facts of the case because the engines are generally not sold by the assessee except to or through a related person. Shri Setalwad submits that out of the total production 90% are sold directly to wholesale dealers, while negligible quantity of engines i.e. 10% are sold through the subsidiary company. It is therefore obvious that proviso (iii) will not come into play because the engines are generally not sold by the assessee to or through a related person. Shri Desai, learned counsel appearing for the Revenue, made a brave attempt to urge that the 90% sale effected by the assessee is not a wholesale trade but the engines are sold on retail. We are unable to find any merit in the submission, because it is based on assumption and for which there is no foundation whatsoever. The expression "wholesale trade" has been defined u/s 4(4)(e) of the Act and means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail. The Assistant Collector in the impugned order has specifically observed that the Company sells their goods in wholesale trade through two channels, first directly to wholesale dealers and secondly through the subsidiary company. In face of this clear-cut finding recorded by the Assistant Collector, it is impossible to accede to the submission of Shri Desai that the sales of the Company is not wholesale trade as prescribed u/s 4(4)(e) of the Act. Shri Setalvad points out that most of the engines manufactured by the Company are sold to the industrial consumers and therefore the sales clearly fall within the expression "wholesale trade". In our judgment the Assistant Collector was clearly in error in holding that the price charged by the subsidiary company to their purchasers should be taken into consideration for determining the assessable value. The price at the second stage of sale is not relevant and such assessment is not permissible under any of the provisions of Sec. 4 of the Act. In our judgment, the Asstt. Collector was in error in refusing to grant the claim of refund made by the Company under various applications.

6. Shri Desai made a faint attempt to urge that the grant of refund would amount to unjust enrichment and in support of the submission made reference to the averment made in paragraph 24 of the return dated July 18, 1985 sworn by Shreeram Shankar Risbood, Assistant Collector of Central Excise. The only claim made in the return is that the claim for refund is barred by principles of unjust enrichment. We are unable to find any merit in this submission. The requirements for examination of defence of unjust enrichment are well set out in the decision of the Full Bench of this Court reported in 1990 (46) E.L.T. 23 New India Industries Ltd. v. Union of India. Shri Desai very frankly and very rightly stated that the affidavit filed by the Department does not satisfy the requirements set out by the decision. It is therefore not possible to refuse the

claim of the petitioners on the ground of unjust enrichment. In our judgment, the petitioners are entitled to the relief sought.

7. Accordingly, rule is made absolute and the impugned order dated February 16, 1983 passed by the Assistant Collector of Central Excise, Pune IV Division, Pune is set aside and it is declared that the petitioner Company is entitled to the refund of the amount of Rs. 44,32,673.10, the details of which are set out in the order of the Assistant Collector.

Shri Setalvad submits that the Department should be directed to pay the amount of refund before a certain date and that too with interest. Shri Desai stated that the amount of refund would be paid on or before December 31, 1990. As regards interest Shri Desai submitted that no case has been made out for grant of interest. Shri Setalvad on the other hand points out that though the refund applications were filed from the year 1976 onwards and even personal hearing was given in August 1980, the Assistant Collector did not bother to pass any order till the present petition was filed and specific directions were issued to pass the order. It is obvious that the refund applications were kept pending without any reason whatsoever and therefore we are inclined to direct payment of interest at the rate of 9% per annum on the amount covered by the refund applications and which would be payable from the date of lodgment of each of the refund application till February 16, 1983, when the Assistant Collector passed the order. We are not inclined to grant interest beyond February 16, 1983 because the petition remained pending in this Court for no fault of the Department, but we would direct the Department to pay the amount of refund along with interest at the rate 15% of per annum in case the Department fails to refund the amount on or before December 31, 1990. The interest at the rate of 15% per annum would be payable from today till the date of refund, provided the amount is not refunded before December 31, 1990.

8. In the circumstances of the case, there will be no order as to costs.

