(1990) 09 BOM CK 0083

In the Bombay High Court

Case No : Writ Petition No. 1290 of 1982

Kirloskar Oil Engines Ltd. — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 14-09-1990

Acts Referred:
Central Excise Rules, 1944 — Rule 174

Citation : (1991) 51 ELT 278

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

Bench : Division Bench

Judgement

Pendse, J.—Petitioner No. 1 is an existing company within the meaning of Section 3 of the Companies Act, 1956 and are engaged in the manufacture of various types of bimetal bearings at their factory at Khadki. Pune District. The company holds L-4 licence issued by the Central Excise authorities under Rule 174 of the Central Excise Rules for the manufacture of bimetal bearings in the factory. The bearing are manufactured in a composite plant from the raw material stage upto the stage of final product. The process of manufacturing bimetal bearings is first to purchase aluminium ingots from canalising agencies. The aluminium foils are purchases from the open market. The alloy billets are then faces, rolled and annealed in the plant. During annealing, excess tin and other impurities appear on the surface of the rolled billet in the form of bubbles. The bubbles are removed by process known as tin bleeding. The alloy billets are then flattened and degreases and brushed. The aluminium foil is also brushed. The flattened alloy billets and the aluminium foil are thereafter bonded together by cold rolling to form aluminium alloy strip with the foil together. The aluminium alloy strips are then cut lengthwise and widthwise. The question involved in this petition is whether the manufacture of aluminium alloy strips are liable to payment of excise duty under Tariff Item 27(b) of the First Schedule to the Central Excises & Salt Act.

Aluminium alloy strips in the process of manufacture of bimetal bearings are degreased and brushed. Steel strips are then degreased and finished. Steel strips and aluminium alloy strips are then bonded together in a rolling mill to form a bimetal strip. The bimetal strip is tested by means of deburring and chiseling. The bimetal strip so prepared is thereafter machined for formation into a bearing, which are commonly known as bimetal bearings.

2. The Company in accordance with the directions of Central Excise authorities filed classification list under protest in respect of aluminium alloy strips on April 28, 1980. The classification list was approved by the Assistant Collector of Central Excises Poone on May 15, 1980. Tariff Item No. 27 of the First Schedule was amended on June 18, 1980 by addition of Explanation II. The Company thereafter filed revised classification list under protest on June 19, 1980 and that list was approved by the Assistant Collector on July 27, 1980. The Company was insisting before the Assistant Collector that manufacture of aluminium alloy strips is not liable to payment of excise duty. The order passed by the Assistant Collector approving the classification list was challenged by the Company by filing appeal before the Collector of Central Excise (Appeals), Poone and the appeal was dismissed on December 31, 1981. The Appellate Authority held that the product is liable to excise duty if (a) it is a result of manufacturing activity; (b) it is goods and (c) it is specified in the First Schedule to the Central Excise & Salt Act. The appellate authority held that aluminium alloy strips are goods as the same are movable, have exchange ability and economic value, and therefore the Company is liable to pay duty on manufacture of alloy strips under Tariff Item 27(b). The order of the Appellate Authority confirming the classification list, filed under protest, by the Assistant Collector is under challenge in this petition filed under Article 226 of the Constitution of India.

3. Shri Hidayatulla, learned Counsel appearing on behalf of the petitioners, submitted that though several questions are raised in the petition it is not necessary to deal with those questions as the principal question urged by the learned counsel goes to the root of the matter. The principal question urged is that the manufacture of aluminium alloy strips is not liable to payment of excise duty as these aluminium strips are not marketed and are not available in the market. The learned counsel urged that the aluminium strips manufactured by the petitioners are not available in the market and therefore even though the strips come into existence as a result of manufacturing activity and even though the strips are goods and are specified in the First Schedule to the Central Excise Act, are not liable to payment of excise duty. Tariff Item 27(b) gives the description as follows.

"Aluminium manufactures, the following, namely, plates, sheets, circles, strips, shapes and sections, in any form or size, not otherwise specified."

Shri Hidayatulla did not dispute that manufacture of aluminium alloy strip would attract Tariff Item 27(b) of the First Schedule to the Act, but urged that as the alloy strips are not marketed the liability to pay duty does not arise. The submission is correct and deserves acceptance. The Supreme Court has consistently held that simply because certain article falls within the schedule it would not be dutiable under the excise law if the said article is not goods known to the market. The Supreme Court held that the marketability is therefore an essential ingredient in order to be dutiable under the Schedule to the Central Excise Tariff Act. It is suffice if reference is made to the two decisions of the Supreme Court Union Carbide India Limited Vs. Union of India (UOI) and Others, , Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay, .

4. Shri Hidayatulla submitted that on the question as to whether aluminium alloy strips are marketable, the petitioners are consistently claiming right from the date of filing of classification list that the article is not marketable. The learned counsel urged that the Department did not produce any evidence to indicate that the article is marketable even though the burden is solely on the department to establish that fact. The learned counsel further submitted that the Collector of Central Excise (Appeals) in the impugned order observed that the mere fact that the aluminium alloy strips are not marketed is not enough to justify the claim of the petitioners that the same are not liable to payment of duty. Shri Hidayatulla is right in his submission that the Department has failed to establish that aluminium alloy strips are marketable but on the other hand the appellate authority has proceeded on the basis that even if the strips are not marketable that has no relevance for recovering excise duty. It is obvious that the order of the Appellate Authority suffers from serious infirmity as the conclusion is against the dictum laid down by the Supreme Court. In our judgment, the impugned order therefore cannot be sustained and it must be held that the manufacture of aluminium alloy strips are not liable to payment of duty under Tariff Item 27(b) of the First Schedule.

5. Shri Hidayatulla submitted that the classification list was filed by the Company under protest and duty was recovered by the excise authority on an erroneous assumption that the manufacture of alloy strips are liable to payment of excise duty. The learned counsel submitted that as the erroneous order passed by the Assistant Collector and the appellate authority are set aside, the Company is entitled to refund of duty erroneously recovered. The submission is correct and deserves acceptance. Shri Desai, learned counsel appearing on behalf of the Department, submitted that grant of refund would amount to unjust enrichment of the Company. The Full Bench of this Court in the judgment New India Industries Ltd. and another Vs. Union of India and another, held that the burden is upon the Department to state on affidavit as to how the doctrine of unjust enrichment would be attracted and the Department must establish that duty was passed off by the Company to the consumers. In the return filed on behalf of the Department, there is no whisper of such claim and therefore the contention of unjust enrichment cannot be entertained. Apart from this circumstance, when erroneous orders of the excise authorities are set aside then as consequence of the order the Company is entitled to get refund. In our judgment, the order of refund cannot be declined.

6. Accordingly, rule is made absolute in terms of prayer (h) (i) and (ii). The Assistant Collector of Central Excise Poona is directed to ascertain the amount of refund payable to the Company and pass appropriate order of refund and pay over the said amount to the Company on or before January 15, 1991. In case the amount is not paid before that date, then the Company would be entitled to get back the amount of refund along with interest at the rate of 15% per annum payable from today till the date of actual payment.

Bank guarantees furnished by the Company in accordance with the interim order passed by this Court to stand discharged.

7. There will be no order as to costs.

