

(2005) 03 GUJ CK 0088

In the Gujarat High Court

Case No : Special Civil Application No. 16067 of 2004

Milcent Appliances Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 18-03-2005

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2005) 188 ELT 475

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Kamal Trivedi and Tejas Barot, for Trivedi and Gupta for Petitioner Nos. 1-2, for the Appellant; Jitendra Malkan, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—This is a petition under Article 226 of the Constitution of India challenging the order in appeal passed by respondent No. 2 on 25th August, 2004 (Annexure-F). The petitioner, a Private Limited Company is engaged in the business of manufacture of domestic flour mills, popularly known as "Gharghanti". The case of the petitioner is that the flour mill manufactured by the petitioner does not contain any inbuilt electrical mechanism. Two abrasive stones are connected with a shaft passing through both and such a shaft is connected to an electrical motor through V belt and pulley mechanism. Thus according to the petitioner it is not an electric appliance as understood in common parlance as well as in technical sense understood in engineering circles.

2. On 28th February 1986 when the Central Excise Tariff Act, 1985 (Tariff Act) came into operation the machines, like one manufactured by the petitioner, were covered under Heading No. 84.37 which reads as under :

"84.37 Machines for cleaning, sorting or grading seed, grain or dried leguminous vegetable" machines used in milling industry or for the working of cereals or dried leguminous vegetables, other than farm type machinery".

The petitioner has been classifying domestic flour mill under the said Heading of Tariff Act. However, on 31st May, 1990 the Central Board of Excise and Customs (CBEC) issued Circular bearing No. 11/90-CX.4 whereby it was declared that flour mills, with or without electric motors were properly classifiable under Heading No. 85.09 of the Tariff Act.

3. The circular came to be challenged before this Court by way of Writ Petition bearing Special Civil Application Nos. 10542 of 1994 and 10544 of 1994. After hearing the parties the Court directed the petitioners therein, including the present petitioners, to approach the Appellate Tribunal with a direction to the revenue not to effect any recovery of duty for past dues accrued upto 15th September, 1994 till the appeals were decided by the Tribunal.

4. Before the appeals were taken up for hearing by the Tribunal the CBEC issued one more Circular dated 5th December, 1994 bearing No. 82/82/94-CX classifying domestic flour mills, with or without electric motor, as being covered by heading No. 84.37 of the Tariff Act. The Tribunal heard the appeals of the petitioner along with appeals of other similarly situated assesseees and passed a final order on 26th July, 2000. The operative portion of the Tribunal's order reads as under :

"4 We have carefully considered the matter, we find that the Board's Circular No. 82/82/94-CX dated 5.12.94 was not before the Tribunal when the orders in the above cases were passed by the Tribunal. We also find that the exact mechanism of the goods has to be gone into with reference to para 9 of the Tribunal's decision in the case of Gurukrupa Trading Co. Ltd., supra. The learned advocate also submits that the Board's Circular is still in force and had not been modified/rescinded. This aspect has also to be gone into.

5. As the Board's circular has to be looked into with reference to the exact nature of the goods in dispute, we consider that on this factual aspect the matter needs to be remanded to the jurisdictional Commissioner of Central Excise (Appeals) for fresh decision after affording opportunity to the appellants to present their case and then pass a speaking appealable order as per law. The appellant's claim for the benefit of notification may also be gone into for determining the duty against them. With these observations all these three appeals are allowed by way of remand".

5. In consequence of the aforesaid direction made by the Tribunal respondent No. 2 heard the petitioner and after recording facts observed as under :

"I have also gone through the exact nature of the goods i.e. cabinet for Domestic Electric Flour Mill, in dispute. I find as under :

"The flour mill has two emery stones, the lower emery stone remain static, while the upper one rotates so as to crush and grind cereals and grains. A shaft passes through the hole of the stone that rotates i.e. the upper emery stone. Below the lower stone, a big mechanical pulley is fitted. The big pulley is also fitted at the lower end with the shaft. There is an arrangement to connect the big pulley by V-

Belt to the pulley fitted on the electric motor. However, the electric motor is not fitted with the whole appliance, but may be attached by the customers or at the request of the customers, by the dealers. The electric motor is the prime mover, which gives power to the Domestic Electric Flour Mill. The weight normally ranges between 40 Kgs. to 70 Kgs. per Flour Mill.

From the above, it is seen that there is no specific mechanism by which the above disputed equipment could be operated by hand manually, without electric power. This disputed item under consideration cannot be operated without power. Further, there is nothing on record to show that the "gharghanti" supplied/cleared without motors and those fitted with electric motors were two different classes of goods. From the above it is seen that the mechanism of the disputed goods is similar to the mechanism of the goods described in para-9 of Tribunal's decision in case of Gurukrupa Trading Co. as well as described in the Board's Circular dated 05.12.94".

Thereafter respondent No. 2 referred to the earlier circular dated 31st May, 1990 and concluded that "till the issue of the Circular dated 05.12.94, the product namely Domestic Electric Flour Mill both with or without electric motors by virtue of Circular dated 31.05.90 have to be classified under Chapter Heading 8509 of Central Excise Tariff Act, 1985". Respondent No. 2 has further observed in his order that the department had raised demand of duty for the period covering calendar years 1990 to 1992 and therefore, the period prior to issue of Circular dated 5th December, 1994 was covered by the earlier Circular and the show cause notice for demand issued prior to the said Circular on 5th December, 1994 were correct in law and there was no infirmity in the impugned order passed by the lower authority. He therefore dismissed the appeals of the petitioner and other assesseees. It is this order which is under challenge.

6. Mr. K.B. Trivedi, learned Senior Advocate appearing for M/s. Trivedi and Gupta, learned Advocates for the petitioner submitted that firstly, respondent No. 2 had committed an error in holding that the earlier Circular dated 31st May, 1990 was available to be pressed into service despite the subsequent Circular having categorically stated that "earlier instructions issued on the subject stand superseded"; secondly, it was submitted that the Tribunal having given specific direction to respondent No. 2 in its order of 26th July, 2000 the only inquiry that respondent No. 2 was required to undertake was to find out the mechanism of the goods with reference to paragraph 9 of the Tribunal's earlier decision in case of 1997 (91) ELT 463 thirdly, the order of the Tribunal was clear and appeals were allowed by way of remand with a direction to look into the Board's Circular dated 5th December, 1994 with reference to the factual aspect regarding exact nature of the goods in dispute. He therefore, submitted that the appellate authority viz. respondent No. 2 could not have relied upon the earlier Circular of 31st May, 1990 and had exceeded the direction issued by the Tribunal in its order of remand. That even otherwise, respondent No. 2 having accepted, on merits, that the product manufactured by the petitioner was falling within the description/

classification of goods specified in the later Circular dated 5th December,1994, respondent No. 2 thereafter could not have proceeded to apply the earlier Circular of 31st May,1990. In this connection, reliance has been placed on decision of the Apex Court in case of M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, to contend that in almost identical fact situation the Apex Court has in no uncertain terms stated that :

"15. The argument that the later circular has only prospective operation and that it cannot apply to these appeals because the Tribunal had already decided them must also be rejected. It is not open to the Revenue to raise a contention that is contrary to a binding circular issued by the Board. It cannot but urge the point of view made binding by the later circular".

6.1. That in the aforesaid case of Ranadey Micronutrients, before the Apex Court, the language used by the later circular stated that "Board's earlier Circular No. 26/90-CX.3 dated 26.6.1990 accordingly stands withdrawn", while in the present case later Circular states that earlier direction stands superseded. That there was no difference, and even if there was any difference the language employed in the Circular of 5th December,1994 was more emphatic in content than the Circular which was under consideration before the Apex Court.

6.2. A further submission connected with the same aspect of the controversy was that in case where a circular has to be applied only prospectively, the circular itself makes the same abundantly clear and for this purpose attention was invited to the decision in case of The Paper Products Ltd. Vs. Commissioner of Central Excise,

6.3. Lastly it was submitted that Constitutional Bench of the Supreme Court in case of Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, has categorically stated that regardless of the interpretation that may be placed on a particular provision by the courts, including the Supreme Court, if a circular issued by the Central Board of Excise and Customs places a different or a contrary interpretation upon the said provision, that interpretation will be binding upon the revenue. He therefore urged that the impugned order made by respondent No. 2 to the extent it holds against the petitioner by relying upon Circular dated 31st May,1990 is required to be quashed and set aside and the portion upholding the applicability of Circular dated 5th December,1994 on facts of the case requires to be confirmed.

7. Mr. Jitendra Malkan appearing on behalf of the respondents submitted firstly, that the Tribunal had rendered a decision in case of 1994 (53) ECR 585 on 15th April,1994, the Board had issued Circular on 5th December,1994 and the Supreme Court had rejected the appeal filed against order of Tribunal by M/s. Workwell Engineering Company on 6th March,1995, therefore, according to him a presumption be raised that the Apex Court had held that Circular of 5th December,1994 had no application in case of assessee's manufacturing domestic flour mills. Secondly, it was submitted that the Circular in question dated 5th

December, 1994 was not retrospective in operation and in absence of any indication to that effect should not be applied retrospectively. Thirdly, it was submitted that the law as on the date when the goods were manufactured would be applicable i.e. on the day when the charge under provision of the Act was fastened when the goods were manufactured. Lastly, it was submitted that as could be seen from earlier round of proceedings before this Court, a challenge in similar set of circumstances was not entertained by the Court and the petitioners were relegated to the Tribunal in light of availability of alternative remedy by way of a statutory appeal. He therefore urged that the impugned order was not required to be interfered with in any manner and it would be open to the petitioner to challenge the same by way of appeal before the Tribunal.

8. The question is not as to whether a particular circular is or is not applicable to the facts of the case : that is incidental. In a case where a superior forum had issued direction, can it be said that it is open to the inferior Tribunal to disregard the same in any manner whatsoever. The controversy is no longer *res integra*. In the case of *The Bhopal Sugar Industries Ltd. Vs. The Income Tax Officer, Bhopal*, the Supreme Court was called upon to decide this point. In the case before the Apex Court the assessee company which manufactured and sold sugar used sugarcane purchased from other cultivators as well as grown in its own farms. It claimed deduction of agricultural income from its total income by valuing the sugarcane grown in its own farms at market value and deducting therefrom the agricultural expenses. In appeal the Tribunal directed the Income Tax Officer to ascertain the average transport charges from the purchasing centres to the assessee's factory and after adding to it the rate of purchase in order to ascertain the market value give any relief that may be due to the assessee. The said order was challenged by way of Reference Application by Revenue but the Reference was withdrawn and the order of the Tribunal became final. On the assessee applying to the Income Tax Officer to give effect to the directions of the Tribunal, the officer wrote to the assessee that no relief could be given to it. The assessee challenged the same in appeal and it was held by the Appellate Authority that the officer had acted arbitrarily and in clear violation of the directions given by the Tribunal, but proceeded to consider the correctness of the Tribunal's order and held that there was no manifest injustice done to the assessee. On appeal to the Supreme Court, the Constitutional Bench held : "We think that the learned Judicial Commissioner was clearly in error in holding that no manifest injustice resulted from the order of the respondent conveyed in his letter dated March 24, 1955. By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is further more destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts. If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have indeed found it

very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior tribunal, yet held that no manifest injustice resulted from such refusal.

It must be remembered that the order of the Tribunal dated April 22, 1954, was not under challenge before the Judicial Commissioner. That order had become final and binding on the parties, and the respondent could not question it in any way. As a matter of fact the Commissioner of Income Tax had made an application for a reference, which application was subsequently withdrawn. The Judicial Commissioner was not sitting in appeal over the Tribunal and we do not think that, in the circumstances of this case, it was open to him to say that the order of the Tribunal was wrong and, therefore, there was no injustice in disregarding that order. As we have said earlier, such a view is destructive of one of the basic principles of the administration of justice".

8.1. The aforesaid decision was rendered in 1960. Three decades down the line the Apex Court has reiterated the principle in the case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd., in the following terms :

"It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws".

8.2. On application of this settled legal position it is not possible to accept the contention of the revenue that the petitioner must be relegated to avail of statutory right of appeal as an alternative remedy.

9. Once respondent No. 2 had found on facts that the case of the petitioner was governed by Circular dated 5th December, 1994 there was no occasion for him to go beyond the said point. The order of the Tribunal is categorical in terms and the remand was for a limited purpose. Respondent No. 2 could not have thereafter chosen to expand the scope of the proceedings by referring to the earlier Circular of 31st May, 1990 and deny the relief which the petitioner was otherwise entitled to by virtue of Circular dated 5th December, 1994. The impugned order of respondent No. 2 is therefore bad in law to the aforesaid extent.

10. The contention on behalf of the respondents that earlier order of Tribunal in case of M/s. Workwell Eng. Co. (supra) had been confirmed by the Apex Court after the date of the later Circular i.e. 5th December,1994 is besides the point and incorrect. It has not been shown that the Apex Court was called upon to adjudicate, applicability or otherwise of Circular dated 5th December,1994. The Tribunal had decided the case of M/s. Workwell Eng. Co. (supra) on 15th April,1994 when the Circular dated 5th December,1994 was not in existence and hence, in normal course of events any confirmation of the said order would be dehors the applicability or otherwise of the said Circular dated 5th December,1994.

11. In the present case the Tribunal had remanded the matter to respondent No. 2 on 26th July,2000 by making specific reference to the later Circular of 5th December,1994 and decide the factual position qua the said Circular. In other words, applicability of Circular was not to be decided by respondent No. 2, but he was directed to ascertain the fact as to whether the product referred to, and considering the entry mentioned in the said Circular the product manufactured by the petitioner would fall within the said entry. In these circumstances also there was no occasion for the respondent No. 2 authority to disregard the said Circular after holding that the same was applicable in the facts of the case considering the product manufactured by the petitioner.

12. The contention relating to Circular not being retrospective in operation and the law being applicable as on the date of manufacture of the product cannot be accepted for the simple reason that the same was not an issue and once the proceedings were pending, and the Circular of 5th December,1994 had superseded all earlier directions, on the date when the adjudication was to take place, it had to take place in light of the Circular in existence viz. Circular dated 5th December,1994 as that was the only Circular effective on the date when respondent No. 2 decided the issue. The aforesaid decision in case of Paper Products Ltd.(supra) on which reliance has been placed by respondent No. 2 as well as in affidavit-in-reply instead of assisting the revenue supports the case of the petitioner. The Apex Court has taken cognizance of the fact that as per the language employed by the Circular, on the basis of which the Apex Court was called upon to resolve the controversy, specifically made it clear that the change would be prospective from the date of issuance and hence to read the decision as being applicable in all situations is not the correct reading of the decision. Needless to state that, Apex Court has time and again reiterated that its judgments should not be read as Euclid's Theorem but have to be appreciated and applied in context of the facts and circumstances and the controversy which was before the Court when the judgment was rendered.

13. Reference to the decision in case of M/s. Workwell Eng. Co. (supra) and the order of Supreme Court rejecting the appeal against Tribunal's decision in the affidavit-in-reply for the purpose of contending that the revenue can take a stand contrary to Circular dated 5th December,1994 is unwarranted. As held by the

Constitutional Bench of the Apex Court in case of Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, even in a case where a provision or an entry might have been interpreted by the Apex Court in particular manner, it is always open to CBEC to place a different/contrary interpretation, and if such an interpretation is placed by way of circular that interpretation will be binding upon the revenue and the revenue cannot take recourse to the decision of the Court for the purpose of ignoring /disregarding the circular issued by CBEC.

14. In the result, the impugned order in appeal bearing No. (A)/272 to 274/VDR-I/2004 dated 25th August,2004 (Annexure-F) made by respondent No. 2 is quashed and set aside to the extent it goes beyond the order of remand and decides that the Circular dated 31st May,1990 is applicable and confirms the order-in-original to the said extent.

15. The petition is allowed accordingly. Rule made absolute to the aforesaid extent. There shall be no order as to costs.