

(1978) 02 DEL CK 0007

In the Delhi High Court

Case No : Civil Writ Appeal No. 411 of 1977

Modi Rubber Ltd.

APPELLANT

Vs

The Board of Central Excercise and Customs

RESPONDENT

Date of Decision : 08-02-1978

Acts Referred:

Citation : (1978) 2 ELT 127 : (1978) ILR Delhi 352

Hon'ble Judges : V.S. Deshpande, J;H.L. Anand, J

Bench : Division Bench

Advocate : F.S. Nariman, A.B. Divan, Ravnder Narain, Arjun Anand, Talat Ansari, B.N. Lokur, Charanjit Talwar and Avinash Mahajan, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) It is the nature of excise duty and its incidence, direct as well as indirect, which is the subject matter of this writ petition.

(2) The petitioner manufactures tyres and tubes, which are excisable articles under item 16 of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"). The excise duty is leviable on the process of manufacture u/s 3 of the Act. Where the duty is chargeable on excisable goods with reference to value, such value is calculated as the normal price in wholesale trade in accordance with section 4. Under Rule 8(1) of the Central Excise Rules, 1944, the Central Government may exempt (subject to such conditions as may be specified in the notification) any excisable goods from the whole or any part of the duty leviable on them. Notification No. G.S.R. 409(E), dated 16th June, 1976, was issued under Rule 8(1) to give 25 per cent exemption from payment of excise duty on the articles listed in the table at the end of the said notification. Tyres and tubes are items 18 and 19 in the said schedule. Exemption is in the following terms:

(3) The Government exempts the goods listed in the table and cleared from one or more factories in excess of the basic clearances by or on behalf of a

manufacturer from so much of the duty of excise livable thereon as is in excess of 75 per cent of such duty. The base clearance is the clearance of excisable goods, which is liable to payment of full excise duty. The exemption of 25 per cent is available only on that clearance which is in excess of the base clearance. The period during which the base clearance is liable to the payment of full excise duty and in which the excess of the clearance over the base clearance is entitled to the benefit of the 25 per cent exemption of excise duty is called the base period. Where the clearance of goods is calculated in terms of weight, number or volume of the goods, then the excess over the base clearance is found out merely by comparing the actual clearance of the goods with its base clearance in terms of weight, number or volume as specified in column (4) of the table to the notification against the Serial number specified in corresponding entry in column No. 1 thereof which is the Serial number of the item in the First Schedule of the Act under which it is dutiable. Where, however, the base clearance is to be found out with reference to the value of the goods as is to be done in respect of tyres and tubes manufactured by the petitioner, then the following method set out in paragraph 2(l)(b) of the notification is to be followed. Since the decision of the case turns on the construction of this part of the notification, it is reproduced below:

"For the purpose of determining the base period, where the clearances of all specified goods are compared in terms of value as specified in column (4) of the said table, such value shall be the value as determined u/s 4 of the Central Excises and Salt Act, 1944..... as adjusted with reference to the average index number of wholesale prices in India for manufactures".

Briefly, while section 4 takes into account the actual wholesale price of the goods to calculate their value for the purpose of levying excise duty, paragraph 2(l)(b) of the notification requires the value of the goods to be adjusted with reference to the average index number of wholesale prices in India for manufactures. The object is to arrive at the real value of the goods after eliminating such rise or fall in money value of the goods, as may be due to inflation or deflation. So much for the determination of the adjusted value of the goods cleared forming the base clearance. But the base clearance itself has to be found out only for a particular period which is called the base period. While paragraph 2(1)(b) opens with the words "for the purpose of determining the base period", its substance is really concerned with the method of determining the base clearance of goods in terms of its value u/s 4 of the Act modified by adjustment with the index number of wholesale prices of manufactures. But, this has to be for a particular period and this period, namely, the base period, is to be actually found out in paragraph 2(2), which is as follows :-

"After comparing the clearances of specified goods under subparagraph (1) the base period and base clearances, in relation to a factory, shall be determined as under:- (a) where the specified goods were or are cleared from a factory for the first time on or after the 1st day of April, 1976, the base period shall be the year

1975-76, and the base clearances shall be nil ; (b) where the specified goods were cleared from a factory for the first time on or after the 1st day of April, 1973, but not later than the 31st day of March, 1976, the base period shall be the three financial years, namely, 1973-74, 1974-75 and 1975-76 and the base clearances shall be one-third of the aggregate of the clearances of such base period; (c) where the specified goods were cleared from the factory for the first time earlier than the 1st day of April, 1973, the base period shall be the year in which the aggregate of the clearances of such goods during any of the financial years 1973-74, 1974-75 and 1975-76 was the highest and the clearances during such base period shall be the base clearances."

(4) Paragraph 5 of the notification states that "base period" and "base clearances" mean the base period and the base clearances as determined in the manner specified in paragraph 2.

(5) The petitioner started manufacturing tyres and tubes after the 1st day of April, 1973 and, Therefore, falls in category (b) of sub-paragraph (2) of paragraph 2. It submitted declarations and clearances of goods made during three years 1973-74, 1974-75 and 1975-76, so that the one-third of the aggregate of the clearances of these three years, i.e. the base period, shall constitute the base clearance of these goods. The petitioner did so according to the method prescribed in paragraph 2(1) (b) read with paragraph 2(2) of the notification by adjusting the normal wholesale price of the goods, which is the value u/s 4 of the Act with the wholesale price index number for manufactures for these three years. The declarations of these clearances based on the adjusted value of the excisable goods were at first accepted provisionally and then finally by the Excise Department. Apparently, the department was then of the view that the method of working out the base clearances during the base period as prescribed by paragraph 2(2) (b) was applicable to the goods of the petitioner covered by paragraph 2(2)(i)(b) of the notification-

(6) Subsequently, the department seems to have reconsidered the matter and took the view that the base period clearances ought to have been calculated by the petitioner after taking into account the unadjusted value for the base period years, i.e. according to this new stand of the department expressed in the notice to show cause, dated 20/23rd April, 1977 issued to the petitioner, the petitioner was not entitled to the benefit of adjusting the actual money value of the goods in terms of the normal wholesale price with the index number for wholesale price for manufactures current for the relevant years in India. On this view, ..the petitioner was asked to show cause why deficiency in duty should not be recovered from it under Rule 10-A of the Central Excise Rules, 1944 to the extent of Rs. 64,652 on the tubes cleared from the factory from 2nd July, 1976 to 5th July, 1976. This was followed by another show cause notice, dated 2nd May, 1977 in respect of goods cleared during the period July, 1976 to March, 1977. The amount of short duty was worked out at Rs. 1,21,48,026.44. No reason is given in this show cause notice as to why the petitioner was not entitled to the

benefit of calculating the base clearances of the tyres and tubes according to their adjusted value under the notification as distinguished from. the unadjusted value u/s 4 of the Act. The Trade notice No. 41/76. dated 25th June, 1976, at annexure K of the writ petition, does not single out those factories which fall under category (b) of sub-paragraph (2) of paragraph 2 for denial of adjustment of value under paragraph 2(1) (b). On the contrary, it does not make any distinction between categories (b) and (c) of sub-paragraph (2) (i) for the purpose of application of the method of value adjustment in finding out the base clearances during the base period.

(7) When, Therefore, the writ petition challenged the show cause notices issued to the petitioner on the ground that they are contrary to the fundamental provisions of the notification, the question considered at the time of the admission of the petition was whether the petitioner should not be asked first to avail itself of the remedy of appeal u/s 35 of the Act before the writ petition could be entertained in view of clause (3) of the amended Article 226 of the Constitution. In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, , the Supreme Court held that administrative action which is contrary to the fundamental provision of a statute would be without jurisdiction and a suit to invalidate such administrative action would not be barred by the statute because such action would not be under the statute, but outside it. The bar to a suit contained in the statute would not, Therefore, apply.

(8) Since we could not find anything in the notification or any reason in the show cause notices for denying the petitioner the benefit of paragraph. 2 (1) (b) of the notification requiring the actual value of the goods manufactured by the petitioner u/s 4 to be modified by its adjustment with the whole-sale prices index number for manufactures for the relevant years under paragraph 2(2) (b) of the notification, a prima fade case was made out that the show cause notices were without jurisdiction and, Therefore, the fundamental right of the petitioner to property was threatened by the demand for recovery of huge amounts of supposedly deficit excise duty. The claim made by the writ petitioner came under sub-clause (a) of Article 226(1) of the Constitution. Clause (3) did not bar a writ petition complaining of a threat to its fundamental right under sub-clause (a) of Article 226(1).

(9) The dividing line is between an error within jurisdiction and an error without jurisdiction. If, for instance, a sales-tax authority misconstrued the statute or a notification under it, the error was committed within jurisdiction and the only remedy against it was the one provided by the statute itself, such as an appeal or a revision. On the contrary, if the sales-tax authority wanted to impose the tax on an export sale on which it could not be imposed in view of Article 286(1)(b) of the Constitution and the relevant sales-tax statute, then the error consisted in an administrative action which was opposed to a fundamental provision of the Constitution or a law and this made the action totally without jurisdiction. A challenge to an error committed within jurisdiction may be made by way of a writ

petition under subclauses (b) & (c) of Article 226(1) and this is why such a challenge cannot be made without the petitioner first resorting to the alternative remedy provided by the statute, action under which is under challenge (see *Shri R. K. Gupta v. Delhi Administration*, etc. Cw 259 of 1977, decided on 20th January, 1978(2), and an article on "Judicial Review-Expansion and Self-restraint", 1973-15, *Journal of Indian Law Institute* 531). The error within jurisdiction is incapable of a collateral attack by a writ petition alleging infringement of a fundamental right in view of the seven Judges Bench decision in *Ujjam Bai v. State of Madhya Pradesh & another* Air 1962 S.C. 1621 . On the contrary, administrative action which is without jurisdiction, though purported to be in accordance with the Constitution and a sales-tax statute, can be challenged as an infringement of a fundamental right without having recourse to the alternative statutory remedy as was held in *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, , where *Ujjam Bai*'s case was considered at pages 875-876-

(10) The present writ petition was admitted and is being decided on merits because demands for excise duty from the petitioner without giving it the benefit of the exemption under notification, dated 16th June. 1976, was opposed to the fundamental provisions of the said notification, which is "law". The action being totally without jurisdiction was a nullity. It can, Therefore, be redressed by relief granted to the writ petitioner under sub-clause (a) of Article 226(1) of the Constitution.

(11) For the first time the reason why the Excise Authorities took the view that the petitioner was not entitled to the benefit of the partial tax exemption was given in the counter-affidavit filed by the Government on 11th July, 1977. It is as follows :

"Under section 4 of the Central Excises and Salt Act, 1944 the specific method of determination of the assessable value for the purpose of payment of Central Excise Duty provides that the assessable value has to be so assessed that the benefit of the relief has to be passed on to the consumers. In the instant case admittedly the petitioner has not passed on such relief either in part or in whole to the consumer."

The contention of the respondents, Therefore, is that the petitioner would be entitled to the benefit of the duty rebate only if it reduces the price proportionately to the reduction in duty so as to pass on the benefit of the reduction of the duty to the purchasers of the tyres and tubes.

(12) Mr. B. N. Lokur for the respondent supported this contention on the ground that the incidence of the excise duty is ultimately on the consumer. It was not the intention of the Government to enrich the producer of the goods without any benefit to the consumers. This argument is developed in paragraph 3 of the counter-affidavit of the Government as follows :-

"Though the goods become liable to the duty at the time of manufacture but the

effective rate of duty is chargeable at the time of their clearance from the factory; and the notification in question comes into effect on the clearance made on the basis of the base period clearance. Section 4 of the Act refers to the value of goods at the time of clearance and not at the time of production and it further clarifies that normal price of the goods will be taken into account for Central Excise purpose at which such goods are ordinarily sold-

(13) It is well settled that the duty of excise is levied on the process of manufacture. This law is expressed in section 3(1) of the Act as follows : "There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods..... which are produced or manufactured in India..... and at the rates set forth in the First Schedule." When we turn to the First Schedule Column 3, we find that the duty is imposed either ad valorem or according to the weight or measurement. It could also be according to the number or volume of the goods. Reading the Act with the Schedule, it would appear that while the duty is imposed by the statutes on the goods as they are produced, the assessment of the quantum of the duty is made in the Schedule. The value of the goods is not the only criterion for such assessment. Even the value may be either the normal wholesale price or a fixed tariff value and different tariff value may be fixed for different articles as is made clear by section 3 itself. Section 3 itself does not refer to the clearance of the goods from the factory. The time and the manner of payment of duty is stated by Rule 9 and it is there that it is stated that no excisable goods shall be removed from a factory or godown of a factory until excise duty thereon has been paid in such a manner as is prescribed in the Rules. The contention of the respondents that the effective rate of duty is chargeable only on the value of the goods at the time of the clearance of the goods from the factory does not, Therefore, fix the point of the incidence of the duty. It only fixes the point of the assessment of the duty. It is true that section 4 of the Act refers to the value of the goods which is the normal selling price of the goods and ordinarily the producer of the goods Would add the excise duty livable on the goods to his cost of production and the margin of profit before fixing the wholesale price of the goods. But, section 4 is not the charging section. That is section 3. Section 4 is the manner of the levy of duty according to selling price. It is true that in assessing the duty the Government would take into consideration either the selling price or the weight or the volume or the number or the tariff value of the goods. Nevertheless, this does not mean that the excise duty is imposed on the selling price of the goods. This is demonstrated by the fact that it may be imposed only on the weight or volume or number irrespective of either the selling price or the tariff value.

(14) Further, it is quite open to the Government to grant an exemption subject to conditions. If the object of the Government in granting an exemption is to benefit the consumer by the reduction of the selling price of the goods, then the Government notification granting the exemption should itself say so. For instance, notification, Gsr 1089, dated 29th April, 1969 expressly stated that the benefit of the exemption was to be available only to those manufacturers who

produce proof to the satisfaction of the Collector that such benefit has been passed on by them to whom they have sold the goods. Such a condition has to be a part of the exemption notification. For, the notification is "law". But, after enacting the law, such a condition cannot be imposed by administrative directions, guidelines or press note. These administrative acts cannot go contrary to the statutory notification.

(15) The question then arises whether in construing the notification effect can be given to the alleged intention of the Government that the benefit of the rebate in excise duty was to be passed on to the consumers. While the object of law must be borne in mind in construing it, the words to be construed must be capable of such a construction as would result in achieving the laudable object which the Government wishes to achieve. There is a limit beyond which the courts cannot bend the meaning of words to achieve the supposed object of the notification. This was plainly stated by the Constitution Bench of the Supreme Court in *Hansraj Gordhandas Vs. H.H. Dave, Assistant Collector of Central Excise and Customs, Surat and Others, , and Union of India (UOI) and Others Vs. Tata Iron and Steel Co. Ltd., Jamshedpur, .*

(16) It was argued by Mr. Lokur for the respondents that paragraph 2(1) (b) was concerned with the determination of the base period and not of the base clearances. It "is true that para 2(1) starts with the words "for the purpose of determining the base period". But base period itself is determined only by the fixation of the base clearances. In fact, base period has no meaning except in relation to base clearances. The base is of clearance and not of any period. The base period simply means the period for which the clearance is to be taken as the base clearances. It is because this is taken as the base clearances the time to which the base clearance extends is simply called the base period. Once this is realised, the meaning of paragraph 2(1) (b) becomes clear. It is wholly devoted to the modification of the value of the goods found u/s 4 of the Act by adjustment of the said value with the wholesale price index number. It is because such adjustment is not contemplated in section 4 that paragraph 2(1) (b) of the notification was enacted. The exemption of duty is, Therefore, to be given not on the value found u/s 4, but after adjustment of that value made under paragraph 2(1) (b). The making of such adjustment is necessary only for the purpose of finding out the clearance of the goods. When such a clearance is found for a particular period, it becomes the base clearance for that base period.

(17) Paragraph 2(2) is too clear to require any detailed argument or exposition. It divides the manufacturers of the goods entitled to partial exemption of duty into three classes according to point of time the manufacturer started manufacturing the goods. No distinction is made between the categories (a), (b) and (c) as to the method of calculating the base clearances. Categories (a), (b) and (c) only lay down the base periods, namely, the periods, clearances during which have to be taken into account in fixing the base clearances. It is true that in category (a) the whole of the production is entitled to the benefit of the rebate

in duty and, Therefore, the base clearances is nil. This does not mean that the words "base clearances" have any different meaning in category (a) as distinct from categories (b) and (c). The meaning does not change because it is impossible to find any base clearances in category (a) for the simple reason that it applies only to a factory from which goods are cleared for the first time on or after 1st April, 1976. These are new manufacturers who deserved the greatest help and, Therefore, the whole of their production is given the benefit of the 25 per cent exemption from the duty. On the other hand, base clearances are bound to be determined by categories (b) and (c) which relate to older manufacturers.

(18) It was argued by Mr. Lokur that the benefit of rebate from duty is to be given only in category (c) because the base period in it has to be found out by first finding out the year in which the aggregate of the clearances of such goods during any of the financial years was the highest. He argued that in category (b) it was not necessary to find out the base period because it was already stated to be the three financial years 1973-74, 1974-75 and 1975-76. We do not think that this difference between category (b) and (c) has any bearing on the determination of the base clearances. It is only the base period which is fixed in category (b), but which is to be found out in category (c). But fixation of base period in category (b) does not dispense with the necessity of determining the base clearances. For, the base period has no meaning, unless the base clearance is known. The base clearances is to be one-third of the aggregate of the clearances of the goods during the three years which constitute the base period. The base clearances are not mere volume of production. They are to be determined in terms of value. The value u/s 4 has to be adjusted under paragraph 2(l)(b) of the notification. Howsoever the notification be read, it can not be made to mean that the adjustment required by paragraph 2(l)(b) is to be applied only to category (c) of paragraph 2(2), but not to category (b).

(19) In fact, the contention of the Government that the benefit of the duty rebate would be available to a manufacturer who passes on the benefit to the consumer is contrary to the argument that the adjustment of duty under paragraph 2(l)(b) is not to be made in respect of assessment of duty on goods cleared from the factories covered by category (b) of para 2(2). The pleadings and the clarification issued by the Government is that it is for the individual manufacturer to decide whether he would pass on the benefit of the duty rebate to the consumer. The manufacturer who chooses to do so would get the benefit of the duty rebate, but one who does not do so would not get it. We cannot reconcile the argument contained in the pleadings either with the oral argument or with the language of the notification. How can the meaning of the notification vary according as one manufacturer passes on the benefit to the consumer and another one does not do so ? The notification does not make any such classification of manufacturers and it cannot, Therefore, be so construed.

(20) Mr. Anil Dewan, learned counsel for the petitioner, pointed out that no contention was raised in the pleadings of the respondents that adjusted values

were to be taken into account only for the purpose of determining the base period and not for the purpose of determining the base clearances. The argument was only raised at the bar. We have already pointed out that the one is in terms of the other and the two cannot be considered separately.

(21) Mr. Dewan further pointed out that in order to determine the excise duty livable on the items produced by the petitioner, it is necessary first to determine the assessable value u/s 4 of the Act. It is only after the assessable value is determined that the excise duty livable thereon is ascertained. It is erroneous to suggest, as is done by the Government, that assessable value will have to be again determined after taking into consideration the relief and exemption granted under the notification, dated 16th June, 1976. It is neither intended by the notification nor is it practicable that the assessable value should be determined after giving effect to the relief and the exemption contemplated under the said notification, This in effect would be the stand of the Government by its insistence that it is only when the benefit of the rebate in duty is passed on by the manufacturer to the consumers that the manufacturer becomes entitled to the benefit of exemption from duty. In other words if the price to the customer inclusive of duty remains the same and the duty livable thereon is calculated and thereafter the relief permissible under the notification is reduced, as the Government intends to do, then according to the suggestion in the show cause notices, the assessable value would thereafter have to be recalculated and it would be higher than the assessable value on which the excise duty livable was calculated in the first instance. Having arrived at this assessable value, if the duty is then to be calculated, it would not be the same as before and in this manner the calculation would keep on changing. Such a procedure would lead to an absurd situation.

(22) That this could not be the intention underlying the notification would also be clear from the fact that in cases where duty is calculated on the basis of fixed tariff values of weight or number, the benefit of the rebate of duty is not required to be passed on to the customer. If so, it is not understandable why the benefit of the rebate of the duty is required to be passed on to the consumers only in cases where the duty is to be calculated on the basis of the assessable value determined u/s 4 of the Act.

(23) Giving different interpretations to the said notification in respect of goods subjected, on the hand, to ad valorem duty and, on the other hand, duty on the basis of tariff values or weight or number, would lead to discrimination which cannot be justified on the basis of any reasonable classification between the two and would be contrary to Article 14 of the Constitution, We are in agreement with this contention of the petitioner.

(24) For the reasons given above, the writ petition is allowed and the show cause notices, dated 20/23rd April, 1977 and 2nd May, 1977 (annexures I and J to the writ petition) are quashed and the respondents are prohibited from taking recovery of any supposed deficit of excise duty from the petitioner on the basis

of the said show cause notices. The respondents are directed to assess the tyres and tubes manufactured by the petitioner to excise duty in accordance with the observations made above. Therefore, the direction issued by respondent No. 2 to the petitioner in his letter, dated 2nd June, 1977 prohibiting the petitioner from clearing goods beyond 6th June, 1977 on a provisional basis under Rule 9B Bond is also quashed. The petitioner shall be entitled to continue to clear the goods in accordance with the notification, dated 16-6-1976 as construed above. There will be no order as to costs.

(25) I am in respectful agreement with the conclusion proposed by my learned brother, Deshpande, J., as indeed, the reasons on which it is based. While it is, Therefore, unnecessary for me to add anything useful on the merits, an aspect of Government action in the framing of the notification appears to me to be too baffling to be allowed to escape notice.

(26) According to the position taken up on behalf of the Government, exemption from payment of a substantial part of the excise duty leviable on tyres and tubes was granted to the industry by Notification of June 16, 1976, not by way of a bonanza to the industry but to provide the much desired relief to the consumer apparently because it is the consumer who over the years has been writhing in agony under spiralling prices of commodities essential for the life of the community. It was, however, not disputed before us on behalf of the Government that on a number of earlier occasions, when similar exemptions were given, the frame of the concerned notifications was such that the exemption was subject to the benefit of it being passed on to the consumer by a suitable modification in the pricing policy of the industry. We were at a loss to understand why if the intention in issuing the present Notification was the same as on the previous occasions i.e. that the benefit should pass to the well deserved hands of the consumer, was the benefit not made dependent on being reflected in the pricing policy. We also looked around in vain for an Explanation as to why, when the industry failed to pass the benefit to the consumer, steps were not taken to either modify the language of the notification or to withdraw the benefit altogether. Was the departure in the frame of the notification the result of a mere slip or gross negligence or something worse ? If the language of the notification, was a deliberate Act, was it intended to give an unconditional gift to the industry with a mere pious wish that the benefit would be passed on, as if by a religious duty, by the industry to the consumer ? Would there be a justification to conclude that as a result of the frame of the notification, a substantial benefit was passed on to the industry with an illusory one to the consumer as a mere eye wash ? We have decided the petition, but these questions still remain unanswered, our pointed questioning of the Government counsel notwithstanding. It is not for us to suggest as to whether the circumstances in which the notification was issued and in the way it was framed would call for appropriate administrative action, but there is little doubt in our mind that the matter would deserve attention and even an appropriate inquiry, if for no other reason, at least for the reason that no suitable machinery exists today to protect the interests of the consumer. It is

high time some one in authority considered the propriety of introduction of the institution of Ombudsman in Industry as a watchdog over the cost-price relationship and quality control to protect the vital consumer interest, as indeed, public interest.