

(2014) 04 BOM CK 0187

In the Bombay High Court

Case No : Writ Petition No. 2179 of 2004

M/s. Shree Satpuda Tapi Parisar Sahkari Sakhar Karkhana Ltd.	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Citation : (2014) 307 ELT 699 : (2014) 6 MhLj 697

Hon'ble Judges : S.V. Gangapurwala, J;N.W. Sambre, J

Bench : Division Bench

Advocate : A.P. Kolte, Advocate for the Appellant; Alok Sharma, Assistant Solicitor General for the Union of India, Advocate for the Respondent

Judgement

S.V. Gangapurwala, J.—The petitioner assails the order passed by the respondent No. 2 thereby dismissing the appeal filed against the order passed by the respondent No. 3, so also the show cause notices. Mr. Kolte, the learned counsel submits that, the petitioner was issued with various show cause notices with regard to payment of excise duty upon molasses for a period from 1994 to 1997. The respondents withdrew all the show cause notices except the show cause notice issued for a period of January and February 1995. According to the learned counsel the show cause notices are issued only on the sole basis that nearby sugar factory i.e. Shirpur Sahkari Sakhar Karkhana, Shirpur (hereafter referred as to the "Shirpur S.S.K.") had sold molasses at the rate of Rs. 1310/- per metric tonne, whereas the petitioner has shown the value of molasses at the rate of Rs. 850/- per metric tonne. The petitioner uses the said molasses for captive consumption. According to the learned counsel on the basis of the same facts, all other show cause notices are withdrawn, so on the basis of principle of judicial discipline said show cause notice is also required to be withdrawn. The learned counsel relies on the judgment of the Apex Court in a case of Birla Corporation Ltd. Vs. Commnr. of Central Excise, and another judgment of in a case of Jayaswals Neco Ltd. Vs. Commissioner of Central Excise, Nagpur reported in 2006 (195) E.L.T. 142 (S.C.).

2. According to the learned counsel, it has not been considered that the molasses used by petitioner for captive consumption may be of different grade than that of the nearby sugar factory. The authority had sent the sample of the molasses to the technologist who had issued a certificate that it would be valued at the rate of Rs. 1,000/- per metric tonne i.e. not at the rate of the molasses sold by the nearby sugar factory, still the Tribunal did not consider the said aspect. According to the learned counsel, it is the duty of the department to first assess the quality of molasses which has been considered as a comparative sale instance. Without considering the same the show cause notice could not have been issued.

3. Mr. Sharma, the learned Assistant Solicitor General states that while giving reply to other show cause notices, the petitioner has raised the ground that the grade of molasses manufactured by it and used for captive consumption is different than that of Shirpur Sugar Factory, considering the said reply show causes notices were withdrawn. But no such stand was taken in respect of the show cause notice in question. According to the learned counsel in view of Rule 6(b) of the Central Excise (Valuation) Rules, 1975 the authority was justified in issuing show cause notice, so also the Tribunal has rightly considered the said aspect. The reply to the show cause notice is silent with regard to the quality and its product.

4. We have gone through the show cause notice and the orders passed. It is not disputed by respondents that all other show cause notices issued to the petitioner on the same ground from the year 1994 to 1997 have been withdrawn except the present show cause notice which claims payment of difference of excise duty for a period of two months i.e. January and February 1995. The only explanation coming forth is while filing reply to other show cause notices, the petitioner had raised a dispute about the gradation of the molasses and in the reply to present show cause notice no such dispute was raised.

5. Before we proceed to deal with the contentions canvassed by the respective learned counsel, it would be necessary to refer to the relevant provisions.

6. Rule 6 of the Central Excise (Valuation) Rules 1975 reads as under:

Central Excise (Valuation) Rules, 1975

RULE 1.....

RULE 2.....

RULE 6. If the value of the excisable goods under assessment cannot be determined under rule 4 or rule 5, and-

(a) where such goods are sold by the assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a person other than a related person:

[Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other relevant factors;]

(b) where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based-

(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee:

Provided that in determining the value under this sub-clause, the proper officer shall make such adjustment as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

(ii) if the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods;

(c) where the assessee so arrange that the excisable goods are generally not sold by him in the course of wholesale trade except to or through a related person and the value cannot be determined under clause (iii) of the proviso to clause (a) of sub-section (1) of Section 4 of the Act, the value of the goods so sold shall be determined-

(i) in a case where the assessee sells the goods to a related person who sells such goods in retail, in the manner specified in clause (a) of this rule;

(ii) in a case where a related person does not sell the goods but uses or consumes such goods in the production or manufacture of other articles, in the manner specified in clause (b) of this rule;

(iii) in a case where a related person sells the goods in the course of wholesale trade to buyers, other than dealers and related persons, and the class to which such buyers belong is known at the time of removal, on the basis of the price at which the goods are ordinarily sold by the related person to such class of buyers.

7. The petitioner has its sugar factory and distillery unit in the same factory premises. The molasses is a residue by-product arising during manufacture of sugar. The said molasses is captively consumed by the petitioner within the same factory of production and is supplied to its distillery unit through pipeline. The petitioner has captively consumed 7960.40 M.T. of molasses for the month of January and February 1995. The said molasses is cleared on payment of Central Excise Duty taking into consideration the value of molasses at Rs. 850/- per metric tonne. Vide impugned show cause notice a differential central excise duty of Rs. 7,32,356/- was proposed to be demanded. The same was based on the ground that during the relevant period nearby sugar factory i.e. Shirpur S.S.K. has sold molasses in the open market at Rs. 1310/- P.M.T. and petitioner valued

the molasses captively consumed for payment of excise duty at Rs. 850/- P.M.T.

8. The present matter would be governed by Rule 6(b)(i) of the Central Excise (Valuation) Rules, 1975 and its proviso.

9. Perusal of the Rule 6(b)(i) it is manifest that, where the excisable goods are not sold by the assessee but are used or consumed by him, or on his behalf in the production or manufacture of other articles, the value is to be based on the value of the comparable goods produced or manufactured by the assessee or by any other assessee. Proviso to Rule 6(b)(i) further lays down that while determining valuation under this sub clause, the proper officer has to make adjustment as appears to him reasonable taking into consideration all the relevant factors and in particular the difference in the material characteristics of the goods to be assessed of the comparable goods.

10. The petitioner undisputedly is using molasses produced by it for captive consumption. It has cleared the said molasses by paying excise duty valuing the same at Rs. 850/- P.M.T. The respondent authority has issued show cause notice to the petitioner on the ground that another sugar factory i.e. Shirpur S.S.K. is selling its molasses in the open market at the rate of Rs. 1310/- P.M.T. and as such molasses produced by petitioner and used for captive consumption should be valued at same rate i.e. 1310/- P.M.T. for payment of excise duty. In such an event Rule 6(b)(i) of the Central Excise (Valuation) Rules, 1975 would be applicable.

11. Rule 6(b)(i) of the Central Excise (Valuation) Rules, 1975 will have to be read along with the proviso appended to it. The function of the proviso is that, it qualifies the generality of the main enactment by providing an exception and taking out as it were from the main section a portion, which, but for the proviso would fall within the main enactment.

12. The general rule in construing a provision containing a proviso is to construe them together without making either of them redundant or otiose. Even if enacting part is clear, effort is to be made to give some meaning to the proviso and to justify its necessity. It is also settled proposition of law that the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and the construction which would make construction unnecessary and redundant should be avoided.

13. Reading sub-clause (i) of Rule 6(b) with the proviso appended to it in harmony, it is abundantly clear that the value to be assessed at is that of comparable goods i.e. goods which are resembling or are on par with the goods assessed. Further various material factors as contemplated under the proviso are required to be adhered. The one particular factor which the authority is required to consider and satisfy himself is the material characteristic of the goods to be assessed and of comparable goods.

14. The assessee would not have the advantage of viewing the comparable

goods as it would not have any domain over it, nor has opportunity to test it. The provisions and the proviso cast duty on the proper officer to verify the same. There are various grades of molasses. The show-cause notice, nor impugned orders even remotely suggest that proper officer has considered the material characteristic of goods assessed and comparable goods. It nowhere suggest that quality of both molasses is same. The burden is upon the proper officer. If the proper officer would have considered various factors, so also material characteristics of comparable goods while valuing the goods of petitioner, then the burden would have shifted on the assessee. However, in the first instance the proper officer has not discharged the burden and the obligation cast upon him so as to shift the burden upon the petitioner.

15. In the show cause notice only a bald averment is made that nearby sugar factory is selling molasses at the rate of Rs. 1310/- per metric tonne. Even, if, arguments of learned Assistant Solicitor General is considered referring to provisions of Sec. 6(b) (ii) of the Central Excise (Valuation) Rules, 1975, same would be of no avail in as much as sub clause (ii) comes into operation, if the value cannot be determined under sub-clause (i) on the cost of production or manufacture including profits, which the assessee would have normally earned on the sale of such goods. Perusal of show cause notice, it transpires that the sole basis for issuing show cause notice is that nearby sugar factory is selling molasses at the rate of Rs. 1310/- per metric tonne and the petitioner is claiming rate at Rs. 850/- per metric tonne without satisfying about all the other relevant factors and in particular the difference if any in the material characteristics of the goods to be assessed and the comparable goods. The show cause notice nowhere discloses that the authority satisfied itself about the material characteristics of the goods to be assessed and of the comparable goods. In absence thereof, the said show cause notice cannot be sustained

16. Apart from above, there is another facet of the case. On similar set of facts i.e. Shirpur S.S.K. has sold molasses at Rs. 1310/- P.M.T. and petitioner has valued its molasses used for captive consumption at Rs. 850/- P.M.T. all other show cause notices for three years i.e. prior and subsequent to the impugned notice have already been withdrawn.

17. The respondent ought to have followed same course in the present matter on the basis of principle of judicial discipline. In the light of above, Rule is accordingly made absolute in terms of prayer clause "B". No costs.