

(1986) 07 BOM CK 0030

In the Bombay High Court

Case No : Writ Petition No. 1481 of 1982

Music India Ltd. and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 30-07-1986

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(1)
Constitution of India, 1950 — Article 226

Citation : (1987) 1 BomCR 8 : (1987) 11 ECC 46

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The petitioner No. 1 is a Public Limited Company registered under the provisions of the Companies Act and is engaged in the manufacture of gramophone records and music cassettes. The petitioner No. 1 has a factory at Kandivli in Bombay where gramophone records and music cassettes are manufactured. The gramophone records are liable to excise duty under Tariff Item No. 37A, while music cassettes under Tariff Item No. 59. The petitioners cleared the goods prior to year 1980 after payment of excise duty upon assessable value which was inclusive of post manufacturing expenses. It is the claim of the petitioners that they became aware of the judgment of this Court in the case of Bombay Tyre International Ltd. Vs. Union of India 1979 ELT 625 delivered in November 1979 and realised that the assessable value cannot include post manufacturing expenses. On May 27, 1980, the petitioners submitted price list of the Assistant Collector in which the assessable value stated was one determined after excluding the post manufacturing expenses. The petitioners also filed revised price list but the Assistant Collector rejected the price list holding that the petitioners cannot deduct the post manufacturing expenses for ascertaining the assessable value. The petitioners thereafter filed fresh price lists from time to time, but on the insistence of the Department that the assessable value should include the post manufacturing expenses proceeded to clear the goods on payment of duty under protest. The petitioners thereafter

instituted the present petition under Article 226 of the Constitution of India on July 28, 1982.

2. During the pendency of this petition, the Supreme Court delivered judgment dealing with deduction of post manufacturing expenses in ascertaining the assessable value u/s 47 of the Central Excises and Salt Act (hereinafter referred to as the "Act") and that judgment is in the case of Union of India Vs. Bombay Tyres International Limited reported in 1983 Excise Law times, 1896. In view of this judgment when the petition came up before me for hearing on December 9, 1983, certain directions were given and the petitioners were permitted to claim deductions for (a) insurance, (b) freight and forwarding, (c) cost of secondary packing, (d) trade discount, and (e) Bonus to dealers. By my order, I directed that the petitioners should file a fresh statement of deductions in respect of price list already filed and on such statement being filed, the Assistant Collector of Excise should pass a speaking order after giving opportunity to the petitioners to substantiate their claim and after personal hearing. Accordingly, the petitioners filed their fresh statement claiming deductions in accordance with the decision of the Supreme court and thereupon the Assistant Collector after hearing the petitioners passed order dated May 3, 1984 granting certain discount while disallowing the claim under some heads. The Assistant Collector rejected the claim of the petitioners for refund in respect of the duty paid by inclusion of post manufacturing expenses for the period commencing from January 1, 1977 to May 26, 1980 on the ground that the claim was barred by limitation as contemplated by Section 11B(1) of the Act. The petitioners have amended the petition to challenge the legality of the order passed by the Assistant collector.

3. Shri Shroff, learned counsel appearing on behalf of the petitioners, restricted his challenge to the order of the Assistant collector in respect of claims for deduction of post manufacturing expenses under four headings only. The learned counsel urged that the Assistant Collector was in error in disallowing the claim of deduction in respect of secondary packing. The Assistant Collector in paragraph 4.02 of his order dealt with the claim under the heading Secondary Packing. The petitioners claim that the expenses incurred in respect of packing material like wooden boxes, corrugated cartoons, steel strap, plastic strap, gum tapes, etc. for goods meant for out-station deliveries must be deducted, while determining the assessable value. The assistant Collector declined to grant relief on the ground that the packings were used by the Company on its own without any requests from the buyers. The Assistant Collector held by reference to certain observations in the decision of the Supreme Court in the case of Bombay Tyres International Limited that secondary packing which is necessary for putting the Excisable articles in the condition in which it is generally sold in the wholesale market at the factory gate must be included in the value of the article for the purpose of excise duty. The Assistant Collector observed that secondary packing is very essential for the petitioners to forward the products to the branches and as such costs are incurred in the normal course of business, and, therefore, the deduction for the expenses incurred in respect of secondary packing cannot be

granted. Shri Shroff submits that the finding recorded by the Assistant Collector on this count is totally contrary to the decision of the Supreme Court in the case of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., . The submission of the learned counsel is correct and deserves acceptance. The Supreme Court in the case of Godfrey Philips India Limited, after referring to its earlier decision in Bombay Tyres International Limited, held that on a proper construction of Section 4(4)(d)(i) read with the Explanation, the cost of secondary packing done for the purpose of facilitating transport and smooth transit of goods to be delivered to the buyer in the wholesale trade cannot be included in the value for the purpose of assessment of excise duty. In the case before the Supreme Court, the facts were cigarettes after manufacture were usually placed in paper/card board packets, each packet containing 10 or 20 cigarettes and subsequently these packets were packed in paper in card board, cartoons, each of the cartoons containing a number of packets of cigarettes. Number of such were then put in corrugated wooden fibre board containers for delivery and the question arose, whether the cost of packing in corrugated fibre board containers can be included in the value of cigarettes for the purpose of assessment of excise duty. The Supreme court held that the price of corrugated fibre board cannot be included because the secondary packing was done only for the purpose of facilitating the smooth transport of the cartoons containing the packets of the cigarettes to the buyer in the wholesale trade. In view of the dictum laid down by the Supreme Court, it is impossible to sustain the finding of the Assistant Collector that the expenses incurred in respect of secondary packing material cannot be excluded while determining the assessable value of gramophone records and music cassettes.

4. The second head in respect of which Shri Shroff makes complaint in this petition is the claim for regional discount and the discussion in respect of this Item is found in paragraph 0.04 of the impugned order. The petitioners claim regional discount in respect of sales to Madhya Pradesh, Uttar Pradesh, Bihar, Chandigarh, Punjab and Haryana. It is the claim of the petitioners that discount is given to maintain the parity of prices as the local taxes in these areas are very high. These discounts are not allowed to dealers in any other places. The Assistant Collector refused to grant relief to the petitioners in respect of these regional discount on the ground that this discount is more in the nature of sales promotion expenses. The Assistant Collector observed that the goods are removed from the factory to Company's branches at Delhi and Calcutta and from there the goods are forwarded to the areas in respect of which discount is sought. According to the Assistant Collector as it was not known at the time of removal from the factory gate as to which place the goods would be forwarded, the discount cannot be granted. The finding of the Assistant Collector is clearly erroneous and cannot be sustained. The Supreme court by its order in the case of Union of India and others V/s. Bombay Tyres International Pvt. Ltd. reported in 1984 ELT 329, while dealing with the question as to deduction of trade discount while ascertaining the assessable value observed :

"Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice."

Shri Shroff submits that the petitioners have demonstrated before the Assistant Collector that it is an established practice to grant regional discount in respect of sales in certain areas of the country because of the high amount of local taxes. The Assistant Collector did not discard the claim of the petitioner that it was the consistent practice to grant regional discount, but proceeded to reject the claim on the ground that the goods are not ear-marked for these places while leaving the factory gate. It is difficult to appreciate any merit in the reasons given by the Assistant Collector. The reliance by Shri Shroff in this connection on the decision of the Gujarat High Court in the case of Gujarat State Fertilizers Co., Limited Versus Union of India and others reported in 1980 ELT 397 is appropriate. In my judgment, the petitioners are entitled to claim deduction of the value of regional discount given while ascertaining the assessable value for the purpose of excise duty.

5. The next item in respect of which Shri Shroff urged that the Assistant Collector was in error is the claim based upon the difference in assessable value and the actual price charged. The petitioner claimed that M/s Mecotronics Private Limited was a buyer to whom sales are affected at a price less than the price determined as assessable value and these sales were effected solely on the ground that the buyer had Sales Depots. The Assistant Collector declined to go into the merits of the claim under this head on the ground that the claim is based under the heading Bill Discounting Charges and the question as to whether sale to buyer being a class of buyers is an issue pending before the Customs, Excise and Gold (Control) Appellate Tribunal. Wednesday, the 30th July, 1986.

In my judgment, the Assistant Collector was clearly in error in refusing to go into the merits of the claim under this head. It was necessary for the Assistant Collector to ascertain whether there was really any difference in assessable value and the actual price charged and that aspect can be determined only after examining the material which the petitioners could produce. In case, the Assistant Collector finds that indeed there is difference in price charged to M/s Mecotronics Private Limited, then the Assistant Collector has to consider whether the said customer is a "favoured customer", and whether the less price was charged for any particular reason. In case, the Assistant Collector finds that the reason for charging less price was the facility of Sales Depot, then as decided by this Court and the Supreme Court on numerous occasions, the Assistant Collector will have to determine the payment of excise duty in respect of sale to the customer by taking into consideration only the actual price charged. It would be necessary for the Assistant Collector to look into this aspect afresh.

6. The next challenge is in respect of the finding of the Assistant Collector in respect of cash discount. The cash discount was claimed by the petitioners at flat

rate of 2% in respect of all sales except records sold at contract prices and records sold to class of buyers having own Depots. The Assistant Collector came to the conclusion that for availing the benefit of cash discount, the petitioners must establish that such cash discount was actually passed on to the buyers. The Assistant Collector found that unless the cash discount is actually passed on to the buyer, it is not permissible for the petitioners to claim that the value of the cash discount should be excluded while determining the assessable value. Shri Shroff submitted that the petitioners are entitled to claim that cash discount in the price list must be allowed irrespective of whether it was actually availed of by the customer and in support of this submission, reliance is placed on the decision of the Division Bench in the case of Jenson and Nicholson (India) Limited and another V/s. Union of India and others reported in 1984 (17) Excise Law Times 4. The decision undoubtedly supports the submission urged on behalf of the petitioners. The Division Bench held in paragraph 14 of the judgment :

"We are, therefore, of the opinion that cash discount as mentioned in the price list of the petitioner must be allowed irrespective of whether it was actually availed of by the customers."

I have reservation about the principle laid down by the Division Bench but the judicial discipline demands that I must follow the decision of the Division Bench. Shri Lokur, learned counsel appearing on behalf of the respondents, urged that I should refer the matter to the larger Bench but I am not inclined to adopt that course as this is not the only point involved in the matter and in respect of this limited item, it would not be appropriate to make reference to the Division Bench. In my judgment, cash discount can be allowed provided it is established that such cash discount was actually availed of by the Customer. It is possible that mere promise would be given to give cash discount, and in fact the cash discount would not be given to any customer and in such cases it would be difficult to hold that cash discount mentioned in the price list should be allowed while determining the assessable value. In view of this decision of Division Bench, the petitioners are entitled to relief on this count also.

7. Shri Shroff then submitted that the petitioners had sought refund of the excess duty paid with effect from October 1, 1975 onwards and that claim was turned down by the Assistant Collector on the ground that refund of duty of excise cannot be granted unless the claim is made within six months from the date of payment in view of the provisions of Section 11B of the Act. The petitioners have restricted their claim for refund in the present petition for a period commencing from year 1977 onwards. It was contended on behalf of the petitioners that Section 11B(1) of the Act prescribes for limitation for duty erroneously recovered by the authorities but the limitation prescribed under that Section would not prevent the petitioners from claiming refund in a Writ Petition, in case it is established that the excess duty was paid under mistake of law. It is now well-settled that in case any duty is paid under mistake of law, then the authorities recovering such duty is liable to refund it provided the person who

pays such duties files Writ Petition within a period of three years from the date of knowledge of mistake of law. In case, such proceedings are adopted within a period of three years, then the duty will have to be refunded for the entire period for which it is recovered. The petitioners claimed that they became aware of the mistake of law in November 1979 and the Petition is filed on July 29, 1982 i.e. within a period of three years from the date of knowledge of mistake of law. In my judgment, the petitioners are entitled to refund of excess duty paid from the year 1977 onwards. It is not in dispute that from the year 1980 onwards, the petitioners paid duty under protest. Shri Lokur urged with reference to the decision reported in West Coast Paper Mills Vs. Superintendent of Central Excise and Others, that it is not open for the petitioners to claim that mistake of law came to their knowledge only in November 1979. The learned counsel urged that the petitioners cannot claim that the mistake was known to them only in November 1979 when the Supreme court had decided Voltas' case in the year 1973 holding that post manufacturing expenses cannot be inclined while ascertaining the assessable value of the goods for the purpose of excise duty. It is undoubtedly true that Voltas case was decided in the year 1973 but inspite of the judgment, the Department persisted in including the post manufacturing expenses while determining the assessable value and in case the Department followed that action in spite of the judgment, then no blame can be attached to the petitioners for not detecting the mistake earlier.

8. The grievance was made on behalf of the petitioners about the method of calculation adopted by the Assistant Collector, even in respect of items on which the finding was recorded by the Assistant Collector in favour of the petitioners. The petitioners claim that during the period commencing from May 27, 1980 and ending with September 23, 1983, the petitioners had a price list which was exclusive of excise duty. It was claimed that the refund, therefore, has to be calculated by deducting the quantum of deductible expenditure from such price to arrive at the assessable value on which the excise duty is payable. After September 23, 1983, the petitioners had declared the price under the price list which was inclusive of excise duty and, therefore, the method for calculation for the period after September 1983 adopted by the Department is correct.

It is, obvious that the method adopted by the Department for calculating the amount of refund for the period prior to September 23, 1983 and commencing from May 27, 1980 was not correct. It is necessary for the Assistant collector to re-calculate the amount and determine the assessable value for this period i.e. May 27, 1980 to September 23, 1983. The amount of refund to which the petitioners would be entitled would depend upon such calculations.

As I have come to the conclusion that the finding of the Assistant Collector in respect of some items which were not excluded for the purpose of determining the assessable value was incorrect, it is necessary to remit back the proceedings to the Assistant Collector for a fresh adjudication.

9. Accordingly, rule is made partly absolute and the matter is remitted back to

the Assistant Collector for a fresh adjudication in the light of the observations and findings given in the judgment. The Assistant Collector would determine the assessable value of the goods manufactured by the petitioners by deducting the value of (1) secondary packing, (2) regional discount, (3) cash discount, and (4) the difference between assessable value and actual price charged to M/s Mecotronics Private Limited, if it is found that such customer was not a favoured customer and the actual price charged was as claimed by the petitioners. The Assistant Collector would ascertain the amount of excess duty paid by the petitioners in respect of manufacture of gramophone records for the period commencing from January 1, 1977 and ending with May 26, 1980 and in respect of manufacture of music cassettes for the period commencing from January 1, 1980 and ending with December 25, 1980 and refund the amount found due to the petitioners. The Assistant Collector shall pass the order of adjudication and refund the amount within a period of six months from today. In the circumstances of the case, there will be no order as to costs.

Shri Shroff submitted that the Assistant Collector should be directed to pay the amount with interest. I am not, at all, inclined to grant the prayer. The Counsel overlooks that on some items the order of the Assistant Collector was correct and not even challenged. The prayer for interest is rejected.