(1988) 03 KAR CK 0050

In the Karnataka High Court

Case No : Writ Petition No. 8312 of 1976

Mysore Cements Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 01-03-1988

Acts Referred:

Central Excise Act, 1944 — Section 4, 4 (4) (d) (i)
Central Excise Rules, 1944 — Rule 44, 8

Citation : (1988) 17 ECC 385 : (1989) 22 ECR 147 : (1988) 37 ELT 556 : (1988) ILR (Kar) 2711 : (1988) 2 KarLJ 27

Hon'ble Judges : S. Rajendra Babu, J;M. Rama Jois, J

Bench : Division Bench

Judgement

Rama Jois, J.—In this writ petition presented by M/s. Mysore Cements Ltd., the following question of law arises for consideration :

"Whether the packing charges relating to the port land cement manufactured by the petitioner is liable to excise duty under the provisions of the Central Excises and Salt Act, 1944."

2. Facts of the case, in brief, are as follow :

Section 4 of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) was amended in the year 1973. The relevant part of Section 4 of the Act, after its amendment, reads :

* * * * * *

According to clause (4)(d)(i) of Section 4 of the Act generally the cost of packing is to be taken into account while computing the cost of the goods at the stage of manufacture and levy of excise duty. But there is an exception. The exception is, the cost of packing should not be included for levying excise duty if (i) packing material is of a durable nature, and (ii) it is returnable by the buyer to the assessee.

3. After this section came into force, on the ground that the gunny bags in which the port land cement manufactured by the assessee was being packed, was a durable packing material and was also returnable by the purchaser to the petitioner no excise duty was paid by the petitioner during the period commencing from 1-10-1975 to 27-11-1975. However, when the department demanded the payment of excise duty even on the packing material the petitioner paid the excise-duty in respect of the packing charges also under protest from 28-11-1975 to 8-1-1976. On and after 9-1-1976 by the issue of a Notification by the Central Government under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, a clear exemption was granted to the cost of packing in respect of grey port land cement. The said notification reads :

"G.S.R. In exercise of the powers conferred under sub-rule (1) of rule 8 of the Central Excise Rules, 44, the Central Government hereby exempts grey port land cement falling under item No. 23 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 44) from so much of the duty as is equivalent to the duty leviable with reference to that part of the value thereof which represents the cost of packing in which such cement is delivered at the time of removal from the factory."

The Assistant Collector, Central Excise, on 20-8-1976 issued a show-cause notice to the petitioner calling-upon it to show-cause as to why excise duty should not be collected from the petitioner for the period commencing from 1-10-1975 to 27-11-75. Petitioner furnished its reply to the said show-cause notice. Relevant portion of the reply reads :

"4. There can be no dispute that the gunny bags are durable in nature as conceded in the show-cause notice. In the instant case gunny bags, in which cement is packed, are returnable by the buyers to the assessee in terms of the authorisation issued by the Regional Cement Officer. This authorisation directs the purchaser of Cement to "please preserve empty cement bags in serviceable condition and return them to the factory of origin or its collecting agent for payment". A zerox copy of a specimen authorisation dated 7th Feb. 1975 is annexed herewith and marked as Annexure ''A''. The assessee submits that gunny bags in question are collected by itself or at times by its agents. In any event, they are not collected by independent agencies. The independent agencies do not sell them to the agencies as stated in the notice."

Simultaneously petitioner also demanded for the refund of the amount of Rs. 7,74,432.84 being the excise duty paid on packing charges under protest for the period commencing from 28-11-1975 to 8-1-1976.

4. The stand taken on behalf of the respondents is that in order to attract the explanation incorporated in Section 4(4)(d)(i) of the Act, there must be proof of return of the packing material by the purchaser to the petitioner-manufacturer, or, in the alternative, there must be a proof of an arrangement between the petitioner and the purchaser that the gunny bags in which the cement was sold

were returnable to the petitioner. The further plea of the respondents was that in the present case there was neither proof of return of the bags nor was there any proof of any arrangement between the petitioner and the purchaser of cement for the return of gunny bags.

5. As far as the true meaning of Section 4(4)(d)(i) of the Act is concerned, it has already been interpreted by the Supreme Court in K. Radha Krishnaiah Vs. Inspector of Central Excise and Others, . The Supreme Court has held that in order to attract Section 4(4)(d)(i) of the Act, the following two conditions must be fulfilled :

(i) the packing must be a durable material returnable by the buyer to the assessee; and,

(ii) there must be an arrangement for the return of the packing material by the purchaser to the seller.

In the present case show-cause notice itself proceeds on the basis that the packing material viz., gunny bag is durable, therefore returnable packing material. Therefore, the first condition is satisfied.

6. As far as the second condition is concerned, learned counsel relied on the price fixation order issued by the Assistant Controller, Southern Region, dated 27-10-1975, it reads :

"ALL CENTRAL/STATE CO-ORDINATING/SPONSORING AUTHORITIES & INDENTORS/ALL FEDERATIONS/ASSOCIATIONS SPONSORING CEMENT DEMANDS.

Dear Sirs,

Sub : F.O.R. destination price of cement and resale price of second-hand serviceable jute bags during the period from 1-10-75 to 31-12-75.

The Ministry of Industry & Civil Supplies (Department of Industrial-Development) has intimated that the charges for packing one metric tonne of cement for the period 1-10-75 to 31-12-75 will be Rs. 40.98 (Rupees forty and paise ninety-eight only). Accordingly, the price of ordinary port land cement packed F.O.R. destination railway station per metric tonne will work out as follows :

Rate Contract Non-Rate Contract Govt. Rs. Non-Govt. Rs. Public Rate I. Price of Ordinary 201.00 211.00 211.00 port land Cement (Unpacked F.O.R. destination railway station) Packing charges 40.98 40.98 40.98 Plus excise duty and Actuals Actuals Actuals auxiliary excise duty. II. Price of Rapid 224.00 234.00 234.00 Hardening cement/Raw Heat Cement/Grey Cement or specific not less than 3500 cm 2 ga. Packing charges 40.98 40.98 40.98 Plus excise duty and Actuals Actuals Actuals auxiliary excise duty. III. Water proof 233.00 243.00 243.00 (hydrophobic cement) Packing charges 40.98 40.98 40.98 Plus excise duty and Actuals Actuals Actuals auxiliary excise duty. The serviceable second hand jute bags may be collected by the Bag Collecting Agents of the respective cement factories (to be collected by them at the consumer''s work sites on ''CASH AND CARRY'' basis) and the re-sale price for the period 1-10-1975 to 31-12-1975 is Rs. 92.54 (Rupees ninety two and paise fifty four only) for 100 bags. Sales-tax, where leviable is extra.

Yours faithfully, for "CEMENT CONTROLLER"

Learned counsel printed out that the control order itself fixed the rate of bags and also made provision for return of the bags and even fixed the rate for the bags returned. Learned counsel for the petitioner submitted that as the cement was a controlled commodity and its sale was regulated by the Cement Control Order, the manufacturer was bound to sell the cement to the person in whose favour a release order was issued by the Cement Controller. A copy of one such order issued by the Cement Controller (Southern Region) in favour of the Executive Engineer, G.I.B.C. Division-2, Jamkhandi, Bijapur District, Andhra Pradesh, is produced as Exhibit ''B''. By that order petitioner was asked to supply/ sell 300 bags of cement. The last condition of the rules reads :

"Please preserve empty cement bags in serviceable condition and return them to the factory of origin or his collecting agent on payment."

Learned counsel submitted that during the relevant period the entire quantity of port land cement manufactured by the petitioner was required to be supplied under the release orders of the Cement Controller and every release order contained a similar condition. This fact is not at all in dispute.

7. A combined reading of the price fixation order and the release order, in both of which there is a specific provision to the effect that the purchasers are at liberty to return the cement bags and when so returned the petitioner has to purchase the bags at the rates specified. This clearly establish an arrangement between the petitioner and the purchaser of cement for the return of the gunny-bags. Once this arrangement is established the Explanation incorporated in Section 4(4)(d)(i) of the Act gets attracted. As a result the petitioner was not liable to pay excise duty on cost of packing for the period from 1-10-1975 to 27-11-1975 and further the petitioner also becomes entitled to refund of the amount of excise duty relatable to the packing charges paid in protest from the period commencing from 27-11-1975 to 8-1-1976.

8. The Madhya Pradesh High Court, on a consideration of a similar question, has come to the conclusion that the condition to be fulfilled for non-levy of excise duty on bags was the existence of an arrangement to return and not the proof of actual return. The court further held that the provisions in the Cement Control Order for return of empty cement bags to the manufacturer/seller did amount to an arrangement for the return of the empty bags and therefore the second condition to bring the case under the Explanation u/s 4(4)(d)(i) of the act has been fulfilled. (Sec : Birla Jute Manufacturing Co., Vs. Union of India - 1980 E.L.T. 593 at 596, Paragraph - 9). We are in respectful agreement with the view of the Madhya Pradesh High Court.

9. Sri Padmarajaiah, the learned counsel for the respondent, however, strenuously contended that in order to get rid of the liability of excise duty on the cost of bags the petitioner has to prove before the authorities that there was a clause in the agreement entered into between the petitioner and the purchaser of cement for the return of the gunny-bags and therefore this court should not interfere and could only issue a direction to the authorities to decide the said question after giving opportunity to the petitioner.

10. If the question was required to be decided on the basis of the evidence which the petitioner was required to produce, the contention of the learned counsel would have been unexceptionable. But, as stated earlier, cement is a controlled commodity and the sale of cement was fully controlled by the various orders and directions issued by the Cement Controller. In Annexure ''A'', the Cement Controller has fixed packing charges separately and a specific provision was made in Annexure - ''A'' to the effect that the manufacturers should purchase empty bags at the rates specified by the Cement Controller. Further in Annexure - ''B'' which is one of the release orders there is a specific clause that the purchaser should return the empty bags to the petitioner. In the face of these statutory provision, which by themselves impose a condition that the bags are returnable there is no question of calling upon the petitioner to prove that one of the terms of the sale was that the gunny bags were returnable as the statutory condition constitutes an arrangement between the seller and the purchaser of port land cement to the effect that the gunny bags were returnable. Hence we do not find any justification to issue only a direction to the authorities as requested by the learned counsel for the respondents.

11. So far as the belief is concerned, the petitioner has sought for the issue of a writ of mandamus directing the respondents to refund the sum of Rs. 7,74,432.84 collected by way of excise duty on packing charges from the petitioner during the period commencing from 28-11-1975 upto 8-1-1976. This prayer has got to be granted.

12. As regards the amount which is the subject matter of the show-cause notice in the application for amendment, which we have allowed, the petitioner has stated that during the pendency of the writ-petition the petitioner was compelled to pay the amount of Rs. 8,11,024.21 and therefore there should also be a direction for the refund of the said amount.

13. In the result, we make the following order :

(i) Rule made absolute.

(ii) Write of mandamus shall issue to Respondent-1 to refund an amount of Rs. 8,11,024.21 (Rs. Eight lakhs eleven thousand twenty four and paise twenty-one only) collected from the petitioner as excise duty on packing material of port land cement for the period from 1-10-1975 to 27-11-1975 and to refund the amount of Rs. 7,74,432.84 (Rs. Seven lakhs seventy four thousand four hundred thirty two and paise eighty-four only) being the amount of excise duty on packing charges paid by the petitioner in protest for the period commencing from 28-1-1975 to 8-1-1976.

(iii) No order as to costs.

