

(1981) 11 BOM CK 0013

In the Bombay High Court

Case No : Writ Petition No. 3075 of 1979

Narendra Engineering Works

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 06-11-1981

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1981) 8 ELT 859

Hon'ble Judges : S.P. Bharucha, J;P.B. Sawant, J

Bench : Division Bench

Judgement

Bharucha, J.—The petitioners manufacture at Kolhapur connecting rods for diesel engines and tractors. They also engage in job work by processing forgings supplied to them into connecting rods, of sizes required by the suppliers, recovering in that behalf only labour charges. Their total investment on plant and machinery is Rs. 1,61,000/-; they are, therefore, a small scale industry.

2. In 1975 item 68 was introduced into the First Schedule of the Central Excises and Salt Act, 1944. Under the terms thereof all goods not elsewhere specified, manufactured in a factory, subject to some stated exceptions, became liable to excise. At the time of introduction of the said item the rate of the excise payable was 1%, it is now 8%.

3. On 18th June, 1977 a notification was issued under the Central Excise Rules whereby goods falling under item 68 cleared for home consumption on or after the first day of April in any financial year by or on behalf of a manufacturer from one or more factories were exempted from the payment of excise duty leviable thereon, provided that the total of the value of capital investment made from time to time on plant and machinery installed in the industrial unit in which the goods were manufactured was not more than Rupees 10 lakhs; that this exemption was not applicable to a manufacturer if the total value of all excisable goods cleared by him or on his behalf in the preceding financial year had exceeded Rupees 30 lakhs; and that the exemption applied only to the first

clearance for home consumption upto a value not exceeding Rupees 30 lakhs during a financial year subsequent to 1977-78. The notification explained that in determining the value of such clearances the value of goods cleared for captive consumption within the factory was not to be taken into account.

4. The petitioners satisfied all the requirements of the said exemption and were, consequently, not assessed to excise in respect of the connecting rods processed by them on job work and were not required to take in that behalf an excise licence.

5. On 1st March, 1979 a notification (now called "the 1979 notification") was issued under the Central Excise Rules in supersession of the notification of 18th June, 1977. It is convenient to set out the operative part thereof :

.....the Central Government hereby exempts goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) hereinafter referred to as the said goods) and cleared for home consumption on or after the 1st day of April in any financial year, by or on behalf of a manufacturer from one or more factories.

(a) in the case of first clearances of the said goods upto an aggregate value not exceeding rupees fifteen lakhs, from the whole of the duty of excise leviable thereon; and

(b) in the case of the clearances (being clearances of the said goods of an aggregate value not exceeding rupees fifteen lakhs) immediately following the said first clearances of the value of rupees fifteen lakhs, from so much of the duty of excise thereon as is in excess of four per cent ad valorem.

Provided that an officer not below the rank of an Assistant Collector of Central Excise is satisfied that the sum total of the value of the capital investment made from time to time on plant and machinery installed in the industrial unit in which the said goods, under clearance, are manufactured, is not more than rupees ten lakhs.

Explanation-I. - For the purposes of determining the value of any capital investment, only the face value of the investment, at the time when such investment was made shall be taken into account.

Explanation-II. - For the purposes of determining the value of clearances under this notification, the value of the said goods cleared for captive consumption within the factory in which the said goods are manufactured shall not be taken into account.

Explanation-III. - In this notification, the expression "factory" has the meaning assigned to it in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948).

2. Nothing contained in this notification shall apply to a manufacturer, if the total value of the said goods cleared for home consumption by him or on his behalf from one or more factories in the proceeding financial year and exceeded rupees

thirty lakhs."

6. It appears that the petitioners and the excise authorities at Kolhapur had confabulated on the subject of the application of the 1979 notification to the petitioners' job work. On 24th August 1979 the petitioners wrote to the Assistant Collector, Central Excise Division, Kolhapur, on the subject of computation of value for determination of duty liability with reference to the 1979 notification. They stated that the Jurisdictional Superintendent of Central Excise had informed them that, for the computation of the value limit to determine the duty liability as contemplated by the 1979 notification, the value in respect of the job work undertaken by them would be taken as the value of raw material plus the job work charges charged by them as determined u/s 4 of the act. The petitioners contended that such mode of computation of value had no support in law. They required the Assistant Collector to intimate to them whether this procedure had the concurrence of the Central Board of Revenue to enable them to take up the matter with them. On 7th September 1979 the Assistant Collector laconically replied that the decision of the Superintendent, Central Excise, "is correct as per law".

7. Pursuant to this communication of the Assistant Collector the petitioners were compelled to apply for an excise licence and filed a classification list. They filed this petition challenging the interpretation placed by the excise authorities upon the 1979 notification. The petitioners have, in the interregnum, not been granted an exemption under the 1979 notification and excise duty has been collected from them under item 68 in respect of the rods processed by them on job work.

8. It was contended by Mr. Govilkar, learned counsel for the respondents, that the petition was premature in that no final decision had been taken by the excise authorities as to whether or not the petitioners were entitled to exemption under 1979 notification inasmuch as the excise authorities had no opportunity to satisfy themselves that all the conditions requisite under the 1979 notification had been satisfied by the petitioners. The requirements of the 1979 notification, other than that of value, are substantially identical with the requirements of notification of 18th June 1977, which the petitioners had, admittedly, satisfied. Upon the only requirement that was varied, that relating to value, the excise authorities placed an interpretation. Consequent thereupon it became clear that the petitioners could not obtain an exemption under the 1979 notification and were, in fact, compelled to apply for an excise licence. The conclusion on interpretation of the Assistant Collector in his letter of 7th September 1979 had, thus, civil consequences for the petitioners and entitled them to come to Court to challenge it.

9. Mr. Govilkar next contended that there were provisions under the Act for appeal and that it was not open to the petitioners to file a writ petition without exhausting those provisions. Mr. Hidayatullah, learned counsel for the petitioners, drew our attention to trade notices issued in respect of the application of the 1979 notification to job-workers by the Excise Collectorates at Madras, Bombay

and Pune. It is not necessary for us to set out the contents thereof. It is enough to state that the Madras trade notice takes a view which is entirely favourable to the job-worker while the Bombay trade notice takes a view which is entirely adverse to him; the Pune view appears to be somewhere in-between. In this situation it seems to us necessary to place a judicial interpretation upon the 1979 notification at the earliest possible juncture.

10. The principle contention raised by the respondents in their affidavit in reply is based upon Section 4 of the Act. The submissions of Mr. Govilkar before us were based principally upon Section 4 of the Act. It is, therefore, convenient to take up this argument, which, indeed, goes to the root of the matter, at the outset. Section 4(1) of the Act, which is material, reads :-

"Valuation of excisable goods for purposes of charging of duty of excise :-

(1) Where under this Act, the duty of excise is chargeable on excisable goods reference to value, shall, subject to the other provisions of this section, be deemed to be -

(a) The normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for the delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -

(i) Where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in Cl. (a) be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) Where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum fixed, under any such law, then, notwithstanding anything contained in Cl. (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail :

(b) Where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable

equivalent thereof determined in such manner as may be prescribed."

11. The Supreme Court has in the case of A.K. Roy and Another Vs. Voltas Limited, interpreted Section 4. It was held that excise is a tax on the production and manufacture of goods and Section 4 provided that the real value of goods could include only the manufacturing cost and the manufacturing profit. It was the submission of Mr. Hidayatullah that, since the petitioners, as job-workers, incurred no expenditure in acquiring raw material, the value of the raw material could not form part of their manufacturing cost and could not be taken into account in determining the value of the processed goods.

12. Mr. Govilkar contended that the 1979 notification did not operate for the purposes of the determination of the value; it operated only for the purpose of fixing the exemption limits. Value was to be arrived at by applying the provisions of Section 4. This is substantially correct.

13. Mr. Govilkar then contended that whether or not the manufacturer, in this case, the petitioners, spent for the raw material the value of the raw material had to be taken into account for the purposes of determining the real value of the manufactured goods. He relied upon a judgment of the Allahabad High Court in Ganga Dhar Ram Chandra vs. Collector, Central Excise, 1979 E.L.T. 597. This was a case in which a firm, which manufactured and sold vegetable non-essential oils, took oil seeds belonging to it to other oil mills and got the oil manufactured there upon payment of manufacturing charges. It was contended by the excise authorities that the firm was liable to pay excise duty even on the oil manufactured at its instance by other oil mills. The Court posed this as being the real question that arose for determination : was the firm the manufacturer of the oil manufactured by other oil mills out of oil seeds supplied by it. In para 5, upon which Mr. Govilkar placed great reliance, the Court held that the oil manufactured by the other oil mills was excisable. The Court concluded that it was not the firm which was the manufacturer but the other oil mills which had manufactured the oil at its instance. Mr. Govilkar wanted us to read the observations in para 5 as implying that the real value of the oil included the cost of the oil seeds. There is no warrant for doing so. The question of value of the oil was just not before the Court. Reference must also be made to an unreported Division Bench judgment of our Court (in Special Civil Application 138 of 1961, Shri Agency vs. M. Y. Kakade, Dy. Superintendent, Central Excise, decided by Patel and Chandrachud, JJ, on 12th July, 1961) wherein it was held that the definition of the word "manufacturer" in the Act necessarily included persons who got goods manufactured by someone else for sale on their account. The Allahabad judgment does not, therefore, assist Mr. Govilkar.

14. Mr. Govilkar then relied upon the judgment of the Madras High Court in The Commissioner, Corporation of Madras vs. The Assistant Collector of Central Excise, 1972 2 M.L.J. = 1978 E.L.T. 653 in which it was held that manufacture within the meaning of the Act was not confined to manufacture of goods for sale. There need be no dispute with this proposition for it does not avail Mr. Govilkar.

15. What must be accounted for in determining the real value of the rods processed on job-work by the petitioners is, as the Supreme Court has laid down in the Voltas case, the manufacturing cost and the manufacturing profit. The cost incurred by the petitioners in manufacturing the rods does not include the cost of the raw material. We do not see how the excise authorities can justify, in the face of the Voltas judgment, taking the value of the raw material into account in computing the value of the processed rods for the purposes of determining the petitioners' claim to exemption under the 1979 notification.

16. It is interesting to note that by a notification dated 3rd April, 1975 goods falling under item 68 manufactured in a factory as job work have been exempted from so much of the excise duty leviable thereon as is in excess of the duty calculated on the basis of the amount charged for the job work. The explanation to the notification provides that the expression "Job Work" means items of work where an article intended to undergo a manufacturing process is supplied to the job worker and is returned after it has undergone the intended manufacturing process, and only the job work is charged for.

17. Mr. Hidayatullah also contended that the language of the 1979 notification made it clear that, in determining the turn-over, what had to be taken into consideration was the value of the clearances and not the value of the goods themselves. In his submission, in the case of goods made on job work, such as was done by the petitioners, the value of the clearances would only be the job work charges shown upon the invoices which accompanied the goods when they were cleared. He drew support for the distinction from a notification issued under the Central Excise Rules in relation to Section 174A of the Act, dealing with the exemption of goods or categories of manufacturers from the provisions requiring an excise licence. The notification states, inter alia, that exemption from excise duty leviable on goods may be granted "(a) based on the value of the goods "or" (d) based on the value of clearances made in a financial year". In Mr. Hidayatullah's submission, there was thus a distinction recognised by the excise authorities themselves between the value of goods and the value of clearances. Mr. Govilkar on behalf of the respondents suggested that, in either event, the value had to be the value of goods and that what clause (d) in the aforesaid notification referred to was an exemption based on the value of clearances made in a financial year; in other words, in his submission, the emphasis was upon the phrase "in a financial year". It appears to us that there is substance in Mr. Govilkar's contention. But it cannot be disputed that the phraseology used in the 1979 notification in respect of the computation of the value of the clearances of goods creates some confusion. Mr. Hidayatullah was right when he submitted that an exemption notification must be construed liberally in favour of the assessee and that the benefit of the ambiguity in the 1979 notification must be given to the petitioners. But we would rather found our judgment upon the dicta of the Supreme Court in the Voltas case.

18. In the result, the rule is made absolute to the extent now mentioned. The

respondents are directed not to act upon the letter dated 7th September, 1979 and to include only the job work charges for the purposes of calculation of the aggregate clearances of the petitioners under the notification dated 1st March, 1979. The respondents shall proceed to determine whether the petitioners are entitled to exemption under the said notification upon the said basis. The respondents shall pay to the petitioners the costs of the petition.