
(2002) 07 BOM CK 0016

In the Bombay High Court

Case No : Writ Petition No. 1001 of 1981

National Leathercloth Manufacturing Co.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-07-2002

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 4

Citation : (2003) 111 ECR 403 : (2003) 156 ELT 654

Hon'ble Judges : J.P. Devadhar, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : Dharmadhikari, instructed by V.L. Panjuwani, for the Appellant; M.I. Sethna and K.R. Chawdhari, instructed by T.C. Kaushik, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—Based upon the decision of this Court in the case of Bombay Tyres International Ltd. Vs. Union of India (UOI) and Others, , the Petitioners had filed the present petition in the year 1981, inter alia, challenging the constitutional validity of new Section 4 of the Central Excises and Salt Act, 1944, and also the orders passed by their Excise authorities declining to exclude certain expenses claimed as post-manufacturing expenses from the assessable value while approving the classification list of the petitioners. The petitioners have claimed refund of Excise duty amounting to Rs. 40,18,805.60 ps. with 18% interest in respect of the goods cleared by them during the period from 12th November, 1977 to 12th November, 1980, on the ground that certain post-manufacturing expenses have been erroneously included in the assessable value and excise duty has been erroneously paid by them.

2. During the pendency of the petition the Respondents were directed by this Court to deposit certain amount in Court and the petitioners were permitted to withdraw that amount on furnishing security. Accordingly the Respondents had deposited the amount and the Petitioners had withdrawn the same by furnishing security. Later on, the said order was modified and the Petitioners were directed

to bring back the amount withdrawn by them and the Respondents were directed to adjudicate the matter afresh in accordance with the decision of the Apex Court in the case of Union of India v. Bombay Tyre International Limited reported in 1983 (14) E.L.T. 1896. Since the Apex Court in the case of Bombay Tyre International (*supra*) has upheld the constitutional validity of new Section 4 of the Central Excises and Salt Act, 1944 the only issue to be determined by the Excise authorities was regarding the permissibility of certain deductions as post-manufacturing expenses as per the guidelines laid down by the Apex Court in the Bombay Tyre International's case (*supra*).

3. In the light of order passed by this Court, the matter was adjudicated afresh by the Excise authorities after giving personal hearing to the Petitioners and by an order dated 12th April, 1984 the Assistant Commissioner of Central Excise, Bombay-II rejected the refund claim of the Petitioners as time-barred and disallowed the deduction claimed by the Petitioners as post-manufacturing expenses under different heads. The petition has been amended to challenge the said order dated 12th April, 1984.

4. Mr. Dharmadhikari, learned Counsel appearing on behalf of the Petitioners fairly stated that he would restrict his argument on two issues namely rejection of the refund claim as time-barred and refusal to deduct from the assessable value, post-manufacturing expenses such as secondary packaging and bill discount charges only.

5. As regards the rejection of refund claim for the period from 12th November, 1977 to 12th November, 1980 is concerned it was submitted that by a letter dated 4th January, 1980 the Petitioners had informed the Respondents that, they were paying duty under protest and, therefore, refund claim at least from the date of payment of duty under protest ought to have been held to be within time. A perusal of the letter dated 4th January, 1980 (Exhibit "A" to the petition) clearly shows that in the said letter nothing was stated as to which item is a post-manufacturing expense and which item cannot be included in the assessable value. In fact, by a letter dated 21st January, 1980, the Respondents had informed the Petitioners that their letter dated 4th January, 1980 is vague and in the absence of particulars, the payments made thereafter cannot be treated as payment under protest. Under the circumstances, we see no reason to interfere with the finding given by the adjudicating authority in rejecting the Petitioners claim as time-barred. Since the payments made during the relevant period are not under protest and the refund claim is beyond the period prescribed under the Act, the adjudicating authority is justified in rejecting the claim as time-barred.

6. Mr. Dharmadhikari, learned Counsel for the Petitioners submitted that the secondary packaging was done pursuant to the specific order received from the up-country customers. Referring to a copy of the letter dated 28th January, 1975 issued by one of their customers seeking additional packing, it was submitted that since the additional packing is done at the instance of the customers, the same cannot be included in the assessable value. However, in view of the clear

finding given by the adjudicating authority to the effect that the assessee has been uniformly using hessain cloth for all the delivery to the up-country customers, irrespective of any specific request, the use of hessain cloth as secondary packing has to be held to be normal packing which are offered to the wholesalers at the factory gate. In view of the clear finding given by the adjudicating authority and in the light of decision of the Apex Court in the case of Government of India and Others Vs. Madras Rubber Factory Ltd. and Others, , the cost of the secondary packaging in which the goods are ordinarily sold to the wholesalers is liable to be included in the assessable value. In this view of the matter denial of deduction on account of secondary packaging from the assessable value as post-manufacturing expenses is justified. Apart from that, it is not the case of the assessee that the secondary packing is of a durable nature and is returned by the buyer to the assessee. Therefore, the cost of such packing has to be included in the assessable value.

7. As regards the claim of deduction on account of bill discounting charges, the adjudicating authority has held that before the sale price is credited to the account of the Petitioners, they withdrew the amount from the bank for which the bank charged interest to the company, and such an arrangement was in the nature of overdraft facility. From the facts on record, it is seen that the customer is making full payment to the company through the documents presented to the bank, but the company chooses to prematurely encash the documents. If the amount of interest paid by the company to the bank out of the sale proceeds is on account of premature encashment, then such expenditure cannot be considered to be post-manufacturing expenses. Therefore, in view of above findings given by the adjudicating authority to the effect that the interest charges paid by the Petitioners is on account of the overdraft facility availed by them, the same cannot be treated as post-manufacturing expenses and refusal to deduct said interest charges from the assessable value cannot be faulted. In this view of the matter both the claims of the Petitioners fail.

8. It is an admitted position that the duty demanded as per the impugned order dated "12th April, 1984 is to the tune of Rs. 53,93,388/- and the Petitioners have already paid an amount of Rs. 39,20,000/- thus leaving balance of Rs. 14,73,388/-. Mr. Dharmadhikari, learned Counsel for the Petitioners submitted that the Petitioners had furnished a bank guarantee of Rs. 16,00,000/- as per the Court order in favour of the Respondents and the same has been renewed from time to time and the said bank guarantee continues to be in force. Since, we have upheld the validity of the order impugned in the Petition, the Respondents would be entitled to recover the balance amount of Rs. 14,73,388/- with interest at the rate of 12% per annum from the date of said order till payment by encashing the bank guarantee furnished by the Petitioners and or by any other mode permissible in law.

9. In this view of the matter, the petition is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

10. At this stage, Mr. Dharmadhikari, learned Counsel appearing on behalf of the Petitioner seeks stay of the execution of the order for 12 weeks. The request is granted and the Respondents are directed not to encash the Bank guarantee for the period of 12 weeks from today.

11. Certified copy expedited.