(1993) 06 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition 949 of 1983

National Radio and Electronics Co. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 10-06-1993

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1993) 48 ECR 565 : (1993) 67 ELT 232

Hon'ble Judges : M.L. Pendse, J;A.P. Shah, J

Bench : Division Bench

Advocate : Shri D.B. Shroff and Mr. H.C. Daruwalla, instructed by M/s Crawford Bayley and Co., Mr. M.I. Sethna and Shri. H.V. Mehta, for the Appellant;

Judgement

Pendse, J.—The petitioner No. 1 is a company incorporated under the provisions of the Companies Act, 1913 and manufactures various excisable goods like wireless receiving sets, office machine and apparatus, musical systems, watches, clocks and time pieces, calculators etc. The articles manufactured by the company are liable to payment of excise duty under Tariff Items Nos. 33A, 33D, 33F, 44 and 68 of 1st Schedule of the Central Excise Act. The company was following the self removal procedure prescribed under Chapter VII-A of Central Excises and Salt Act, 1944 and was filing price lists from time to time under Rule 173C of Central Excise Rules. On January 19, 1980 the company filed a revised price list in respect of goods falling under Tariff Items Nos. 33A and 33D, that is, in respect of manufacture of wireless receiving sets and calculators, claiming deduction on account of post- manufacturing expenses from the wholesale price to arrive at the assessable value. The claim for deduction was based on the basis of cost data for the year 1978-89. The company thereafter filed several price lists and the Assistant Collector passed order on July 10, 1981 holding that the deductions claimed on account of post-manufacturing expenses were not permissible. The company had also filed several applications for refund, claiming refund of duty in respect of radios and calculators. The Assistant Collector dismissed all the applications for refund by passing diverse orders.

2. The company preferred appeals before the Collector (Appeals), Bombay. During the pendency of the appeals, the company filed writ petition No. 2004 of 1982 in this Court and the learned Single Judge made the petition absolute and directed the department to determine the deduction on account of post-manufacturing expenses within a period of four weeks and refund the amount collector, in accordance with the direction of the High Court, took up the proceedings and after hearing the claim of the company, rejected the contention that the deductions are necessary on account of post- manufacturing expenses while determining assessable value of the articles manufactured. The company thereupon filed the present petition under Article 226 of the Constitution to challenge the legality of the finding of the Assistant Collector. On December 9, 1983 in pursuance of the decision of the Supreme Court reported in 1983 (14) E. L. T. 1896 (S. C.) Union of India and Others v. Bombay Tyre International Ltd., a format order was passed in several matters pending in this court involving the question of deductions and amendments in respect of price lists already filed claiming the deductions on account of (a) freight; (b) octroi (c) bonus to dealers; (d) commission on sales; (e) transit insurance and (f) any other claim beyond these dealt with in the Bombay Tyre International case and the proceedings were remanded back to the Assistant Collector, Central. Excise, for reconciliation of the claim for deduction made by the company in the light of decision of the Supreme Court in Bombay Tyre International Ltd. ''s case. The Assistant Collector, Central Excise thereupon heard the company, perused the documents and passed order dated March 30, 1984 declining to accede to the claim of the company that deductions are permissible under various heads on account of post-manufacturing expenses. The Assistant Collector determined the revised assessable value and approved the price list without abatement of post-manufacturing expenses as claimed by the company. The petitioners thereupon amended the present petition pending in this Court challenging the findings of the Assistant Collector and the controversy which now survives for consideration is in respect of items which the company claims are liable to be deducted on account of post-manufacturing expenses.

3. The first item is in respect of bonus to dealers. Shri Shroff, learned Counsel appearing on behalf of the company, claimed that the policy document issued by the company prior to February 6, 1981 sets out the scheme which provides for grant of bonus to the dealers and also establishes that the scheme was in existence from the year 1970. The Assistant Collector declined to accept the claim for deduction on the ground that the allowance and nature of discount was not known at the time of removal of the goods. The Assistant Collector observed that though the nature of the discount is known, the allowance is not known till the dealer fulfills the conditions required for claiming the bonus and the fulfilment of conditions can be ascertained only at the end of the year or specified period of the bonus scheme. The finding of the Assistant Collector that the petitioners are not entitled to claim deduction on this count is not correct. The Supreme Court in decision reported in 1984 (17) E. L. T. 329 (S. C.)

examined the claim as regards the trade discount and observed that 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, the allowance and the nature of the discount being known at or prior to the removal of the goods. The question which falls for determination therefore is whether the bonus to dealers falls within the expression "discounts allowed in the trade". As observed by the Supreme Court, the trade discount should be allowed to be deducted by whatever name such discount is described. We have no hesitation in holding that the bonus to dealers is in the nature of trade discount. As per the test laid down by the Supreme Court, the allowance in the nature of the discount should be known at or prior to the removal of the goods. It is not in dispute that in accordance with the policy documents produced by the company, bonus to dealers is known at the time of sale of goods to wholesale dealers. It is equally not in dispute that the rate of sale of goods to wholesale dealers. It is equally not in dispute that the rate at which bonus would be paid to the dealers is also set out. In our judgment, once these two averments are established, then the advantage of deduction cannot be declined on the ground that exact quantum of bonus which will be payable to the dealers is not known at the time of removal of the goods. In the nature of things, it is impossible to expect what would be the quantum of bonus at the time of removal of the goods because the quantum can be determined only at the end of the year and would depend upon the quantity of articles sold. It is entirely unnecessary for the manufacturer to establish what should be the quantum of bonus which will be payable at the end of the year at the time of removal of the goods. The quantum can be ascertained only at the end of the year and therefore it is impossible to expect that the discount allowed by the trade should be known at the time of removal of the goods. In our judgment, the Assistant Collector was clearly in error in declining to examine the claim for deduction under the heading "bonus to dealers" on an erroneous assumption that the quantum of discount should be known at or prior to the removal of the goods. Shri Sethna, learned Counsel for the department, submitted that the payment of bonus to dealers is part of the sale price of the article, but it is not possible to accede is related to sales activity and granted to them an extra incentive. In our judgment, the bonus paid to the dealers clearly amounts to trade discount and has no relation whatsoever to the value of articles sold and consequently would squarely fall within the expression "post-manufacturing expenses". It is not in dispute that payment of bonus is not dependent on rendering of any after sales service.

The Assistant Collector also held that from the documents submitted by the company that the company assigned specific sales target to the dealer at the beginning of the year and these targets include sales of cloth the manufactured sets and traded sets. According to the Assistant Collector, as the bonus scheme is a composite on covering both manufactured and traded sets, it is not permissible for the company to claim deductions on the strength of bonus scheme in respect of manufactured articles. The conclusion of the Assistant Collector is erroneous and unsustainable. Merely because composite scheme is floated by the company, that would not entitle the Assistant Collector to reject the scheme even in respect of manufactured articles. The Assistant Collector will have to examine what amount of bonus was paid in respect of manufactured articles and if that fact is established by the company, then deduction shall be granted. Shri Sethna submitted that the advantage of deduction under the heading "bonus to dealers" is available provided it is established by the company that the payment of bonus to dealers is under an agreement or under terms of sale or the established practice. It is obvious that the burden is upon the company to establish the agreements or the established practice. The company claims that the scheme was in force from year 1970 and the Assistant Collector will have to examine this facet and record finding. In our judgment, the Assistant Collector has erroneously declined to examine the claim and therefore the proceedings are required to be remitted back to the Assistant Collector for re-examination.

4. The second head under which the deduction is sought by the company is freight and octroi. Shri Shroff submitted that the claim deduction on account of freight and octroi was presented before the Assistant Collector by letter dated March 26, 1984. The Assistant Collector declined to grant relief under this heading on the ground that the account for freight and octroi is combined and the books of account do not reveal separate heads in respect of these two items. Shri Shroff complains and in our judgment with considerable merit that the finding of the Assistant Collector is entirely illegal and the claim has been denied without any rationale. It is not in dispute that in paragraph 49 of the judgment in Bombay Tyre International Ltd. ''s case, the Supreme Court held that the cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery. Shri Sethna on behalf of the department very rightly did not dispute that the manufacturer is entitled to claim deduction towards the expenses incurred on freight and octroi duty. The only ground furnished by the Assistant Collector to tun down the claim was that the accounts for the freight charges and octroi duty paid were not separately presented and that ground cannot be sustained. Shri Sethna submitted that the order of the Assistant Collector also indicates that the freight charges claimed by the company also cover charges for postage and inclusion of such charges may not be permissible. It is necessary for the Assistant Collector to examine whether the amount claimed under this heading is properly calculated or otherwise but it is not permissible to reject the claim on the ground that the accounts of freight charges and octroi duty are combined. Shri Shroff pointed out that in respect of freight charges and octroi duty, combined receipt is received from the transporter and accordingly entries are made in the books of account. In our judgment, the Assistant Collector has erroneously declined to, examine the claim under this heading and therefore the Assistant Collector will have to reconsider the entire claim and pass appropriate order.

5. The third claim for deduction is under the heading of transit insurance. It is

not in dispute that the company is entitled to claim deduction in respect of transit insurance charges. The Assistant Collector again declined to grant deduction on the ground that the accounts of the company reveal that there is only one heading `insurance'' which includes the amount towards fire insurance, transit insurance, storage insurance, building insurance etc. The Assistant Collector observed that as the company failed to present the worksheets to establish what exact amount was paid towards transit insurance, the entire claim should be turned down. We are afraid that the Assistant Collector has failed to discharge the duty to determine the claim of the company. It is not permissible to reject the entire claim been assuming that the company has not filed separate worksheets to establish what amount was paid towards transit insurance. It was open for the Assistant Collector to fix any amount under the principle of best judgment. In case the company fails to produce separate worksheets, it is not permissible to reject the entire claim on the ground that company failed to produce evidence to establish specific direct the Assistant Collector to reconsider the claim under this heading and pass appropriate order.

6. That leads for consideration the last claim of deduction under the heading `secondary/outer packing''. Shri Shroff submitted that the radios manufactured by the company are packed in secondary/outer packing for safe transport of the goods and this packing is a part and parcel of cost of transportation and should be dealt with on the same footing as freight and octroi. It is not permissible to accede to the submission of the learned Counsel. The Supreme Court has laid down in Bombay Tyre International Ltd. ''s. case that the deduction is permissible when the goods are transported in a special packing. The special packing is made at the request of the buyer of the goods or is necessary by taking into consideration the peculiar nature of the goods transported. The company admitted before the Assistant Collector that the radios being delicate electronic items are normally packed in packings more than one and the radios are never sold at a factory gate without these packings. The Assistant Collector was perfectly justified in holding that the deductions sought in respect of secondary/ outer packing is not permissible. In our judgment, the finding of the Assistant Collector on this count does not suffer from any infirmity.

7. As the conclusion of Assistant Collector in respect of other items is incorrect for the reasons set out hereinabove, it is necessary to set aside the impugned order dated March 30, 1984 and remit the matter back to the Assistant Collector for a fresh disposal in the light of the observations made in the judgment. It is made clear that the finding of the Assistant Collector in respect of claim for deduction on the ground of secondary/outer packing is not disturbed. The Assistant Collector shall permit the company to lead additional material if so demanded and then dispose of the matter afresh as expeditiously as possible.

8. Rule is accordingly made absolute. In the circumstances of the case, there will be no order as to costs.

