(2001) 04 DEL CK 0114

In the Delhi High Court

Case No : Civil Writ Petition No. 263 of 1979

Nuchem Plastics Limited APPELLANT

Vs

Assistant Collector of C. Ex., Faridabad RESPONDENT

Date of Decision : 04-04-2001

Acts Referred:
Central Excises and Salt Act, 1944 — Section 4(1)

Citation : (2002) 143 ELT 254

Hon'ble Judges : S.B. Sinha, C.J;A.K. Sikri, J

Bench : Division Bench

Advocate : Vivek Sood and Manoj Lohia, for the Appellant; Jayant Bhushan, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—In this writ petition, the petitioner herein, a manufacturer of U.F. and M.F. Moulding Powder and Prescol Resin powder, has inter alias prayed for issuance of a writ in the nature of mandamus directing the respondents to approve as proper value to be charged with excise duty the international prices fixed under law by the Government for supplies made by the petitioner to the holders of release orders issued by the Govt.

2. The petitioner is registered and incorporated under the Companies Act. The product of the petitioner is chargeable with excise duty which used to determine the value of its product from time to time in terms of the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act, for short) and the rules framed there under.

3. According to the petitioner, in terms of the scheme, the petitioner was obliged to supply and in fact had been supplying goods to the holders of the release orders issued by the Chief Controller of Exports and Imports Bombay at the international price fixed by the Chief Controller of Imports and Exports. The international prices were fixed by the Government and release orders are issued

by it. As such, according to the petitioner, it had no discretion in the matter. The question which arose for consideration was as to whether the excise duty shall be payable on ordinary price for sale or at the international price fixed by the Central Govt. It is not in dispute that international price for the goods was fixed at Rs. 6000/- per metric tonne.

4. The petitioner would contend that the issue was referred to the Collector Central Excise who in turn raised the same to the Central Board of Excise and Customs for instructions and orders. Instructions, directions and guidelines of the Collector, Chandigarh sought for by the local officials of the Department of Central Excise, Faridabad had also been referred to the Board in terms of Section 35A of the Act. The relevant extract of the said letter is as under:

"One of the items covered under the scheme is U.F. moulding powder. The office of the CCI & E vide their No. 1/2(ix)/74-EPC/5690 letter dated 22/23-10-1975 (copy enclosed) addressed to the plastics and linoleum export Promotion Council Bombay has fixed the international price for U.F moulding powder @ Rs. 6000/- per MT for the quarter October-December, 1975 and mentioned M/s. Nuchem Plastics Ltd., Faridabad as one of the two indigenous suppliers.

The firm has submitted two separate price lists-one @ 12,500/- per MT for sales in the wholesale market and the second @ Rs. 6000/- as fixed by the Commerce Ministry, for supplies under the aforementioned scheme. The first price list has already been approved by the Assistant Collector of Central Excise, Faridabad. The problems that have arisen are in regard to the acceptance of the second price which is more than 50% less than the normal price.

In my view the special price fixed by the CCI&E should be acceptable as a statutory price under the provisions of Section 4(1)(a)(ii) of the Central Excises and Salt Act, 1944. The case would also appear to be covered u/s 4(1)(a)(i) as the buyers can be treated as a different class of buyers. On the question whether the price is the sole consideration I am of the opinion that it is so because the advantages of import replenishment etc. are obtained by the suppliers from the Govt. and not from the buyers.

Since however the matter is not free from doubt, Board''s confirmation of my views is solicited."

The Board gave its opinion stating:

"The question whether the value of polyethylene moulding powder (HDP/LIP) which is said to be released at international price fixed by the CCl&E as part of the Export Scheme should be based on such prices has been examined.

The Scheme under which the supplies of indigenous raw materials like polyethylene powder (HDP/LDP) are made at international prices and how release orders for the purpose are issued is explained in the import trade control policy at Page 21 of Vol. II of the Import Trade Control Policy for the period from April, 1976 to March, 1977 (Para 44). The buyers to whom the raw materials are supplied under release orders constitute a distinct class and, Therefore, in terms of proviso (1) of Section 4(1)(a), the value may be based on such prices."

5. By reason of the impugned order dated 9-1-1979, the Assistant Collector Central Excise, Faridabad, however, rejected the claim of the petitioner inter alias on the ground that international price is an optional one and is not binding on the assessed under any statutory law. The Superintendent of Excise also vide letter, dated 18-1-1979 held that the claim of the petitioner was not acceptable.

6. It is not in dispute that the international price fixed by the Central Govt. and the normal prices for the goods in question are different.

7. Section 4 of the Central Excises and Salt Act, 1944, as it stood then, reads as under :

"4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such 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 assessed to a buyer in the course of wholesale trade for 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 assessed at different prices to different classes of buyers (not being related persons) each such price shall subject to the existence of the other circumstances, specified in Clause (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 assessed 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 price, being the maximum fixed under any such law, then notwithstanding anything contained in Clause (iii) of this proviso the price or the maximum price as the case may be, so fixed, shall be in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessed 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 assessed to or through such related person shall be deemed to be the price at which they are ordinarily sold by all 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;"

8. The only question which arises for consideration is as to whether the proviso (ii) appended to the said provision would be applicable to the instant case or not.

There cannot be any doubt that the value to be determined for the purpose of computation of excise duty payable on the product would be the normal price thereof i.e. to say the price on which the assessed ordinarily sell its goods in the course of wholesale trade but the proviso (ii) appended thereto, inter alia, makes an exception to the said rule.

9. A price fixed under any law for the time being in force must be given a broad meaning.

10. It is not in dispute that international prices are fixed by the Central Govt. under a scheme. Under the industrial licenses the manufacturers are obliged to export 15% of their production. Such a clause has been inserted as the petitioners are required to import raw-material which are required for their use and consumption in their factory.

11. How the prices are fixed and how release orders are issued is the subject matter of Import Trade Control Policy which is a part of the legislative process.

12. A proviso as is well known has three different functions, as has been held by the Apex Court in S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others,

"A proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify of set at naught the real object of the main enactment. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself".

13. As this proviso seeks to act as an exception to the main provision, the same should be given full effect to, particularly in view of the fact that the entire scheme is made under a statutory provisions. A fiscal statute as is well known in case of doubt shall be interpreted in favor of the subject and against the revenue. In M/s. K.R. Steel Union Ltd. Vs. Commissioner of Customs, Kandla (Gujarat), it has been held :

"10. In our opinion, a notification like the one which falls for our consideration (No. 77/80-Cus.) cannot be read in a narrow manner so as to defeat the object of the notification because the notification in question permits the importation of certain second-hand machineries to be used in the manufacture of goods meant only for export in units situated in the defined zones. The object and purpose of such exemption notification is to encourage exports by granting exemption from customs duty on materials that are required to be imported for the purpose of manufacture of resultant products which are to be exclusively exported. The words of the notification have to be construed keeping in view the said object and purpose of the exemption. This is also the view taken by this Court in the case of M/s. Oblum Electrical Industries Pvt. Ltd., Hyderabad Vs. Collector of Customs, Bombay, This Court in that case while construing the words : "materials required to be imported for the purpose of manufacture of products" found in Notification No. 116/88-Cus. Similar to the notification involved in this case held :

"The wordings in the notification have to be construed keeping view the said object and purpose of the exemption. In the notification two different expressions have been used, namely, materials required to be imported for the purpose of manufacture of products and replenishment of materials used in the manufacture of resultant products which indicates that the two expressions have not been used in the same sense. The former expression cannot be construed as referring only to materials which are used in the manufacture of the products. The said exemption must be given its natural meaning to include materials that are required in order to manufacture the resultant products. On that view, the exemption cannot be confined to materials which are actually used in the manufacture of the resultant product but would also include materials which though not used in the manufacture of the resultant product are required in order to manufacture the resultant product".

14. Furthermore, there was absolutely no reason as to why interpretation of the Board had not been accepted by the respondent herein.

15. For the reasons aforementioned, we are of the opinion that duty should be charged at the international price and not on the wholesale price. We however direct that the matter relating to refund of the excise duty paid by the petitioner shall be subject to the findings which may be arrived at by a competent authority as to whether the petitioner has passed on the liability to the consumer or not and whether in the event such refund is directed to be made the same would amount to unjust enrichment or not. With the said observation, this writ petition is allowed but in the-facts and circumstances of the case, there shall be no order as to costs.

