
(1990) 09 BOM CK 0043
In the Bombay High Court
Case No : Writ Petition No. 265 of 1982

Roche Products Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 06-09-1990

Acts Referred:

Central Excise Rules, 1944 — Rule 233B
Central Excises and Salt Act, 1944 — Section 4

Citation : (1991) 33 ECR 58 : (1991) 51 ELT 238

Hon'ble Judges : M.L. Pendse, J; M.F. Saldhana, J

Bench : Division Bench

Advocate : Shri V. Nankani and Mr. S. Rustomjee, instructed by M/s. Crawford Bayley and Co, for the Appellant; Shri R.V. Desai, for the Respondent

Judgement

Pendse, J.—The petitioners are a Company incorporated under the Companies Act, 1956 and manufactures bulk drugs, synthetic vitamin "A" in various forms, animal feed supplements and food additives and supplements at their factory at Balkum in Thane District. The products manufactured by the Company are liable to payment of excise duty under Tariff Item 68 of the First Schedule to the Central Excises and Salt Act, 1944. By Notification dated April 30, 1975, the Central Government exempted the goods falling under Tariff Item 68 which were cleared from the factory of manufacture, for sale, from so much of duty of excise leviable thereon, as is in excess of the duty calculated on the basis of the invoice price charged by the manufacturer for the sale of such goods. To avail of this exemption, the manufacturers were required to file a written declaration to the effect that they were opting to avail of the exemption. The petitioner Company availed of the exemption by writing dated June 19, 1975. The option covered several products like bulk drugs, synthetic vitamin "A" in various forms, animal feed supplements and food additives and supplements.

2. The products manufactured by the petitioner Company were sold to M/s. Voltas Limited under agreement of distributorship. It is no in dispute that the

products in respect of which exemption was available are the products sold to M/s. Voltas Limited under the agreement of distributorship.

3. The Superintendent of Central Excise, Thane by show cause notice dated March 5, 1976 served on the Company claimed that as the Company was selling its entire production to M/s. Voltas Limited under distributorship agreement, the exemption available in the Notification dated April 30, 1975 is required to be withdrawn. The Company was called upon to show cause why the Company should not be directed to file the price list in Part IV, as required u/s 4, Proviso (iii) of Clause (a) of sub-section (i) of the Act on the basis of the prices charged by the distributors to their independent dealers. The petitioners gave reply on April 20, 1976 and thereafter the Assistant Collector passed order dated October 14, 1976 making the show cause notice absolute. The Assistant Collector held that the prices charged by M/s. Voltas Limited to their customers should be taken for the assessment purposes and the Company should file price list in Part IV and should pay duty on the basis of the prices charged by Voltas Limited to their independent dealers in respect of all past clearances from October 1, 1975.

The Company preferred an appeal before the Appellate Collector, Central Excise, Bombay but the appeal ended in dismissal by order dated June 3, 1977.

4. The Company then carried a Revision Petition before the Central Government and during the pendency of the petition, the Company filed price list in Part IV and paid excise duty on the prices charged by M/s. Voltas Limited to their customers. The duty was paid by the Company under protest and without prejudice to the rights agitated in Revision Petition before the Central Government. The Revision Petition was allowed by Additional Secretary to the Government of India, Ministry of Finance and Department of Revenue by order dated March 5, 1980. The Government of India held that the invoice price to M/s. Voltas Limited should constitute the assessable value under the Central Excise Notification dated April 30, 1975 and the orders of the Superintendent of Central Excise and the Appellate Authority that the assessable value should be the price charged by M/s. Voltas Limited to their customers are not correct. The Revisional Authority held that where the assessee paid duty by claiming benefit under Exemption Notification dated April 30, 1975 the concept of "related person" u/s 4 cannot be imported.

5. In consequence of the order passed by the Revisional authority, the petitioner Company submitted application dated December 3, 1980 seeking refund of the differential amount of excise duty of Rs. 3,42,509.20 for the period commencing from March 1, 1978 to May 14, 1980 in respect of all the products supplied to M/s. Voltas Limited. By the impugned order dated October 5, 1981, the Assistant Collector of Central Excise, Bombay Division, Thane sanctioned Rs. 1,11,677.81 and rejected the claim for Rs. 2,30,831.39. The Assistant Collector held that the revisional authority had given relief only in respect of one product, i.e. "ROVIMIX" and, therefore, refund cannot be granted in respect of payment of duty on other products. The Assistant Collector further held that the Company

failed to produce Gate Pass No. 1141 dated July 28, 1978 involving the amount of Rs. 1,726.97 and in absence of Gate Pass refund cannot be granted. The Assistant Collector further held that excise duty of Rs. 40,628.36 paid under 46 Gate Passes was not paid under protest and, therefore, refund is not admissible. Finally, the Assistant Collector held that the refund sought by the petitioner Company is not passed on to the customers and, therefore, the amount of refund should constitute the part of the assessable value u/s 4 of the Central Excises and Salt Act, 1944 and duty of Rs. 6,114.81 and Rs. 2,176.70 is payable on this refund amount and this amount will have to be excluded while awarding the claim of refund. The order of Assistant Collector is under challenge.

6. Shri Nankani, learned counsel appearing on behalf of the petitioner, submitted that the Assistant Collector by the impugned order denied refund of Rs. 2,30,831.39 on entirely unsustainable grounds. We find considerable merit in the submission of the learned counsel. The first ground for refusing the refund is that the revisional authority had granted relief only in respect of product Rovimix and not in respect of other products supplied by the Company to M/s. Voltas Limited. The assumption of the Assistant Collector on this count is entirely unfounded and contrary to the orders produced on record. As mentioned hereinabove, the distributorship agreement between the Company and M/s. Voltas Limited provided for supply of various products manufactured by the Company. The products supplied by the Company were described by the Assistant Collector of Central Excise while confirming the show cause notice as "fine chemicals". The order of the Assistant Collector dated October 14, 1976 recites that the inquiry made by the Department revealed that the entire production of fine chemicals are supplied to M/s. Voltas Limited and, therefore, the Voltas Limited became related person within the meaning of Section 4 of the Act. In consequence of the order, the Assistant Collector directed the Company to file revised price list in accordance with Part IV and pay duty on the basis of the prices charged by M/s. Voltas Limited to their independent dealers on all past clearances from October 1, 1975. The copy of the price list filed by the Company in accordance with the direction on December 15, 1977 reveals that the Company was supplying large number of products manufactured to M/s. Voltas Limited. It is obvious that all these products were covered by the order of the Assistant Collector and the Appellate Authority and were in issue before the revisional authority. The question as regards the assessable value of the goods supplied by the Company to M/s. Voltas Limited was to be determined on resolution of issue as to whether the concept of related person u/s 4 can be imported while payment of duty by claiming the benefit under exemption notification dated April 30, 1975. The revisional authority on principle held that the concept is not permissible and M/s. Voltas Limited cannot be treated as related person. Once, this conclusion is reached, then the consequence must follow and the duty recovered by the Department on an erroneous principle is bound to be refunded to the petitioner Company. The assumption of the Assistant Collector that the order of the revisional authority deals with only one product is wholly incorrect.

The Assistant Collector was also in error in denying refund of Rs. 1726.97 on the ground that Gate Pass No. 1141 dated July 28, 1978 was not produced by the Company while seeking refund. The petitioner Company claims that Gate Pass was sent to the office of the Assistant Collector along with another refund application dated October 25, 1979 which was pending and hence could not be enclosed with the refund application filed subsequently. The learned counsel appearing on behalf of the Company produced an acknowledgment receipt from the Office of the Assistant Collector about the receipt of this Gate Pass. The respondents have not cared to file any return challenging the claim made by the Company and we fail to appreciate how the claim for Rs. 1726.97, in these circumstances, can be ignored.

The finding of the Assistant Collector that refund of Rs. 40,628.36 covered by 46 Gate Passes cannot be granted because the duty was not paid under protest is incorrect both factually and in law. The learned counsel appearing on behalf of the petitioner pointed out that the duty was paid under protest during the pendency of the revision petition, and after the decision of the revision petition, the duty recovered cannot be retained. Shri Desai, learned counsel appearing on behalf of the Department, submitted that the procedure prescribed under Rule 233-B of Central Excise Rules, 1944 was not followed and, therefore, the order of the Assistant Collector is correct. We are unable to find any merit in this submission. The Company had written letter to the Assistant Collector intimating that the duty is paid under protest pending the revision petition and that is more than sufficient compliance with the requirement of Rule 233-B. The Rules are procedural and can by no stretch of imagination be treated as mandatory. Apart from this consideration, the Assistant Collector overlooked that the refund is sought because the superior authority has set aside the orders passed by the lower authorities and the refund sought is in the nature of restitution. The Company paid the duty during the interregnum i.e. while the revision petition was pending before the Government and once the revisional authority sets aside the decision of the lower forums, then the duty recovered in pursuance of the orders which were reversed cannot be retained, whether the duty was paid under protest or without any protest. In our judgment, the refusal of refund of Rs. 40,628.36 is wholly incorrect.

7. The deduction of Rs. 6,114.81 and Rs. 2176.70 by the Assistant Collector on the ground that the refund amount is liable to payment of excise duty u/s 4 of the Act is entirely illegal. The Assistant Collector thought that the amount of refund available to the Company is not likely to be passed on to the customer and, therefore, the amount of refund should form part of the assessable value and the Company is liable to pay excise duty on this amount of refund. The Assistant Collector thereupon decided to deduct Rs. 6114.81 and Rs. 2176.70 on this count. We are unable to appreciate how the Assistant Collector can resort to the provisions of Section 4 of the Act to charge duty on the amount of refund. We do not find any such provision u/s 4 to authorise the Assistant Collector to levy duty on the amount of refund. The Assistant Collector also overlooked that

the refund is claimed because under erroneous orders, the Department recovered the excess duty from the Company. As soon as those orders are set aside, the Company would be entitled to get the refund and this refund cannot be denied under any provisions of the Act. In our judgment, the Assistant Collector was in error in rejecting the claim of Rs. 2,30,831.39 and sanctioning only Rs. 1,11,677.81.

8. Accordingly, petition succeeds and it is declared that the petitioners are entitled to the refund of Rs. 2,30,831.39 in addition to the refund granted by the Assistant Collector. The direction to the Assistant Collector to pay the amount of refund is not required, as by an interim order passed at the stage of admission, the Department was required to deposit the amount in this Court and the petitioner was allowed to withdraw the said amount on furnishing an undertaking to refund, if called upon. The undertaking given by the petitioners stands discharged. In the circumstances of the case, there will be no order as to costs.