

(1993) 03 BOM CK 0083
In the Bombay High Court
Case No : Writ Petition No. 265 of 1981

Rogers and Co. Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-03-1993

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1993) ECR 393 : (1993) 67 ELT 249

Hon'ble Judges : Sujata V. Manohar, J;S.H. Kapadia, J

Bench : Division Bench

Advocate : Mr. S. Diwan, instructed by M/s. Gagrath and Co, for the Appellant;
Mr. R.V. Desai, Mr. M.I. Sethna, Mr. H.V. Mehta and Mr. K.C. Sidhwa, for the Respondent

Judgement

Sujata Manohar, J.—The first petitioner-company at all times material to the petition manufactured aerated waters and prepared or preserved foods at its factory in Bombay. The aerated waters manufactured by the Company were liable to excise duty under Item 1D of the 1st Schedule to the Central Excises and Salt Act, 1944. The Company sold its products to various customers who were its wholesale dealers. It did not effect any sales at the factory gate. The price charged by the Company to its wholesale dealers was inclusive of the costs of transportation for delivery of the goods from the Company's factory to the wholesale dealers' premises. The price, therefore, included post manufacturing costs and expenses.

2. The dispute in the present petition relates to the calculation of the value of the goods so manufactured by the petitioner-company for the purposes of levy of excise duty. The period which is covered by the petition is from 1st September 1976 to 29th February 1984.

3. The old Section 4 of the Central Excises and Salt Act was replaced by a new Section 4 which was brought into operation from 1st October 1975. Prior thereto, the Bombay Excise Collectorate issued a trade notice dated 18th August 1975

setting out therein, inter alia, the prescribed proforma for filing of price lists in view of the provisions of the new Section 4. The Company accordingly filed its price lists. According to the Company, through mistake of law, it claimed an exclusion from the price of only the cost of transportation of the goods. Thereafter, the Company by its letter dated 26th August 1976 Addressed to the Assistant Collector, filed revised price lists where it claimed deduction from its price of post-manufacturing costs and expenses. Accordingly to the Company, its post-manufacturing expenses for the period 1-4-1974 to 31-1975 were Rs. 0.91 paise per dozen bottles of aerated waters. The price lists which have been filed by the Company for the periods which are relevant to the present petition are also filed on the same basis and the Company has claimed a deduction of s. 0.91 paise per dozen bottles from the price on the basis of these being post manufacturing expenses deductible from price for determination the value of the goods for the levy of excise duty. The respondents have, however, permitted the company a deduction of only Rs. 0.36 per dozen bottles and disallowed the balance deduction of Rs. 0.54 per dozen bottles.

4. Being aggrieved by this order, the petitioner, preferred an appeal before the Appellate Collector who by his order dated 18-1-1978 remanded the case for de novo adjudication because according to him certain expenses on bonus, provident fund relating to drivers of the trucks etc. had not been considered. In the meanwhile, the Company had filed revised price lists and four refund claims, all dated 18-3- 1977. Two of these refund claims were in accordance with the permitted deduction of 36 paise. The other two refunds claimed were in respect of the balance amount of 54 paise. The refund claims in respect of even the deduction of 36 paise were rejected by the Assistant Collector. The Company, therefore, filed appeals before the Appellate Collector of Central Excise. The Appellate Collector by his order dated 9th August 1978 remanded the refund claims for de novo adjudication.

5. We need not examine here the subsequent proceedings which have taken place and which are set out a length in the petition. The first petitioner company's price lists have been approved without granting any deduction of either 36 paise or 54 paise as claimed by the Company. The Company is challenging in this petition rejection of the Company's claim for deduction of post-manufacturing expenses. After the writ petition was admitted, the decision of the Supreme Court in the case of Union of India & Ors. v. Bombay Tyre International Ltd., reported in 1983 (14) E. L. T. 1896, was pronounced as also the subsequent clarification of the Supreme Court dated 15-11-1983 in the same case. Thereafter, a Ld. Single Judge of this Court issued a format order dated 9-12-1983 under which he directed the assessing authorities to determine the excise duty liability of the petitioner in accordance with the directions given by the Supreme Court in the above case. For that purpose, he had specified the headings of deductions claimed by the assessee which were to be examined. The headings so specified were :

- (1) Cost of transportation
- (2) Commission
- (3) Trade Discount, and
- (4) Motor Trucks Insurance

together with further or other claims or deductions or Heads of Expenditure beyond those dealt with in the judgment orders of the Supreme Court in Union of India v. Bombay Tyres International case (supra). The petitioners were required to file requisite statements/amendment with the authorities by 9-1-1984. They were also required to file such documentary evidence as they may be called upon to do by notices issued by the assessing authorities within 2 weeks of the filing of the statements/amendments. Such documentary evidence was to be filed within 2 weeks of the notices. There were other detailed directions given in the said order which need not be reproduced here. Pursuant to the directions so given by the Ld. Judge, the 1st Petitioners filed statements before the assessing authority under their various heads of claim for deduction.

6. The assessing authority by its order dated 26-3-1984 denied to the petitioners deduction under three heads which are now being challenged before us in this petition by way of amendment. These three heads are:

- (1) Transport expenses
- (2) Cost of secondary, durable and returnable packing, and
- (3) Trade discounts.

These are the only claims which are pressed before us by the petitioners. Hence, we will confine ourselves to these three claims alone.

(1) Transport Expenses : - u/s 4(2) of the Central Excises and Salt Act, 1944, where an relation to any excisable goods a price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price. In the case of the petitioners, there is no dispute that there are no sales at the factory gate and the price is fixed with reference to the place of delivery. The petitioners' cost of transportation from the place of delivery. The petitioners' cost of transportation from the place of removal to the place of delivery is, therefore, to be excluded from such price u/s 4 sub-section 2. The Assistant Collector has accordingly granted to the petitioners deduction in respect of the cost of transportation of the aerated water bottles from the petitioners' factory to the premises of the wholesale dealers. The Assistant Collector has, however, not granted to the petitioner certain deductions in respect of the cost of the petitioners' delivery department. The Assistant Collector has held that transport in the present case involves three activities : (1) Transport of excisable goods from the place of removal to the place of

delivery.

- (2) Bringing back empty bottles from the customers' premises to the factory, and
- (3) Bringing back unsold duty paid bottles and their subsequent re transportation to some other customers.

According to the Assistant Collector, only the 1st activity would qualify for deduction u/s 4(2). She has, therefore, granted only a portion of the delivery department expenses, as a deduction in the manner set out in the order which is challenged before us by the petitioners.

7. Now, the petitioners transport the bottles from their factory to the premises of the wholesale dealers in their own trucks. There are delivery men who accompany such trucks. On arrival at the premises of the wholesale dealer, the crates of aerated water bottles are unloaded from the truck and transported to the premises of the wholesale dealer. Empty bottles are taken back by the delivery men and loaded in the trucks. These empty bottles are taken back to the factory of the petitioners. Similarly any unused bottles are also collected and taken back to the factory of the petitioners. These are later distributed to other wholesale dealers. The petitioners contend that the cost of transport includes the costs of the delivery department as well as the cost of maintaining trucks and drivers. These should all have been allowed fully as a part of their transport costs.

8. In support they have relied upon a decision of the Supreme Court in the case of Indian Oxygen Ltd. Vs. Collector of Central Excise, . In the case before the Supreme Court also, the assessee company which manufactured compressed Oxygen and dissolved acetylene which were sold in cylinders, had claimed the cost of transportation of these cylinders which included also the cost of return of empty cylinders to their factory. The price of sales of the product at the assessee's factory gate were also, however, available. Hence the Supreme Court said that since ex-factory price was available, value for the purposes of excise could be determined on that basis. Supreme Court, however, considered the question of cost of transportation and it observed, "it is clear from Section 4 that the delivery and collection charges have nothing to do with the manufacture as they are for delivery of the filled cylinders and collection of the empty cylinders. These charges have to be excluded from assessable value..... Duty of excise is a tax on the manufacture, not a tax on the profits made by a dealer on transportation". These observations of the Supreme Court are binding on us. The Supreme Court has clearly, therefore, held that u/s 4, the valuation of excisable goods for the purposes of charging duty of excise will exclude from such value the cost of transportation from the place of removal to the place of delivery including the cost of dialer of filled cylinders to the premises of the wholesalers to the factory of the petitioners, since these do not form a part of the manufacturing activity of the petitioners. The ratio directly applies to the present case. The only additional fact which we have to take into account is the cost of bringing back unutilised full bottles. This transport cost is also not a part of the

manufacturing activity of the petitioners. The price which is charged by the petitioners to the wholesaler, the cost of return of empty bottles as also the cost of return of unutilised full bottles. Hence all these costs will have to be deducted from the value of the goods for the purposes of excise duty in view of the ratio of the Supreme Court Judgment in the case of Indian Oxygen Ltd. (supra).

9. Mr. Desai, Ld. Advocate for the Respondents sought to rely upon the observations of the Supreme Court in the case of Union of India v. Bombay Tyres International Ltd. 1983 (14) E. L. T. (SC) 1925 (para 49). In this paragraph the Supreme Court, while dealing with post-manufacturing expenses, said that where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include cost of insurance and freight for transportation of the goods from the factory gate to the place or places of delivery. It was the contention of Mr. Desai that these observations of the Supreme Court do not cover the cost of return of empty bottles and hence petitioners are not justified in claiming these costs. But the subsequent Supreme Court decision in the case of Indian Oxygen Ltd. (supra), has expressly dealt with this aspect. Although the observation are obiter dicta, they are nevertheless binding on us. In view thereof, the assessee is entitled to claim a deduction in respect of the cost of the delivery department also.

10. The second head of deduction claimed by the assessee relates to durable and returnable packing. The assessee supplied their bottles of aerated water in crates. These crates are returned by the wholesalers to the assessee along with empty or full bottles. The assessee has claimed repair charges in respect of these crates as deductible expenses on durable and returnable packing. Section 4(d)(i) of the Central Excises and Salt Act, provides that "value" in relation to any excisable goods-, where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing "except the cost of packing which is of a durable nature and is returnable by the buyer to the assessee. "Hence, petitioners have claimed this deduction. The claim has been disallowed by the Assistant Collector. The Assistant Collector has come to the conclusion that the wholesale price charged by the petitioner did not include as a component of this price, the cost of such crates and hence there is no question of excluding cost from the wholesale price.

11. In support, the Assistant Collector has relied upon the proforma which was filled in by the petitioners for determination of value u/s 4 of the Central Excises and Salt Act, 1944. This proforma contains various columns. Under column 3, the assessee is required to set out the price at which such goods are ordinary sold in the course of wholesale trade. If the price in column 3 does not include the cost

of packing, the assessee is required to set out in column 5 the nature of such packing and in column 6 the cost of packing. Therefore, columns 5 and 6 are required to be filled in if the wholesale price does not include the cost of packing. Under columns 5 and 6 the assessee have stated, "returnable and durable secondary packing. Price includes packing secondary returnable glass container". Asterisk which is put next to "returnable and durable secondary packing" has a reference to the price breakup which the petitioners have mentioned against column 10 where separate cost of secondary packing is shown as a component of the price. As asterisk is put against this component to correlate it to columns 5 and 6. In the present case, crates are secondary packing. Primary packing will be bottles. The assessee have contended that they have filled in columns 5 and 6 by mistake and this is apparent from what they have written in those columns. What they have written clearly shows that the price includes the cost of returnable and durable secondary packing.

12. From the order of the Assistant Collector (at internal page 43), it seems that the department had never disputed the nature of the packing being durable and returnable. The Assistant Collector, examined the trade practice in this regard and said that the ownership of the crates was not transferred to the customers. Customers merely paid a security deposit and the goods were not sold together with the bottles and crates. Therefore, wholesale price charged was not inclusive of charges on account of bottles and crates. These findings, in our view, do not appear to have any basis and proceed from non- application of mind to the material which was before the Assessing Officer.

13. Mr. Desai has also contended that there should be an agreement between the buyer and the company for the return of packing before claim can be made for deduction under this head. In support he relied upon the judgments of the Supreme Court in the case of K. Radha Krishnaiah Vs. Inspector of Central Excise and Others, , Mahalakshmi Glass Works (P) Ltd. Vs. Collector of Central Excise, Bombay, and Sathe Biscuits and Chocolate Company Ltd. and another Vs. Union of India and others, . It was, however, nobody's case before the Assistant Collector that there was no arrangement between the assessee-company and the wholesalers regarding return of crates. The arguments before the Assistant Collector proceeded on the basis that the crates were, in fact, returnable. In fact, the Assistant Collector has also examined the trade practice in this connection. Therefore, on the facts of the present case, the judgments which are relied upon by Mr. Desai had no application in the case of the assessee. It is not disputed that the crates in which they supplied aerated water bottles to their wholesale dealers were returnable. In fact, the assessee aerated water bottles to their wholesale dealers were returnable. In fact, the assessee have incurred repair charges in respect of the crates so returned which they are claiming as a part of the cost of such crates which should be deducted.

14. This brings us to the last head of deduction which has been denied to the petitioners. This pertains to a claim of trade discount. The Assistant Collector has

rightly observed that in view of the judgment of the Supreme Court in Bombay Tyres International case (supra), and particularly the clarification issued by the Supreme Court in that case reported in 1984 (17) E. L. T. 329 (SC) : 1983 ECR 2233 (SC) . "Discounts allowed in the Trade..... 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 discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. "Such deduction also need not be at a uniform rate. Our High Court in the case of 966455--> has held that claim for such discount must be considered on its own merit irrespective of the fact that the quantum of discount varies from region to region and also within the same region from dealer to dealer. The claim cannot be rejected on the ground of such variation.

15. In the light of these observations, we have to examine the petitioners claim for trade discount. The claim of the petitioners falls in two categories; one, the trade discounts given by the petitioners to their credit customers and two the trade discount given to cash customers. In the case of those customers who do not pay in cash, the petitioners have entered into a special agreement for supplying goods at a special low price with each such customer prior to removal of goods. The agreement does not expressly specify any percentage of trade discount. But a special low price is fixed under the agreement which is lower than the price list published by the petitioners. In the invoice shown is the agreed low price. The special price is fixed under the case of supply to such customers, no discount is shown in the invoice. What is shown in the invoice is the agreed low price. The special price has been negotiated by the petitioner with individual wholesale dealers. There is no uniformity about the special price so agreed upon, nor is there any uniform basis on which petitioners have granted such a low price. The discount has varied from customer to customer. Such a discount falls within the ratio of the judgment of the Supreme Court in the case of Bombay Tyres International (supra) read with the decision of our High Court in Rallis India Ltd. & Anr. Union of India (supra)., As the arrangement is entered into prior to the removal of the goods, the discount is known to the customers before removal of the goods, the discount is known to the customers before removal of the goods. Secondly, a special low price is clearly in the nature of a discount because it is lower than the published price list of the petitioners. The fact that it is differently negotiated with different customers also can make no difference. What is, therefore, required to be taken into account is the actual discount so allowed by the petitioners to give them a proportionate deduction from the price for the purposes of determination of excise duty. The Assistant Collector was clearly wrong in not applying her mind to the relevant facts. She appears to have denied the discount granted to credit customers only on the ground that the percentage of trade discount was not shown in the invoices and that the trade discounts so granted varied from customer to customer. Both these findings show non-application of mind to the relevant provisions of law.

16. The second type of trade discount which is claimed by the petitioners is in respect of the discount which the petitioners have granted to their cash customers. In these cases, there is no special agreement between the parties as in the case of credit customers. The petitioners, however, urged that there is a trade practice under which their policy of granting a discount is known to cash customers. In the price lists which are circulated by the petitioners, however, it is not mentioned that the petitioners will grant such a discount to their cash customers. It is also an accepted position that the cash discount which is granted by the petitioners is not uniform. The practice followed by the petitioners is that they give to their customers a book in which all the supplies made to the customers are noted down. At periodic intervals the petitioners give to their purchasers vouchers giving credit which vouchers are encashed by the customers. The vouchers vary from customer to customer and no basis is set out by the petitioners on which such discounts are granted.

17. These discounts have been disallowed by the Assistant Collector on the ground that there is no material before the Collector to show that such discounts were known to the customers at the time of the removal of the goods. The petitioners also, apart from urging that there is a trade practice to give such discounts, have not been able to show that the discount to be granted by the petitioners was known to the wholesale dealers who purchased the goods from them on a cash basis. This becomes particularly important the goods from them on a cash basis. This becomes particularly important in a case like the present one where a uniform discount is not granted and where the different wholesalers are given vouchers on different basis. In such a situation, it is difficult to accept that there was a trade practice which was known to each of the cash customers prior to removal of the goods or that each customer knew the quantum or percentage of discount at the time of removal of the goods. Normally such a trade practice is uniform and is well publicised and often mentioned in the price lists themselves. None of these factors are present in the present case. In these circumstances, it is difficult to accept that the criteria for granting such a discount to cash customers were known to the trade in advance. The petitions have themselves stated that the quantum of discount was a matter of individual negotiations. It is not clear when these negotiations have taken place in the absence of any written agreement. Undoubtedly, the petitioners have given such a discount to their cash customers. But the petitioners have merely set out in their letter dated 21-1-1984 addressed to the Assistant Collector, Exhibit Z-9 to the petition, that even if the discount to cash customers is not shown on the invoice, it is granted in accordance with the procedure adopted by the petitioners. They have said, "For the discount to cash customers, a book is given where every day purchases are noted down and from these records quarterly or half yearly as the case may be, a particular customer collects the discount by signing vouchers issued by the Petitioners" Officers. "This explanation does not throw any light on the question whether the quantum of the discount was known to the customers prior to the removal of the goods. Looking to all the

circumstances, the findings given by the Assistant Collector that such a discount was not known to the customers prior to removal of the goods cannot be considered as perverse or without any application of mind. In these circumstances, in our view, no interference is called for from the findings of the Assistant Collector that the petitioners are not entitled to take into account the trade discount given by them to their cash customers.

18. It was vehemently urged by Mr. Desai on behalf of the department that the petitioners did not produce before the Assistant Collector the requisite evidence in the form of documents in support of their claims for various deductions. But the contention of the department is not supported by the order which is passed by the Assistant Collector. The order which is so passed (at internal page 16) sets out that on 12-3-1984, the assessee were required to demonstrate accuracy, authenticity and validity of the figures of costs so claimed by them. On 12-3-1984, various persons who appeared on behalf of the assessee (as set out in that order) produced records of the Company for the year 1975 onwards for verification and demonstration to the Assistant Collector as to how they have arrived at the figures in respect of transport charges claimed by them and in respect of trade discount to credit and cash customers.

19. In connection with the returnable and durable packing, it was submitted on behalf of the assessee that since this question had not been decided by the Supreme Court, the questions should be kept pending and should be decided after pronouncement of the Supreme Court judgment in this regard. The Assistant Collector, however, has proceeded to deny this claim to the petition. The relevant points at issue in this connection which the Assistant Collector was required to decide, were whether the cost of such returnable crates formed a part of the wholesale price. If so, whether such cost was required to be deducted from the wholesale price. If so, whether such cost was required to be deducted from the wholesale price in view of the provisions of Section 4(iv)(d) of the Central Excises and Salt Act, 1944. The Assistant Collector, has, however, rejected the claim only on the ground that the crates were not separately charged for. This, factory, in our view, is not of any relevance. The crates were supplied by the petitioners. They have therefore incurred the cost for such crates. What was required to be considered was whether cost of supplying such crates to the customers in which the bottles were admittedly packed, formed a part of the price. There is a complete non-application of mind to this aspect. The Assistant Collector has clearly misdirected herself in this regard.

20. A general contention is raised by Mr. Desai that the assessee had not produced evidence in the form of relevant documents in support of their claim for deductions and hence we should not intervene under Article 226 of the Constitution to set aside the order of the Assistant Collector. He has strongly relied upon the decision of this Court in the case of *Britannia Industries Ltd. Vs. Union Bank of India*, . The entire grievance of Mr. Desai Ld. Advocate for the

assessee is without basis because the Assistant Collector's order has not proceed on the basis of the petitioners not furnishing documents in respect of their various claims at all. We have earlier set out the observations made by the Assistant Collector at pages 16 and 17 of her order where she has stated that the assessee produced records for the year 1975 onwards for verification of their claims in respect of transport charges and trade discounts. Again on page 20 of the order, the Assistant Collector has set out how the assessee sought time for the production of documents and also obtained extention of time from this Court for filing their revised claims. They were granted such extention of time on 20-3-1984. The assessee company furnished their refund claims along with revised worksheets and other documents. The certificates submitted by the Chartered Accounts of the Company in support of their claims for various deductions are also on record. Therefore, in the facts of the present case, the ratio of the judgment of this Court in Britannia Biscuits case (supra) has no application at all. In the case of durable & returnable packing, the assessee wanted the question to be kept open pending Supreme Court decision. But this claim is rejected on other grounds. Hence in support of this claim, if the Assistant Collector requires any further material. she may call upon the petitioners to furnish such material, if such materials is not already on record.

21. In the premises, the matter is remanded to the Assistant Collector for the purpose of determining :

(a) The transport costs which are required to be deducted from the value of the goods for the purposes of levy of the duty of excise in the light of our judgment; and the judgment of the Supreme Court cited herein;

(b) for the purposes of determining the value of secondary, durable and returnable packing in the form of crates which is required to be deducted from the value of the goods for the purposes of payment of excise duty.

(c) for the purposes of determining the amount of trade discounts granted by the petitioners to their credit customers which is required to be deducted from the value of the goods.

22. For the purposes of so determining the deductions in the light of our judgment, the Assistant Collector may permit the petitioners to produce any additional material that the Assistant Collector may require or which the petitioners may produce before the Assistant Collector. Such additional material to the furnish within 6 weeks and the final adjudication to be made by the Assistant Collector within 12 weeks.

23. As far as refunds are concerned, it will be open to the Assistant Collector to pass such order as he may consider appropriate, in accordance with law in the light of the provisos of the Central Excises and Salt Act, 1944.

24. Rule is made absolute accordingly. In the circumstances, there will be no orders as to costs.