(1991) 09 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No. 3312 of 1981

Roplas (India) Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 04-09-1991

Acts Referred:
Central Excises and Salt Act, 1944 — Section 36(2)

Citation : (1991) 56 ELT 511

Hon'ble Judges : S.W. Puranik, J;D.J. Moharir, J

Bench : Division Bench

Advocate : Shri Atul Setalwad and Mr. C.M. Korde, instructed by M/s. Little and Co, for the Appellant; Shri R.V. Desai and Shri P.N. Menon, for the Respondent

Judgement

S.W. Puranik, J.—The petitioners are manufacturers of various fibre glass reinforced plastic articles such as jeep bodies, side cars, galley carts, chemical equipment, automotive items, etc. They also manufacture certain types of food trolleys/carts, beverage and/or bar trolleys/carts. They are specially manufactured by the petitioners for supply of these items to the Indian Airlines and Air-India for use in various aircrafts. They are of different dimensions so as to fit the various equipments in a particular type of aircraft. Unlike the normal kitchen trolleys, these trolleys manufactured by the petitioners for use in aircraft also have space for storage of trays and beverages to be placed in an insulated space below the top tray. When they are not in actual use in the aircraft, they are fitted in the special niches provided for them in the galley by means of a fastening mechanism. They are mostly of aluminium frame and their body is made of fibre glass or decorative laminate.

2. Till the end of 1977, for the purpose of assessment of Central Excise duty under the Central Excises and Salt Act, 1944, these trolleys were classified and cleared under Tariff Item 68 of the First Schedule. However, on 25th January, 1978 the respondent-Department issued a show cause notice upon the petitioners inter alia contending that the trolleys manufactured by the petitioners

should be classified under Item 40 as ''steel furniture''. Another show cause notice on the same basis was issued on 28th January, 1978 demanding differential duty from the petitioners. The petitioners vide Exhibit ''H'' to the Petition dated 22nd February, 1978 and Exhibit ''I'' to the Petition dated 23rd February, 1978 filed their reply to the show cause notices. However, the respondents'' authorities by their order dated 6th May, 1978 upheld the Department''s contention that the trolleys are to be classified under Item 40 and confirmed the demand for differential duty.

3. The petitioners promptly informed the authorities that they would pay duty under Item 40 under protest.

4. On 6th July, 1978, the petitioners preferred an appeal before the Appellate Collector of Central Excise. On hearing parties, the appellate authority by its order dated 7th November, 1979 allowed the appeal and held that the show cause notices issued to the petitioners were liable to be quashed. It further clarified that the trolleys be cleared as classified under Item 68 as originally done. In March, 1980 it was intimated to the petitioners that the appellate order was under review. On 30th July, 1980, a review notice u/s 36(2) of the said Act was received by the petitioners and after filing its reply and on personal hearing, an order came to be passed on 20th June, 1981 in review inter alia holding that the food trolleys manufactured by the petitioners are rightly classifiable as steel furniture under Tariff Item 40 of the Central Excise Tariff. The impugned order in appeal was thus modified accordingly. Being aggrieved by this final order in review, the petitioners have approached this Court by way of this Writ Petition.

5. Shri Atul Setalwad with Shri C. M. Korde instructed by M/s. Little & Co. appear for the petitioners. Shri R. V. Desai with Shri P. N. Menon appears for the respondents. Oral and written submissions were made by the learned Counsel supported by case law.

6. The two main contentions that arise for our consideration are : (1) Whether the conclusion of the Central Government is correct on merits, and (2) whether the order of the Central Government u/s 36(2) of the said act was barred by limitation because the notice calling upon the petitioners to show cause why the order of the Collector (Appeals) should not be reviewed was beyond the time stipulated in the third proviso to Section 36(2).

7. Even though submissions on both these points were heard at length, we find that this matter can be disposed of by the decision on the very first point as to whether the conclusion of the Central Government is correct on merits. For the reasons stated below, we do not think it necessary to answer the second point.

8. At the outset, we have stated in detail the general description of the food trolleys and bar trolleys manufactured for the purpose of use in aircraft. It is also brought to our notice that even though the trolley has a tray on top, it also has an enclosed space below the tray which is insulated and is meant for storage of several hot food trays. Further, it must be borne in mind that these trolleys are

for the convenience of air-hostess who has to serve the food to a large number of passengers sitting in several rows of chairs. In the special circumstances as prevalent in an aircraft and the narrow galley which is used as a passage between the passengers seats, the trolley has to be very compact in width but has to have capacity to store a large number of trays. As and when the said trolley is not in actual use, the same is placed in a slot of the size of the trolley and is concealed in the wall with a locking arrangement.

9. In our opinion, it cannot be conceived that such a trolley can be used in household so as to be called a furniture. The word "furniture" is not defined under the said Act or rules framed thereunder. Ordinarily, furniture would be something which is to furnish or to supplement something for the better use of that thing or place such as for the comfort and convenience of residents of a house, for example, furniture in a drawing room or furniture in a dining room. But where certain articles which are made are exclusively used for a special purpose and which cannot ordinarily be used in a household, they cannot be classified as furniture, irrespective of the fact whether the articles are made of steel, plastic or wood. Examples can be given of operation tables in a hospital or a dentist chair or trolleys used for transporting equipments from one place in the factory to another or for that matter food and medicine trolleys used in hospitals. Even though several characteristics of these above article may be similar to a household furniture or may have trappings of the furniture, yet such articles which are specially manufactured to suit a particular purpose and use cannot be used in the household ordinarily and therefore cannot be termed as furniture.

10. For the above view, we draw support from the judgment of the Punjab and Haryana High Court reported in 1979 (4) ELT (J 265) - Jiwan Singh and Sons v. Senior Superintendent of Central Excise, Jullundur; judgment of the Bombay High Court reported in Materials Handling Engineering Co. Vs. M.G. Waknis, Superintendent of Central Excise and others, ; Division Bench judgment of the Bombay High Court reported in 1976 Sales Tax Cases (Volume 37) 336 - Commissioner of Sales Tax v. Associated Dental & Medical Supply Co.; and the judgment of the Supreme Court Elpro International Ltd. Vs. Joint Secretary, Govt. of India, Ministry of Finance and Others, - delivered by A. N. Sen and D. P. Madon, JJ. Similar is the view expressed by the Allahabad High Court in 1969 Sales Tax Cases (Vol. XXIII) 201 Imperial Surgico Industries, Lucknow v. Commissioner of Sales Tax, Uttar Pradesh, Lucknow.

11. The only reasoning in the impugned order dated 20th June, 1981 passed in review is : "Since several essential components of the trolleys are made of Steel, Government are of the view that the food trolley would rightly be classifiable as ''steel furniture'' under Tariff Item 40 of Central Excise Tariff, whether the percentage of steel used was very high or not. "This reasoning is in fact devoid of any reasoning. Before finding whether it is ''steel furniture'', it has to be found out whether it is ''furniture''. As observed above, since the food trolleys herein are specially manufactured for exclusive use in aircraft and are made of various

sizes to suit each different type of aircraft, they cannot be construed as furniture, much less steel furniture.

12. For the reasons stated above, we do not wish to dwell upon the question of limitation raised by the petitioners.

13. In view of the above reasoning, the Petition will have to be allowed and the petitioners would also be entitled to the refund of the excise duty paid under protest. However, it is the contention of the respondent-department that no refund should be allowed since the petitioners-Company have supplied the trolleys to the Airlines and recovered the price thereof inclusive of excise duty. By granting refund of the amount to the petitioners it would amount to unjust enrichment by the petitioners. This reasoning does not hold good for the reason that the proceedings were initiated by the Department and the decision of assessment under one classification or another entered was a decision arrived at in departmental proceedings. It is well-settled that in such cases the question of unjust enrichment does not arise while granting refund to the party who has paid under protest. The question of unjust enrichment arises only when a matter regarding classification comes directly under Article 226 of the Constitution before the High Court. For these reasons, the stand taken by the Department cannot be acceded to.

14. In the result, the Petition succeeds and is allowed. The impugned order dated 20th June, 1981, Exhibit ''Y'' to the Petition, is quashed and set aside. The appellate order dated 7th November, 1979, Exhibit ''N'' to the Petition, is confirmed. The petitioners are also entitled to the refund of the amount paid under protest under Item 40 of the Central Excise Tariff as mentioned in prayer clause (b) (iii). Rule is made absolute accordingly. In the circumstances of the case, there shall be no order as to costs.

15. Certified copy to be issued on priority basis.