(1989) 04 CAL CK 0014

In the Calcutta High Court

Case No : C.R. No. 10625 (W) of 1980

Serampore Belting Works Limited APPELLANT

Vs

Collector of C. Ex. RESPONDENT

Date of Decision : 27-04-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 174
Central Excises and Salt Act, 1944 — Section 2, 4
Constitution of India, 1950 — Article 226

Citation : (1989) 24 ECC 264 : (1990) 45 ELT 546

Hon'ble Judges : Susanta Chatterji, J

Bench : Single Bench

Advocate : Gautam Chakraborty, Jatin Ghosh and P.K. Datta, for the Appellant;S.N. Datta, Sunil Chatterjee and Dilip Pal, for the Respondent

Judgement

Susanta Chatterji, J.—The present Rule was issued at the instance of the writ petitioner praying for declaration that Serampore Belting Works Limited is the manufacturer of transmission belting and is liable to be assessed to the excise duty on its manufacturing profit and manufacturing cost and for issuance of an appropriate writ to quash all orders of assessment made in respect of the said transmission belting manufactured by the petitioner and sold to Messrs. Goodyear India Limited and for other consequential reliefs as stated in the writ petition. It is further stated that the petitioner Company started manufacturing activities of rubber products at No. 52, J.N. Lahiri Road, Serampore, Hooghly since 1948 and the entire manufacturing activities in the said factory are carried on under the control and supervision of the Company by engaging its own workmen and with its own machinery. The petitioner is alleged to be the owner of the finished goods until and unless the same is sold to the purchasers. In or about 1964, the petitioner Company is alleged to have commenced manufacturing rubber transmission belting which is an excisable goods under Tariff Item 16-A(4), the duty being ad valorem. The Company is also alleged to have relevant L-IV Licence from the Excise Authorities as manufacturer of the products and obtained various other statutory licences. It is claimed in details that since the petitioner started manufacturing excisable goods i.e. rubber transmission belting, it paid excise duty on products duly manufactured by complying with of all the formalities required under the Central Excise Rules. It goes on claiming that since about 1966 under and in terms of an agreement with Messrs. Goodyear India Limited, the Company has been manufacturing transmission belting as per the orders placed by the said Messrs. Goodyear India Limited and according to their technical specifications. The said products were manufactured out of the raw materials purchased by the petitioner Company in its own plant and machinery and by engaging its own labourer/staff after manufacturing of the products by the petitioners and the same were alleged to have been embossed with patented brand name by the said purchaser i.e. Messrs. Goodyear. It is further alleged that in terms of the said agreement, the petitioner was and is obliged to replace the said belting manufactured and sold to Messrs. Goodyear. In the event any manufacturing defects were detected the Goodyear has had the right to reject such goods. The entire transaction had been on the basis of principal to principal and the petitioner company was paid by the said Messrs. Goodyear within two weeks from raising the bills by the Company on number of despatches as submitted. The writ petitioner states that at the time of starting manufacture of the said transmission belting and selling the same to Messrs. Goodyear, the procedure for levy and collection of excise duty was known "physical control procedure". An Excise Officer was posted inside the factory and kept watch from the stage and the entry of raw materials inside the factory and clearance of the finished goods. The petitioner was allegedly, advised by the said Excise Officer that as the transmission belting manufactured by the petitioner and sold to Messrs. Goodyear was not made available for sale to other independent buyers, the assessable value has to be determined on the basis of the price at which the Company sold the products to Messrs. Goodyear. The petitioner Company paid duty on the Goodyear''s price to their dealers/customers under a mistaken belief that such duty was lawfully payable although in law and on fact. The price at which the Company sold goods to Messrs. Goodyear was the only one on which duty was leviable and not on anything else as the Company''s price to Messrs. Goodyear represented the manufacturing cost and manufacturing profit. The petitioner, however, discovered the said mistake after coming to know of the judgment of the Hon''ble Supreme Court in the case of A.K. Roy and Another Vs. Voltas Limited, The petitioner Company accordingly claimed for refund for the excess money collected from the petitioner in the past and also made representation for determination of the assessable value for the levy of duty in the manufacturing cost and manufacturing profit of the petitioner i.e. the price at which the petitioner Company sold the transmission belt to Messrs. Goodyear. Pursuant to the amended provision of law, the petitioner Company duly submitted its price-list for the determination of assessable value showing the price at which the petitioner Company sold the products to Messrs. Goodyear India Limited for the purpose of determination of assessable value. As the Excise Authorities did neither approve nor reject the price-list submitted by the Company on September 30,1975, the petitioners moved a writ application and C.R. No. 12582-83(W)/76 was issued. The said Rule was disposed of in terms of judgment dated 20-5-1980 by S.C. Deb, J. (As His Lordship then was) directing the respondents to approve the price-list by determining the assessable value of the products which were the subject matter of the said writ petition and the respondents were directed to give an opportunity for personal hearing to the petitioner before such approval and the petitioner will be at liberty to make submissions. It was made clear that if the petitioner is aggrieved by the order determining the assessable value the petitioner was given liberty to take such action or steps as may be advised. In spite thereof, the respondent No. 2 the Assistant Collector of Central Excise, Calcutta, IV-Division by his order dated 19th September, 1980 purportedly held that the price at which Messrs. Goodyear sold to their dealers and customers would be the normal price for the determination of assessable value. Being aggrieved the petitioner Company has again filed the present writ petition on the ground that the power or jurisdiction of the Central Excise Authorities in the matter of levy and collection of Central Excise Duty is circumscribed by the provision of the Act and/or the Rules framed thereunder. The purported order dated 19th September, 1980 is ex facie, bad in law and is altogether contrary to the direction given at the time of disposal of the Writ Petition No. 14901 (W) of 1976 as submitted. The finding of the Assistant Collector that Messrs. Goodyear India Limited was in full control of the production is absolutely incorrect and there was no evidence that the said Goodyear authorised the petitioner Company to maintain register in this behalf nor in fact they did so. Stating all these facts, the petitioner company has sought the reliefs as indicated above.

2. The writ petition is contested by the respondents by filing affidavits. Messrs. Goodyear India Limited has been impleaded as the respondent No. 4 in the present writ petition. It is disclosed in the affidavit sworn on behalf of Messrs. Goodyear India Limited on 7-4-1981 that the respondent No. 4 has been purchasing rubber transmission belting from the petitioner Company since about 1966 under the terms of the agreement dated 17th January, 1966. The important features of the said agreement on the basis of which purchases were and/or are still being made are that the respondent No. 4 was required to place formal order for a period of 3 (three) months and provided the specification of the products to be manufactured and supplied by the petitioner. The rubber transmission belting supplied to the respondent No. 4 were and/or are manufactured by the petitioner in its own factory under its control and supervision by engaging its own workmen. The entire raw materials used in the manufacture of the products are purchased by the petitioner. From time to time, the Manager, Technical Services of the respondent No. 4 inspects the finished products in order to see that the goods conformed to the purchase specification provided by the respondent No. 4 after the manufacture of the products manufactured by the petitioner, the same are embossed with the patented brand name of the respondent No. 4 and sold to them by raising invoices. The

respondent No. 4 has to make payment of the agreed price of the goods. The transaction are on principal to principal basis and are in the usual course of business. At no stage prior to the sale of the finished products, the respondent No. 4 becomes the owner of the goods. After the said goods is transferred to the said respondent No. 4 and when the goods are delivered to the respondent No. 4 after sale they became owners. The petitioner Company, is, however, at liberty to make any manufacture any rubber products and free to sell its manufactured products to purchasers, but once the brand name of Goodyear is embossed on the products the same becomes the property of the respondent No. 4 and under the terms of the agreement, the petitioner cannot sell the branded products to any other person except the Goodyear. The respondent No. 4, however, made representation to the Collector of Excise Duties by letter dated 8th of January, 1976 whereby it was contended that the respondent No. 4 is not the manufacturer within the meaning of Section 2(f) of the Central Excise Act and before any final orders were passed in the said matter, the respondent No. 4 moved the writ Court for setting aside and quashing the notice dated 21st October, 1975. It is also stated that leave was granted to Messrs. Goodyear to make representation to the Collector and further representation was made. The Collector, West Bengal, on or about 24.1.1977 passed an order holding that Goodyear is a manufacturer within the meaning of Section 2(f) of the Act in respect of the goods purchased by the petitioner by relying on the judgment of Gujarat High Court in the case of Jamnadas Chhotalal Desai and Others Vs. C.L. Nangia and Others, . The Excise Authorities, however, did not proceed in the matter requiring the respondent No. 4 to take up L-IV Licence or pay any duty or complying with all Central Excise formalities. The respondent Nos. 1 to 3 have, however, contested the writ petition by filing affidavit-in-opposition sworn by one Assistant Collector of Central Excise, Calcutta on 6th of May, 1988. It is stated therein that the present writ petition involves determination and/or decision of various disputed questions of facts including the determination of source of finance utilised in the manufacture of the subject goods and/or in conducting the litigations and/or in executing bank guarantees as per orders of this Hon''ble Court in their earlier writ petition being C.R. No. 14901 (W) of 1976. All these complicated questions of facts cannot conveniently be dealt with or decided in the writ petition. It is further stated that by way of implementing provisions as contained in Section 2(f) of the Act, the Central Excise Authorities, as the Collector of Calcutta on or about October 10,1975 issued a trade notice whereby attention of the trade was invited to the provision of the said Section 2(f) as it was worked at the material time and it was brought to the notice of the trade and industry that in the light of the revised definition of the term "manufacture" under the said Section, Government after due consideration of the question whether or not persons or firms or companies had factory of their own and who used to get excisable goods manufactured in the duly licensed factories of other manufacturers according to their own specifications and under their own brand names or trade marks were required to be licensed under the Central Excise Law. By the said trade notice the attention of the trade and industry was also invited to the provisions of Rule 174 of the Central Excise Rules, 1944 wherein every manufacture of excisable goods was required to take out a licence unless exempted u/s 174A and the law required that such manufacturers should not conduct business in regard to such goods otherwise than by authority and subject to the terms and conditions of licence granted by an authorised Officer in the appropriate form. Messrs. Goodyear India Limited made representation on or about May 13,1976 against a notice dated December 17,1975 issued by the Superintendent of Central Excise, Sahagunj Range requested Messrs. Goodyear India Limited to take out a licence for the goods manufactured by Messrs. Dunlop India Limited on their behalf nor the said representation, of Messrs. Goodyear India Limited requested the Collector of Central Excise and Customs, West Bengal for fixing a date for discussion. The Collector of Central Excise and Customs did not find any scope for discussion on the subject as the procedure for obtaining licence would be the same in any of the Collectorates. Thereafter, by a letter dated June 24,1976 Messrs. Goodyear India Limited requested the Collector of Central Excise and Customs that they should not be treated in a general manner since the question whether or not they are/were manufacturer would depend upon their own service and factories where their goods were produced. They also informed the Collector that they had submitted representations to the Collector of Central Excise, Calcutta against similar notice issued by the Calcutta Collectorate and the said representations were under considerations. By another letter dated July 24, 1976 Messrs. Goodyear India Limited was informed that the order communicated under the letter dated June 15,1976 was a final order and the question of keeping the issues in abeyance could not arise. Meanwhile, a writ petition was moved by or on behalf of Messrs. Goodyear India Limited on or about November 29,1975 challenging the trade notice dated October 21,1975 and Rule being C.R. No. 13660 (W) of 1976 was issued. In compliance with the order dated December 16,1976 in the said writ petition, the Collector of Central Excise and Customs, West Bengal after affording reasonable opportunity to Messrs. Goodyear India Limited of being heard decided the representation dated December 24, 1976 made pursuant to the orders of this Hon''ble Court. In deciding the issues involved the Collector considered various factors including several questions of facts and laws and the Collector took the view that the manufacture of the goods was to be construed as being effected for and on behalf of Messrs. Goodyear India Limited and as such the said Messrs. Goodyear India Limited were held to be manufacturer within the meaning of said Section 2(f) of the said Act and they had rightly been asked to obtain the Central Excise licence in their name under the provisions of the said Rules. In the said order, the Collector made it clear that the above decision is given by him pursuant to the orders made by the Hon''ble Court. The petitioner Company, however, filed a price-list and/or revised price-list and continued to clear the subject goods on payment of duty under protest of the value declared in the said revised price-lists determining its own liability for duty due on the said products till the date of filing of the writ petition being C.R. No. 14901 (W) of 1976. The Rule was, however, disposed of by certain directions and in compliance with the direction and/or orders the Assistant Collector passed an order on or about September 14, 1980 after affording reasonable opportunity to the petitioner. In the said order, the Assistant Collector held that the issues involved in the case as to whether Messrs. Goodyear India Limited was to be reckoned as "manufacturer" or as to how the value of the goods manufactured with the brand name of Messrs. Goodyear India Limited was to be determined. It was held by him that the selling price at which Goodyear India Limited sold/sells the goods to their dealers/customers not being related persons in course of wholesale trade, would be the normal price for the purpose of determination of assessable value. It is further stated that the petitioner Company did not go in appeal against the order of the respondent No. 1 passed pursuant to the direction of the High Court in Civil Order No. 13660 (W) of 1976; it is not open to either to the petitioner or to Messrs. Goodyear to make a different plea and the present petition is otherwise speculative and misconceived. All other allegations made by the petitioner Company have been denied and disputed. The petitioner Company has also filed an affidavit-in-reply by disputing the contentions of the contesting respondents and reiterated the stand already taken in the main writ petition.

3. Having heard the lengthy arguments advanced by Mr. Gautam Chakraborty, the Learned Counsel appearing for the petitioner and Mr. S.N. Dutta and Mr. Sunil chatterjee the Learned Advocates for the contesting respondents, this Court finds that the main grievance of the writ petitioner is that the goods manufactured by Serampore Belting Works Limited at its own factory under the agreement by and between Serampore Belting Works Limited, the petitioner No. 1 and Messrs. Goodyear India Limited, the respondent No. 2 to be supplied to Messrs. Goodyear under the brand name of Goodyear cannot be taken as ''manufacturer'' by Messrs. Goodyear and the excise duty cannot be levied on the selling price of Messrs. Goodyear to their dealers and customers. Regard being had to the background and the detailed facts and circumstances of the case and the materials on record, it is strongly argued that the petitioner No. 1 Company with its own men and machinery and in its own plant, had been manufacturing the goods under the specification of Messrs. Goodyear and sells and supplies to Goodyear only and the excise duty has to be levied on the selling price by Serampore Belting Works Limited to Messrs. Goodyear and not as the selling price by Messrs. Goodyear to their dealers and customers. This Court has considered the argument and counter-argument of the learned lawyers of both sides. With great anxieties, this Court has scrutinized the pleadings of the parties and the materials on record including the decisions and/or orders made upon the previous writ applications filed by the parties as indicated above. The attention of this Court has been drawn to various aspects of the case wherein it is admitted both by the petitioner No. 1 Company and the respondent No. 4 Messrs. Goodyear India Limited that the goods are manufactured by Serampore Belting Works Limited as per terms of agreement by and between the petitioner No. 1 and the respondent No. 4 and such manufactured goods with the brand name of "Goodyear" cannot be sold by the petitioner Company to any other person/dealer/

consumer other than Messrs. Goodyear India (Tyre) Limited. The goods are made and manufactured with the specification given by Messrs. Goodyear India Limited and time to time the finished products are inspected by the agents and/or representatives of Messrs. Goodyear India Limited. It is not proved before this Hon''ble Court by any materials whatsoever that the goods are manufactured at the place of the petitioner No. 1 by men and materials and/or funds and finance provided by Messrs. Goodyear India Limited. There is nothing to infer and surmise that the goods in question were and are manufactured by Messrs. Goodyear India Limited. Any admission by either party contrary to such facts cannot be conclusive and the admission, if any, can be explained properly under which context the same was made. In the instant case, this Court has the occasion to examine the pleadings of the parties and to scrutinize the relevant materials on record. There cannot be any other conclusion (but?) that the goods manufactured by Serampore Belting Works Limited at its own factory with its own men and materials are not to be deemed as manufactured by Messrs. Goodyear India Limited. If the goods are manufactured by Serampore Belting Works Limited under specific terms and conditions to be sold exclusively to Messrs. Goodyear India Limited it has to be ascertained as to whether the excise duty has to be levied upon the sale price paid by Messrs. Goodyear India Limited to Serampore Belting Works Limited or the excise duty has to be levied upon the sale price of the goods to its dealers and customers. In order to examine this issue, this Court''s attention has been drawn to several aspects of the relevant Act and the Rules and the Schemes known as "physical control procedure". This Court''s attention has also been drawn to the case of Union of India (UOI) and Others Vs. Cibatul Limited, . It has been found that excise duties levied u/s 3 of the Central Excises and Salt Act on goods manufactured in India and, broadly, for the purpose of computing the duty, the value of the article is deemed u/s 4 of the Act (as it stood before its amendment by Act XXII of 1973) to be the wholesale cash price for which an article of the life-time and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory for delivery at the place of manufacture. The words "manufacture" and "manufacturer" had been defined by clause (f) of Section 2 of the Act, and for the purposes of the present controversies what is relevant is that part of the definition which defines a manufacturer of goods as being "any person who engages in their production or manufacture on its account". Accordingly, the question has got to be answered as to whether in the instant case, the goods were manufactured on its own account and the seller merely manufactures them on behalf of the buyer. The relevant provisions of the agreement have got to be construed in their proper perspective. In the instant case, it is clear that the buyer is obliged to purchase the manufactured product from the seller. For this purpose, the buyer is to inspect whether the goods are being manufactured according to the specification and the seller has no right to sell the goods with the brand name to others in the market. It is very much significant to note that the buyer is obliged to purchase the goods manufactured by the seller and in that event it can be clearly observed that the proposition that the goods are manufactured by the seller on behalf of the buyer, is accepted. This Court has also considered another decision reported in the same volume of Joint Secretary to the Government of India and Others Vs. Food Specialities Ltd., It has been found that where the assessee Company manufactures the goods according to the specifications supplied by Nestle''s another Company and affixes the trade mark of the latter on the goods and supplies the same to the latter at the wholesale price free on Rail at the place of its head office or free on lorry at factory stipulated under the agreements, it is the wholesale price of such goods that must determine the value for the purpose of assessment of excise duty. The value of the trade marks cannot be added to the wholesale price for the purpose of determining the value of the goods for the purpose of levy of excise duty. There can, therefore, be no doubt that the wholesale price at which the goods with the trade marks affixed to them are sold by Serampore Belting Works Limited to Messrs. Goodyear India Limited as stipulated under the agreement would be the value of the goods for the purpose of the excise duty, i.e. the price at which the petitioner No. 1 Company sells the goods to the respondent No. 4 in the course of wholesale trade.

4. In view of such provisions of law and the conclusion drawn by this Court, there is no bar and/or impediment to grant the reliefs to the petitioner as prayed for.

5. The next question has to be considered as to the claim, for refund of the sums collected as duty from the petitioner in excess of the duty leviable on the basis of manufacturing cost and manufacturing profit of the petitioner Company in respect of the transmission belting manufactured by the petitioner Company and sold to Messrs. Goodyear. The attention of the Court has been drawn to a decision of Salona Tea Company Limited v. Superintendent of Taxes, Nawgounge and Ors. on the question of limitation. It is found there that normally speaking in a Society governed by rules of law, taxes should be paid by citizens as soon as they are due in accordance with law. Equally as a corollary of the said statement of law it follows that taxes collected without the authority of the law as in this case from a citizen should be refunded because no State has right to receive or to retain taxes or monies realized from citizens without the authority of law. It has been observed there that in a case where tax and money has been realized without the authority of law and the same should be refunded and in an application under Article 226 of the Constitution of India the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner. It is true that in some cases the period of 3 (three) years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule. The Court might consider the delay unreasonable even if it is less than a period of limitation prescribed for a civil action for the remedy. Where the delay is more than that period it will almost always be proper for the Court to hold that it is unreasonable. In the instant case, however, the petitioner has to make an independent application for refund and if it can be explained that there is no unavoidable laches on its part and there is no "unreasonable enrichment", the department may consider the case in the proper perspective notwithstanding

the period of limitation.

6. For the foregoing reasons, the writ petition is allowed in part. The Rule is made absolute to the extent that a Writ of Certiorari be issued quashing the order dated 9th September, 1980 passed by the respondent No. 2 the Assistant Collector of Central Excise, Calcutta-IV Division and any proceedings taken pursuant thereto upon declaration that the petitioner No. 1 Company is the manufacturer of transmission Belting and is liable to be assessed to duty on its manufacturing profit and the manufacturing cost. Leave is granted to the petitioner Company to make a proper application for refund of the amount collected as duty from the petitioner in excess of the duty leviable on the basis of manufacturing cost and the same may be considered by the concerned respondent authority in accordance with law without being influenced by any observations made by this Court in passing this judgment and the same may be disposed of within 8(eight) weeks from the date of filing of the application by passing a speaking and reasoned order after considering all the relevant factors in accordance with law. The Rule is made absolute to the extent as indicated above. There will be no order as to costs.