

(1987) 08 MAD CK 0066
In the Madras High Court
Case No : Writ Petition No. 894 of 1981

Seshasayee Paper and Board Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-08-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 56A, 9
Central Excises and Salt Act, 1944 — Section 11A, 2, 3, 4, 4(4)
Constitution of India, 1950 — Article 265

Citation : (1988) 15 ECC 35 : (1987) 32 ELT 503

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : A.L. Somayaji, Aiyar and Dolia, for the Appellant; T. Somasundaram, for the Respondent

Final Decision : Allowed

Judgement

Nainar Sundaram, J.—The petitioner manufactures certain varieties of paper, hereinafter called "core paper" and as well as wrapper paper. Both are excisable commodities under Item 17 of the Central Excise Tariff. In core paper at the time of clearance necessarily gets packed in the wrapper paper before it is cleared for the market. The petitioner during the period from 16-3-1976 to 31-8-1977, paid duty both on the core paper and on the wrapper paper, but valuing them and paying duty thereon separately. The value of the wrapper paper was not included in the value of the core paper at the time of the clearance of the core paper for market. On the ground that the value of the wrapper paper, when it was used to pack the core paper for the marketability of the latter though the wrapper paper had suffered duty separately ought to have been tacked on to the value of the core paper to arrive at the total value of the core paper for the purpose of levy of duty thereon as per Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944, hereinafter referred to as the Act, the petitioner has been visited with a show cause notice - demanding payment of difference in duty. The respondents have made it clear that the duty paid on the wrapper paper separately has been

excluded and not taken into account while arriving at the short payment or differential duty. This demand has prompted the petitioner to come to this Court, on principle challenging the very validity of the show cause notice.

2. Mr. A.L. Somayaji, learned counsel for the petitioner, would submit that the wrapper paper manufactured by the petitioner admittedly did suffer the duty thereon and in that context when it is being used for packing the core paper for putting the latter into the market, its value cannot be tacked on to the value of the core paper to arrive at the total value of the core paper and that would amount to double taxation.

3. Mr. T. Somasundaram, learned Additional Central Government Standing counsel, appearing for the respondents, would advance an argument that irrespective of the fact that the wrapper paper has suffered the duty on its being manufactured by the petitioner, when the core paper is packed in the wrapper paper, the value of wrapper paper must necessarily be added on to the value of the core paper to arrive at the excisable value of the core paper and this is the implication of Section 4(4)(d)(i) of the Act.

4. The petitioner manufactures both the core paper and the wrapper paper in its factory premises. The wrapper paper as such has suffered the duty on its manufacture. The petitioner as the manufacturer of the wrapper paper has paid the duty thereon". Then the duty paid wrapper paper is being used for packing the core paper to put the latter into market. The controversy here centres around the question as to whether the cost of wrapper used should be tacked on to the cost of core paper to arrive at the excisable value of the core paper. The petitioner complains that if so done, it would amount to double taxation not authorised by law. Section 4(4)(d)(i) reads as follows :-

"(4) For the purposes of this section - (d) "value" in relation to any excisable goods - (i) Where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing, except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation. - In this sub-clause "packing" means the wrapper, container, bobbin, pin, spool, reel or wrap beam or any other thing in which or on which the excisable goods are wrapped, contained or wound."

The scope and implications of Section 4(4)(d)(i) came up for consideration before the Supreme Court in *Union of India and Ors. v. Bombay Tyre International Ltd., etc*, 1983 ELT 1896, and the discussion found in paragraphs 51 to 54 needs extraction to appreciate the principles laid down in the pronouncement -

"51. The case in respect of the cost of packing is "somewhat complex. The new Section 4(4)(d)(i) has made express provision for including the cost of packing in the determination of "value", for the purpose of excise duty, inasmuch as the case of the parties that the new Section 4 substantially reflects the position obtaining under the unamended Act. We shall proceed on the basis that the

position in regard to the cost of packing is the same under the Act, both before and after the amendment of the Act, Section 4(4)(d)(i) reads :

"(4) For the purposes of this section - (d) "value" in relation to any excisable goods, -- (i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation. - In this sub-clause, "packing" means the wrapper, container, bobbin, prin, spool, reel or wrap beam or any other thing in which or on which the excisable goods are wrapped, contained or wound."

It is relevant to note that the packing of which the cost is included, is the packing in which the goods are wrapped, contained or wound when the goods are delivered at the time of removal. In other words, it is the packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer. The degree of packing in which the excisable article is contained will vary from one class of articles to another. From the particulars detailed before us by the assessees, it is apparent that the cost of primary packing, that is to say, the packing in which the article is contained and in which it is made marketable for the ordinary consumer, for example a tube of tooth paste or a bottle of tablets in a cardboard carton, or biscuits in a paper wrapper or a tin container, must be regarded as falling within Section 4(4)(d)(i). That is indeed conceded by learned counsel for the assessee. It is the cost of secondary packing which has raised serious dispute. Secondary packing is of different grades. There is the secondary packing which consists of larger cartons in which a standard number of primary cartons (in the sense mentioned earlier) are packed. The large cartons may be packed into even larger cartons for facilitating the easier transport of the goods by the wholesale dealer. Is all packing, no matter to what degree, in which the wholesale dealer takes delivery of the goods to be considered for including the cost thereof in the "value? Or does the law require a line to be drawn somewhere? We must remember that while packing is necessary to make the excisable articles marketable, the statutory provision calls for strict construction because the levy is sought to be extended beyond the manufactured article itself. It seems to us that the degree of secondary packing, which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise levy. To that extent, the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate.

52. If any special secondary packing is provided by the assessee at the instance of a wholesale buyer which is not generally provided as a normal feature of the wholesale trade, the cost of such packing shall be deducted from the wholesale cash price.

53. We have also been referred to Section 2(f) of the Act, which defines the

expression "manufacture" and it is urged that the degree of packing to be considered for the purpose of including its cost in the "value" of an excisable article should be spelled out from that definition. We are unable to accept the suggestion. The expression "manufacture" is related to the taxable "event and refers to a process which enters into the character of the article, while "packing" has been defined by Section 4(4)(d)(i) in relation to the "value" of the article.

54. That, we think, is the position in regard to the cost of packing under the Act, both before its amendment and after."

It is an indisputable proposition that the duty of excise is imposed in respect of the manufacture or production of an article, but the point at which it is collected is not determined by the point of time when its manufacture is completed, but will rest on considerations of administrative convenience. Once it is admitted that the wrapper paper manufactured by the petitioner has suffered the excise duty paid by the manufacturer namely, the petitioner, should it be made to suffer duty once again by adding its value to the core paper, which is packed in the wrapper paper, invoking Section 4(4)(d)(i) of the Act.

5. The question as to when the manufacture of an article could be said to have been completed has vexed and even today is vexing Courts and in the case of packing, views were expressed by High Courts with reference to Section 4(4)(d)(i) that the cost of packing referred to in that provision is includible in the assessable value of the main excisable article, which is packed in the packing material, only if the packing is a process incidental or ancillary to the completion of its manufacture. Hence, with reference to the article which is capable of being sold even without packing, the view taken was that the cost of packing shall not be included in the assessable value of the main excisable article. The High Courts also opined that only in the case of unit packing, namely, primary packing its cost could be included in the assessable value of the main excisable article and in the case of "additional packing, secondary packing or special packing", its cost is not includible in the assessable value of the main excisable article.

6. In *Union of India v. Bombay Tyre International Ltd. etc.*, 1983 ELT 1896, the Supreme Court, as per the extracts made above, settled the principles by holding that the definition of manufacture, as given in Section 2(f) of the Act is of no avail, in the case of packing, because it has been separately dealt with u/s 4(4)(d)(i) in relation to the value of main excisable articles. A word of caution has also been struck by the Supreme Court that this statutory provision calls for strict construction, because the levy is sought to be extended beyond the manufactured article itself. I venture to sum up the principles deducible from the above pronouncement of the Supreme Court as follows -

(i) The packing in which the wholesale dealer takes delivery of the main excisable article has to be included in the value of the article for the purpose of excise duty on it;

(ii) The cost of primary packing, that is to say, the packing in which the main

excisable article is contained and in which it is marketed for the ordinary consumer, shall be includible in the value of the main excisable article;

(iii) In the case of secondary packing, the degree of secondary packing which is necessary for putting the main excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing, whose cost can be included in the value of the main excisable article for the purpose of levy; to this extent the cost of secondary packing cannot be deducted from the wholesale cash price;

(iv) But, where special secondary packing is provided by the assessee at the instance of the wholesale buyer, which is not generally provided as a normal feature of the wholesale trade, the cost of such packing shall be deductible.

7. In the present case, the petitioner has averred that as per the international trade practice in the paper industry and as per the Indian Standards Specifications, the ream-reel of weight of paper and paperboard sold is inclusive of the weight of the wrapper paper, or in other words, the weight of ream-reel is the combined weight of the packed paper as well as the wrapper paper, and this convention has been accepted by the Directorate General of Supplies and Disposals, Government of India, for supplies under the Rate Contract also and the chargeable weight of the paper is always inclusive of the weight of the wrapper paper. There is no dispute over this and in fact, this has been accepted as existing factual features by Mohan J. in *Seshasayee Paper and Boards Ltd., Erode v. Appellate Collector of Customs and Central Excise, Madras* and Anr., 1984 ELT 3 Mad. If these are the admitted factual features and they are so, we can take it that the wrapping assumes the character of primary packing, that is to say, it is the packing in which the core paper is contained and in which it is marketed, as per the trade practice, to the customer. Then as laid down by the Supreme Court, the cost of such packing has to be tacked on to the value of the main excisable article not by falling back upon the theory of manufacture as per the definition found in Section 2(f) of the Act, but by the force of the provision found in Section 4(4)(d)(i). The object behind Section 4(4)(d)(i) is apparent. It is to obviate the attempt in the trade to have the cost of packing done for the main excisable article taken away from the mischief of levy of excise duty, on the ground that packing by itself would not amount to manufacture, or a process incidental or ancillary to the completion of the manufacture of the main excisable article. Hence, now by the force of Section 4(4)(d)(i) the principles under which, have now been settled by the Supreme Court in the pronouncement referred to above; if it is a case of primary packing or secondary packing necessary for putting the main excisable article into the wholesale market, the cost of such packing has to be tacked on to the value of the main excisable article. The petitioner is not on principle grudging the tacking on the value of the wrapper paper to the value of the core paper to arrive at the excisable value of the latter. What the petitioner complains is that in the present case the wrapper paper itself having suffered the excise duty on its manufacture, paid by the manufacturer the

petitioner, it would not be fair and proper to tack on its value to the value of the core paper and make it suffer excise, duty once again on that basis and that would amount to double taxation. Here, the wrapper paper was manufactured by the petitioner itself, and such manufacturer of the wrapper paper suffered excise duty as such and as the manufacturer, it was the petitioner who paid the excise duty. Under Article 265 of the Constitution of India, "no tax shall be levied or collected except by authority of law". It is true that the -Article by itself does not prohibit double taxation. But, there should be an authority of law behind such double taxation. Section 3 of the Act speaks about the levy and collection; in such manner as may be prescribed; duties of excise on all excisable goods produced or manufactured. Section 4 deals with valuation of excisable goods for purpose of charging of duty of excise. Rule 9 of the Central Excise Rules, 1944 hereinafter referred to as the Rules, prescribes the time and manner of payment of duty and that rule contemplates that no excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture or any other commodity in or outside such place, until the excise duty leviable thereon has been paid. The power to levy double taxation is not evident from the provisions either of the Act or of the Rules. On the other hand, the intendment is clear that an excisable goods on its manufacture must suffer the excise duty leviable thereon. Section 4(4)(d)(i) contemplates the tacking on of the cost of packing to the value of the packed main excisable article to arrive at the excisable value of the latter. In substance, what all Section 4(4)(d)(i) lays down is that the packing material also should suffer the excise duty by having its value tacked on to the value of the packed main excisable material. But, where the manufacturer of both the packed main excisable material and the packing material is one and the same, and if such manufacturer has paid excise duty on the packing material, if the value of such packing material is to be added on to the value of the packed main excisable material, it would make the former, namely, the packing material, suffer duty once again for which apparently there is no authority, expressed in the provisions of either the Act or the Rules. The cardinal rule behind the levy of excise duty is that the manufacturer should pay the duty of excise on the excisable goods manufactured or produced by him. There is no escape from that obligation. To obviate an attempt on the part of the trade to exclude the cost of packing from the value of the packed main excisable article on the ground that packing is neither an act of manufacture nor incidental nor ancillary to the process of manufacture of the packed main excisable article, Section 4(4)(d)(i) provided for inclusion of the cost of packing for the determination of the value of the packed excisable article for levy of excise duty thereon.

8. There is no intention expressed in Section 4(4)(d)(i) to levy duty on the packing material more than once, when the packing material is being manufactured by the same person, who also manufactures the packed material. There is no warrant for implying such an intention also under that provision. The

packing material manufactured, if it is an excisable good, should necessarily suffer the excisable duty to be paid by the manufacturer. The point at which the excise duty should be imposed will depend upon considerations of administrative convenience. But if the value of the packing material is to be tacked on to the value of the packed material, as per Section 4(4)(d)(i) of the Act, the value of the packing material merges with the value of the packed material and levy of excise duty has got to be done only on that basis, as contemplated in that provision. Here in the present case, the petitioner has paid excise duty for wrapper paper manufactured by it separately and hence we have to take it that the wrapper paper has already suffered the duty. The manufacturer of both the core paper and the wrapper was one and the same, namely, the petitioner. In that contingency, the provision in Section 4(4)(d)(i) cannot be invoked to tack on the value of the wrapper paper to the value of the core paper. Hence, the basic concept in the mind of the third respondent, to attempt by the impugned show cause notice, to include the value of the wrapper paper in the value of the core paper and on that basis to complain about short payment of duty cannot be countenanced.

9. It is for the Revenue to notify and declare as to when the wrapper paper manufactured for captive or home consumption by the same person, who also manufactures the packed or wrapped paper, should suffer the excise duty. But the wrapper paper manufactured for captive or home consumption could bear the excise duty only once, to be paid by the manufacturer; since there is no authority of law available to make it suffer excise duty twice; to be paid by the manufacturer. For the wrapper paper, manufactured for captive or home consumption, the point of time at which levy should be made on it, can be relegated to the stage of clearance of the wrapped paper, so that as per Section 4(4)(d)(i) the value of the wrapper paper can be added on to the value of the wrapped paper, and on that consolidated basis there could be levy of excise duty. It is not claimed by the respondents before me, that the petitioner was directed to adopt this procedure for the period in question. Without any protest from the third respondent, the excise duty has been paid by the petitioner separately, on the wrapper paper. Mr. T. Somasundaram learned Additional Central Government Standing Counsel, would submit that there could be a case of purchase of duty paid wrapper paper from the open market and utilising it for packing the core paper, and in such a case, the value of such paper cannot be excluded from the value of the core paper. Learned Additional Central Government Standing Counsel forgets that we are dealing with a law which imposes duty on manufacture to be paid by the manufacturer. The value of the duty paid wrapper paper purchased from open market and utilised for packing the core paper will be the cost of packing within the Section 4(4)(d)(i) to be included in the value of the core paper. In such a case, the manufacturer of the core paper has not paid the duty for the manufacture of and on the manufacture of the wrapper paper, he being not its manufacturer. He has merely paid the price for the duty paid wrapper paper, purchased in open market and that price can certainly be the cost

of packing u/s 4(4)(d)(i).

10. Learned counsel for the petitioner would bring to my notice the following pronouncements rendered in the context of Rule 56A of the Rules, with regard to* allowing credit of duty already paid on material or component parts of finished products, in the contingencies set out therein.

(i) Seshasayee Paper and Boards Ltd., Erode v. Appellate Collector of Customs and Central Excise, Madras and Anr. - 1984 ELT 3 (Madras); (ii) West Coast Paper Mills Ltd. v. Collector of Central Excise, Bangalore -1985 ELT 276 (Kar); (iii) Straw Products Ltd. and Anr. v. Superintendent of Central Excise, Rayagada and Ors. - 1986 ELT 286 Ori. It is not necessary to refer to and rely on the rulings rendered with regard to Rule 56A of the Rules, because that rule is a process to be sought for and worked out on fulfilment of contingencies therefore ,and no such contingency has arisen in the present case. By an analysis of the provisions of the Act and the Rules, and in particular taking note of the scope of Section 4(4)(d)(i) as exemplified by the Supreme Court, in the pronouncement referred to above, I am convinced that the principles to govern should be set down as follows :

The wrapper being an excisable article on its manufacture must suffer the excise duty. The liability to pay the excise duty on the wrapper paper is that of the manufacturer. The point at which it should suffer the excise duty will depend on considerations of administrative convenience. If the very same manufacturer manufactures other varieties of paper or core paper, and they are to be packed in the wrapper paper, also manufactured by him, the value of the wrapper paper has to be added on to the value of the core paper, as per Section 4(4)(d)(i) to make up a consolidated value for levy, provided the wrapper paper has not suffered excise duty of its own separately, in the hands of the manufacturer. If it has so suffered, it will not be in order to tack on its value to the value of the core paper, since that would amount to double taxation not authorised in law. The manufacturer is cast with the liability to pay the requisite excise duty on the wrapper paper manufactured by him. But that liability cannot be cast on him twice in the absence of an authority of law, which is lacking here. But the point at which levy should be made need not be static and can be fixed up according to administrative exigencies. Taking note of the intendment behind and the implications of Section 4(4)(d)(i), the value of the wrapper paper, if it has separately suffered excise duty in the hands of the manufacturer of the wrapper paper, who is also the manufacturer of the wrapper paper, shall not be added on to the value of the wrapped paper to make up a consolidated value to suffer excise duty on that basis.

11. Learned counsel for the petitioner would also contend that the present demand is barred by limitation as per Section 11A of the Act for the period anterior to 18-4-1977, taking the date of the initial show cause, namely, 10-10-1977, as the date of service of notice as per Section 11A. However, Mr. T. Somasundaram, learned Additional Central Government Standing Counsel, would

answer this contention by stating that is a case of suppression of facts and hence the time limit could be five years and in this view the present demand even for the above period could not be stated to have become barred. Mr. Somayaji, points out that there has been no plea, at any point of time earlier to the filing of the counter affidavit by the respondent in this writ petition, which happened only in July 1987 that the petitioner was guilty of suppression of facts. There is no need to go into this question, because I have sustained the primary contention with regard to the very untenability of the basis for the demand. For the reasons expressed above, this writ petition is allowed. No costs.