

(1985) 04 BOM CK 0003

In the Bombay High Court

Case No : Writ Petition No. 1179 of 1980

S.S. Miranda Limited and Another

APPELLANT

Vs

Union of India (UOI), M.C. Thakur, ACCE and Another

RESPONDENT

Date of Decision : 24-04-1985

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 4(d)(ii)

Citation : (1992) 41 ECR 373

Hon'ble Judges : Sawant, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sawant, J.—The present controversy arises out of the decisions under the Central Excise Act by the Supreme Court on the subject of the post manufacturing expenses in Union of India and Ors. v. Bombay Tyres International Private Limited reported in 1983 ELT 869 : 1983 ECR 653 : ECR C 659 SC and 1983 ELT 1896 : 1983 ECR 1627 SC : ECR C 663 SC and also in 1984 (17) ELT 329 : 1983 ECR 2233 (SC) : ECR C 693 SC and the order passed by this Court in the present petition on the 9th December 1983. In order to appreciate the precise nature of the controversy, it is necessary to state the following few preliminary facts:

1A. The Petitioners are a public limited company engaged in the business of manufacturing of engineering goods such as tool bits, rounds, turnings, hacksaw blades, etc. After this Court gave its decision on the question of post manufacturing expenses in the case of Bombay Tyres International Private Limited which was reported in 1979 ELT 625 : 1980 CC 37 (Bom), the Petitioners submitted a revised price list to the Excise Authorities on the 16th January 1980 on the basis of the said judgment. On the 4th February 1980 they wrote a letter to the Excise Authorities that henceforth they would pay the excise duty on the post manufacturing items under protest. On the 26th March 1980 the Petitioners submitted a fresh price list on the basis of audited accounts for the year ending 31st December 1979 and also made on the same day a refund application for Rs.

15,01,043/- for the period from July 1977 to December 1979. On the 5th May 1980, the Assistant Collector of Excise passed his order rejecting the revised price list and on the 25th July 1980 he also rejected the claim for refund. The Petitioners preferred an appeal against both the orders and on the 10th September 1980 the Collector of Excise (Appeals) rejected the appeal on merits. It is to challenge the said Appellate Order that the present petition was filed on the 8th October 1980.

2. In the meanwhile the Supreme Court delivered the aforesaid orders and judgments in appeal against the decision of this Court in the case of the Bombay Tyres International Private Limited. In view of the said orders and decisions of the Supreme Court, the learned Single Judge on the 9th December 1983 passed an interim order in this petition. The sum and substance of the said order was that the assessing authorities, namely, the Assistant Collector, Excise was to permit the Petitioners to submit their statements of deductions/amendments in respect of the price list already filed for a proper determination of excise duty liability in respect of deductions claimed under some headings beyond those dealt with in the decision of the Supreme Court, if they were otherwise admissible. The Assistant Collector was also to permit the Petitioners to submit their refund claims or amendments to their refund claims already pending in respect of the said heads of deductions. The Petitioners were also required to file such documentary evidence which they might be called upon to do so by the Assistant Collector. The Assistant Collector was then to finalise the price lists/refund claims after giving an opportunity to the Petitioners, and pass a speaking order. The Assistant Collector was thereafter to file in this Court the orders of assessment along with the copies of statements of deductions/amendments and the price lists, etc. All final orders including orders for payment were then to be passed by this Court. After the said order was passed notices were sent by the Assistant Collector calling upon the Petitioners to produce the relevant documentary evidence in support of their claim under each of the heads under which deductions were claimed by the Petitioners and after hearing the Petitioners, the Assistant Collector passed his order on the 18th May 1984, allowing certain deductions and rejecting others.

3. Although originally the Petitioners were claiming various reliefs in different amounts, the Petitioners have now confined their claim only to two items. The first item is of deduction for the "Surprise Incentive" offered by them to their customers for the year 1983 and the second item is of the claim for refund in respect of the headings under which the deductions were allowed by the Assistant Collector and covering the period (a) from 1st July 1977 to 27th September 1979 and (b) from 1st January 1980 to 29th January 1980. It may be mentioned here with regard to the claim for refund for the two periods that although the Assistant Collector held that the relevant deductions were permissible, he rejected the same on the ground that the claim was not filed within six months which is the period of limitation for claiming refund u/s 11B of the Central Excise Act.

4. Taking first the claim for deduction on account of "Surprise Incentives", the case of the Petitioners is that by their circular dated the 23rd May 1983 they had offered to their customers/dealers a discount under a Special Incentive Scheme called "The Miranda Package of Surprise Incentives". This was in addition to the other discounts they had allowed to the dealers. The basic features of the said "Surprise Incentives" scheme were as follows:- If the dealers' purchases in June were 15% above the target, they were entitled to a 1% target incentive on their total purchases from 1st January to 30th June 1983. Even if the dealers' monthly targets were not fulfilled, if they fulfilled the said target up to June 1983 over a period of six months together and also exceeded the total target of 15%, they were to get the said incentive of 1% on the total purchases for the six months ending June 1983. By this circular the Petitioners also promised that there would be some incentives in the coming months but the quantum of such incentives was not announced and it was specifically mentioned that it would be kept secret and would be announced as a surprise. The Petitioners however made it clear that as such further "Surprise Incentive" would be given to the dealers on their total purchases from 1st January to 31st August, if the target for July and August plus 15% was achieved by them. Similarly, the Petitioners announced an unspecified amount of incentive for September and October if the target by that time plus 20% was achieved by the dealers. Likewise for the period ending October, a further unspecified discount to cover 10 months purchases from 1st January 1983 to 31st October 1983 was also announced. The details of the scheme are in the said circular letter which is Ex. "I-1" to the petition. The Petitioners thereafter issued yet another circular to their dealers on the 1st November 1983 in which they announced incentive for November and December 1983. This further incentive was as follows: The dealers who completed their Annual Bonus target by 30th November and made purchases in November and December for a further 1/12th of the foregoing target were to be given 3% special discount on November and December purchases and the dealers who completed their Annual Bonus target by 31st December and made purchases in December of a further 1/24th of the foregoing target were to be given 2 1/2 % special discount on November and December purchases. This Circular letter is at Ex. I-2 to the petition. It is the case of the Petitioners that they had accordingly given the "Surprise Incentive" discount to their dealers between 1st January 1983 and 31st December 1983. That discount was known to the dealers at the time of and also prior to the removal of the goods. The discount was properly a trade discount and was therefore eligible as a deduction from the sale price. The Assistant Collector had disallowed the same on the ground that it was not known at the time of clearance, which reasoning was contrary to the facts. They therefore claimed that the said claim should be allowed, setting aside that part of the order of the Assistant Collector.

5. As against this, it was contended on behalf of the Respondents that although in the order only one reason was given, namely, that the quantum of incentive was not known at the time of clearance, there was also an additional reason for

disallowing this deduction. That reason was that although by his letter dated the 7th March 1984 the Assistant Collector had called upon the Petitioners to substantiate their claim that they had paid to their dealers such incentive bonus monthwise and goodswise, the Petitioners had not produced any documentary evidence to support their claim and hence there was no material to prove the Petitioners' claim that they had in fact paid such discount to their customers. It was also contended that the reason given by the Assistant Collector in his order that the discount was not known at or prior to the time of the removal of the goods is clear on the facts of the case. In this connection, it is pointed out that from 1st January 1983 almost to the end of May 1983 the dealers were not even aware that there was any such "Surprise Incentive" scheme in the offing. Therefore, the claim for deduction from 1st January to 31st May 1983 is not maintainable at all. As regards the period from July to October 1983 the quantum of incentive which was to be made available to the dealers was admittedly not declared, and therefore, not known. As regards months of June, November and December 1983, although both the factum of the incentive and its quantum was made known the incentive was to be available only if the dealers had succeeded in fulfilling their quotas and not otherwise. Therefore at the time the dealers cleared their individual consignments during the said three months they were not aware whether they would at all get the incentive bonus and to what extent. In the result for no period of the year 1983 for which the deduction is claimed the quantum of incentive was even known at or prior to the removal of the goods in question.

6. I find much substance in the contentions raised on behalf of the Respondents. Section 4(d)(ii) of the Central Excises and Salt Act, 1944 states that "value" in relation to any excisable goods does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale. The Supreme Court in its clarifying order reported in 1984 (17) ELT 329 : 1983 ECR 2233 (SC) : ECR C 693 SC while referring to trade discounts which are allowed as deductions has stated as follows:

Trade Discounts.--Discounts allowed in the Trade (by whatever name such discount is described) 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 discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price.

This makes it clear that trade discounts if they are to be allowed as deductions from the said price must be known at or prior to the removal of the goods. Judged on this criterion the discounts claimed for none of the periods is

permissible as deductions. As regards the period up to 31st May 1983, admittedly the Petitioners' customers were not even aware that there was going to be any such incentive scheme since it was announced for the first time only by a circular dated the 23rd May 1983. Similarly is the situation with regard to the period from July to October 1983, for the incentive was announced for the said period only by the circular dated the 1st November 1983. The customers were therefore obviously unaware of any such incentive at the time they cleared their individual consignments during the said three months. The only period for which it can be said that the customers were made known of the said incentive scheme was the period of three months viz., June, November and December 1983. All that however can be said with regard to the said three months is that the Petitioners' customers were aware that there was some such incentive scheme operative during the period. But even with regard to these three months, it can hardly be said that they knew at the time they cleared the individual consignments during the said three months the quantum of discount that they would be entitled to. In fact at the time they cleared the specific consignments during the said three months they could not even be sure that they would get any discount at all. This was because according to the scheme itself their entitlement to the discount was dependent on their fulfilling certain target within a specific period. Both the availability of the incentive as well as its quantum were contingent upon the customers' purchasing a particular quota and during a particular period. If they failed to complete the specified quota during the specific period, they were not entitled to any discount at all. In other words the incentive was not as a matter of course accompanying each purchase. It was more in the nature of a contingent benefit. It could hardly be described as a trade discount. That it was not a discount allowed in accordance with the normal practice of the wholesale trade at the time of removal of the goods is patent on the face of the said scheme itself. Both the circulars did not make a secret of the fact that they were both surprise and incentive schemes. The contents of the circulars themselves show that neither the factum of the incentive nor its quantum was known in advance for a major part of the period. Nor was the quantum known to the purchasers at the time of clearing their individual purchases during the rest of the period. At best this was a profit sharing scheme between the Petitioners and their customers on the customers reaching the targets of purchase. I am therefore of the view that the Petitioners are not entitled to claim any deduction on account of their said surprise incentive schemes for the year 1983.

7. Coming now to the second claim of the Petitioners, namely, the refund of the excise duty paid for the period from 1st July 1977 to 27th September 1979 and 1st January 1980 to 20th January 1980 on items for which the deductions are allowed, the Petitioners have now confined their claim by an amendment only to Rs. 4,07,639/- although originally they had claimed a higher amount. As stated earlier, the Assistant Collector has rejected this claim on the ground that an application for refund was filed after more than six months, and therefore, was barred by limitation. There is no doubt that the Assistant Collector was justified

in rejecting the said claim since he had no authority to grant a claim more than six months" old. However, the question before this Court is whether the said claim though time barred by Section 11B of the Central Excise Act should be allowed by this Court in this writ petition since the petition is filed within three years of the accrual of the said claim. The petition was filed on the 8th October 1980 and if the ordinary law of limitation is applied as held by the Supreme Court in some cases the Petitioners' claim would be within time. The Respondents have no doubt disputed even the new quantum claimed by the Petitioners. It is not however necessary for me to go into the dispute with regard to the quantum. This is because I am of the view that the Petitioners in this case are not entitled to the refund of any amount even if this Court has power to grant the claim since the Petitioners have admittedly recovered the said amount of excise duty from their customers. To grant the Petitioners' claim in such circumstances will amount to permitting them to enrich themselves unjustly and to misappropriate the monies which properly belong to their customers and to the ultimate consumers. In an equitable and discretionary writ jurisdiction such as of Article 226, the Courts should not countenance such claims. This is now well settled by three decisions of the Supreme Court reported in (i) Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, (ii) Amar Nath Om Prakash and Others Vs. State of Punjab and Others, and (iii) U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, I have also dealt with this aspect of the matter in a dissenting judgment which is reported I.T.C. Ltd. Vs. M.K. Chipkar and others, I.T.C. Ltd. v. M.K. Chipkar where I have discussed the entire case law on the point till date. There are also judgments of other High Courts taking the same view. They are (1) Madras Aluminium 81 ELT 478 : 1980 CC 50D : 1990 (26) ECR 607 (Mad) decided on 27.11.1979 Madras; (2) C.S.G.A. & Co. (1972) 30 STC 120 decided on 14.7.1975 Andhra Pradesh (3) Hyderabad Asbestos 80 ELT 735 decided on 23.5.1980 Delhi : 1990 (28) ECR 377 (Delhi); (4) Jaswant Sugar 83 ELT 920 decided on 4.5.1982 Allahabad : 1982 ECR 680D (All); (5) Tata Chemicals 83 ELT 776 decided on 31.1.1983 Gujarat; (6) Bharat Chemicals (unreported) decided on 21.11.1983 M.P. (copy furnished); (7) New India Industries 83 ELT 1763 decided on 22.2.1983 Gujarat : 1983 ECR 2002 (Guj); (8) Ahmedabad Calico 84 (17) ELT 246 decided on 6.4.1983, Gujarat and (9) Godavari Plywood 84 ELT 732 decided on 18.9.1984 Andhra. Our own Division Bench has in the case of Ogale Glass Works Ltd. v. The Union of India reported in 1975 CC III 115 : 1979 ELTJ 468, has taken a similar view which has so far not been overruled. Although some later Division Benches of this Court have taken a different view, all that can be said is that there is a difference of view on the subject in this Court. However it must be noted here that none of these later Benches had the benefit of the three Supreme Court judgments referred to by me earlier. I have also not come across any further Supreme Court judgment which has taken a contrary view.

8. In the result the petition is dismissed and the Rule is discharged with costs.