

(1983) 07 MAD CK 0057

In the Madras High Court

Case No : Writ Petition No. 1024 of 1981

T.I. Miller Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 20-07-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173, 8
Constitution of India, 1950 — Article 226

Citation : (1987) 31 ELT 344 : (1984) ILR (Mad) 251

Hon'ble Judges : S. Mohan, J

Bench : Single Bench

Advocate : Habibullah Badsha, for the Appellant; T. Somasundaram, Additional Central Govt. Standing Counsel, for the Respondent

Judgement

1. This Writ Petition coming on for hearing on Thursday, the seventh; fourteenth, Friday the 15th, Tuesday, the 19th day of July, 1983; and on this day upon pursuing the petition and the affidavit filed in support thereof the order of the High Court, dated 23-2-1981 and made herein, and of the records relating to the order C. No. V. 68/(N.S.)3/41/79, dated 31-1-1981 as amended by order C. No. V/68(N.S.) 3/41/79, dated 5-2-1981, on the file of the 2nd respondent comprised in the return of the respondents to the writ made by the High Court, and upon hearing the arguments of Mr. Habibullah Badsha, Advocate for the Petitioner, and of Mr. T. Somasundaram, Additional Central Government standing counsel on behalf of the Respondents, the court made the following Order :

2. The Writ Petition is directed against the order dated 5-2-1981, of the Assistant Collector of Central Excise (2nd respondent) confirming the demand for Rs. 5,79,449.13 substituting the original demand for Rs. 7,09,237-84. This order is sequel to the order of Assistant Collector, dated 31st January, 1981. The short facts are as follows :

3. The petitioner company is engaged in the manufacture of cycle lamps among other things. The lamps so manufactured are supplied to cycle dealers. The cycle

lamps fall under Item 68 of the First Schedule to the Central Excises and Salt Act, 1944. As required under Rule 173-B of the Central Excise Rules, the petitioner company was filing classification lists for the goods manufactured and cleared by them. The classification list filed by the petitioner was approved by the department from time to time. Since the department itself treated cycle lamps as part of the cycle, the Government of India acting under Rule 8 of the Central Excise Rules exempted cycles and parts thereof under Notification No. 55 of 1975 as amended by Notification No. 102 of 1980 dated 18-6-1980. As a result, cycle parts were not liable for payment of duty from 18-6-1980.

4. The second respondent issued a show cause notice on 24-10-1980 as follows :

"M/s. T. I. Miller Limited, Ambathur, Madras-53 are holders of Central Excise Licence 37/75 for the manufacture of Cycle Parts and accessories. The said item is covered under Item 68 of the First Schedule to the Central Excises and Salt Act, 1944 and governed by Chapter VII-A of the Central Excise Rules, 1944. As required under Rule 173-B of the Central Excise Rules, 1944, the company has been filing classification lists for the items intended to be manufactured in the licenced premises.

2. Among various parts and accessories of Cycles, the Company manufactures lamps and parts thereof and they have filed classification lists for the cycle lamps and parts thereof. These lists were approved upto 18-6-1980 under 86/79. dated 1-3-1979, giving a concessional rate of 5% ad valorem and after 18-6-1980, these parts are being assessed to duty at Nil rate as per Notification No. 55/75, as amended by Notification No. 102/80, dated 18-6-1980.

3. Whereas it appears now that the exemption given under Notification No. 86/79, dated 1-3-1979, and Notification 55/75 as amended by Notification 102/80 dated 18-6-1980 are for parts of Cycles only and items, cycle lamps and parts thereof are not to be considered as parts of cycles eligible for exemption under the said notification, hence M/s. T. I. Miller Limited, as hereby directed to show cause to the undersigned within one month from the date of receipt of show cause notice as to why the exemption given under Notification 55/75 as amended by Notification 102/80 from 18-6-1980 onwards and under 86/79, dated 1-3-1979 upto 18-6-1980, should not be denied to them, and why the present assessments should not be revised and why the differential duty for the clearances made in the last 6 months prior to the date of this show cause notice should not be collected under Rule 10 of the Central Excise Rules, 1944.

4. M/s. T. I. Miller Limited, should at the time of showing cause indicate whether they desire to be heard in person. They should also produce all the records upon which they intend to rely.

5. M/s. T. I. Miller Limited are informed that, if no cause is shown within the stipulated time, the case will be decided on its merits.

Sd/- C. Mahesh, Assistant Collector."

The petitioner replied to the show cause notice on 19-11-1980 and stated that cycle lamps and parts thereof are specifically designed for use in cycles and cannot be used for any other vehicle and therefore, they are to be treated as parts of cycles. It was also contended that the trade considered cycle lamps as cycle parts and even consumers accepted it as a cycle part and hence a request was made to drop the demand. It was also pointed out through the letter of the Petitioner dated 21-11-1980 that major cycle lamps manufacturers like M/s. Sankyo Ltd. were not paying duty. A personal hearing was afforded to the petitioner on 27-12-1980. Thereafter, corrigendum was issued to the show cause notice on 15-1-1980 calling upon the petitioner to show cause why the differential duty of Rs. 5,02,923-22 for the period 19th June, 1980 to 23rd October, 1980 and a further differential duty of Rs. 76,525-91 for the period from 24-4-1980 to 18-6-1980 should not be demanded under the then Rule 10 of the Central Excise Rules. By this order dated 31st January, 1981, the second respondent Assistant Collector confirmed his view taken in the show cause notice and held cycle parts are not eligible for exemption under Notification No. 86 of 1979 dated 1-3-1979 and Notification No. 55/75 as amended by Notification No. 102/80 dated 18-6-1980. In the result, he confirmed the demand for Rs. 7,09,237-84 and subsequently by his corrigendum to the order dated 5-2-1981, the demand was amended as Rs. 5,79,449-13. It is under these circumstances the present writ petition has come to be preferred for the abovesaid reliefs.

5. The learned counsel for the petitioner Mr. Habibullah Badsha raises the following grounds :

From 1975 onwards, the parties were treating dynamo lamps as part of the cycle and the respondents were granting exemption. The Indian Standards Institute classified this as part of the cycle. Such a classification is binding on the excise authorities as laid down in 1977 E.L.T. 199 (Paragraph 12). That clearly lays down that the views of the Indian Standards Institute, should be preferred to the foreign views. The learned counsel also contends that how the general public or the trade had treated this part is vital. Viewed from that point of view, there can be no exception whatever that this is part of the cycle and not an accessory. As to how such a construction has to be made is gatherable from 1978 E.L.T. 180, Parry Confectionary Ltd. Madras V. Government of India 1980 E.L.T. 468 and 1980 E.L.T. 679. He also refers to the adumbration of the policy of the Government wherein it was stated that dynamo lighting sets are one of the components of bicycle available for export from India. The learned counsel relies on a ruling in Revision cases Nos. 23 and 24 of 1980-81 decided by the West Bengal Commercial Taxes Tribunal and contends the ration would apply. In view of the fact that the Madras Traffic Code under Vol. IV Rule 43 requires that the cycle should carry a light, it follows that it is component or part. The Import Control Policy in Item 10 defines a component, while Item 14 contains the definition of "accessory", Item 15 defines "parts". Affidavits of dealers have also been filed to show that dynamo lamps are sold as bicycle parts. Under these circumstances, it is only the common parlance understanding that must be taken

note of and the Court cannot be guided by technical meaning as laid down in Delhi Cloth & General Mills Co. Ltd. V. State of Rajasthan & others 1980 E.L.T. 383, where the question arose whether fabric would include tyre cord fabric as well. The same principle was adopted in Indo-International Industries V. Commissioner of Sales Tax, U.P. 1981 E.L.T. 325 and 1979 E.L.T. 664. It is also equally established that the dictionary meaning should not be adopted. That is the ratio of Advani Oerlikon Ltd. and another V. Union of India and others 1981 E.L.T. 432. The same principle was laid down in Commissioner of Sales Tax, U.P. Vs. S.R. Brothers, Kanpur, , Dunlop India Ltd. V. Union of India AIR 1977 S.C. 597 = 1983 ELT 1566 and Union of India (UOI) and Others Vs. Gujarat Woollen Felt Mills, .

6. The next submission of the learned counsel is that this being a fiscal statute it must be construed in favour of the assessee and not in favour of the Revenue. Mrs. Panzy Fernandas Vs. Mrs. M.F. Queoros and Others, .

7. It cannot be contended that the writ petition is against the order of the Assistant Collector and that further remedy by way of appeal is available under the Act and therefore the writ jurisdiction cannot be invoked, because this Court has already taken the view that where it is a matter of classification and should the classification be perverse, it can be interfered with under Article 226 of the Constitution of India. In support of this submission reliance is placed on the decisions reported in 1979 E.L.T. J. 36, 1978 E.L.T. J. 509, and 1978 E.L.T. J. 333. The classification once approved by the department cannot be revised by the lower authority in the hierarchy, namely, the Assistant Collector. The classification was approved on 18-6-1980. The show cause notice came to be issued on 24-9-1980. Under similar circumstances, this court has taken the view that it is not possible for the lower authority to revise his own order or review his own order.

8. Lastly, it is urged that Rule 10 would not apply to a case where exemption was granted & on the basis of the exemption the petitioner carried on trade and suddenly a demand was raised calling upon the petitioner to show cause as to why the exemption should not be denied to the petitioner. In other words, without actually cancelling the exemption, no demand could ever be raised. This is exactly what is sought to be done by the impugned show cause notice which has culminated in the order.

9. The learned Government Pleader appearing for the revenue submits that there is no gainsaying that where there is an ambiguity, the court can go into the purpose of classification, determine the technical meaning or reject the classification by the trade or the understanding in common parlance. But, in this case, there is absolutely no ambiguity whatever. The true test, according to the revenue is, whether it is essential for the operation of the cycle. In the commercial world, if ordinarily a cycle is sold without a dynamo lamp or if a buyer of a bicycle is not bound to buy a dynamo lamp, it is that trade practice which has to be borne in mind. May be it is an accessory for the effective use of

the bicycle during night. But, by no stretch of imagination could it be contended as a part of the cycle. In *State of Uttar Pradesh and Another Vs. Kores (India) Ltd.*, while dealing with the question whether typewriter ribbon is a part of the typewriter, the Supreme Court answered the question in the negative. This was on the basis it is a word of art construed in the popular and commercial senses. This is the ration of the ruling as seen from Paragraph 17 and 18. Reliance is also placed in this connection on the rulings reported in the *State of Mysore Vs. Kores (India) Ltd.* 26 S.T.C. 87. Equally in a case which arose before the Kerala High Court in *Deputy Commissioner Vs. Union Carbide India Ltd.* 38 S.T.C. 198 whether transistor batteries were part of the transistor was the question. The court held that it may be necessary for the convenient use, but it cannot be held to be a part of transistor. Such view prevailed even with the Mysore High Court as seen from the rulings in *N.A.V. Naidu Vs. State* AIR 1971 Mys 16. Therefore, if the popular and commercial meaning are to be attached to this item, it would become an excisable commodity under Item 68 of Schedule I. The various rulings cited contain the general proposition and they have no relevance.

10. The next submission of the learned counsel is that in so far as the show cause notice has fruited into an order, which order is liable to be appealed against and a further appeal is also provided to the Tribunal now after the amendment, there is no reason why this court should exercise writ jurisdiction under Article 226 of the Constitution.

11. It is incorrect to contend that the then Rule 10 would not apply to a case of this character. Originally, accepting the classification the exemption was granted. That notification was not for all time to come. It is well open to the excise department to revise its stand. Under those circumstances, Rule 10 would apply. This is because there was no assessment earlier. That view was considered to be wrong. It is proposed now to assess because the wrong is sought to be corrected. So long as it is within the statutory limit prescribed under Rule 10, there can be no valid objection whatever. Technicalities should not weigh with this court, because the show cause notice itself clearly calls upon the petitioner to show cause why he should not be denied the benefit of exemption and the further show cause is as to the proposed demand. Therefore, there are absolutely no merits in the writ petition.

12. I will first take the question whether this court can entertain the writ petition under Article 226 of the Constitution. For my part, I may straightaway say I see no difficulty whatever. In a matter of classification, this court has always adopted the principle that under writ Jurisdiction it could examine the correctness of a particular classification. Right from the earliest days, the courts were of the view that the classification of a particular item whether perverse or not is a matter which falls within the writ jurisdiction. Therefore, I over-rule the objection raised on behalf of the revenue as to the maintainability of the writ petition.

13. The next question to be dealt with is whether dynamo lamp is a part or component of the cycle or an accessory. One thing is well settled. This is not a

word of art. Therefore, the question is what is the view which has to be accepted. I have no hesitation in holding that it is the popular commercial view that has to be accepted, because the Supreme Court in *State of Uttar Pradesh and Another Vs. Kores (India) Ltd.*, observed as follows :

"Regarding ribbon also to which the above-mentioned rule of construction equally applied, we have no manner of doubt that it is an accessory and not a part of the typewriter (unlike spool) though it may not be possible to use the latter without the former. Just as aviation petrol is not a part of the aeroplane nor diesel is a part of a bus, in the same way, ribbon is not a part of the typewriter though it may not be possible to type out any matter without it.

The very same question with which we are here confronted came up for decision before the High Court of Mysore in *State of Mysore Vs. Kores (India) Ltd.* (1970) 26 STC 87 (Mysore) where it was held :

Whether a typewriter ribbon is a part of a typewriter is to be considered in the light of what is meant by a typewriter in the commercial sense. Typewriters are being sold in the market without the typewriter ribbons and therefore typewriter ribbon is not an essential part of a typewriter so as to attract tax as per entry 18 of the Second Schedule to the Mysore Sales Tax Act, 1957."

That case dealt with the question whether typewriter ribbon was a part of typewriter itself and the answer was as found in the above extract. Incidentally it requires to be noticed that the ruling of the Supreme Court approved the view of the Mysore High Court taken in *State of Mysore Vs. Kores (India) Ltd.* 1970 26 S.T.C. 87 of the latter ruling, the court observed, as extracted in the Supreme Court ruling and referred to above. In *Deputy Commissioner Vs. Union Carbide India Ltd.* 38 S.T.C. 198 the Kerala High Court was confronted with the question whether leak-proof or dry cell batteries which are labelled as transistor batteries can be regarded as normally used only for transistors. The headnote itself sets out the point in issue. The learned Judges after referring to some of the leading decisions of the Allahabad High Court held at p. 202 observed as follows :

"The principle which can be drawn from the above decisions appears to be that a thing is a part of the other only if the other is incomplete without it. A thing is an accessory of the other only if the thing is not essential for the other but only adds to its convenience or effectiveness."

The revenue pressed very much this view for acceptance. I am of the opinion that the stand of the revenue is right. What is important is whether cycle can be sold commercially without dynamo. Or again, to put the proposition differently if the cycle could function without the dynamo. Certainly, the dynamo cannot be a part. It is this view which was accepted by the Supreme Court in *State of Uttar Pradesh and Another Vs. Kores (India) Ltd.*, just now referred to. However, Mr. Habibullah Badsha learned counsel for the petitioner would say that in the context of those cases it was so laid down; but here where the bicycle cannot be used during night without a dynamo or again the dynamo cannot be used for any

other purpose than to be fitted with the bicycle a distinction must be drawn. This argument, in my considered view, overlooks an important fact that in this case what I am called upon to decide is whether it is a part or accessory. From this point of view, I am unable to accept the contention of the petitioner that exemption having been granted from 1975 treating it as a part would be binding upon the revenue for all the time to come. The question whether Indian Standards Institute classification is binding on excise also pales into insignificance, because of the conclusion I have arrived at. The Government of India set out its Industrial Policy wherein no doubt it is stated bicycle components were available for export from India. Item 11 is dynamo sets. Merely because it is available for export, it does not mean that it should be considered as a part for the purpose of this classification. The affidavits of dealers no doubt may say that dynamos are sold as parts. But that by itself is not conclusive because of the important test adopted by the Supreme Court in *State of Uttar Pradesh and Another Vs. Kores (India) Ltd.*, . From this point of view, I am unable to see any relevance to the various cases cited on behalf of the petitioner as to how a particular entry is construed where there is an ambiguity. If the test propounded by the Supreme Court is determinative, I need not labour by referring to various other decisions. It should also be noted that there is no technical meaning here so as to bring this case within the ratio of the rulings reported in *Advani Oerlikon Ltd. and another Vs. Union of India and Others* 1981 E.L.T. 432 *Commissioner of Sales Tax, U.P. Vs. S.R. Brothers, Kanpur*, ; *Dunlop India Ltd. Vs. Union of India* AIR 1977 S.C. 597 and *Union of India (UOI) and Others Vs. Gujarat Woollen Felt Mills*, . It is the axiomatic construction of law that in interpretation of fiscal statutes the court must lean in favour of the citizen rather than revenue because it is expropriatory in character *The Central India Spinning and Weaving and Manufacturing Company, Limited, The Empress Mills, Nagpur Vs. The Municipal Committee, Wardha*, . But in this case in so far as the construction is possible in that the cycle can be used without the dynamo, it is not a part of the bicycle. The mere fact that under the Madras Traffic Code, Rule 43 requires the rider of a bicycle to have a light while riding a bicycle during night cannot be of any assistance in relation to classification.

14. It is the common case between the parties that there was exemption till 18-6-1980 in view of the last of the notification made in No. 102/80. The show cause notice which I have already extracted says "show cause to the undersigned within one month from the date of receipt of the show cause notice as to why the exemption under Notification No. 55 of 1975 as amended by Notification No. 102 of 1980 from 18-6-1980 onwards and Notification No. 86 of 1979, dated 1-3-1979 upto 18-6-1980 should not be denied to them and why the present assessment should not be raised and why the differential duty for the clearance made in the last 6 months prior to the date of this show cause notice should not be collected under Rule 10 of the Central Excise Rules, 1944". This necessitates him to refer to the then Rule 10 wherein the exemption was already granted. The petitioner operated on the basis of the exemption. Without even

calling upon him to show cause on what basis it is proposed to withdraw the exemption, the show cause notice proceeds as if the exemption is not there. Of course, the show cause notice does use the words "why the exemption should not be denied". But what is a matter of tautology. Where is the question of assessing a petitioner during the currency of exemption ? That is why the learned counsel for the revenue bases an argument of convenience and wants to bring it within Rule 10. It is true Rule 10 contemplates "nil" assessment also. But, in this case there is not even a "nil" assessment. The parties proceeded upon an exemption. Therefore, there was no question of assessing the petitioner and granting exemption thereof in which event Rule 10 could be invoked. It is no use to say that the 6 months period contemplated under Rule 10 is not violated. All that I am endeavouring to point out is the exemption is very much there for the period proposed to be assessed in the show cause notice. The learned counsel for the revenue would go to the extent of saying that inasmuch as the petitioner has shown cause to this notice dated 24-10-1980, there is no flaw. This argument is based on an incorrect reading of the show cause notice. Unless and until the exemption was withdrawn in the manner known to law, nobody can assume that the petitioner is liable to be assessed. If such an assumption is made, it would mean nothing but pre-judging the matter and that precisely is the situation here. Therefore, the show cause notice itself is bad. The defect in the show cause notice is sought to be got over by the respondents by saying it has fruited into an assessment. If I am right in my conclusion that during the currency of exemption there cannot be an assessment at all, the order of Assistant Collector and the corrigendum issued to that order cannot have any legal basis. As a matter of fact, I called upon the revenue whether it is willing to withdraw the show cause notice and assess afresh. For the reasons best known to the revenue, this suggestion of mine was not accepted. Of course, this is besides the point. But the most important thing which cannot be lost sight of which I say at the risk of repetition is, the exemption is there very much. It is not shown as to why it is sought to be withdrawn or how the original exemption was wrong, so that it could have been withdrawn in an appropriate and legal manner. That has not been done. It is this defect which looms large and perverts both the show cause notice as well as the order. In view of this, I hold that impugned order is bad which is hereby quashed of course with liberty afforded to the respondent to proceed afresh if it is permissible in law.

15. There will be no order as to costs.