(1986) 11 DEL CK 0042

In the Delhi High Court

Case No : Civil writ petition No. 1401 of 1981

Tobu Enterprises Pvt. Ltd. APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 19-11-1986

Acts Referred:

Citation : (1987) 13 ECC 228 : (1988) 16 ECR 488 : (1987) 29 ELT 16

Hon'ble Judges : Mahinder Narain, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mahinder Narain, J.—The petitioner is a private limited company, and is engaged in the manufacture of "bicycles and tricycles for children" since 1975, at its factory located at 71/5, Najafgarh Road, New Delhi. The circumstance which led to the filing of this writ petition was seizure of bicycle/tricycle which were made by the respondents vide seizure memo which is annexed to the writ petition as annexure 1. According to the seizure memo, excisable goods that were seized, were "all other goods N.E.S. (Wheeled Toys) Tariff Item No. 68 of C. E. Tariff.", "Quantity; 1300 Nos. (details as per list enclosed)", "Value : Rs. 1,83,073.00".

2. Tariff Item No. 68 reads as under :-

"68. All other goods, not elsewhere specified, but excluding;

(a) alcohol, all sorts, including alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; and

(c) dutiable goods as defined in section 2(c) of the Medicinal and Toilet Preparation (Excise Duties) Act, 1955 (16 of 1955).

Explanation : For the purposes of this Item, goods which are referred to in any preceding Item in this Schedule for the purpose of excluding in such goods from the description of goods in that Item (Whether such exclusion is by means of an

Explanation to such Item or by words of exclusion in the description itself or in any other manner) shall be deemed to be goods not specified in that Item."

The words "N.E.S." in the seizure memo means "not elsewhere specified".

3. The question which arises for consideration in the instant case is whether the bicycles and the tricycles which were manufactured by the petitioners and were seized by the seizure memo are covered by notification No. 86/79 dated 1st March, 1979. The said notification reads as under :-

"In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excises Rules, 1944, the Central Government hereby exempts cycles and parts of cycles falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise livable thereon as is in excess of five per cent ad valorem."

4. It is to be noted that under Rule 8 of Central Excises Rules, whole or part of the duty can be exempted. This notification appears to be issued in exercise of such powers. By a notification No. 55/75, dated 1st March, 1975, whole of the duty of excise livable on Item No. 68 in the first schedule and mentioned in the schedule to the notification were exempted from the whole of the duty of excise. By further notification No. 102/80, dated 19th June, 1980, and further amendment to the notification No. 55/75 to the schedule, the words "cycles and parts thereof" were added. The "cycles and parts thereof" came to be wholly exempted from payment of any excise duty. The exemption from whole of the duty of excise was continued by notification No. 104/82-CE, dated 29th February, 1982, as also notification no. 234/82-CE, dated 1st November, 1982.

4A. The effect of the notifications taken together would be that as on 19th June, 1980, cycles and parts thereof were wholly exempted from excise duty.

5. The seizure in the instant case took place on 22nd May, 1981. This seizure obviously is based upon belief that the goods that were seized, were not cycles or cycle parts, but were wheeled toys.

6. Tricycles which were made by the petitioner, were also seized on 22nd May, 1981.

7. Mr. Haskar, appearing for the petitioner, has relied upon the dictionary meaning of the word "cycle" at pages 310 and 1379, New Webster''s Dictionary at page 250, Reader''s Digest - great Illustrated Dictionary at page 426.

8. All these dictionaries say that cycles are bicycles and tricycles. The question is whether what is manufactured by the petitioner, are bicycles or tricycles. One of the bicycles which had been manufactured by the petitioner, has been shown to me. It is a two-wheeled implements which is driven by means of pedals, chains and a free-wheel. It is in appearance, like a bicycle which is used by adults. The bicycle which is made by the petitioner, is much smaller in size and is suitable for being used by children. It has got all the implements which an adult cycle has. It

has one brake, it has solid rubber tyres, free-wheel, chain, pedals, and it has spokes in the wheels. In addition to two wheels, this bicycle has got two additional wheels which are removable, and are needed by children only before they acquire ability to ride the cycle and balance themselves on a cycle. The two additional wheels come into operation for the purpose of support, to prevent falling off, when the child or the person using it, looses balance. These two additional wheels will prevent the cyclist from falling on the ground.

9. To my mind, the use of the free-wheel, the bicycle chain and the pedals and the two additional wheels make the implement made by the petitioner, fall into the category of cycles.

10. Mr. S. K. Misra, appearing for the respondent relies upon the counter-affidavit filed in response to the show-cause notice issued by this Court for establishing that the implements manufactured by the petitioners that were seized by the respondent were not cycles. He relies upon what is stated to be literature leaf-lets and advertisements published by the petitioners in connection with the manufacture and sale of their products. It is stated in this affidavit that the petitioners themselves described that what they made is wheeled toys. The literature referred to and relied upon, has not been appended to the said counter affidavit. Even on my saying to Mr. Misra that he can try to produce it, he did not avail this opportunity. In fact he only said was that the petitioners can be made to respond to an enquiry whether they described their implements as toys. The petitioners denied that what they manufactured and market, they advertise as toys. They produced the same leaf-lets in which their product descriptions are stated. These leaf-lets show tricycles and bicycles. None of these are mentioned as wheeled toys.

11. The other contention of Mr. Misra is that the cycles which are mentioned in the exemption notifications, are those which are capable of being used as means of transport. This is nowhere stated in the relevant notifications and as such, such a contention is not open to Mr. Misra. No doubt, it has been taken in the counter affidavit, but that to my mind, is mere ipse dixit. Besides, in my view the implements made by the petitioners can be used for transport, by children.

12. It is noteworthy that in a letter dated 31st July, 1979, annexure 5 to the writ petition, it was specifically stated by the Superintendent of Central Excise, which letter was written to the petitioners that "tricycles also fall within the definition of cycle". The said letter reads as under :-

"Office of the Superintendent

Central Excise MOR II/MOD III

J-66, Rajouri Garden, New Delhi.

C. No. GL-6/79/908 Dated : 31.7.1979

To,

M/s. Tobu Enterprises Pvt. Ltd.

51/5, Najafgarh Road,

New Delhi-15.

Dear Sir,

Sub : Classification of N.E.S. - T.I. 68/C/R

....

Please refer to your letter No. EX/PL/IV/ dated 21.6.1979, on the above cited subject.

It is to inform you that since Tricycles also fall within the definition of cycle, you are entitled for the concessional rate of excise duty payable on cycles and parts thereof vide notification No. 86/79, dated 1.3.1979.

Yours faithfully,

Sd/-

SUPERINTENDENT

CENTRAL EXCISE MOR II/MOD III".

In this view of the matter, in view of the dictionary meaning of the word "cycle" it is clear that tricycles must fall within the definition of cycles, as a matter of language common or otherwise, as a matter of dictionary meaning to be found in English language dictionaries.

13. It is contended by Mr. Misra that the cycles made by the petitioners are sold in toy shop. This would indicate that these are wheeled toys and not cycles. I do not agree. As the most appropriate persons to make use of these cycles are children. It is but appropriate and convenient to sell them in shops which are frequented by children. Most toys shops are requested by children, and the place of sale is immaterial for the purpose of determination of the nature of the implement which is manufactured and marketed by the petitioner whether it is sold in said toy shops or is sold in the cycle market. It has to be seen what the implement is, and determine what the implement is. The two wheeled implement which is made, to my mind, is capable of transporting children from one point to another. In that sense, it is also a means of transport.

14. In the counter-affidavit, a judgment of the Madras High Court, delivered in writ petition No. 797 of 1976 decided on 4th February, 1976, in the case M/s. T. I. Cycles of India v. Union of India, has been referred to. The full report of this judgment has not been brought to my notice. In any case, from what is stated in the counter-affidavit itself, it is apparent that this judgment is unlikely to have anything to do with the matter which is in issue before me. The madras High Court judgment apparently involved a question of an assembled cycle versus non-

assembled cycle. Such is not the question here, and this judgment cannot be of any assistance. What is sold in the instant case is a completely assembled implement, using free wheels, bicycle chain and pedals. It is complete Cycle, as it is commonly understood.

15. Mr. Haksar relies upon Trade Notice No. 86-CE (19-T) 68/85 dated 19th December, 1985, which is annexed as annexure ''B'' to C.M. 25 of 1985, which reads as under :-

"CENTRAL EXCISE COLLECTORATE : NEW DELHI

TRADE NOTICE NO. 86-CE(10-T)68/85, dated 19.12.1985

Sub : C.E. - Classification of children''s bicycles and tricycles.

....

Children bicycles/tricycles, brought and sold as cycles, will be eligible for exemption as cycles under Notification No. 234/82, dated 1.11.1982 as amended.

Sd/-

Additional Collector."

16. Mr. Misra says that this Trade Notice has no statutory effect. In my view, this Trade Notice is issued by the Central Excise Collectorate, by Additional Collector of Excise. It cannot entirely be without any authority or backing. For the purpose of determination of the instant writ petition, I need not act upon this, but it does appear to be a representation of a sort to public at large, and trade in particular.

17. In view of the ordinary language meaning of cycles being bicycles and tricycles, they would be entitled to exemption under Notification No. 86/79, dated 1st March, 1979, and the subsequent notifications No. 85/75, 102/80, 104/82-CE, and 234/82, mentioned hereabove.

18. In addition to what is stated above, the petitioners have filed in this Court a letter that has been written by the Additional Collector to the Assistant Collector, Central Excise, being dated 16th January, 1986. This is filed as annexure to the application (C.M. 25 of 1986), which reads as under :-

CENTRAL EXCISE COLLECTORATE

CR BUILDING, I. P. ESTATE

NEW DELHI

(LAW SECTION)

To,

The Assistant Collector,

Central Excise, M.O.D. III,

New Delhi.

Subject : OWP1401/81 - M/s. Tobu Enterprises (Pvt.) Ltd., v. U.O.I. - Classification of products - C/R.

Please refer to your letter C. No. V(68)17/42/80, dated 14/1/1986.

2. In view of Trade Notice No. 86-CE(19-T)68/85 dated 19.12.1985, the products will stand exempt from duty from the date of the Trade Notice and no bank guarantee is required to be taken from the party from 19.12.1985 onwards till the writ petition is finally decided by the Delhi High Court.

Sd/-

(K. C. MAMGAIN)

Additional Collector.

Copy or M/s. Tobu Enterprise (P) Ltd., B/29, Kirti Nagar Industrial Area, New Delhi-110015, with reference to their letter No. W/EX/29/9970 dated 7.1.1986."

This letter also indicates that the law Section of the Central Excise Collectorate itself took the view that the products of the petitioners will stand exempt from the duty from the date of Trade Notice No. 86-CE(19-T)68/85 dated 19th December, 1985.

19. In these circumstances, I am of the view that the seizure of goods vide seizure memo annexed as annexure 1 to the petition, was made on erroneous appreciation of the applicable notifications to the facts and circumstances of the case and the seizure was contrary to law. The goods seized vide the said seizure memo are liable to be returned. It is stated that the goods were, in fact, returned, pursuant to an order of this Court dated 21st July, 1981. The goods having been returned, a seizure having been made on the basis of misapprehension about the applicable law, any further proceedings taken on the basis of the said seizure memo, are also liable to be quashed. The seizure memo dated 22nd May, 1981, is quashed. The respondents are restrained from taking any further action pursuant to the said seizure memo dated 22nd May, 1981 and the consequential show-cause notice dated 4th June, 1981 which was issued after the filing of the writ petition.

20. The writ petition has to be allowed. The bank guarantees and the bonds which have been furnished pursuant to the order of the court dated 21st July, 1981, are discharged. The same may be returned to the petitioners.

21. The petitioners will have their costs, which are quantified as Rs. 1,500/-.

