(1984) 03 CAL CK 0011

In the Calcutta High Court

Case No : C.R. No. 7270 (W) of 1978 & C.R. No. 7270 (W) of 1979

Union Carbide (India) Ltd. — APPELLANT

Vs

Assistant Collector of Central Excise — RESPONDENT

Date of Decision : 15-03-1984

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173C, 173C(10), 173C(3), 173C(6)
Central Excises and Salt Act, 1944 — Section 4(1)

Citation : 88 CWN 646 : (1985) 22 ELT 729

Hon'ble Judges : Samir Kumar Mukherjee, J

Bench : Single Bench

Advocate : Debi Prasad Pal, P.K. Pal and Manisha Seal, for the Appellant;S.N. Banerjee, for the Respondent

Judgement

Samir Kumar Mukherjee, J.—Union Carbide (India) Ltd., the petitioner in the present rule, has challenged the order dated 17th April, 1976, signed on 29th April, 1976, passed by the Assistant Collector of Customs, inter alia, directing the petitioner to submit price list without any deduction from the uniform selling price on account of transport charges. The petitioner has also assailed letters dated 9th October, 1975, of the Assistant Collector approving price lists subject to inclusion of costs of wooden packages and those dated 10th May, 1976, issued by the Superintendent of Central Excise, respondent No. 2, returning the price lists, submitted by the petitioner, for resubmission after necessary revisions in the light of the aforesaid order. The reliefs which the petitioner has asked for, are for issuance of writs of certiorari, prohibition and mandamus for rescission, cancellation, withdrawal and/or quashing of the aforesaid order and letters dated 9th October, 1975, and 10th May, 1976, and also for order of restraint against the respondents from giving any effect to or taking any steps whatsoever in pursuance of and under the impugned order and letters.

2. The petitioner manufactures, inter alia, dry batteries of various types and sizes. For that purpose, the petitioner has two factories in West Bengal, two in

Madras and one in Hyderabad. Such factories are known as National Carbon Company being a division of the petitioner. Sale and delivery of such batteries are made in course of wholesale trade through sales godowns situate in different parts of India. The petitioner has a uniform selling price for each and a uniform trade discount is allowed out of the said selling prices to the different wholesalers. The cost of transportation from the factory to the places of delivery is borne by the petitioner and such costs consist of cost of transport of goods to the various godowns as well as costs of transport involved in delivering the goods to their ultimate places of delivery. The batteries after manufacture are first packed in cardboard cartons, which the petitioner describes as primary packing, and a number of such cartons are placed in wooden boxes to facilitate transportation and prevent possible damages in transit. The latter packing is described by the petitioner as secondary packing and the costs, involved in such packing was recovered from the wholesalers to whom sales are made, as extra charges.

3. In the present case, the petitioner submitted price lists and the said price lists were accepted with the remarks that the prices mentioned in the said price lists were approved subject to the inclusion of costs of wooden packing, as and when the goods were cleared in such packing. In arriving at the valuation for imposition of excise duty, regular trade discount, transport charges and charges for secondary packing were excluded by the petitioner. The transport charges, as mentioned in column 10 of the price lists comprised different figures for different destinations and the petitioner alleges the same to be actual transport charges.

4. As the price lists submitted by the petitioner were approved by the excise authorities subject to inclusion of costs of wooden packing, as and when the goods were cleared in such packing, the petitioner preferred an appeal before the Appellate Collector of Central Excise against the said condition. The said appeal is still pending.

5. By a memo of the Assistant Collector, dated 21st Feb., 1976, the petitioner was asked to show cause as to why, in compliance with Rule 173-C (3) of the Central Excise Rules, fresh price lists without any deduction of transport charges should not be submitted and differential duty on the basis of such fresh price lists should not be recovered from the petitioner under Rule 10 of the Central Excise Rules. From the grounds, mentioned in the said memo, it appears that the basis of the show cause was the view of the authority concerned to the effect that uniform prices charged by the petitioner throughout India indicated that freight charged was equalised freight, and as such, no deduction could be claimed by the petitioner on that account.

6. By another memo of the Superintendent of Central Excise dated 26th February, 1976, price lists dated 25th November, 1975, 28th November, 1975, 1st December, 1975 and 23rd Dec, 1975, were returned for resubmission in the light of the reasons given in the said memo.

7. The petitioner submitted show cause contending inter alia that the cost of transportation was not determined on the basis of equalised freight but actual cost of delivery from the places of removal to the places of delivery.

8. By the impugned order dated 17th April, 1976, the Assistant Collector rejected the contentions, made on behalf of the petitioner in reply to the show cause notice, and directed inclusion of transport charges in the sale prices. The respondents have filed an affidavit-in-opposition contending inter alia, that the transportation charges, as shown by the petitioner, were notional charges based on the concept of the equalised freight, which was proved by the charging of a uniform price of the petitioner''s products all over India. The respondents also contested the claim of the deduction of the petitioner of the secondary packing charges and contended that the statutory authority should be permitted to decide the questions raised in the writ application. The propriety of invocation of the writ jurisdiction in view of the existence of disputed questions of fact, needed to be decided, was also raised on behalf of the respondents.

9. It is necessary to mention at this stage that during the pendency of the present rule, the Supreme Court decision in the case of Union of India v. Bombay Tyre International Ltd. 1983 E.L.T. 1896 having been given on 7th October, 1983, the effect of such decision on the contention raised in the present proceeding naturally falls for consideration at the final hearing of this rule.

10. On behalf of the petitioner, it has been stated before me by Dr. Pal that so far as packing charges are concerned since an appeal is pending before the statutory authority, it is not necessary for the petitioner to press this contention before the writ forum and the disposal of the said appeal in accordance with law will serve the ends of justice. The appellate authority, however, should be directed to dispose of the said appeal, in the light of the principles laid down by the Supreme Court in the case of Union of India v. Bombay Tyre International Ltd., reported in 1983 E.L.T. 1896. The necessity of investigation into facts for finding out what was meant to be secondary packing in the case of the petitioner was reported by the parties. In fact, it is found that, at one stage of the present proceeding an affidavit was shown on behalf of the petitioner expressing inter alia, its intention to proceed with the appeal before the statutory appellate authority and for grant of leave to withdraw the rule to that extent.

11. Regarding, however, transport charges, Dr Pal has emphatically contended that, in terms of the decision of the Supreme Court, as reported in Union of India v. Bombay Tyre International Ltd.-- 1983 E.L.T. 1896, the petitioner is entitled to a deduction of the costs of transportation of dry batteries from the factory gate to the place or places where those are sold : vide paragraphs 51 and 52 (of E.C.C.) and 49 and 50 (of E.L.T.) of the said decision. Reliance has been placed on the decision of the Bombay High Court in the case of Union Carbide v. Union of India, reported in 1979 E.L.T. 633 to substantiate the contention of the petitioner that Section 4(1)(a) of the Central Excise Act has no manner of application in the facts of the present case. Moreover, in the present case, price

lists having been approved and deduction of transport charges having been accepted, the same cannot be allowed to be reopened by the respondents in the manner in which it has been sought to be done. In this connection, my attention was drawn to Rule 173C of the Central Excise Rules, which, by its Sub-rule (6), provides that the proper officer may hold an enquiry, and for that purpose, may permit provisional assessments to obviate delay in removal of goods. It has also been argued that the said rule contained procedure, to be adopted in case of the valuation, as disclosed by the assessee in the price lists, is not acceptable to the proper officer : vide Sub-rules (7) to (10).

12. In the instant case, the cost of transportation having been once accepted there is no scope for revision of the same and, for the purpose of such a revision, invocation of Rule 173-C(3) as has been made, is not permitted in law. In support of the aforesaid legal contention, it has further been urged, on behalf of the petitioner, that the respondents nowhere contested that the claim of the petitioner of the transportation charges being based on actuals.

13. Mr. S.N. Banerjee, appearing on behalf of the respondents, has relied upon the decision in Triveni Sheet Glass Works Ltd. v. Union of India, reported in 1983 E.L.T. 711 for the purpose of establishing the proposition that a simpliciter order, passed under Rule 173C of the Central Excise Rules, does not result in assessment. Mr. Banerjee has tried to contend that the amount of deduction, including those on account of transportation charges, should be permitted to be determined by the adjudicating authority. He has, however, in his usual fairness conceded that equalised freight is the same as average freight as mentioned in the Supreme Court decision, referred to above, and the impugned order having disallowed transportation charges in its entirety, cannot be supported. In my view, however, the impugned order of the Assistant Collector of Customs dated 17th April, 1976, seeking to reopen the determination of transportation charges, should be quashed as also the letters dated 10th May, 1976, issued by the Superintendent of Central Excise. The petitioner in law is entitled to deduction of transportation charges, be it based on average freight or actual costs of transportation, and the approval to the said deduction having already been given the respondents are not empowered to reopen the said determination on the ground that such charges were equalised freight. Rule 173C of the Central Excise Rules, upon a proper construction is intended to give finality to an approved price list. The decision in Triveni Sheet Glass Works Ltd. v. Union of India,- 1983 E.L.T. 711 is distinguishable on facts and has no relevance for determination of the question raised in the present proceeding.

14. I, accordingly, direct subject to the observations made above that a writ of certiorari do issue, quashing the impugned order of the Assistant Collector, dated 17th April, 1976, signed on 29th April, 1976, as also the impugned letters dated 10th May, 1976. A writ of mandamus, directing the respondent to forbear from enforcing the direction contained in the letter dated 10th May, 1976, do also issue. The appellate authority, however, will be entitled to dispose of the appeal,

preferred by the petitioner on 26th December, 1975, regarding the deduction of packing charges, in accordance with law and in the light of the principles laid down in Union of India v. Bombay Tyre International Ltd.- 1983 E.L.T. 1896 preferably within a period of six months from the date of this order.

15. The rule is made absolute to the extent indicated above. There will be no order as to costs.

16. As prayed for by Mr. Banerjee, let the certified copy of this order, if applied, be given as expeditiously as possible.

