(1991) 11 MAD CK 0055

In the Madras High Court

Case No : W.A. No. 453 of 1989

Union of India APPELLANT

Vs

Seshasayee Paper and Boards Ltd. RESPONDENT

Date of Decision : 12-11-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(4)

Citation : (1994) 55 ECR 677 : (1992) 58 ELT 371

Hon'ble Judges : A.S. Anand, C.J;Kanakaraj, J

Bench : Division Bench

Advocate : Shri K. Jayachandran, Addl. C.G.S, for the Appellant; M/s Aiyar and Dolia, for the Respondent

Judgement

A.S. Anand, C.J.—The writ petitioner is the respondent herein. Union of India and the Collector of Central Excise, Madras as also the Assistant Collector of Central Excise, Erode Division, who were respondents in the writ petition, are the appellants herein. For the sake of convenience, we shall refer to the parties in the same manner in which they were described in Writ Petition No. 894 of 1981, which was decided by the learned single Judge by his order dated 14th August, 1987.

2. The petitioner manufactures certain varieties of paper known as ''core paper'' and "wrapping paper" or "wrapper". Both are excisable commodities under the Central Excise Tariff. The controversy that was raised in the writ petition by the petitioner was, whether the value of the wrapper paper was required to be included for determining the value of the core paper for the purposes of levy of excise duty. The precise controversy arose in view of the incorporation of Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944. The Excise Department issued a show cause notice to the writ petitioner bringing to its notice that from the record, it was found that for determining the value of the core paper, the writ petitioner had not included the value of the wrapper in which the core paper was wrapped and therefore there had been a short demand of excise duty, to the

tune of Rs. 10,19,948.48 during the relevant period. The writ petitioner was called upon to show cause why the amount should not be recovered from it. Opportunity was granted to the writ petitioner to lead evidence while showing cause against the proposal. Opportunity was also reserved to the writ petitioner that in case it wished to be heard in person before the case was adjudicated, it could make such a request. The show cause notice was issued on 24-12-1980. The writ petitioner did not reply to the show cause notice. It rushed to this Court through the writ petition questioning the opinion of the Assistant Collector, Excise, as reflected in the notice about the exigibility to excise duty the value of wrapper along with its contents, the core paper, on various grounds. The writ petition was resisted and counter was filed. One of the objections raised was regarding the maintainability of the writ petition and it was stated that the writ petitioner cannot approach the Court at the stage of show cause notice. The learned single Judge after perusing the record and after hearing the arguments of the parties, came to the conclusion that since the wrapping paper which itself is an exigible article, had suffered excise duty, it could not be subjected to excise duty again by being included for determining the value of the core paper for the purposes of levy of excise duty. The learned Single Judge however, rendered no finding with regard to the plea regarding the maintainability of the writ petition only against the show cause notice.

3. The learned Additional Central Government Standing Counsel submitted that the finding of the learned Single Judge that the value of the wrapper paper where it had separately suffered excise duty in the hands of the manufacturer was not to be included for determining the value of the core paper for the purposes of determining the excise duty on the ground of double taxation, was erroneous. It is submitted that it was not the wrapper paper which was being subjected to tax once again, but by virtue of Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944, the value of the core paper was being determined and taking note of the provisions of Section 4(4)(d)(i) of the Act, the value of the packing material was required to be included within the value of the contents for determination of the levy of excise duty. Learned Counsel went on to state that it was not proper for the writ petitioner to have rushed to this Court only against the show cause notice. He should have responded to the show cause notice and waited for determination and in the event of any adverse order was made against the writ petitioner, it could pursue the remedies available under the Act. Learned Addl. Central Government Standing Counsel submitted that such short-cut should not have been permitted particularly in fiscal matters where findings were required to be rendered on facts.

4. Mr. A. L. Somayaji, learned Counsel for the writ petitioner/respondent herein submitted that the value of the wrapper paper was not required to be included for determining the value of the core paper since the wrapper was only used for convenient distribution of the finished product. This plea has been seriously controverted by the Addl. Central Government Standing Counsel. It is urged that the use of the wrapper was not for convenient distribution of the finished

product, but to render the finished product marketable as such. In this connection the learned Additional Central Government Standing Counsel invited our attention to the finding of the learned Single Judge also where it has been observed that the writ petitioner was 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, and also to the earlier observation to the effect that the core paper has necessarily to be got packed in the wrapper paper before it is cleared for the market, to urge that the core paper was necessarily to be packet for marketability.

5. The material on the record is scanty as to whether the wrapper has been used only for convenient distribution of the finished product as alleged by the petitioner or was necessarily required to be used for the marketability and effecting sale of the core paper as contended by the revenue. Section 4(4)(d)(i) provides that for the purposes of Section 4(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, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) 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;

Explanation :- For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of :-

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods,......"

The Supreme Court of India in Union of India v. Bombay Tyre International Ltd. - 1983 (14) ELT 1896 elaborately considered and discussed the object and scope of Section 4(4)(d)(i) of the Act, which had been incorporated in the Statute Book. The Apex Court was of the view that the Section had made an express provision for including the cost of packing in the determination of ''value'' for the purposes of excise duty and that, where packing is necessary to make the excisable article marketable, the value was required to be included for determining the value of the contents. Unless a clear picture emerges about the position as to whether the wrapper was used for convenient distribution or was necessary for making the excisable commodity saleable and marketable, every other discussion would be futile. We however, find ourselves unable to agree with the learned Single Judge that the case in hand would be a case of double taxation as that prima facie ignores the mandate of Section 4(4)(d)(i) of the Act. Section 4(4)(d)(i) of the Act, as already noticed, provides for determination of value in relation to excisable goods and mandates that, where the goods are delivered at the time of removal in a packed condition, it would include 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 and ''packing'' as per the Explanation to the said sub-section includes the ''wrapper'' also. So far as the concept of double taxation is concerned, it would be applicable only, where it is the same article, which is being subjected to tax twice as such an article. It has no application to cases which are governed by the provisions of Section 4(4)(d)(i). Thus, where the goods are delivered at the time of removal in a packed condition, the cost of packing material has to be added to the cost of the contents to arrive at the valuation of the contents for purposes of Section 4(4)(d)(i). The cost of packing material in such cases is added on to the contents to determine the value of the contents for levy of excise duty. It is not the case of either party that the wrapper, which had already suffered excise duty, had been brought up for taxation again as a wrapper only. Since, the Legislature itself has provided that the value of wrapper, irrespective of the fact whether it had earlier suffered excise duty or not, is to be included, it would be futile to contend that the action would involve double taxation. The findings of the learned Single Judge in that behalf cannot, therefore, be sustained.

6. However, whether in this case the wrapper was used for convenient distribution or to make the excisable commodity marketable requires a finding because the value of the wrapper would be includable in the value of the core paper only if the wrapper was used to render the core paper marketable and saleable and the material on the record is not sufficient to return a finding one way or the other. Faced with this situation, it is submitted before us by the learned Counsel for the respondent-writ petitioner that the writ petitioner may be granted an opportunity to appear before the authorities, in response to the show cause notice, with a view to establish that the wrapper was not used as of necessity to make the excisable commodity marketable or saleable, but only for convenient distribution. It is also submitted by Mr. Somayaji that in any event the proceedings for recovery were barred by limitation and since no finding had been returned by the learned Single Judge on that aspect, the plea with regard to bar of limitation and all other pleas which are raised in the writ petition may also be permitted to be raised before the authorities below. The learned Additional Central Government Standing Counsel does not object to that course being adopted.

7. Thus, from what we have noticed above, we set aside the order of the learned Single Judge and consequently the writ petition would stand dismissed. It would however, be open to the writ petitioner to raise objections to the show cause notice and lead such evidence as is necessary to arrive at a finding of fact and

the authorities shall consider those objections and evidence, if any, and decide the matter in accordance with law. Since, the time during which objections had to be filed to the show cause notice expired during the pendency of the proceedings in this Court, in the interests of justice, we grant six weeks time from to-day to the writ petitioner to submit objections to the show cause notice. The authorities shall, after objections are submitted, decide the matter in accordance with law after granting opportunity to the parties, if so requested, of personal hearing, expeditiously. The writ appeal is thus allowed to the extent indicated above. However, there will be no order as to costs.