

(1991) 07 BOM CK 0051

In the Bombay High Court

Case No : Writ Petition No's. 189 and 211 of 1981

Voltas Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-07-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4(1)

Citation : (1992) ECR 24 : (1991) 56 ELT 329

Hon'ble Judges : M.L. Pendse, J;A.V. Savant, J

Bench : Division Bench

Advocate : Shri T.R. Andhyarujina, Mr. D.B. Shroff and Mr. H.N. Vakil, instructed by M/s. Mulla and Mulla Craigie Blunt and Caroe, for the Appellant; Shri R.V. Desai and Shri M.I. Sethna, for the Respondent

Judgement

Pendse, J.—Both these petitions filed under Article 226 of the Constitution of India can be conveniently disposed of by common judgment as the issues raised in these two petitions are identical. The facts giving rise to the filing of these two petitions are as follows :

2. The petitioner No. 1 is the Company registered under the provisions of the Companies Act, 1956 and is engaged in the manufacture of Air-conditioners, water coolers and refrigerators. The Company manufactures various models of air-conditioners, water coolers and domestic refrigerators at their factory at Thane and the manufactured goods are delivered to the customers. The manufactured goods of the Company are liable to payment of excise duty under Item No. 29A of the First Schedule to the Central Excises and Salt Act, 1944 and the rate of duty is ad valorem. Prior to the year 1980, the Company removed the goods manufactured on the basis of the prices which included the post-manufacturing costs and expenses. In view of the decisions recorded by this Court and the Supreme Court, the Company filed new price lists on May 15, 1980 and sought exclusion in respect of post-manufacturing expenses. By show cause notice dated September 1, 1980, the Assistant Collector of Central Excise called

upon the Company to explain why the assessable value of the articles should not be determined on the basis of manufacturing costs plus manufacturing profits and selling costs plus selling profits and why the exclusion claimed on account of post-manufacturing expenses should not be disallowed. The Company gave reply to the show cause notice and filed fresh price lists with effect from October 7, 1980 and December 2, 1980 in which the assessable value of the goods excluding the post-manufacturing expenses was set out. The Assistant Collector gave a personal hearing in pursuance of the show cause notice and then approved the price lists without allowing any deduction on account of post-manufacturing expenses. The Assistant Collector passed the order approving the price lists on February 3, 1981. The petitioners preferred Writ Petition No. 189 of 1981 to challenge the legality of order passed by the Assistant Collector declining to exclude the deduction on account of post-manufacturing expenses from the assessable value.

3. The Company was served with show cause notice dated January 20, 1981 by Superintendent, Central Excise demanding Rs. 26,97,937.83 towards excise duty short levied on the clearances made during May 19, 1980 to January 2, 1981. The Company paid the amount of Rs. 6,05,800.84 under protest upto January 31, 1981. The Company then filed Writ Petition No. 211 of 1981 in this Court for quashing show cause notice dated January 20, 1981 and for a declaration that the post-manufacturing expenses cannot be included while determining the assessable value of the manufactured goods. The Company also sought refund of Rs. 6,05,800.84 paid in pursuance of the show cause notice. The petition was admitted on March 9, 1981 and certain interim order was passed.

4. Both the petitions being Writ Petition No. 189 of 1981 and Writ Petition No. 211 of 1981 came up for hearing before one of us (Pendse, J.) on December 9, 1983. Before the petitions came up for hearing, the decision of the Supreme Court in the case of Bombay Tyres International Limited was delivered and in view of the decision of the Supreme Court, the Company sought permission to file fresh statement of the price lists claiming deduction in respect of price lists already filed for proper determination of excise duty liability. The Company was directed to file statements before January 9, 1984 along with documentary evidence in support of the claim. The Department was permitted to call upon the Company to produce documents which are required for determination of the liability. The Department was directed to finalise the assessment within a certain stipulated period and thereafter the Department was to file the adjudication orders in this Court.

In terms of the order passed by this Court, the Company filed 12 revised price lists for the period commencing May 19, 1980 to February 17, 1981 in respect of which Writ Petition No. 211 of 1981 is filed and 18 revised price lists covering the period from February 18, 1981 to December 29, 1983 in respect of which Writ Petition No. 189 of 1981 is filed. Both the revised price lists were forwarded by letter dated January 7, 1984 and along with the revised price lists several

statements pertaining to each of the price lists showing therein that the amount of excise duty provisionally paid was paid under protest and the duty liability payable in terms of revised price lists were filed. The Company claimed refund amounting to Rs. 33,69,859.02 paid in excess in respect of period between May 19, 1980 and February 17, 1981 and sum of Rs. 1,00,08,511.10 in respect of period commencing from February 18, 1981 to December 29, 1983. The figures were subsequently revised to Rs. 33,98,605.30 and Rs. 1,01,22,016.21. The revision was due to calculation error. In these revised price lists, the Company sought deduction under three heads : (a) additional tax on sales tax, (2) maintenance charges, and (c) site service charges. The Assistant Collector called upon the Company by letter dated January 23, 1984 to furnish certain clarifications in respect of deduction claim under three items and the clarification was furnished by letter dated February 6, 1982.

5. The Assistant Collector by order dated March 16, 1984 held that the Company is entitled to claim deduction in respect of amount covered under heading "additional tax on sales tax" but the deduction sought under the heads of "maintenance charges" and "site service charges" are not permissible. The Assistant Collector held that the Company initially did not claim deduction under these headings and the claims are made only after the High Court permitted to submit fresh statements of deductions. The Assistant Collector also held that the maintenance charges and the site charges cannot be excluded while determining the assessable value of the manufactured articles because these services amount to after sale services which ultimately promote the marketability of the article and, therefore, in accordance with the decision of the Supreme Court in *Bombay Tyres International Limited* for the purpose of determining the value u/s 4(1)(d) of the Act, these charges are required to be included. The Assistant Collector also held that the items described under the heads "maintenance charges" and "site service charges" cannot be deducted as the Supreme Court has laid down that except trade discount, excise duty, average freight, no other expenses can be deducted while determining the value of excisable goods. On the strength of these findings, the Assistant Collector held that the Company is entitled for deduction in respect of additional tax on sales tax only and the liability of the Company was assessed at Rs. 1,72,48,061.28 in respect of period between February 18, 1981 and December 29, 1983 and a sum of Rs. 18,40,860.74 in respect of period between May 19, 1980 and February 17, 1981. The total liability of the Company was fixed at Rs. 1,90,88,922.02. The Assistant Collector approved the revised price lists filed by the Company after allowing deductions on account of additional tax on sales tax only. The Assistant Collector filed the papers and proceedings including the assessment order in this Court as per the directions given earlier and thereafter the Company carried amendments in both the petitions challenging the correctness of the order of the Assistant Collector in respect of deduction sought under the headings "maintenance charges" and "site services charges". Both the petitions are thereafter set down for hearing.

6. The short question which falls for determination is whether the deductions

sought by the Company in respect of maintenance charges and site service charges in respect of air-conditions and water coolers are permissible while determining the assessable value of the manufactured goods. Shri Desai, learned Counsel appearing on behalf of the Department, very fairly stated that the observation of the Assistant Collector that the "claim cannot be granted because the deductions on this count were not sought initially cannot be supported. It is obvious that though initially the Company had not sought deduction on this count in pursuance of the interim order passed by this Court on December 9, 1983, the Company was permitted to file revised price lists in accordance with the decision of the Supreme Court in Bombay Tyres International Limited and consequently, the revised price lists were filed by the Company on January 7, 1984 claiming deduction in respect of maintenance charges and site service charges. The Assistant Collector could not have turned down the claim on the ground that the Company did not initially seek deduction under these headings.

Shri Andhyarujina, learned Counsel appearing on behalf of the petitioners, submitted that in respect of room air-conditioners and water coolers sold by the Company, one year's warranty is given to the customers and an offer is made for entering into a contract for annual maintenance service. The contract of maintenance service is optional. The learned counsel pointed out that there is distinction between obligations under the warranty and obligations under the maintenance service contract. The warranty obligations, involve repairs, or replacement of any defective part if such defect is due to faulty material or workmanship. The warranty obligations do not create obligation on the Company to repair or replace any part which needs replacement as a result of wear and tear but such replacement is provided under the maintenance service contract. Under the maintenance service contract, the customer is provided with a stand by machine when repairs are undertaken, while the warranty agreement does not create any obligation to supply service machine. The warranty obligation stipulates that the customer is required to bring the machine for replacement or repairs at the service station nearest to the installation, whilst in the case of maintenance service, it is the Company which brings the machine to the service station. The warranty does not require the Company to check and service the unit at the customer's site, while the contract for maintenance service requires the Company to do so at least on four occasions in a year. Shri Andhyarujina submitted that the distinction between furnishing of warranty and entering into contract of maintenance service should be clearly understood because the assessable value of the manufactured articles includes charges for furnishing warranty but the amount charged for rendering maintenance service for a year cannot form part of the assessable value of the manufactured article. It is not in dispute that the price lists filed by the Company clearly separately sets out the amount charged towards maintenance charges. Shri Andhyarujina, therefore, submitted that the Assistant Collector was in error in holding that the amount of maintenance charges is merely an after sales service which promote the marketability of the article and, therefore, should be included in the value

determining the assessable value for the purpose of payment of excise duty. There is considerable merit in the submission of the learned counsel.

7. Shri Desai appearing on behalf of the Revenue submitted that there is no distinction or difference between service given under the warranty and under maintenance service contract. The learned counsel urged that though it is undoubtedly true that the warranty is furnished to every customer and the maintenance service contract is optional one, still the amount recovered towards maintenance service should be included in the value of the article because the services rendered to them under the warranty and agreement of maintenance of service are not different. It is not possible to accede to the submission of the learned counsel. As mentioned hereinabove, there is clear line of distinction between the obligations under the warranty and the obligations under the maintenance service. The brochure produced by the Company before the Assistant Collector unmistakably establishes that the liability to replace or to repair any defective part is upon the Company provided such defect is due to faulty material or workmanship. The warranty furnished by the Company does not demand that the Company should replace or repair the parts which have become defective due to normal wear and tear and the parts which fail to operate due to mishandling of the machine. The Company is bound to furnish warranty to every customer in respect of goods sold but the customer is not bound to enter into contract in respect of maintenance service. The customer may very well opt for securing the maintenance service from any other Company or may himself carry out the maintenance of the machine and there is neither any compulsion, nor obligation to enter into contract in respect of maintenance service. It is also clear from the perusal of the brochure that the warranty does not assure the customer of service machine during the period of repair and also requires the customer to produce the machine at the service station, while the facility of availability of service machine is available in terms of contract of maintenance of service. It is, therefore, futile for Shri Desai to urge that the services rendered under the warranty and under maintenance service contract are similar. The services are different and distinct and though the Company is bound to furnish warranty and the customer is liable to pay for the warranty charges, the maintenance service is purely optional.

Shri Desai submitted with reference to decision of the Supreme Court in Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, that the charges for other services after delivery to the buyer cannot be deducted and in support of the submission placed strong reliance upon the observation made by the Supreme Court in paragraph 51 of the judgment. The observations relied upon read as follows :

"Therefore, the expenses incurred on account of several factors, which have contributed to its value up to the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee up to the date of

delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges or other services after delivery to the buyer, namely after-sales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade."

The observations of the Supreme Court must be read in its proper perspective and then it would be obvious that the maintenance, service charges cannot be termed as after sale service. The maintenance service charges are not compulsory and the option is given to the customer to enter into contract, if so desired. The customer is not bound to seek maintenance service from the Company but can very well enter into contract with any other Company or a person. The after sales service which the Supreme Court had in contemplation while making the aforesaid observations clearly refer to these services which the customer is bound to accept and pay for. It is also possible that in certain cases after sales service may be in respect of delivery of article from one place to another and in such cases the charges for delivery can be included. It is not possible to accede to the submission of Shri Desai that maintenance service offered by the Company promote the marketability of the article and, therefore, should enter into its value.

It was also not possible to appreciate the observation made by the Assistant Collector that the maintenance service charges are not deductible because the Supreme Court has expressly laid down that no other expenses except trade discount, excise duty and average freight will be deductible for the purpose of determining the value of the excisable goods. On the other hand in paragraph 57 of the judgment in the case of Bombay Tyres International Limited, it was specifically observed that the Supreme Court had considered only those claims of deduction as sought by the assessee in that case and the judgment is confined only to those items and no other head of expenses had been examined by the Supreme Court. In these circumstances, it was wrong on the part of the Assistant Collector to refuse to grant relief of deduction in respect of maintenance service charges and the order on this count cannot be sustained.

Shri Desai in support of his submission that whatever charges are recovered by the Company during the warranty period shall be included in the price to be determined as assessable value, referred to the decision in the case of Collector of Central Excise v. Kelvinator of India Ltd. reported in 1988 (36) Exc LT 517. We are unable to appreciate how the judgment supports the claim of the learned counsel. In the case before the Supreme Court after the free warranty of one year is over, the manufacturer offered a four year service contract only for the sealed system or parts of the refrigerators. The service offered was not free but on payment and the contract was not compulsory but optional. The Supreme Court held that since four year warranty service is optional and this is entered

into after the date of sale, that was clearly after-sale facility and the charges cannot be included in the assessable value of the refrigerator. In our judgment, the decision of the Supreme Court instead of supporting Shri Desai goes against his submission that every item in respect of after-sale service is required to be included in the assessable value of the article.

8. Shri Desai submitted that in support of the claim that the company is entitled to deduct maintenance service charges, the required material or evidence was not produced before the Assistant Collector. The learned Counsel urged that the clarification was sought by the Assistant Collector by letter dated January 23, 1984 and though the Company furnished clarification by letter dated February 6, 1982, no supporting documents or material was produced and consequently the Assistant Collector was handicapped to determine whether the Company is entitled to such deduction. The submission is entirely devoid of any merit for more than one reason. In the first instance, the claim that the Company did not produce enough documents to support the claim of deduction of maintenance service charges is incorrect. The Company filed revised price list and the price lists demonstrated the amount charged towards maintenance service contract from the customer. In addition to the price lists, the Company filed certificate in respect of maintenance service dated February 6, 1984 issued by the Chartered Accountant in support of the claim. The Assistant Collector not only did not reject the certificate but accepted the same in respect of deduction sought by the Company on account of additional tax on sales tax. Shri Desai made a faint attempt to urge that the production of certificate by Chartered Accountant is not sufficient documentary evidence to substantiate the claim. The submission is not correct. After the decision of the Supreme Court in Bombay Tyres International Limited delivered on October 7, 1983, the Government of India, Ministry of Finance issued circular dated December 3, 1983 to all the Collectors of Central Excise. The circular, inter alia, recites that the Assistant Collectors and the Collectors would be required to take up large number of cases for settling the claims arising out of decision of the Supreme Court. The Circular states that it would be very difficult to verify the claims of deductions with reference to each and every voucher/bill and, therefore, the manufacturers should be requested to give a consolidated statement explaining the expenses incurred and which statement should be duly verified and certified by the Chartered Accountant. The Collectors were directed to accept such statements without going into much details with regard to the verification of the individual/voucher etc. The Assistant Collector in the present case accepted the statement duly verified and certified by the Chartered Accountant of the Company and in fact granted relief of deduction under the heading of additional tax on sales tax. It is, therefore, futile for Shri Desai to suggest that reliance on the certificate issued by the Chartered Accountant was not justified and the certificate itself is not suffice to establish the claim. It also cannot be overlooked that the Assistant Collector had not declined relief on the ground of insufficiency of the material. The Assistant Collector turned down the claim on the basis that the maintenance service

charges amount to after-sale service for promoting the article and, therefore, should be included while assessing the value of the article for the purpose of excise duty. The Assistant Collector never doubted or disputed the correctness of the statement made in the price list or in the certificate issued by the Chartered Accountant.

In our judgment, the Assistant Collector was clearly in error in not granting deduction in respect of maintenance service charges recovered by the Company in respect of manufactured articles and the order of the Assistant Collector on this count cannot be sustained.

9. Shri Andhyarujina then submitted that the conclusion of the Assistant Collector that site service charges also cannot be deducted while determining the assessable value is erroneous. The submission is correct and deserves acceptance. Before examining the submission, it is necessary to understand what service is rendered by the Company in respect of contract for site service. The Company carries out several functions to ensure that the Units are maintained properly at site by the dealer. The Company provides design assistance to the dealer for special type of installation. The Company also inspects the actual installation of the Units and also helps the dealer in solving special problems encountered after installation. The site service also includes attending to customers' complaints received directly by Voltas in respect of Units serviced by the dealer. The Company sells the air-conditioners/water coolers to recognised dealers on a principle to principle basis and the dealer fulfills the warranty obligations to its customers. The site services rendered by the Company are independent of the warranty obligations and maintenance service. The Assistant Collector did not furnish any reasons apart from those which were mentioned hereinabove for rejecting the claim for deduction in respect of maintenance charges to turn down this claim also. Shri Desai submitted that site service charges also should be included in the assessable value for the identical reasons which were urged in respect of maintenance service charges. In other words, the submission was that site service charges is nothing different from the services rendered under the warranty obligations. We are unable to find any merit in the submission. The warranty obligation does not require the Company to provide design assistance to the dealer for special type of installation or to inspect the actual installation. In our judgment, the site service charges are recovered by the Company for rendering special service for giving advice in regard to the manner of installation and the charges recovered for rendering such service cannot be included while determining the assessable value of the Unit. The customer is not bound to purchase the air-conditioner or water cooler from the company even though the design assistance for special type of installation is secured from the Company by payment of site service charges. In our judgment, the site service charges are required to be excluded while determining the assessable value of the article. The Assistant Collector was, therefore, in error in not excluding the maintenance service charges and site service charges while approving the revised price lists for the period commencing from May 19, 1980

and ending with December 29, 1983.

Shri Desai made a brave attempt to submit the matter should be remitted back to the Assistant Collector for re-consideration but we fail to appreciate why such course should be adopted, nor Shri Desai could give a convincing answer. The matters are not remitted back to the Assistant Collector for fresh consideration only because the Department so desires. In our judgment, there is no occasion whatsoever to grant such request.

10. Accordingly, petition succeeds and it is declared that 30 revised price lists filed by the Company on January 7, 1984 before the Assistant Collector, Central Excise, Division II, Thane, out to have been approved after allowing deductions on account of additional tax on sales tax, maintenance charges and site service charges as claimed by the Company. The order of Assistant Collector is set aside and Assistant Collector is directed to take consequential steps to give effect to this judgment. In the circumstances of the case, there will be no order as to costs. The Bank guarantees furnished by the petitioners to stand discharged.