

(1990) 01 GUJ CK 0006

In the Gujarat High Court

Case No : Special Civil Application No. 346 of 1981

Whitco Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-01-1990

Acts Referred:

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

Citation : (1995) 75 ELT 61

Hon'ble Judges : J.U. Mehta, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : K.S. Nanavati and K.M. Mehta, for the Appellant; J.D. Ajmera, for the Respondent

Judgement

G.T. Nanavati, J.—M/s. Whitco Limited - Petitioner No. 1, a company incorporated under the Companies Act (No. 1 of 1956), is engaged

in business of manufacturing detergents in the form of powder, cakes and bars. On 29th August 1980, it entered into an agreement with M/s.

Colgate Palmolive (India) Limited (hereinafter referred to as "the Buyer") for manufacturing and selling detergent in the form of cakes and bars, as

may be required by it from time to time and according to specifications and directions given by it. Price was not fixed by the agreement but the

same was to be fixed from time to time by mutual agreement. Excise duty, freight, sales-tax and other levies were to be paid by the buyer. On 3-9-

1980, the petitioner-company submitted Price List No. 95/80-81 in respect of detergent cakes manufactured by it for the buyer in the proforma

meant for determination of value u/s 4 of the Central Excises and Salt Act, 1944 to the Assistant Collector, Central Excise, Vadodara, for his

approval. The value claimed for approval was Rs. 107.27 per carton of nine

dozen cakes (i.e. Rs. 11.92 per dozen, exclusive of excise duty. The Assistant Collector did not approve it as he was of the view that petitioner No. 1 was not an independent unit but an agency of the buyer and therefore the agreement between them was not at arm's length. He held that the price at which the buyer was selling the said product in the course of wholesale trade was relevant and on that basis fixed the assessable value at Rs. 16.51 per dozen. Aggrieved by the said order passed by the Assistant Collector, the petitioners have filed this petition.

2. The order is challenged on the ground that it is contrary to the provisions of Section 4(4)(d)(i) of the Act and the law declared by the Supreme Court and various High Courts in this behalf. The Assistant Collector held that the agreement between the petitioner and the buyer was not at arm's length because (i) the product in question, i.e. FAB detergent cakes was to be manufactured by the petitioner-company as per the specifications and directions given by the buyer; (ii) entire production of FAB detergent cakes was to be sold to the buyer and not to any other party; (iii) the agreement provided for giving advice, assistance and technical knowledge to the petitioner-company; (iv) the buyer had a right of supervision and inspection of raw materials, semi-finished products, packaging and the records maintained in that behalf; (v) the agreement provided for advance payment at the commencement of every quarter, and (vi) the agreement provided for payment of excise duty by the buyer as soon as the product became ready for delivery.

3. It is contended by the learned Counsel for the petitioner that the Assistant Collector did not read the agreement properly and wrongly proceeded on the basis that the agreement provided for giving of advice, assistance and technical knowledge by the buyer, to the petitioner-company. Having gone through the agreement, we find that there is no such provision in the agreement. It was also contended that the Assistant Collector proceeded on as assumption that the entire production of detergent cakes by the petitioner-company was to be sold to the buyer. Though that is not exactly what the Assistant Collector has stated in his order, he appears to have proceeded on that assumption and that becomes clear if we refer to his order wherein he has stated that the entire production of FAB cakes was to be delivered by the petitioner-company to the

buyer. The Assistant Collector overlooked the fact that the petitioner-company is manufacturing not only detergent cakes and bars but also

detergent powder. Another factor which has been ignored by the Assistant Collector is that the petitioner-company was manufacturing this product

not only for itself but also for others. Only that quantity, which was ordered by M/s. Colgate Palmolive, was obviously manufactured for them and

only that product was to be labelled as FAB detergent cakes. Since the agreed quantity was to be manufactured for the buyer, obviously the whole

of it was required to be sold to it, but that does not mean that the petitioner-company was under any restraint, because of the agreement between

the parties, in manufacturing detergent cakes, bars or powder for itself or for other parties. So far as other reasons given by the Assistant Collector

are concerned, we are of the opinion that they are not sufficient either individually or cumulatively to permit an inference that the agreement

between the petitioner-company and the buyer was not at arm's length.

On the contrary, there are certain provisions in the agreement which clearly show that the agreement was at arm's length. Clause 10 of the

agreement provided that the buyer had an absolute and unqualified right to reject the said product or any part thereof if the same was not

manufactured strictly in accordance with the terms of the agreement. The said clause also provided that in case of rejection, the seller, i.e. the

petitioner-company had the right to remanufacture or reprocess the said product and to dispose of the same as it considered fit and proper. Clause

14 of the agreement provided that till delivery of the product was given to the buyer or to the public carriers for the purpose of taking them to the

buyer, the property in the said product was to remain that of the seller. It was only on delivery that the said product was to become property of the

buyer. Clause 19 specifically provided that the seller in no manner had to hold out as an agent of the buyer. In our opinion, these provisions in the

agreement clearly go to show that the petitioner-company while manufacturing FAB detergent cakes for the buyer cannot be said to have

manufactured the same on behalf of the buyer. The agreement clearly appears to be on principal to principal basis. It is significant to note that the

plant, equipments, machinery, raw-materials and labour utilised by the petitioner-company for manufacturing FAB detergent cakes belonged to the

petitioner-company. Merely because the buyer had a right to inspect quality of the raw material and to check records maintained by the seller in that behalf, it cannot be said that the petitioner-company was manufacturing FAB detergent cakes on behalf of the buyer. That provision was made with a view to safeguard the quality of the product and correctness of the accounts. We also fail to appreciate how payment of advances towards the price of the product can lead to an inference that the agreement between the parties was not at arm's length. Such a provision is not inconsistent with the agreement being at arm's length. In this case, the parties had not agreed to a particular price in advance. Further, as the buyer had agreed to pay all taxes, duties and levies, it was not unusual to provide that the buyer should pay excise duty in advance. It is difficult to appreciate how advance payments towards price and excise duty can make the agreement, which is on principal to principal basis and otherwise at arm's length, an agreement of agency.

4. In the view we are taking, we are supported by two decisions of the Bombay High Court in the cases of Centron Industrial Alliance Ltd. Vs.

Union of India and 2 others, Godrej Soaps Ltd. v. Union of India & Ors. 1985 (25) E.L.T. 482 and a decision of the Supreme Court in the case

of Union of India (UOI) and Others Vs. Cibatul Limited, .

5. As against that Mr. Ajmera, learned Counsel for the respondents, relied upon a decision of the Bombay High Court in the case of Pilky

Footwear Co. Pvt. Ltd. Vs. Union of India and others, . In that case the facts were entirely different. There the agreement provided not merely for

giving of advice and assistance and technical know-how and supervision to the buyer but also for supplying necessary working capital by way of

interest, free advances for operation of plant, procurement of moulds and purchase of equipments. In that case the seller was prohibited from

enlarging the manufacturing capacity or from installing fresh machinery without the consent of the buyer and the entire production of the seller was

to be sold to the buyer. It was under these circumstances that the Bombay High Court held that the agreement was not at arm's length. The facts

of this case are quite different and, therefore, obviously the said judgment cannot hold the respondents.

6. In the result this petition is allowed. The impugned order being order in

Original No. 2/80 passed by the Asstt. Collector, Central Excise, Division I, Vadodara on 31-12-1980 is set aside and the respondents are directed to recover excise duty from the petitioner with respect to the goods manufactured by the petitioner-company under the agreement for M/s. Colgate Palmolive and delivered to M/s. Colgate Palmolive during the period the agreement subsisted between the parties on the basis of the Price-List filed by the petitioner-company. In case the respondents have recovered more duty than payable under the order of this Court, then the respondents shall refund the same to the petitioner-company within four weeks from the date of receipt of the writ of this Court. Rule is made absolute accordingly with no order as to costs.