

(1981) 06 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 385 of 1981

Wipro Products Ltd. and another

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 26-06-1981

Acts Referred:

Central Excise Rules, 1944 — Rule 11
Central Excises and Salt Act, 1944 — Section 4

Citation : (1981) 8 ELT 531

Hon'ble Judges : M.L. Pendse, J; Kanade, J

Bench : Division Bench

Judgement

Pendse, J.—By this petition filed under Article 226 of the Constitution of India, the petitioners are challenging the order dated October 9, 1980 passed by the Assistant Collector of Central Excise, Nasik, declining to grant refund of the excess excise duty paid by the petitioners and also seeking certain other reliefs to which we would refer at a later stage.

2. Petitioner No. 1 is a company incorporated under the Companies Act, while petitioner No. 2 is its Managing Direct. The petitioner Company inter alia manufacture Vanaspati and soap. Vanaspati is an item which falls under Tariff Item 13 while soap falls under Tariff Item No. 15 of Schedule I of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Central Excise Act). The petitioners sell their product to wholesale dealers and also through their own depots set at various places. The petitioner Company clear the Vanaspati under the self Removal procedure without filing price lists as per order passed under Rule 176C(4) of the Rules framed under the Central Excise Act. As far as soaps are concerned, the petitioner Company have been filing price lists from time to time.

3. Section 4 of the Act was amended with effect from October 1, 1975. The petitioners cleared their goods after paying duty thereon and the duty paid included the full price recovered from the dealers without excluding therefrom

the post-manufacturing expenses and the selling profits attributed thereto. On November 28, 1979, a Single Judge of this High Court held in the case reported in 1979 E L T 625 *Bombay Tyres International Ltd. v. Union of India & Ors.* that the ratio laid down by the Supreme Court under the old Section 4 in *Voltas* case and *Atic Industries* case and by the Bombay High Court in *I.T.C.* case is applicable even to new Section 4. The learned Judge held that the excise duty is leviable only on the amount representing the manufacturing cost plus the manufacturing profits and excludes post-manufacturing costs and profits arising from post-manufacturing operations, namely selling profit. This judgment in the case of *Bombay Tyres International Ltd.* was widely reported in newspapers and the petitioners thereupon came to know that the levy recovered by the respondents was without jurisdiction and contrary to law. The petitioners thereafter lodged the refund claim on January 31, 1980 pertaining to the period July 1979 and claimed the refund of a sum of Rs. 27,561.76. The petitioners also filed other applications for refund in respect of the period after July 1979. The period covered was from 1st August, 1979 to October 31, 1979. The grounds in support of the refund were that the post-manufacturing expenses are excludable for the purpose of arriving at the assessable value and as the respondents have recovered the excise duty by including the post-manufacturing expenses, the additional levy is required to be refunded. In support of the claim the petitioners annexed a certificate from the Chartered Accountant setting out the post-manufacturing expenses pertaining for different brands of *Vanaspati* manufactured by them.

4. The refund applications were turned down by the Assistant Collector of Central Excise by the impugned order on two grounds. The Assistant Collector held that the deductions claimed by the petitioners are not permissible under new Section 4 of the Central Excise Act. The Assistant Collector observed that the judgment of the Supreme Court in *Voltas* case and *Atics* case would have no application as far as the provisions of new Section 4 of the Act are concerned. The second ground assigned by the Assistant Collector for rejecting the claim was that the Chartered Accountant's certificate did not spell out in detail the selling and distributing expenses and therefore there is no sufficient data to ascertain the post-manufacturing expenses. The order passed by the Assistant Collector is under challenge.

5. The petitioners, apart from claiming relief of setting aside the impugned order, have claimed two more reliefs, and those are (i) to permit the petitioners to clear their products on payment of excise duty on a price excluding therefrom the post-manufacturing expenses and profits; and (ii) return to and for refund a sum of Rs. 13,33,035/- illegally recovered and collected from the 1st petitioner between the period of October 1, 1975 to March 31, 1979. The entire basis of the petitioners claim is based upon the fact that an illegal levy was recovered from them by inclusion of post-manufacturing expenses in the assessable value right from October 1975 onwards and the petitioners are entitled to claim refund as the recovery was without jurisdiction. The petitioners claim that they became

aware of the correct position of law and discovered the mistake only after the judgment was delivered by this Court in Bombay Tyres International Ltd. case.

6. In answer to this petition, Shri Jagmohan v. Shah, working as Assistant Collector in the office of the Assistant Collector, Jalgaon Division, has filed a return sworn on March 12, 1981. By this return it is inter alia claimed that the remedy adopted by the petitioners in filing the writ petition is not an appropriate remedy and the petitioners should be driven to file a suit in the civil Court. The respondents also claim that the grant of relief to the petitioners would amount to unjust enrichment and that should not be permitted by this Court. It is further claimed that in any event the petitioners are not entitled to the relief of refund from October 1, 1975 onwards as the claim is barred both under Rule 11 of the Central Excise Rules and by law of limitation. On merits, the respondents claim that the judgment delivered in Bombay Tyres International Ltd. case is not correct and the reliance on Voltas case is inappropriate. The respondents further claim that the ratio laid down by this Court is not binding upon them because there are several matters pending before the Hon'ble Supreme Court. In our judgment, each and every contention urged on behalf of the respondents is devoid of any merit.

7. This Court has repeatedly held under the old Section 4 of the Central Excise Act that the post-manufacturing expenses should not be taken into account for determining the chargeability to an excise duty. This Court has relied upon the judgment of the Supreme Court in Voltas case and in Atics case to come to that conclusion and it would suffice only to make reference to the two decisions of this Court in the case of Indian Tobacco Company Limited v. Union of India and Ors. reported in 1979 E L T 476 and Union of India v. Mansingka Industries Pvt. Ltd. reported in 1979 ELT 158 = 77 Bom. L.R. 663. As mentioned hereinabove the new Section 4 came into force with effect from October 1, 1975. The learned Single Judge of this Court, as mentioned hereinabove, in the case of Bombay Tyres International Ltd. held that the ratio laid down by this Court in respect of old Section 4 stands good with reference to the new Section 4 also. After the decision of the Single Judge, a Division Bench of this Court concurred with that view in the case of Flexoplast Abrasives Ltd. v. Union of India reported in 1980 E L T 513. The judgment of the learned Single Judge in Bombay Tyres International case was carried in appeal and the Division Bench concurred with the view of the learned Single Judge. It is, therefore, a settled position that the post-manufacturing expenses cannot be included for determining the chargeability of the excise duty. We have perused the judgment, both in the case of Bombay Tyres International's case and in the case of Flexoplast Abrasives Ltd. and we are in entire agreement with everything stated therein. The submission on behalf of the respondents that the new Section 4 does not require exclusion of post-manufacturing expenses while arriving at the value for the purpose of levy of excise duty is entirely incorrect. It must be remembered that the excise duty is levied on manufacturer and can only be imposed on manufacturing operations and the assessable value cannot be include post-manufacturing expenses and

profits attributable to post-manufacturing and non-manufacturing operations. In this view of the matter, the first ground given by the Assistant Collector while refusing the request of the petitioners for refund cannot be sustained.

8. The second ground given for turning down the claim is that sufficient data was not produced to determine the exclusion of post-manufacturing expenses incurred by the petitioners. In this connection the petitioners have produced a certificate of a Chartered Accountant and the Chartered Accountant has given the certificate on the basis of definition of post-manufacturing (selling and distribution) expenses as per the cost Accounting Records (Vanaspati) Rules 1972, enunciated in the Department of company Affairs, Government of India Notification dated November 27, 1972. The Assistant Collector without going into the details of the certificate merely observed that the certificate does not spell out anywhere in detail the selling and distribution expenses and therefore it is not possible to ascertain the quantum of each element present in the so called selling and distribution expense. We are not impressed by the observations made by the Assistant Collector. We have perused the certificate and we find that the relevant data was available before the Assistant Collector to record a finding as to what amount could be deducted towards the post-manufacturing expenses. Even assuming that the material produced before the Assistant Collector was not sufficient, we fail to appreciate why the Assistant Collector did not think it proper to call upon the petitioners to produce additional material. It is necessary to remember that the inquiries conducted by the Assistant Collector are quasi-judicial in nature and it is always desirable that the parties should be given a full opportunity to establish their case. In case the Assistant Collector felt that the material was not sufficient, it was incumbent upon him to call upon the petitioners to produce additional material. It was not proper to turn down the claim by merely observing that the data produced by the petitioners was not sufficient. In our judgment, the order passed by the Assistant Collector on this count also is not sustainable. It is necessary to direct the Assistant Collector to reconsider the case after giving proper opportunity to the petitioners to produce material in support of their claim.

9. In addition to the grounds found by the Assistant Collector to turn down the claim of refund, on behalf of the respondents certain other grounds were urged. Shri Govilkar submits that proper remedy for the petitioners was to file a suit and this Court should not interfere in exercise of its writ jurisdiction. It was further argued that the petitioners are not entitled to the relief because their claim was barred under Rule 11 of the Central Excise Rules and the petitioners are not entitled to the relief for a period three years prior to the date of lodging their claim. In our judgment these contentions are ill-founded. Once it has been established, as repeatedly found by this Court, that the levy of excise duty by inclusion of post-manufacturing expenses was without jurisdiction and illegal, then to drive the petitioners to file the suit is, in our judgment, not a proper course to adopt. Once the constitutional position is well establishment, it is futile for the Government to claim that the citizen should go to a civil Court and seek a

decree instead of approaching this Court in its writ jurisdiction. We fail to appreciate what difference would it make by driving a citizen to file a suit in a civil Court, which as experience shows remains pending for several years. Once the constitutional position is clear and it is well settled that the recovery of duty by inclusion of post-manufacturing expenses is totally illegal, then in our judgment, it would be futile to drive the citizen to a long drawn trial in the civil Court. We are satisfied that it would not be proper and adequate remedy.

10. The submission of Shri Govilkar that the claim for the petitioners is barred by Rule 11 of the Central Excise Rules is also without any merit. The levy of Central Excise by inclusion of post-manufacturing expenses is totally without jurisdiction and outside the provisions of Section 4 of the Act and would not attract the bar of limitation prescribed by Rule 11. The ambit and scope of Rule 11 has been repeatedly considered by this Court and it has been held that Rule 11 has no application where recovery of duty is illegal and without jurisdiction. It would be suffice to make a reference to a decision of the Division Bench of this Court in Special Civil Application No. 2118 of 1976 decided on March 5, 1980 in the case of Associated Bearing Company Limited v. Union of India and Another, 1980 ELT 415. The submission of Shri Govilkar that the claim beyond three years prior to the date of filing the petition is barred by principles of Limitation Act is also without any substance. It has been repeatedly held by this Court that the claim for refund is not governed by the Rules of limitation if the recovery is illegal and without jurisdiction.

11. Shri Govilkar then submitted that in case the relief is granted to the petitioners it would amount to an unjust enrichment. Before considering the submission, we must mention that the same contention is repeatedly urged before the different Division Benches of this Court on behalf of the Department. An identical contention was argued before the Division Bench of this Court in Special Civil Application No. 5106 of 1976 in the case of Maharashtra Vegetable Products Pvt. Ltd. and Anr. v. Unico of India & Ors. - 1981 ELT 468, and the Division Bench by its judgment dated June 20th & 21st, 1980, turned down the same. Mr. Justice Chandurkar speaking for the Bench observed that the State is under obligation to refund moneys which have been recovered without authority of law and the defence that the grant of relief would amount to unjust enrichment is totally without any merit. The Division Bench considered the observations made by the Supreme Court in D. Cawasji and Co.'s case reported in D. Cawasji and Co. and Others Vs. State of Mysore and Another, and strongly relied upon the observations in paragraph 10 of the Judgment to the following effect :

"Nor is there any provision under which the court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so".

It has come to our notice that the same contention has been repeatedly argued

before the Division Benches and every time the contention has been turned down. Shri Govilkar in spite of this position contended that the contention should be reconsidered and in support of his submission invited our attention to the two decisions - one of Delhi High Court and one of Madras High Court. The Judgment of the Delhi High Court is reported in 1980 Excise Law Times page 735 in the case of Hyderabad Asbestos Cement Products Ltd. & Anr. v. Union of India & Ors. Shri Govilkar relied upon the observations made by the learned Judge in paragraph 32 of the judgment and claimed that the relief should be refused to the petitioners. We are not impressed by this submission. In the first instance it must be noted that the claim for refund of duty was turned down by the Delhi High Court on ground that the imposition was perfectly valid. The learned Judge thereafter made certain observations which are clearly obiter in nature. The learned Judge observed that the benefit, if any, of the refund illegally levied excise duty should in all fairness normally belong to the consumers and therefore a question may well be raised that the petitioners cannot be allowed to unjustly enrich themselves to obtain refund. The learned Judge declined to record any conclusive finding as the question did not specifically arise. Realising this position, Shri Govilkar fall back upon the reference made to the Judgment given by Mr. Justice Krishna Iyer in SLP No. 1330 of 1979 to the effect that the benefit of illegally levied price really belong to the actual consumer and not to the manufacturer. Shri Govilkar was unable to produce the copy of the judgment of the Supreme Court, but merely observed that he is relying upon the quotation given by the Delhi High Court in paragraph 32 of the judgment. In our judgment, it would not be proper to rely upon the obiter dictum of Delhi High Court and in absence of a copy of the judgment, it would not be possible for us to determine in what circumstances the observations were made by the Supreme Court. Shri Govilkar also relied upon the judgment of Madras High Court in Writ Petition Nos. 4629 to 4631 of 1975 in the case of M/s. Madras Aluminium Co. Ltd. and Anr. v. The Union of India & Ors. delivered on October 16, 1979 ELT 478. The observations in the judgment, on which Shri Govilkar relied, are to the effect that in regard to all the circumstances, the petitioners are not entitled to get refund of excise duty if they are not in a position to trace the actual consumer and pay back the excise duty collected from them. The Madras High Court has turned down the relief claimed by the petitioners on various grounds and one of the ground which impressed them was the fact that the company would not be able to return the benefit to consumer. We are not inclined to defeat the claim of the petitioners on this count. We are bound by the decision of Division Bench of this Court in Special Civil Application No. 5106 of 1981 ELT 468 and we are in respectful agreement with the conclusion recorded by the Division Bench. The contention of Shri Govilkar that no relief should be granted to the petitioner as that would amount to unjust enrichment deserves to be repelled.

12. Shri Govilkar then urged that there was no sufficient material before the Assistant Collector to determine the extent of the post-manufacturing expenses, and therefore, the petitioners are not entitled to any relief in this petition. We

have mentioned hereinabove our reasons for not accepting the reasoning of the Assistant Collector in refusing the relief on this count. As the Assistant Collector has to decide the matter on merits afresh, we are not inclined to make any observations on the merits of the case. Shri Govilkar made a valiant attempt to urge that the concept of manufacturing cost has not been defined anywhere nor any judgment is pronounced regarding the true ambit of such concept and therefore we must decide what exactly the concept of manufacturing cost. We fail to appreciate why it was necessary for the learned counsel to agitate this contention in the present proceedings. In the first instance we are not called upon to record any conclusion or findings or make observations in respect of the contention which are not required for determination of this petition. Secondly, we fail to appreciate the force in the submission of Shri Govilkar when he urges that the concept of manufacturing cost has not been considered by any Court. The learned counsel obviously overlooked the decision of the Division Bench of this Court in I.T.C.'s case reported in 1979 E L T 476. Shri Govilkar desired to urge that the decision of the Supreme Court in Voltas case and Atics case is being reconsidered and some of the High Courts have made observations which are not in consonance with the decision in I.T.C.'s case. We decline to consider this contention, because in our judgment it is entirely unnecessary to do so in present case. In any event, we are bound by the decision of the Division Bench in I.T.C.'s case and with which we are in respectful agreement. In our judgment, every contention urged by the respondents in answer to the petition is misconceived and deserves to be repelled.

13. That leaves us with the question as to what relief should be granted to the petitioners. The petitioners are entitled to the relief claimed in prayer (a) which is for quashing and setting aside the impugned order dated October 9, 1980. Reliefs claimed in prayer (b) are three in number and the first relief is identical with that claimed in prayer (a). We are not inclined to grant the second relief in prayer (b) as it is not necessary to give any directions to permit the petitioners to clear their product on payment of excise duty on the price excluding the post-manufacturing expenses and profits. Such a relief is uncalled for because once this Court has settled the law, every officer of the Central Excise is duty bound to observe it. The third relief claimed in prayer (b) also cannot be granted as it involves the question of determination of facts. By this relief the petitioners are claiming a refund of Rs. 13,33,035/- recovered from the petitioners between the period of October 1, 1975 to March 31, 1979. Shri Govilkar submits that it is not possible to grant this relief because the authorities under Central Excise Act have not determined the amount which the petitioners are entitled to claim. It is necessary that the Authorities under the Central Excise Act must determine what amount the petitioners have over-paid as excise duty by inclusion of post-manufacturing expenses. After ascertaining that amount, the petitioners are entitled to refund of the same. We have given reasons as to why the submission of the respondents that the claim from October 1, 1975 cannot be considered has no merits and it is obvious that the petitioners are entitled to a refund of

illegally recovered duty by inclusion of post-manufacturing expenses and profits from October 1, 1975 onwards.

14. Accordingly, the petition succeeds and the rule is made absolute in terms of prayer (a). The respondents are further directed to consider the claim of refund of duty which the respondents have illegally recovered and collected by inclusion of post-manufacturing expenses from October 1, 1975 onwards and pass appropriate orders, after giving proper opportunity to the petitioners to substantiate their claim, within a period of six months from to-day, and thereafter if any refund is found due, should refund it within one month. The rule is made absolute accordingly. The respondents shall pay the costs of the petitioners.