(1990) 08 BOM CK 0104

In the Bombay High Court

Case No : Writ Petition No. 1079 of 1980

Wipro Products Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 13-08-1990

Acts Referred:

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

Citation : (1991) 51 ELT 281

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

Bench : Division Bench

Judgement

Pendse, J.—The petitioners are a Public Limited company and are engaged in manufacture of Vanaspati, refined oil, bakery shortening and other products. The vanaspati and refined oil manufactured by the petitioners is assessable under Tariff Item No. 13 of the First Schedule to the Central Excises & Salt Act, 1944 and the rate of duty is 10% ad valorem. The value in relation to the excisable goods is assessed in accordance with provisions of Section 4 of the Act and sub-section (4)(d)(i) prescribes that value in relation to any excisable goods, where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing, except the cost of packing, which is of a durable nature and is returnable by the buyer to the assessees. The petitioners pack Vanaspati and refined oils in 30 gauge tin coated steel plate containers of 18 liters capacity.

2. On November 1, 1978 the petitioners issued a circular to all Wipro stockists intimating that the tin plate is rapidly becoming a scarce commodity in India and supply of the containers is reduced to a substantial degree. The tin plate prices were also escalating at an alarming rate. The circular recites that the industry practice in existence was to discard the once used 18 litres tin container or to sell it as scrap. The circular points out that 18 litres tin containers are durable and it is possible to re-use the tin container at least a few times. The circular then mentions that with a view to utilise the durability of the 18 litre tin container, as also to increase the availability of such containers at a reasonable cost, the

petitioners had decided to re-use the 18 litre tin container. The stockists were informed that with effect from November 1, 1978, 18 litre tin container will be returned and on such return a refund of Rs. 7.65 per tin will be given, provided the tin is not damaged or dented. The petitioners stated that in case the tin containers are found damaged, then the exact amount of refund would be at the discretion of The Company.

By letter dated December 4, 1978 the petitioners informed the Superintendent of Central Excise, Amalner, that the petitioners would be deducting the costs of the containers from the assessable value of the vegetable products manufactured by them as the containers were both durable and returnable. Along with the letter a copy of the circular dated November 1, 1978 issued to the stockists was annexed. Thereafter the petitioners began removing the vegetable products from their factory and paid excise duty on the assessable value thereof after excluding the costs of the tin containers in which the products were packed.

3. The Superintendent of Central Excise inform the petitioners by letter dated February 27, 1979 that the petitioners will have to satisfy the respondents that the prices declared on the gate passed do in fact present the value as determined u/s 4 of the Act. The petitioners were called upon to produce requisite evidence in support of their contention that the containers were durable and were returnable. The petitioners sent their reply on March 5, 1979. By latter dated April 7, 1979 the Superintendent, Central Excise, pointed out to the petitioners that the petitioners had failed to produce any evidence to establish that the containers were in fact return to them. By letter dated April 28, 1979, copy of which is annexed as Exhibit ''B'' to the petition, the Superintendent, Central Excise, informed that the checking gate passes for the period from December 5, 1978 to March 31, 1979 at the time of finalisation of the assessment, it was observed that the petitioners had deducted the price of metal containers from the value of vegetable products. The superintendent informed the petitioners that no evidence was product to establish that the metal containers are durable and returnable. The Superintendent also claimed that the petitioners are not entitled to deduct any amount in respect of packing material and the duty will have to be determined on the basis of the price, including the value of the packing material. After receipt of this latter the petitioners paid the duty, assessed by inclusion of value of value of packing material, from May 7, 1979 under protect. The petitioners challenge the action of the Superintendent, Central Excise in declining the relief sought by the petitioners by excluding the value of packing material, while assessing the duty payable on manufacture of vegetable products.

4. Shri Rana, learned counsel appearing on behalf of the petitioners, submitted that the petitioner company had entered into an agreement with the stockists in respect of return of tin containers and in support of the submission reliance is placed on the circular dated a November 1, 1978. The learned counsel submitted that the circular makes it crystal clear that the petitioners had agreed to take

back the tin containers in which the vegetable products were sold by refund Rs. 7.65 per tin provided the container is in good condition. The learned counsel urged that the fact that the containers are durable and returnable is also reflected from paragraph 4 of the return field by Jitendra Chaturvedi, Assistant Collector of Central Excise and Customs, Jalgaon Division, and sworn on April 21, 1984. In paragraph 4 of the return it is claimed that as per the data available with the excise authorities the petitioners have sold by many as 80 lakhs containers science 1978 and the containers received back are 4303. The retain claims that the circular issued by the petitioners cannot be claimed to be a term of sale offered to every customer. The return claims that there is no material to indicate that such circular was issued every financial year and therefore the promise to refund Rs. 7.65 per tin container cannot be treated as a term of sale. It is not possible to accept the claim made in the return. It is difficult to appreciate why circular dated November 1, 1978 is required to be issued every financial year. Once the circular is issued and the stockists and customers are aware that the company willing to refund Rs. 7.65 on return of the tin container, then it is hardly necessary that such circular should be issued periodically to spell out the term of sale in favor of the petitioners. The observation of the Superintendent of Central Excise in letter dated April 28, 1979 that the company is not produce evidence to establish that the tin containers area durable and returnable also cannot be accepted in view of the fact that in the return it is clearly mentioned that at least 4303 containers were returned.

Shri Rana very appropriately relied upon the decision of the Supreme Court reported in Mahalakshmi Glass Works (P) Ltd. Vs. Collector of Central Excise, Bombay, . The Supreme Court observed.

"What Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944 excludes from computation is the cost of packing which is durable nature is "returnable by the buyer to the assessee". The packing must be one which is retunable by the buyer to the assessee and obviously that must by under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in that event, the words "by the buyer to the assessee" need not have found a place in the section; they would be superfluous. The actual or extent of return has not relevance".

What is necessary is that if the buyer choose to return the packing, the seller should be obliged to accept it and refund the stipulated amount. In the present case there was no evidence of the agreement that the cartons and gunny bags were returnable, the cost thereof is not excludible as that of durable and returnable packing."

It is obvious from the decision of the Supreme Court that the actual return or extent of return has no relevance while determining whether the cost packing, which is of a durable nature and is returnable by the buyer, can be excluded while determining assessable value u/s 4 of the Act. Shri Rana submitted that though the petitioners had promised to return Rs. 7.65 per tin on the customers returning the durable tin containers while computing the amount of packing to be deducted, the actual cost incurred by the petitioners for the tin containers should be taken into consideration. The learned counsel urged that amount of Rs. 7.65 is determined as a depreciated value of the container and while computing the assessable value the actual cost incurred by the petitioners for securing the tin containers should be borne in mind. The submission is correct and deserves acceptance. The petitioners will have to lead evidence before the Superintendent of Central Excise to establish what is the actual value of the tin containers at the time when the tin containers left the factory. The actual value of the tin containers which are durable and returnable, will have to be excluded while computing the assessable value of the vegetable products sold by the petitioners.

5. Accordingly, petition partly succeeds and the order passed by the Superintendent of Central Excise and communicated to the petitioners by letter dated April 28, 1979 is quashed. The Superintendent of Central Excise is restrained from making any demand in any respect of differential duty for the period commencing from May 1979 till the date filling of the petition. The Superintendent of Central Excise should ascertain the amount of refund of differential duty payable to the petitioners from December 5, 1978 till the date of filling of the petition. The Superintendent of Central Excise should determine the amount of refund of duty payable after ascertaining what is the actual price or the value of the tin containers at the time it left the factory gate. The superintendent of Central Excise should call upon the petitioners to produce evidence to establish the value of the tin containers at the time of leaving the factory gate and thereafter compute the assessable value of the goods and then ascertain what amount of refund is payable to the petitioners. The Superintendent of Central Excise is directed to determined and refund the differential duty paid by the petitioners by end of December 1990. The bank guarantee furnished by the petitioners to stand discharged.

6. There will be no order as to costs.