Govind Pay Oxygen Ltd. Vs Assistant Collector Central Excise, Panaji and others

Special Civil Application (Writ Petition) No. 143/B/ of 1978

Court: Bombay High Court

Date of Decision: July 4, 1983

Acts Referred:
Central Excise Rules, 1944 â€" Rule 9B #Central Excises and Salt Act, 1944 â€" Section 4

Citation: (1984) 86 BOMLR 14 : (1987) 11 ECC 204 : (1989) 20 ECR 404 : (1986) 23 ELT 394 : (1982) 134 ITR 268(1) : (1984) MhLj 114

Hon'ble Judges: Ginwala, J; G.F. Couto, J

Bench: Division Bench

Judgement

Ginwala, J.
The Petitioner is a manufacturer amongst other things of Oxygen and Dissolved Acetylene gases. It sells the gases

manufactured to Southern Gas Limited, which is said to be a shareholder of the petitioner''s company. Southern Gas Limited is the only buyer of

Oxygen and Acetylene gases manufactured by the petitioner. Admittedly, the Southern Gas Limited (hereinafter referred to as ''the buyer'')

provides the cylinders in which these gases are delivered by the petitioner to said buyer. The petitioner had submitted the price list to the first

respondent for the purpose of assessing the excise duty on these gases and this list was approved by the first respondent on 19-5-1978. In this

price list the value of the cylinders in which the gases were delivered to the buyer was not included. On 25-10-1978 the first respondent wrote a

letter to the petitioner referring to the petitioner''s letter dated 13-10-1978 in which the petitioner had brought to the notice of the first respondent

that the cylinders in which the acetylene gas is filled belong to the buyer. The first respondent by this letter indicated a doubt as to whether the price

of the cylinder so supplied by the buyer could be included by the petitioner in the price of the gas sold for assessing the duty because according to

him the cost of packing is disproportionately high compared to the material packed. He, therefore, directed under this letter, the petitioner to resort

to Provisional Assessment under Rule 9B of Central Excise Rules, 1944 on execution of a bond for differential duty payable on the basis of value

including the cost of packing material. It may at this stage be said that the average value for a cylinder supplied by the buyer to the petitioner for

delivering the gas worked out at Rs. 394.58. The price of the oxygen and acetylene gas which would be filled in the cylinders for being delivered to

the buyer would come to Rs. 22.50 and Rs. 90. The petitioner under its letter dated 7-11-1978 objected to the Provisional Assessment as

directed by the first respondent under his letter dated 25-10-1978 on the ground that the cylinders which were being supplied by the buyer could

not be termed as packing within the meaning of Section 4(d) of the Central Excises and Salt Act, 1944 (hereinafter referred to as ''the Act'') and

the value of such cylinders could not be computed for the purpose of arriving at the price of the gas sold in order to determine the ad valorem

excise duty. Since no further steps were taken the petitioner has approached this Court for a Writ of Mandamus directing the respondents to

forbear from adding the value of the cylinders supplied by the buyer for the purpose of assessing the excise duty levied on the gas manufactured

and sold by the petitioner.

2. The question, therefore, which falls for determination in this petition is whether the price of the cylinder which the buyer supplies to the petitioner

for delivering the gas to the buyer can be included in the value of the gas manufactured and sold by the petitioner to the buyer for the purpose of

determining the excise duty to be paid by the petitioner. On behalf of the respondents reliance is sought to be placed on the definition of ""value"" as

occurring in Clause (d) of Section 4 of the Act. Relying on sub-clause (i) of this Clause it is submitted that what is exempted from the value of the

goods is the cost of the packing which is of durable nature and is returnable by the buyer to the assessee. It is argued that this sub-clause does not

exempt packing which is supplied by the buyer to the assessee. In other words what is contended is that Section 4(d)(i) does not make any

provision for exempting the packing material which is furnished by the buyer to the assessee manufacturer. Secondly, it is submitted that under

Notification No. 136/79-C.E., dated 28-3-1979 exemption has been granted to the manufacturer in respect of packing of a durable nature

supplied by the buyer to the assessee and returnable by the assessee to the buyer and since this Notification is not retrospective the petitioner is not

entitled to exclude the value of the cylinders supplied by the buyer for the purpose of determining the value of the gas sold, till the date of this

Notification.

3. We do not find any substance in either of these contentions urged on behalf of the respondents. Section 4(d)(i) does not make any provision for

excluding the cost of packing which is supplied by the buyer to the assessee for the obvious reason that the assessee does not spend for such

packing and, therefore, its cost cannot be included in the value of the excisable goods. It is for this simple reason that the Legislature has not

thought it fit to exempt such packing from the value of the excisable goods.

4. Coming to the Notification dated 28-3-1979 it is true that it is not retrospective but that does not mean that the first respondent was entitled to

include the price of such cylinders while determining the value of the excisable goods, namely, the gas, if on the facts and circumstances of the case

he was not entitled to do so under the law. In other words, the said Notification cannot govern our decision with regard to the liability of the

petitioner to include the price of such cylinders while determining the value of the gas for the purpose of assessing the excise duty.

5. As stated above it is admitted that the cylinders in which the gas is delivered to the buyer belong to the latter and not to the petitioner. What

seems to be done is that the buyer brings its own cylinders to the factory of the petitioner where the gas is filled in those cylinders and they are

returned to the buyer with the gas in it. Now actually what the manufacturer, in these circumstances, sells to the buyer is only the gas, since the

container in which the gas is delivered admittedly belongs to the buyer. It would, therefore, appear that for the purpose of assessing the excise duty

on ad valorem basis, as provided in Item 14H of the Schedule of the Act, value of the goods which are actually sold to the buyer would be the

value for the purpose of arriving at the duty. Now as seen above what is sold by the manufacturer to the buyer is the gas alone without the

container, which admittedly belongs to the buyer. There is no container, which admittedly belongs to the buyer. There is no question at all of

including the price or the cost of the container or the cylinder in the value of the gas for the purpose of determining the excise duty. We are,

therefore, clearly of the opinion that the cost of cylinder which is supplied by the buyer to the manufacturer a assessee for the purpose of taking

delivery of the gas cannot be included in the price of the gas for the purpose of assessing the excise duty. In our view, therefore, the first

respondent was not right in asking the petitioner to resort to the Provisional Assessment on the basis of including the cost of such cylinder in the

price of the gas for the purpose of assessing the excise duty.

6. In the result the petition is allowed and the Rule is made absolute in terms of prayer Clause (a). In the circumstances of the case, no orders as to

cost.