

Machine Well Engineers Vs. Union of India (Uoi)

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Court : Allahabad

Decided On : Jul-22-1994

Reported in : 1994LC443(Allahabad); 1994(73)ELT19(All)

Judge : S.H.A. Raza and ;Surya Prasad, JJ.

Acts : Central Excise Rules, 1944 - Rule 8(1); [Constitution of India](#) - Article 14

Appeal No. : Civil Misc. Writ Petition No. 1261 (Tax) of 1987

Appellant : Machine Well Engineers

Respondent : Union of India (Uoi)

Disposition : Petition allowed

Judgement :

1. The Petitioners, which are Small Scale Industries and manufacturer of various goods including electrical appliances, under an agreement with Big Industrial Units including Bajaj Electricals Limited, affix brand name of Big Industrial Units like Bajaj Electricals Ltd. and sell the same to such Big Industrial Units, have challenged the Notification No. 223/87-Central Excise, dated 22-9-1987, mainly on the ground that the said Notification has classified Small Scale Industries into two classes, one which manufactures goods and sells the same either in the market or sells directly to Big Industrial House, which affixes its brand name on the goods and the other class of Small Scale Industries which manufacture the goods and

affixes the brand name of the purchaser, a Big Industrial House.

2. As far as the 1st class of the Small Scale Industries is concerned, it is exempted from excise duty if the goods are upto the tune of Rs. 20,00,000/- under the Notification dated 1-3-1986. But as far as the 2nd class of Small Scales Industries are concerned, it is not eligible for such exemption.

3. As the common questions of law and facts were involved in all the writ petitions, the petitions were heard together and are disposed of by a common judgment.

4. It has been submitted that the object of both the Notifications i.e. dated 1-3-1986 and 22-9-1987 is three fold; firstly to grant exemption to the manufacturers of the goods which sells the goods worth Rs. 20,00,000/-; secondly to see that the 'Big Industrial House' did not avoid payment of excise duty; and thirdly to give an advantage to Small Scale Industries in the market as against 'Big Industrial House'. The question as to by putting the brand name of the purchaser or by not putting the brand name of the purchaser does in any way affect the manufacturing of the goods, because it was submitted that the excise duty is leviable on the manufacturing of the goods, deserved to be answered in this writ petition. A similar question came up for consideration before the Hon'ble Supreme Court in case of R.C. Industries v. Union of India Civil Appeal No. 1496 of 1977. A Division Bench consisting of three Hon'ble judges including Hon'ble Mr. Justice P.N. Bhagwati (as he then was) by means of the Judgment dated 3-4-1986 indicated :

'The question arising in this appeal are concluded by two decisions of this court, viz. Union of India and Ors. v. Cibatul Limited - 1985 (22) Excise Law Times 302 (S.C.) and Joint Secretary to Govt. of India v. Food Specialities Ltd. -1985 (22) Excise Law Times 324 (S.C.). It is clear on an application of the principles laid down in these two decisions that the appellants manufactured these goods on their own account and not on behalf of the brand name owners and the assessable value of the goods manufactured by the appellants was the wholesale price at which the appellants sold the goods to others. The appellants could not therefore be assessed to excise duty on the basis of the value of the goods being taken to be the wholesale cash price, at which the goods were sold by the wholesale dealers, who were the brand name owners, and to whom the goods

were sold by the appellants. It is only the wholesale cash price at which the goods were sold by the appellants to the wholesale dealers, who were brand name owners, that was liable to be taken as the value of the goods for the purpose of levy of excise duty.'

In the operative portion of the judgment it was held :

'We therefore, allow the appeal, set aside the order passed by the Government of India as also the orders passed by the Assistant Collector and the Collector confirming the demand for differential duty from the appellants. If any amount in respect of such differential duty has been recovered by the respondents, such amount shall be refunded to the appellants within six weeks from today. The appeal is disposed of accordingly with no order as to the costs.'

5. The same question again cropped before the Hon'ble Supreme Court in the case of Sidhosons and Anr. v. Union of India and Ors. Writ Petition Nos. 1686-1685 and Writ Petition No. 1691 of 1979, decided on 28-10-1986 reported in 1986 (26) E.L.T. 881 (SC) and the same view was taken.

6. In case of Kulwant Electrical Industries, Delhi v. Union of India and Ors. Civil Appeal Nos. 2921-2934 of 1977 along with other appeals and writ petitions the matter was again considered by the Hon'ble Supreme Court and the case of Sidhosons and Anr. v. Union of India and Ors. (supra) was relied upon.

7. Thereafter by means of Notification No. 175/86-C.E., dated 1-3-1986, exemption to first clearance of specified goods up to the value of rupees fifteen lakhs and concessional duty on subsequent clearance in the case of manufacturer having clearance not exceeding rupees one and a half crores in the preceeding year was issued by Government of India. Explanation IV of the said Notification reads as under :

'Explanation IV - For the purposes of this notification, where the specified goods manufactured by a manufacturer, are affixed with a brand name or trade name (registered or not) of another manufacturer or trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such

other manufacturers or trader.'

8. It seems that the aforesaid Notification was issued in confirmity with the aforementioned judgments of the Supreme Court. But the position was complicated again by issuance of another Notification No. 223/87-C.E., dated 22-9-1987 which reads as under :

'GOVERNMENT OF INDIA

MINISTRY OF FINANCE

(DEPARTMENT OF REVENUE)

New Delhi, the 22nd September, 1987

31 Bhadra, 1909 (Saka)

NOTIFICATION No. 223/87-CENTRAL EXCISE

G.S.R. 813 (E):- In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 175/86-Central Excise, dated the 1st March, 1986 namely :-

In the said Notification :-

(i) after paragraph 6, the following paragraph shall be inserted, namely :-

'7. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another persons who is not eligible for the grant of exemption under this Notification :

Provided that nothing contained in this paragraph shall be applicable in respect of the specified goods cleared for home consumption before the 1st day of October, 1987';

(ii) after Explanation VII, the following Explanation shall be inserted, namely :-

'Explanation VIII - 'Brand name' or 'trade name' shall mean a brand name or trade name, whether registered or not, that is to say a name or mark, such as symbol, monogram, label, signature or invented word or writing which issued in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person.'

(C.P. Srivastava) Under Secretary to the Government of India F. No. 339/3/86-TRU

EXPLANATORY NOTE : This amendment seeks to deny small scale exemption in respect of specified goods affixed with the brand name/trade name of a person who is not eligible for the exemption under Notification No. 175/86-CE., dated 1-3-1986.'

9. A perusal of Paragraph 7 of the aforesaid notification indicates that the exemption contained in this notification would not apply to the specified goods, where manufacturer affixes specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification, the effect of the aforesaid amendment would be, that if the manufacturer affixes the goods with brand name of a person with whom he had entered into agreement, no exemption to him would be given, but the manufacturer puts its own brand name or not and sells it into the market or to the purchaser who puts its brand name upon such goods, such manufacturer would be entitled for the exemption. The Explanatory note to the amendment dated 22-9-1987, further made it clear that this amendment seeks to deny small scale exemption in respect of specified goods affixed with the brand name/trade name of a person who is not eligible for the exemption under Notification No. 175/86-CE., dated 1-3-1986.

10. On 9-12-1987 this Court passed order to the effect that the counter affidavit may be filed on or before 11-1-1988. A rejoinder affidavit may be filed on or before the petitioner is taken up for admission. It was further provided if considered

necessary the petition shall be disposed of at the admission stage. Operation of the Notification dated 22-9-1987, pertaining to the petitioner would remain stayed subject to the condition that the petitioner furnishes bank guarantee for the amount of the excise duty payable by them on the clearance of the goods with the Assistant Collector, Central Excise, Ghaziabad. It was further indicated that the petitioners would continue doing the same till further orders of this court.

11. Although this order was passed on 9-12-1987, but a perusal of the order sheet dated 3-8-1992 indicates that no counter affidavit was filed in writ section. It is unfortunate that the counsel appearing on behalf of Union of India has not appeared to indicate as to whether the counter affidavit was filed by him or not whether he intends to file it or not.

12. The Notification No. 223/87-Central Excise, dated 22-9-1987 by means of which earlier Notification dated 1-3-1986 was amended came up for consideration before the Hon'ble Single Judge of Calcutta High Court in the case of Banner and Company v. Union of India reported in 1994 (70) E.L.T. 183 (Cal.), wherein it was observed :

'It does not need the citation of any authority to hold that excise duty is payable on manufacture and a process is not manufacture if it does not change the character of the goods manufactured. Putting the brand name on specified goods does not change the goods and cannot amount to manufacture. With respect I adopt the reasoning of the Division Bench of the Bombay High Court in Bush India Limited v. Union of India and Ors., 1980 (6) E.L.T. 258, that the manufacture was complete even without the brand name being put on the specified goods and that the marketing of the specified goods under the trade name made no difference as they still remain the same article irrespective of the name under which they may be sold. See also Bata India Ltd. v. Assistant Collector of Central Excise, 1978 (2) E.L.T. 211, Bapalal and Co. v. Government of India, 1981 (8) E.L.T. 581, Corona Sahu & Co. Ltd. v. Superintendent of Central Excise and Ors., 1981 (8) E.L.T. 730, Union of India v. Cibatul Ltd., 1985 (22) E.L.T. 302 and the Joint Secretary, Government of India v. Food Specialities Ltd., 1985 (22) E.L.T. 324.

The putting of brand name therefore is not a Material factor for imposing excise duty. Apart from the judicial decisions on the point, Explanation IV to paragraph 6 of the earlier Notification clearly indicates that the putting of brand name of the large scale unit would not mean that the small scale industrial unit was not the manufacturer of the goods. Explanation IV has not in fact been amended by the impugned notification. Therefore a mere adding of brand name is an irrelevant consideration as far as the excise duty is concerned.

Therefore having regard to the settled legal position even if a small scale industrial unit like the petitioner, affixed the brand name of the large scale unit, the manufacturer would continue to be that of the small scale industry and the incidence of excise duty could be avoided by the large scale unit, by requiring the Small Industrial unit to produce specified goods without the brand name and then putting on the brand name itself and the large scale unit would, even under the impugned notification, reap the benefit of the exemption under the earlier notification. The distinction between the two classes of Small Scale Industries cannot therefore be justified with reference to the first object of the impugned notification.

In my view the distinction between the two classes of Small Scale Industries cannot be justified even with reference to the second objective, viz. to protect Small Scale Industries from competition with large scale units.

Whether or not the brand name is stipulated to be added to the goods by the large scale unit as part of its specification or service to be rendered by the Small Scale Industry to the large scale unit would not stop the Small Scale Industry from manufacturing and selling the specified goods in the open market. There would be no question of competition with 'big industries' as the big industry, far from being a competitor would be small industry's largest creditor and customer. The argument, appears to be that small scale unit selling its product with its own brand name and a big large scale unit selling goods purchased from the petitioner under its own brand name would result in the small scale industry not being able to sell its own product under its own brand name. This stand is indefensible. The distinction under the impugned notification is not based upon the supply of goods to large scale units and others but on the fixing of Trade Mark brand name alone. So under

the impugned notification a large scale unit could purchase the specified goods from a small scale unit without its brand name, and without bearing the burden of excise duty and subsequently put on its own brand name and sell the product of the small scale industry under its brand name. Thus under the impugned notification the competition would still be there.'

13. We are of the view that the conclusions arrived at by the learned Single Judge of Calcutta High Court are based on correct enunciation of the equality clause enshrined in Article 14 of the [Constitution of India](#). Although Article 14 above discrimination, but it does not rule out classification on rational basis. But if the classification is based on rational consideration having nexus with the object sought to be achieved, it cannot be subject matter of judicial scrutiny, but where the classification has no nexus with object sought to be achieved, the Courts would intervene to enforce the mandate of the Constitution.

14. In the present case we find that one class of Small Scale Industry which manufactures goods and sells it in the open market or to the purchaser, who affixes into the goods, its brand name is exempted from the Excise duty, upto the tune of Rs. 20,00,000/- in accordance with the Notification dated 1-3-1986. But the other of Small Industry, who after manufacture, of the goods affixes on it the brand name of the purchaser, under an agreement with the purchaser, such a class of Small Scale Industry, would not be entitled for the exemption. The said classification is not based on any rational principle and the objects sought to be achieved by the Notification. We are of the view that ignoring the Notification No. 223/87-C.E., dated 22-9-1987, which suffers from vice of discrimination and arbitrariness, the petitioners are entitled to the benefit of Notification No. 175/86-C.E., dated 1-3-1986.

15. In view of what we have stated herein above, the writ petition succeeds. A writ in the nature of mandamus commanding the opposite parties to accord to the petitioners the benefit of the Notification No. 175/86, dated 1-3-1986, is issued. The order of this Court dated 9-12-1987 directing the petitioners to furnish bank guarantee for the amount of excise duty payable by them on the clearance of the goods with the Assistant Collector Central Excise, Ghaziabad stands discharged.

