British India Corporation Ltd.

Vs

Collector of Central Excise

Petition No. 94 of 1955

(J. L. Kapur, A. K. Sarkar, Raghuvar Dayal, S. K. Das, M. Hidaytullah JJ)

20.08.1962

JUDGMENT

HIDAYATULLAH, J. -

This is a petition under Art. 32 of the Constitution challenging the imposition of Excise Duty on the petitioner by virtue of item No. 17 "Footwear" of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) with effect from February 28, 1954, and the calculation of the duty ad valorem by including in the price, charges for freight, packing and distribution.

The petitioner, the British India corporation Ltd. is a public limited company which was formed to take-over other companies and to amalgamate them. Among the companies which the petitioner took over were Cooper Allan & Company Ltd., and the North West Tannery Company Ltd., both at Kanpur. These two Companies manufacture shoes and other leather goods and operate as a single unit manufacturing the well-known brand of "F L E X" shoes. As a result of the financial proposals of the Central Government for the financial year 1952-55, a bill (No. 9 of 1954) was introduced in parliament on February 27, 1954. Under cl. 8 of the Bill foot-wear were proposed to be taxed at 10% ad valorem if produced in any factory as defined in the factories Act, 1948 (63 of 1948). When the Finance Act, 1954 (17 of 1954) was enacted, the Central Excises and Salt Act, 1954, was amended by the inclusion of item 17 in the Schedule, though in a slightly different form. The item as finally enacted read as follows :-

> "17. FOOTWEAR, produced in any factory including the precints thereof whereon fifty or more workers are working or were working on any day of the preceding twelve months, and in any part of which manufacturing process is being carried on with the aid of power or is ordinarily so carried on, the total equivalent of such power exceeding two horse-power.
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> #"Footwear" includes all varieties of footwear, Ten percentwhether known as boots shoes, sandals, chappals, "ad valorem"or by any other name."##

Under the provisions of the Provisional Collection of Taxes Act, 1931, (XVI of 1931), the duty was leviable from February 28, 1954, by virtue of a declaration in the Bill to that effect. On the preceding day the Superintendent of Central Excise, Kanpur, deputed and Inspector of his department to obtain from the petitioner a declaration of all stock of footwear and requested that the Inspector be permitted to verify the stocks with a view to levying the Excise Duty on and from February 28, 1954. As a result of the imposition of Excise Duty on footwear the petitioner was required to pay during the remaining ten months of 1954 as a sum of Rs. 9,47,630/- as Excise Duty.

The petitioner produces in the two units above-named, footwear for sale to the public and for supplies to the Government for the use of the Army and the Police. The petitioner contends that though the Excise Duty paid by it was capable of being passed on to the consumer, it could not include it in the price at which shoes were sold to the public because of heavy competition by those free from such duty, though it did include the Excise Duty in the price of the footwear supplied to Government. Thus Rs. 2 lacs odd were passed on to Government but Rs. 7 lacs odd were borne by the Company itself. The petitioner contended before the Collector of Central Excise, Allahabad, that the calculation of the duty ad valorem should not be based on price including freight, packing and distribution charges paid to it by its distributors in the outlying parts of India. This contention of the petitioner was not accepted by the Collector. The petitioner then took an appeal to the Central Board of Revenue but before the appeal could be disposed of, the petitioner filed this petition under Art. 32 of the Constitution praying for writ or writs to quash the order of the Collector of Central Excise, Allahabad, and writ or writs or prohibit Union Government. The Central Board of Revenue and the Collector and Superintendent of Central Excise from enforcing the provisions of item 17 against petitioner and collecting the Excise Duty therein levied.

According to the petitioner, a distinction has been made in Item 17 above-quoted between manufacturers of footwear employing more than 50 workers or carrying on the manufacturing process with the aid of power exceeding 2 H.P. and other manufactures. According to the petitioner this amounts to discrimination because there is no reasonable basis for differentiating between manufacturers on the basis of number of workers or the employment of power above 2 H.P. The petitioner contends that the essentials of the manufacture of footwear are the same whether one employs 50 or more workers or less. The larger number of workers is merely needed because the out-turn has to be greater but the number does not change the nature of the operations or the method of production. Similarly, the need for than 2 H.P. arises if a larger number of mechanical units have to be worked and there is no essential difference between a large manufacturer and a small manufacturer by reason of the employment of more power or less. It is, therefore, contended that the imposition of Excise Duty on bigger manufacturers creats a discrimination in the trade which is neither just nor discernible and amounts to a violation of Art. 14 of the Constitution. The levy of the Excise Duty in such circumstances is said to be both illegal and unconstitutional.

As a corrolary to this it is contended that the petitioner, which was already carrying on its business at a loss in view of the competition, is now further handicapped by having to bear a heavy Excise Duty which it cannot pass on to the consumer due to the competition by those not paying the duty and is likely to go out of its business and that the levy of the Excise Duty in these circumstances amounts to a breach also to Art. 19(1)(f) and (g) and 31 of the Constitution.

It is further contended that the duty ad valorem ought to be calculated on the ex-factory price and not on the price charged to the distributors which includes within itself the cost of packing and charges for freight and distribution commission. It is contended that this is an error apparent on the face of the order of the Collector of Excise and the order deserves to be quashed by the issue of writ of certiorari or other appropriate writ.

Lastly, it is contended that the Finance Act, 1954, received the assent of the president of April 27, 1954, and must be deemed to have become law from that date. The collection of Excise Duty from March, 1954, before the Finance Bill became law, is said to be illegal. We shall deal only briefly with these arguments as most of them have by now been considered and decided in other cases of this Court.

The contention that this duty is does not amount to a duty of excise because it cannot be passed on by the petitioner to the consumer was not raised before us. It was mentioned in the petition. An Excise Duty is a duty on production and though according to the economists, it is an indirect tax capable of being passed on to the consumer as part of the price yet the mere passing on the duty is not its essential characteristic. Even if borne by the producer or manufacturer it does not cease to be a duty of excise. The nature of such a duty was explained in the very first case of the Federal Court and subsequently in others of the Federal Court, the Privy Council and this Court, but this ground continues to be taken and we are surprised that it was raised again.

The contentions that the duty could not be collected before the passing of the Finance Act, 1954, has been the subject of an elaborate discussion in the recently decided case of this Court, M/s. Chotabhai Jethabhai Patel and Co. vs. Union of India [(1962) Supp. 2 S.C.R. I.]. It is conceded that in view of the above decision the point is no longer open.

It is also conceded that the question whether in calculating the duty advalorem, the Collector of Excise was justified in including in the price the cost of packing, charges for freight an commission for distribution, or not, is a matter for the decision of the authorities constituted under the Act subject to such appeals and revisions as might lie but not a matter for consideration directly under Art. 32 of the constitution, in view of the recent decision of this Court in Smt. Ujjam Bai vs. State of U.P. (Civil Misc. Petition No. 79 of 1959) decided on April 10, 1962. It may be pointed out that the present petition was filed at a time when the appeal before the Board of Revenue was pending and there was a further right of revision of the Central Government.

This leaves over for consideration the challenge under Art. 14, 19, and 31 of the constitution. The argument under each of these Articles is based on precisely the same facts viewed from different angles. It is contended that there is a discrimination between big manufacturers of footwear and small manufacturers which is not based on any differential. This discrimination, it is said, leads to the imposition of a heavy tax on the big manufacturers with a corresponding exemption in favour of the small manufacturers giving rise to a competition sufficient to put the big manufacturers out of the market. The tax being illegal the levy amounts to a confiscation of the property of the petitioner. It will thus be seen that the imposition of the duty is first challenged Art. 14 as a discrimination, next it is challenged under Article 19 as a deprivation of the right to acquire, hold and dispose of property or to carry on a business or trade and lastly the collection of duty is characterised as a confiscation of property without the authority of law under Art. 31.

The arguments suffers from a fundamental fallacy in that it assumes that there can be no classification of manufacturers on the basis of the number of workers or the employment of power above a particular horse-power. Manufacturers who employ 50 or more workers can be said to form a well-defined class. Manufacturers whose manufacturing process is being carried on with the aid of power exceeding 2 H.P. are also a well-defined class. Legislation of this type depending upon the number of workers or the extent of power employed, is frequently to be found. The most obvious example is the Factories Act which defines a factory with reference to the employment of a certain number of workers or the employment of power. The contention that size makes no difference is not valid. It is well-known that the bigger manufactures are able to effect economics in their manufacturing process and their out-turn being both large and rapid they are able to undersell small manufacturers. If this were not so mass production would lose all its advantages. No doubt the manufacturers are now required to bear burdens which previously did not exist, like bonus, expenses on labour welfare etc. but still the manufacturers, provided the business is well run, can by mass production offer the same commodity at a competitive price as against small manufacturers and bear

the burden as well. Therefore, in imposing the Excise Duty, there was a definite desire to make an exemption in favour of the small manufacturer who is unable to pay the duty as easily, if at all, as the big manufacturer. Such a classification in the interests of co-operative societies, cottage industries and small manufactures has often to be made to give an impetus to them and save them from annihilation in competition with large industry. It has never been successfully assailed on the ground of discrimination. Recently, this Court in the Orient Weaving Mills (P) Ltd. v. The Union of India [(1962) Supp. 3 S.C.R. 481.] considered a similar argument in relation to an exemption granted to societies working a few looms on co-operative basis as against big companies working hundreds of looms. The exemption was held to be constitutional and the classification of co-operative societies was held to be reasonable. A similar consideration applies in the present case, where the exemption operates in respect of very small manufacturers employing not more than 50 workers and carrying on their manufacturing process with power not in excess of 2 H.P. This affords a protection to small concerns who, if they were made to pay the duty, would have to go out of business. In our judgment the Schedule which is characterised as discriminative is based upon a reasonable classification and is validity enacted. If the law is held to be valid the attack under Arts. 19 and 31 must also fail.

In view of what we have said above the petition must fail. It will be dismissed with costs.

Petition dismissed.

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