Coromandel Fertilizers Ltd.

Vs

Union of India and Others

Civil Appeal Nos. 1373 to 1376 of 1976

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Civil Appeals Nos. 683-686, 1062-1064 of 1977 and 885 to 890 of 1978

(P. N. Bhagwati, Amarendra Nath Sen, R. S. Pathak JJ)

17.08.1984

JUDGMENT

AMARENDRA NATH SEN, J. –

1. These appeals arise out of the writ petitions filed by the appellant as the petitioners in the High Court of Judicature, Andhra Pradesh at Hyderabad. The High Court disposed of all the writ petitions by one common judgment. For reasons stated in the judgment the High Court dismissed all the writ petitions. This Court granted special leave to the appellant to file appeals against the dismissal of the writ petitions by the High Court and also directed some of the special leave petitions to be heard along with the appeals. As all the writ petitions were dismissed by one common judgment delivered by the High Court, we propose to dispose of all these matters by this judgment.

2. Two questions fall for determination in these appeals. The first question is whether on a true consideration of the Notification 25/70 dated March 1, 1970 issued by the Government of India, the appellant is entitled to claim exemption from the imposition of excise duty on fertilizers which, according to the appellant, are mixed fertilizers manufactured by the appellant. The other question is whether the amount of commission paid by the appellant to its selling agents should be deducted as trade allowance in computing the value of the goods for assessment of excise duty.

3. It may be noted that some of these appeals are concerned with the first question, namely the exemption under the Notification 25/70 dated March 1, 1970, and in the remaining appeals the question of exclusion of the commission paid to the selling agent is involved. Same questions are involved in the special leave petitions.

4. The broad facts about which there does not appear to be any serious dispute may be briefly noticed.

5. The appellant carries on business as manufacturers of diverse kinds of fertilizers at the factory situated at Vishakhapatnam. The appellant considered that it would be advisable to entrust the sale of its products to organisations with experience in the sale of fertilizers, instead of the appellant

itself organising sales of the fertilizers manufactured. Accordingly, the appellant appointed M/s E.I.D. Perry Limited and M/s Rallis India Ltd., as their selling agents and entered into agreements with them for sale of fertilizers manufactured by the appellant on terms and conditions mentioned in the agreements entered into by the appellant with the selling agents. Under the terms of the agreements the selling agents were appointed by the appellant and the selling agents were entrusted with the task of arranging the sale of the fertilizers for and on behalf of the appellant in consideration of receiving a commission of 3 1/2 per cent. calculated on the net realisable value, i.e., upon the gross sales realisation less excise duty and sales tax, freight expenses and discount and rebate. This commission is the remuneration paid by the appellant to the selling agents for discharging the obligation of the selling agents under the agreement of selling the fertilizers. In the absence of any such agreement the appellant would have been obliged to carry on the activity of organising the sales of its products on its own.

6. The Central Government issued a notification bearing No. 25/70 dated March 1, 1970 which reads as follows :

> In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts mixed fertilizers, falling under Item 14-HH of the first Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) manufactured with the aid of power, from two or more fertilizers on all of which the appropriate amount of the duty of excise or, as the case may be, the additional duty under Section 2-A of the Indian Tariff Act, 1934 (32 of 1934), has already been paid, from the whole of the duty of excise leviable thereon.
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> Explanation. - For the purpose of this notification, the term 'mixed fertilizers' means mixtures of fertilizers containing more than one nutrient (nitrogen, phosphate or potash) and does not include single nutrient fertilizers like super phosphate manufactured from rock phosphate.

7. On the basis of this notification the appellant had asked for exemption from the imposition of excise duty on fertilizers manufactured by it, claiming such fertilizers to be mixed fertilizers within the meaning of this notification. The appellant had also claimed deduction of the selling agency commission paid by the appellant to its selling agents for sale of the fertilizers manufactured by the appellant as trade discount in the matter of computation of excise duty payable on the fertilizers manufactured by the appellant. The claims on both these accounts were disallowed by the Assistant Collector whose decisions were upheld by the Appellate Collector. Aggrieved by the decisions of the authorities concerned, the appellant filed writ petitions in the High Court. As we have earlier observed, the High Court by its common judgment refused to entertain the claims of the appellant under these two heads and dismissed all the writ petitions filed by the appellant in the High Court. Against the decision and judgment of the High Court disallowing these claims, these appeals with special leave granted by this Court have been filed by the appellant.

8. The case of the appellant in support of its claim for exemption under the notification may be indicated. The claim is made in respect of the fertilizer known as 'Gromor N.P.K. 14-35-14' which, according to the appellant, is a mixed fertilizer qualifying for relief under the notification. The petitioner makes the case that Gromor N.P.K. 14-35-14 is manufactured with the aid of power mixing two imported fertilizers, namely, rock phosphate and muriate of potash on which the appellant had paid proper duty. The manufacturing process of the said fertilizer consists of treating rock phosphate with sulphuric acid which produces phosphoric acid. When such phosphoric acid is

treated with ammonia, mono and di-ammonium phosphate in slurry form comes into existence. To this slurry, muriate of potash is added. Thereafter the said mixed fertilizer comes into existence. During the said process, a small quantity of ammonium sulphate is formed; but it is neither possible to separate it nor it is possible to use it, as it is mixed with the other ingredients. According to the appellant, mono and di-ammonium phosphate in slurry form cannot be used as fertilizers for the reason that they are highly concentrated and in slurry form. The contention is that since Gromor N.P.K. 14-35-14 is manufactured with the aid of power from the two fertilizers, it qualifies for exemption under the notification. In support of the contention that the fertilizer Gromor N.P.K. 14-35-14 comes within the scope of the exemption under the notification, Mr Setalvad, the learned counsel appearing on behalf of the appellant, has argued that on a plain reading of the language used in the notification this fertilizer clearly comes within the ambit of the notification and satisfies all the requirements laid down in the notification for exemption under the said notification. Mr Setalvad argues that the explanation added to the notification cannot control or in any way affect the plain language used in the notification. It is his argument that taxing statutes and rules and notifications issued thereunder will have to be construed and understood with reference to the language used therein and there is no scope for speculation about the true intention or for trying to gather the true intention otherwise than by interpreting the language used therein. Mr Setalvad has further commented that the trade notice issued by the Government in November 1974, purporting to qualify the notification by seeking to lay down that the exemption only applied to physical mixture of duty paid fertilizers and not to mixed fertilizer produced as a result of chemical reaction, is of no material consequence. It is his comment that the exemption granted under the notification cannot in any way be curtailed or taken away or otherwise affected by the issue of a trade notice purporting to qualify the meaning and scope of the notification and the right of any party entitled to the benefit under the notification cannot be taken away by any purported clarification of the notification without amending the notification itself.

9. It may be noted that before the High Court the very same contention was raised and the very same arguments were advanced. The High Court has elaborately and very carefully considered the case made for exemption under the notification and the arguments advanced in support thereof. On a careful and proper consideration of the contention raised and the arguments advanced, the High Court, in our view, rightly disallowed the claim for exemption and rejected the arguments advanced. While declining to entertain the claim in this respect the High Court held :

> What is exempted is 'mixed fertilizers' falling under Item 14-HH of the First Schedule to the Act. Item 14-HH refers to "fertilizers, all sorts, but excluding natural, animal or vegetable fertilizers when not chemically treated". It is, therefore, manifest that the notification is concerned with only 'fertilizers' and not with any other commodity. This idea is further demonstrated from the word 'manufactured....from two or more fertilizers'. So, it follows that a mixed fertilizers, in order to win the exemption from duty, should be one which has been manufactured from two or more fertilizers. when the notification once again used the word 'fertilizers' its intention to emphasise that the exemption would be available only to mixtures of fertilizers becomes patent. This meaning is further made clearer by the explanation which gives the meaning of the term 'mixed fertilizers' as 'mixtures of fertilizers'. Therefore, there cannot be any hesitation to understand the meaning of the notification as purporting to grant exemption only to mixed fertilizers manufactured from two or more fertilizers. It is not its purpose to grant exemption to mixtures of fertilizers and other commodities as well.

Shri Setalvad for the petitioner Company strongly urged that if two or more fertilizers are used in the manufacture of mixed fertilizers, such fertilizers would be entitled to exemption despite the use of other commodities like sulphuric acid and ammonia. According to him, what all the notification requires is the use of two or more fertilizers in the manufacture of mixed fertilizers and it does not matter if, in addition to two or more fertilizers, some other commodities are also used. He also pointed out that had the Government of India wanted to limit the exemption in the manner in which the learned Government Pleader construed, then it would have used the word 'only' before 'two or more fertilizers'. Since that word does not occur, the exemption would be available even if other commodities are used. If that were the intention of the notification, then it could have easily said 'manufactured from two or more fertilizers or other substance's. Not only it omitted to say that, but on the other hand the notification throughout emphasises on the use of fertilizers and fertilizers alone. The absence of the word 'only' before 'two or more fertilizers' does not stand in the way of understanding the real intention of the Government of India. To our mind, consequently, the true and natural meaning of the notification is that the exemption is available to mixed fertilizers alone. If other commodities are also used in manufacturing the mixed fertilizers, then the said mixed fertilizer walks out of the exemption.

10. The High Court has further observed :

We have already noted the averments in paragraph 8 of the writ petition describing the process of manufacture of N.P.K. 14-35-14 and the fertilizers and commodities used therein. The petitioner company itself stated that N.P.K. 14-35-14 is manufactured by mixing with the aid of power from two imported fertilizers viz. rock phosphate and muriate of potash. The manufacturing process, according to the averments in the writ petitions consists of treating rock phosphate with sulphuric acid, which treatment produces phosphoric acid. The phosphoric acid that is thus produced is further treated with ammonia as a consequence of which mono and di-ammonium phosphate in slurry form comes into existence. Let us not think at the present of the phosphoric acid and mono and di-ammonium phosphate which come into existence in the process of manufacture. Let us concentrate on the basic commodities used in the manufacture of this fertilizer. From the averments in paragraph 8 of the writ petition it is obvious that not only the two fertilizers i.e., rock phosphate and muriate of potash are used, but also sulphuric acid and ammonia are used. The sulphuric acid and ammonia used in the manufacture of N.P.K. 14-35-14 are not created it the process of manufacture. They are brought from outside and utilised in the process of manufacture just like the two fertilizers rock phosphate and muriate of potash. This much is evident from paragraph 8 of the writ petition.

Undoubtedly sulphuric acid is an acid. That can be seen not only from the very name it has, but also from the list of acids given in Item 14-G of the First schedule under the head 'acids. Ammonia, as can be seen from Item 14-H which is under the heading 'gases', is a gas. Sulphuric acid and ammonia are independent commodities which are by themselves exigible to excise duty. In contrast, when we come to Item 14-HH in the First Schedule, it deals only with 'fertilizers'. It purports to deal with fertilizers of all sorts excluding natural, animal or vegetable fertilizers, when not chemically treated. It gives a number of commodities which are treated, under law, as fertilizers. Entry 3 of Item 14-HH contains the words which the notification used. It deals with mixed fertilizers manufactured with the aid of power from two or more fertilizers. When in the Act itself this distinction between fertilizers, including mixed fertilizers, on one hand and acids like sulphuric acid and gases like ammonia is pointed out and maintained, it is futile to argue that Notification 25/70 grants exemption to mixed fertilizers which are manufactured from two or more fertilizers and acids and gases. To say that is only to introduce something which is not in the notification. We are, therefore, of the view that Gromor N.P.K. 14-35-14 is not within the exemption given under the

notification.

11. We entirely agree with the views expressed by the High Court. We may also note that the High Court has further aptly pointed out :

> The process of manufacture of N.P.K. 14-35-14, bringing into existence several other substances, and once again utilising them in the process, treating one substance with the other, cannot be said to be mixture of fertilizers as postulated by the notification. So, it will have to be held that N.P.K. 14-35-14 is not entitled to exemption under Notification 25/70.

12. It has to be borne in mind that the Explanation added to the notification also forms a part of the notification itself. The notification has to be construed as a whole and in properly interpreting the notification, the Explanation which has been added to the notification cannot be ignored. The question as to whether the Explanation seeks to control the operation or the effect of the notification is indeed immaterial, as the Explanation purports neither to control nor to alter but only seeks to explain. What the Explanation provides is not in any way in conflict with or contrary to what the notification provides.

13. Mr Setalvad made a grievance that the authorities concerned had allowed the benefit of the notification under similar circumstances to a rival company. If the grievance of the appellant is true, the appellant may not doubt have reasons to feel sore about it. We have, however, to point out that the grievance of the appellant even if it is well founded, does not entitle the appellant to claim the benefit of the notification. A wrong decision in favour of any particular party does not entitle any other party claim the benefit on the basis of the wrong decision. We are, therefore, clearly of the opinion that the fertilizer manufactured by the appellant in respect of which claim for exemption under the notification is made is not a mixed fertilizer within the meaning and scope of the notification and we have no hesitation in rejecting the case of the appellant, expressing our agreement with the reasons stated in the judgment of the High Court.

14. The other question raised on behalf of the appellant relates to the appellant's claim for deduction of the commission paid to the selling agents from the assessable value of the goods manufactured in the matter of the computation of the excise duty. The agreements which the appellant had with the selling agents clearly go to indicate that the selling agents who were being appointed were the agents of the appellant for sale of fertilizers on behalf of the appellant. The agreement clearly provides that the selling agents will secure orders on behalf of the appellant, execute such orders on behalf of the appellant and will also remain liable to the appellant for realisation of the price of goods sold to various parties; and for such services rendered by the selling agents, the selling agents will be entitled to the commission stipulated in the agreement between the parties. The agreement is essentially an agency agreement and the selling agents were being appointed as agents for sale and distribution of the product of the appellant on the basis of the terms and conditions stipulated in the agreement. Clause 2(a) of the agreement dated April 1, 1971 with M/s Rallis India Limited which deals with the question of appointment clearly states : "Coromandel hereby appoints the agent as one of Coromandel Sales Agents for sale and distribution on behalf of Coromandel of the product in the territory.....".

15. The commission which is paid by the appellant to the selling agents is for services rendered by them as such agents. Such commission paid to agents for services rendered cannot be considered to be in the nature of any trade discount which may qualify for deduction in determining the assessable

value of the goods for the purpose of imposition of excise duty - under the Central Excises and Salt Act, 1944.

16. The decision of this Court in the case of M.C.V.S. Arunachala Nadar v. State of Madras (1959 Supp 1 SCR 92 : AIR 1959 SC 300 : 1959 SCJ 297) and the decision of the Court of Appeal in England In Re Licensed Victuallers' Mutual Trading Association, Ex parte Audain ((1889) 42 Ch D 1 : 60 LT 684 : 37 WR 674 (CA)) relied on by Mr Setalvad are not of any assistance in deciding the question in the present case.

17. In the case of M.C.V.S. Arunachala Nadar v. State of Madras (1959 Supp 1 SCR 92 : AIR 1959 SC 300 : 1959 SCJ 297) this Court was concerned with the question of constitutional validity of the Madras Commercial Crops Markets Act (Madras Act XX of 1933), the rules framed thereunder and also certain notifications issued in pursuance thereof. Bye-law 25 dealt with "Trade allowance applying to the market and notified area". While considering the nature of trade allowance this Court observed at page 109 :

> What is a trade allowance ? Trade involves exchange of commodities for money, the business of buying and selling and the transaction involves the seller, the buyer, the commodity sold and the price paid for the sale. Allowance means something given as compensation, rebate or deduction. Under the section, the said deduction should be in any transaction in respect of commercial crops. The deduction may be out of the commodity or out of the price. The recipient may be the seller, the buyer or a third party. When A sells a quantity of cotton to B for a hundred rupees, B, the purchaser, may deduct one rupee from the sale price and pay ninety-nine rupees to A; he may keep that amount for himself or pay the same to C. So too, A, the seller, may purport to sell one maund of cotton but in fact deduct a small part of it, retain that part of himself or give it to C; or both A and B may fix the price of the commodity purchased at Rs 102 but the purchaser pays one rupee to C and the seller retains or pays one rupee to C; or it may be that payments have nothing to do with the price or the transaction, but both the parties pay C a specified amount as consideration for the user of the premises or for the services rendered by him. The question whether a particular payment is a trade allowance or not, depends upon the facts of each case. Firstly, it must be a deduction in any transaction in respect of commercial crops. If it is a deduction out of the price or commodity agreed to be paid or transferred, it would be a trade allowance. On the other hand, if the payment is de hors the terms of the transaction but made towards consideration for the use of the premises or services rendered, it would not be a deduction from the price or in any transaction.

18. These observations were made in the context of the provisions of the Act and while construing the same. They are of no assistance in considering the question raised in the present case. It may further be noticed that in the instant case, there is no sale by the appellant to the agents to whom the commission is paid by way of remuneration for services rendered as agents of the appellant.

19. In the case of Re Licensed Victuallers' Mutual Trading Association. Ex parte Audain ((1989) 42 Ch D 1 : 60 LT 684 : 37 WR 674 (CA)), the Court of Appeal in England on a construction of the agreement observed that the word discount in the agreement must be construed as commission so that the agreement was not one to issue shares at a discount.

20. It is possible that in a given case, payment of what is termed as commission may, depending on

the facts and circumstances of the case be in the nature of trade allowance. But every kind of trade allowance does not necessarily qualify for deduction in assessment of excise duty. Commission paid to an agent for services, rendered by him in the matter of sale of the product of the appellant on behalf of the appellant on the basis of agreement the appellant had with its selling agents cannot be considered to be in the nature of such trade discounts as may qualify for deduction in the computation of the assessable value of the goods of the purpose of levy of excise duty. The commission paid to the selling agents is not a trade discount given either to the wholesale buyer or to the retail buyer. It is not given to the consumer or the trader. The commission paid on the basis of the agreement to the selling agent by way of remuneration for services rendered by the agent cannot by any process of reasoning be said to be trade discount payable or paid at the time of removal of the goods from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production. The amount of commission paid to the selling agents, therefore, is not trade discount within the meaning of the Explanation to Section 4 of the Act and does not qualify for any deduction. In our view the High Court was clearly justified in rejecting this claim of the appellant.

21. Both the claims made by the appellant, therefore, fail and have been rightly rejected by the High Court. We, accordingly, dismiss the appeals. We, however, propose to make no order as to costs.

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