

(1984) 04 BOM CK 0022

In the Bombay High Court

Case No : Writ Petition No's. 1618, 1628, 1629, 1680 of 1984

Ashok Leyland Limited

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 04-04-1984

Acts Referred:

Central Excise Rules, 1944 — Rule 173C

Central Excises and Salt Act, 1944 — Section 11A, 4, 4(1), 4(2), 4(4)

Citation : (1986) 26 ELT 676

Hon'ble Judges : Qazi, J;Khatri, J

Bench : Division Bench

Judgement

Khatri, J.—By these four writ petitions, Ashok Leyland Limited (for short the petitioners) challenge four different orders passed by Respondent No. 2 Assistant Collector, Central Excise, Nagpur (for short, the respondent) u/s 11A of the Central Excise and Salt Act, 1944, (hereafter the Act) directing the petitioners to pay short levied excise duty on the motor vehicles manufactured by them at their Bhandra factory.

2. The material facts lie within a narrow compass. The petitioners are manufacturers of medium and heavy duty motor vehicles and have their factories at Ennore and Hosur in Tamil Nadu, at Alwar in Rajasthan and at Bhandra in Maharashtra. These motor vehicles are liable to excise duty under Tariff Item 34 of the first schedule to the Act. The respondent is the authority concerned with levy and collection of duty in regard to the Bhandra factory. According to the petitioners they have fixed ex-factory price for these goods and excise duty is payable by them u/s 4(1)(a) of the Act on the ex-factory wholesale cash price. Their case is that they have appointed 22 main dealers all over India and 99 per cent of the sales are made to these dealers directly at the factory gate and only 1 per cent to the consumers in retail. The ex-factory price as shown in the price list furnished by the petitioners to the department under Rule 173(c) does not include the three items which the petitioners terms as delivery charges transit insurance charges" and commission (margin). It is common ground that the

Superintendent Central Excise, issued show cause notices to the petitioners u/s 11A of the Act, claiming that these items also ought to have been included in the assessable value of the goods for levying the correct excise duty. The petitioners submit that these items are not liable to be included in the assessable value of the goods, in view of the decision of the Supreme Court reported in 1983 E.L.T. 1896 (Supreme Court) Union of India v. Bombay Tyres International Limited.

3. So far as the item of commission (margin) is concerned, the petitioners explain that this item does not form part of the wholesale price they charge from their main dealers. According to them the main dealers are allowed to mark up the commission by way of margin such that in public interest the maximum retail price of the vehicles throughout India is maintained at the same level and this commission forms part of the selling profit of the main dealers. It is common ground that on the basis of a similar show cause notice issued by the Department in respect of vehicles manufactured by the petitioners in their Tamilnadu factories, the matter went up to the Madras High Court in Writ Petition No. 476 of 1978. By a judgment dated 28th September 1981, a learned Single Judge of that High Court upheld the stand of the petitioners that their main dealers were not related persons under the Act and that there was no scope for treating the commission as a component of the assessable value. This decision was confirmed in Letters Patent Appeal by that High Court in December 1982. The Supreme Court also dismissed the department's petition for Special leave to appeal in November 1983. The petitioners claim that this decision is binding on the present respondent also, inasmuch as identical terms of agreement between the petitioners and their main dealers on the basis of which the decision was rendered, apply to Bhandra factory also.

4. It is not in dispute that in response to show cause notice, the petitioners brought to the notice of the respondent all the aforesaid facts, including the decisions of the Supreme Court and the Madras High Court. By the four impugned orders the respondent held that the petitioners were not entitled to exclude any of the three items from the assessable value in terms of the decision of the Supreme Court. The respondent also did not accept the petitioners claim based on the Madras High Court decision. In the result, he held that the petitioners had been short-levied to the extent of (a) Rs. 17,988.83 for the period from 1st July 1982 to 31st August, 1982 (b) Rs. 1,68,575.55 for the period 20th July, 1982 to the 30th September, 1982 (c) Rs. 15,62,529.44 for the period, 1st October, 1982 to 31st August 1983 and (d) Rs. 4,90,224.20 for the period 1st September, 1983 to 31st January 1984 and directed them to pay these items. These are the order now being challenged in this bunch of petitions. As the petitions raise common questions of law and fact, they are being disposed of by this common judgment.

5. The respondent has resisted the petitions on a number of grounds which do not find place in the impugned orders. We shall have occasion to refer to this aspect a little later. He has raised a preliminary objection to the maintainability of

the writ petitions on the ground that the petitioners have not exhausted the remedies available to them under the Act before approaching this Court. On merits Shri Natu who appears for him has resisted the petitioners claim on the following grounds :

- (i) The sales in question do not generally fall under the substantive part of Section 4(1)(a) proper but under proviso (iii) thereto;
- (ii) "Delivery charges" are distinct from the cost of transportation from the factory gate to the place of delivery as contemplated by Section 4(2) of the Act. In fact, Section 4(2) is not applicable to the sales in question, inasmuch as according to the petitioners price at the factory gate is known to them;
- (iii) For the same reasons as given in item (ii) transit insurance will also form part of the assessable value;
- (iv) The commission recovered by the petitioners main dealers from their customers is over and above the dealers ex-factory price and because it is paid by the buyers it forms part of the assessable value and cannot be treated as "trade discount".
- (v) The petitioners cannot press in aid the Madras High Court judgment for Bhandara transactions and
- (vi) No interference by this Court is called for on the facts and circumstances of the present cases which involve high stakes to the extent of Rs. 22 lakhs.

6. We shall first of all dispose of Shri Natu's challenge to the maintainability of the present writ petitioners. We are conscious of the position that Chapter VI-A of the Act which was brought into force in October 1982 provides for a complete machinery by way of appeals review and reference against impugned orders. Shri Hidayatullah who appears for the petitioners, urges that it would have been open to this Court to dismiss the petitions in limine at the admission stage only but not thereafter. Having admitted them and heard arguments of both sides on merits for a number of days, Shri Hidayatullah submits it will not be meet to throw out the petitions at their fag end on a technical ground. Shri Natu has cited a decision of the Supreme Court *Titagarh Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , *Titagarh Paper Mills v. State of Orissa* and a decision of Allahabad High Court reported in 1984 E.L.T. 1 (Allahabad) *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, *Hirdaya Narayan Vs. Income Tax Officer, Bareilly* and a Division Bench decisions of this Court in Writ Petition No. 174/B/8, dated 2nd August 1984 *Laukoplast (India) Pvt. Ltd. v. Union of India and others* 1983 ELT 2106.

7. On going through the cases cited by the two learned counsel we find that the Supreme Court has observed in *Hirdaya Narayan's* case that where a High Court entertains a petition and gives hearing on merits, it is not open to it to eventually reject it on the ground that statutory remedy was not availed of by the petitioner. Thus ruling has been followed by this Court in *Laukoplast's* case. As against this

in both the decisions relied upon by Shri Natu we find that the writ petitions were dismissed in limine by the High Courts concerned on the ground that the Act provides a complete machinery to challenge the impugned orders. Here we may point out that Shri Natu raised the preliminary objection only after the arguments of the petitioners were concluded in their entirety indeed he himself had also covered the entire ground of the respondents on merits. In the circumstances, we hold that it is now too late in the day of Shri Natu to press for dismissal of the writ petitions on the ground urged by him. We overrule this particular objection of the respondent and proceed to decide the case on merits.

8. Before going to the merits we would like to clear the pitch on one rather unusual aspect. A perusal of the impugned orders will show that the respondent, while reaching the finding that the petitioners are liable to pay the excise duty on the three items under consideration has purported to rely on the Supreme Court decision in *Bombay Tyres International*. The petitioners also rely on this very decision. According to the interpretation put by the respondent on this decision the petitioners are not entitled to deduct delivery charges and transit insurance, which according to him are distinct from transport charges. So far as the petitioners claim that the commission does not form part of assessable value is concerned, the respondent has not given any reasons for rejecting this submission in three out of the four impugned orders. It is only in one order (writ petition no. 1680 of 1984) that he has observed that the Madras Judgment does not deal with the question whether the main dealers of the petitioners fall within the first part of the definition of related person as obtaining in Section 4(4)(c) of the Act. Having made this observation the respondent did not proceed to record any finding whether in his view the main dealers fall within the aforesaid first part of the definition. He casually observes that in terms of the Supreme Court decision in *Bombay Tyres case*, the commission is also not deductible from the assessable value. A look at the return of the respondent and the propositions called out therefrom in paragraph 5 supra will bear out that the respondent is now frantically trying to support his orders on extraneous grounds not finding place in any of the impugned orders.

9. Shri Hidayatullah for the petitioners contends that this course sought to be adopted by Shri Natu for the respondent is not open to him. Replying on an earlier decision in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, a five-Judge, Bench has held in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned, and cannot be supplemented by fresh reasons in the shape of affidavits or otherwise. Otherwise an order which is bad in the beginning may by the time it comes to Court on account of a challenge get validated by additional grounds later brought out. Shri Hidayatullah has cited two more cases of this Court (both Division Bench decisions) where the aforesaid decision of the Supreme Court has been applied to orders passed by the statutory authorities under the Central Excise and Salt Act See 1980 E.L.T. 258

Bush (India) Ltd. v. Union of India and 1983 E.L.T. 2289 Dunlop Rubber Company v. M. V. Raghavan Ayer. Shri Natu did not profess to controvert the submission advanced by Shri Hidayatullah and in our opinion rightly. It is thus clear that the respondent is not entitled to support the impugned orders on grounds which do not figure in those orders. Resultantly we must restrict him to the reasons and grounds mentioned in his orders.

10. This takes us to the heart of the question before us, namely whether the Supreme Court decision in Bombay Tyres entitles the respondent to include the three items or any of them in the assessable value. At the outset we must make it clear that the wholesale price at the factory gate, as shown by the petitioners in their price lists does not include any of these items. It was the Superintendent Central Excise, who has ferreted out these items from the bills issued by the petitioners to their dealers. The show cause notices allege that these items should also have been added to the wholesale prices shown by the petitioners in the price lists, as according to him, the items form part of the assessable value. The correct position thus is that the petitioners never included any of these items in the ex-factory price, much less claimed their deductions; it is the Departments stand that these items should be added to the price figuring in the petitioners list furnished under rule 173(c). As it is, the department had already levied excise duty on the basis of the amounts shown in the price lists. The show cause notices now seek to make good the amount short levied on these items.

11. Section 4 of the Act, as obtaining before the amendment of 1973, and after the amendment, came for scrutiny in depth at the hands of the Supreme Court in Bombay Tyres International. The true post-amendment position under the Act has been lucidly set forth by the Supreme Court in paragraph 46 of its judgment. In substance Their Lordships have held that the price at which excisable goods are ordinarily sold by the assessee to the buyer in the course of wholesale trade, at the factory gate, is the basis for determination of the excisable value provided the buyer is not a related person within the meaning of Section 4(4)(c) of the Act and the price is the sole consideration for the same. Where the wholesale price of such goods for delivery at the factory gate is not known and the assessable value thereof is determined with reference to the wholesale price for delivery, at place other than the factory gate, the cost of transportation from the factory gate, to the place of delivery has to be excluded from such price : Section 4(2) of the Act. It is thus clear that where the wholesale price at the factory gate is known, the question of transport charges becomes entirely irrelevant. Indeed, it is the contention of Shri Natu himself that the petitioners are not entitled to press in aid the provision of Section 4(2) of the Act, because the admitted basis in these cases is that the ex-factory price is very much known to them. In these premises, it is difficult to appreciate how the respondent was justified in directing the addition of the delivery charges and the transit insurance to the amount of the ex-factory price declared by the petitioners in their price list.

12. The petitioners have clearly averred in their petitions that in the course of

their business after giving ex-factory clearances and also after clearance of payment of duty they arrange to despatch the vehicles (chassis) to their dealers as well as Regional Sales Officers for effective distribution. The cost of transport of such vehicles from the factory gate to the aforesaid distributors and the insurance during the transit, is initially paid by the petitioners and later on recovered from the respective parties. It is thus clear that these charges which the petitioners describe delivery charges and cost of insurance in transit are referred to in para 49 of the Supreme Court judgment. In other words, these items cannot legitimately form part of the assessable value determined on the basis of the wholesale price at the factory gate as contemplated by the main provision of section 4(1)(a) of the Act.

13. In a few cases where the wholesale price for delivery at the factory gate may perhaps be not known (which admittedly is not the stand set up by the respondent in his impugned orders or show cause notices), Section 4(2) will squarely apply and in that case the petitioners could not be compelled to pay the transit charges and transit insurance, as permitted u/s 4(2). We have to appreciate that the price of an article is related to its value (using this term in general sense) and several components which enrich the value and give marketability to the article in the trade, get blended into the value. The expenses incurred over such factors which contribute to the value of an article naturally go to form part of the assessable value. Needless to emphasize that the expenses incurred over transport of the goods that are already sold at the factory gate for a known price, do not contribute to the enrichment of the value as such and cannot obviously form part of the assessable value. Viewed from this angle also, these two items cannot form part of the assessable value.

14. To pick up the thread in paragraph 49 of their judgment the Supreme Court has ruled that the assessee will be entitled to deduction on account of the cost of transportation of the assessable article from the factory gate to the place or places where it is sold and that this cost of transportation will include the cost of transit insurance for such transportation. One may also see with advantage the clarification issued by the Supreme Court in this regard : 1984 (17) E.L.T. 329 Union of India v. Bombay Tyres International Pvt. Ltd. in the result, we hold that irrespective of the provision under which the excise duty is levied whether under the main provision of Section 4(1)(a) or under any of the three provisos to this clause (a), or under clause (b), the petitioner are not liable to pay the expenses incurred by them over transport and transit insurance goods from the factory gate to their eventual destination. We confess our inability to appreciate the rationale of the respondent's observations in the impugned orders that delivery charges and insurance charges adverted to by the petitioners, are distinct from the transport charges and insurance charges as contemplated by the Supreme Court in paragraph 49 of its judgment. The impugned orders are clearly unsustainable so far as these two items are concerned.

15. Now we got to the third item of commission (margin) which the petitioners

allow their main dealers to recover from their customers as part of their own (that is, main dealers) selling profits. In this connection the petitioners avered that their main dealers have been allowed to mark up the commission by way of margin so that the maximum retail price of the vehicles throughout India is maintained at the same level in public interest. The petitioners have also made it clear that the so called commission is retained by their dealers themselves for good and is not ploughed back to the petitioners in any shape.

16. We have been taken by both the learned counsels through the judgment of the Division Bench passed in appeal. After a thorough scrutiny of all the terms and conditions of the contracts between the petitioners on the one hand and their main dealers on the other, the Madras High Court has held that the relationship between the petitioners and the main dealers is not that of principal and agent but that of a seller and buyers. It has been further held that the main dealers are not related persons within the meaning of Section 4(4)(c) of the Act and that the transactions between the two parties is on principal to principal basis. Shri Vishwanathan, who is the Manager of the petitioners Company (Finance and System) has filed an affidavit on 26th March 1985 to the effect that all agreements are entered into by the Company with the main dealers at Madras Head Office only, that no agreements whatever are separately made in respect of vehicles lifted from the Bhandara factory and that the same form of agreement which came up for consideration at the hands of the Madras High Court is applicable to Bhandara transactions also. No doubt, Shri Natu vehemently opposed the petitioners request for filing this affidavit. However in the interest of justice and also because it does not cause any prejudice to the respondent on merits we have taken the affidavit on record. The respondent has also filed an additional lengthy affidavit in reply.

17. We have already observed above that in as many as three of the impugned orders the respondent has not given any reason why the Madras High Court decision which was rendered inter parties, has not been given effect to by him. In the 4th Order he has given a cursory excuse that the question whether the main dealers of the petitioners attracted the first part of the definition of the term related persons as given in Section 4(4)(c), was not considered by the Division Bench of the Madras High Court. As already observed by us, the respondent has not take pains to reach his own conclusion on this aspect. May we say that even factually the excuse given by him in his order is not correct. A perusal of the judgment of the learned Single Judge will show that he has dealt with this particular aspect. The Division Bench did not examine it again because the department themselves did not press the same presumably because there was no substance in it. It will thus be wrong for the respondent to suggest that this particular question was kept open by the Madras High Court.

18. Although the principle of Res Judicata may not strictly apply we have no doubt that the respondent was bound to follow the decision of the Madras High Court which was confirmed by the Supreme Court also. At any rate, he should

have made serious endeavour to see whether he had good justification to take a contrary view. Had it been necessary for us to reach our own independent findings we would have, on the terms of the agreement reached the same conclusions as the Madras High Court. In our view, the learned Judges have, we say this with respect, rightly relied upon the Supreme Court decision in 1978 E.L.T. 444 Atic Industries Ltd. v. Assistant Collector of Central Excise and the decision of this Court in 1981 E.L.T. 348 Amar Dye Chemicals Ltd. v. Union of India. It must be held that the relationship between the petitioners and their main dealers is that of buyer and seller, on principal to principal basis. The dealers are not petitioners agents or related persons within the meaning of either part of Section 4(4)(c) of the Act.

19. Shri Natu has placed great reliance on a decision of Andhra Pradesh High Court reported in Mopeds India Ltd. Vs. Assistant Collector, Central Excise, Nellore Division and Others, where the Court held that the dealers of the company were Distributors and related persons. The decision rests on the particular terms and conditions of the agreement in the case. These terms are materially different from those of the agreement before us. The case is decided on its own facts and is clearly distinguishable from the present one. We need not detain ourselves any longer.

20. All the propositions formulated by Shri Natu condensed in para 5 (para) stand disposed of by what we have said above. In passing we may refer to Shri Natu's submission that this Court may not grant any relief to the petitioners for the reason that the stakes involved are pretty high. We would not have perhaps paused to take note of this submission but for the repeated pains taken by Shri Natu to impress this aspect on us. We would only like to assure him that we have done our very best to understand the case of department. After all if the stakes are high indeed as they are so not only for the Department but also for the assessee. This factor will not deter us from doing our plain duty of administering even handed justice between parties whosoever they be. We leave the point here.

21. Once the main part of Section 4(1)(a) is held to be the proper basis for determination of the assessable value it automatically follows that whatever margin the main dealers (who are buyers from the petitioners) may be permitted to charge to their customers, will form part of their selling profits. This component cannot by any stretch of imagination be blended into the assessable value. The respondent was manifestly wrong in holding that this item could be legitimately added to the figure declared by the petitioners in their price list as the price of the goods sold by them at the factory gate.

22. The result is that all the four petitions will have to be allowed. The four impugned orders are hereby quashed. Rule made absolute in all the four cases. No order as to costs.