

(1970) 04 GUJ CK 0008

In the Gujarat High Court

Case No : Special Civil Application No. 625 of 1964

Atul Products Ltd.

APPELLANT

Vs

D.R. Kohli, Collector of Central Excise, Baroda

RESPONDENT

Date of Decision : 01-04-1970

Acts Referred:

Central Excise Rules, 1944 — Rule 10

Citation : (1978) 2 ELT 8

Hon'ble Judges : R.B. Mehta, J

Bench : Single Bench

Judgement

1. The petitioner company, Atul Products Ltd. challenges in this petition the various orders and notices issued by the excise authorities seeking to reopen the assessment on the petitioners' products in question by including the packing charges for the purpose of levy of excise duty on the Coal Tar Dye stuff became excisable goods. The petitioners company manufactured Coal Tar Dye Stuff. These dye stuffs fall into two categories. As far as the Ciba Atul Dye Stuff is concerned, the know-how was supplied by the Ciba of India Limited, Bombay hereinafter to as "Ciba" and on its specifications, the company supplied these dyes at agreed prices. The sole purchasers from the company of these Ciba Atul Dyes were the Ciba India Ltd. As far as the Atul Dyes are concerned, they are manufactured as per that company's own specifications and Ciba is only one of its purchasers not exceeding 3% of the Atul Dyes manufactured by the petitioner company. The company is supplying these dyes in bulk packings in drums and its price do not have any extra charge for these drums. After the Ciba purchased dyes, the Ciba repacked these goods in smaller containers. It is the case of the company that Ciba is absolutely free to deal with the dyes after receiving them for the petitioner company. The Ciba sells these dyes to its own customer in its own packing under its own name and label and after reblending and/or reprocessing. The Ciba sold these dyes to its customer in bulk containers as well as in small containers. For bulk containers, the Ciba charges no extra packing charges to their customers but for small containers, they charge extra packing

charges. The smallest size of 1/4 kilo had the packing charge of Rs. 2.60 per kilo while for the packing 25 kilos, extra packing charges was only 0.45p. per kilo. The excise authorities had in the first instance approve the prices and had assessed these goods. However, by the notice dated January 31, 1962, respondent No. 3 Superintendent informed the company that separate packing charges should be included in the price list. The company submitted its reply to his notice. The respondent No. 2 Assistant Collector, by the order, dated October 16, 1962, held that repacking charges of Ciba should be included in the price list for the purpose of assessment of excise duty. The Assistant Collector also ordered the company to furnish these prices inclusive of packing charges and if they were aggrieved by that decision, they should file and appeal. The Collector has by the order, dated April 3, 1964, in appeal confirmed this order. During the pendency of this appeal, the company submitted its objections. The Collector had intimated the company that he had referred the matter to the higher authorities whose orders were awaited. The company had made various requests for a personal hearing, but no personal hearing was given to the company before this appeal was decided. Meanwhile, 13 demand notices were issued during the period from November 1, 1963 to January 6, 1964, 5 of which were in respect of Atul dyes while 8 were in respect of Ciba Atul Dyes for the relevant period from March 1, 1961 to March, 1964. After the appeal was decided, show cause notices were issued on May 20, 1964. The company was given a personal hearing and an opportunity to make its representation. On all these demand notices, final orders were passed in July, 1964. The Assistant Collector held that as the appeal decision was already communicated at the earlier stage, there was no question of confirming the present demands. In the circumstances, there is no dispute regarding the inclusion of packing charges in the price list. He, therefore, ordered that if the company was still aggrieved it may refer the matter to the Collector, Central Excise for decision. The petitioner company has filed the present petition challenging all these impugned orders and demand notices seeking to reopen the assessment by including the packing charges in the assessable value for purpose of excise levy u/s 4(a) of the Central Excises and Salt Act, 1944, hereinafter referred to as "the Act". The Assistant Collector has filed an affidavit-in-reply. It is stated in this reply that the ex- factory process together with the packing charges and post manufacturing expenses incurred for making the product marketable and which are re-coverable from the dealers, all together constitute assessable value. They have further contended that the company supplied the goods in bulk packages to facilitate the post delivery operations by the Ciba and on the petitioner's own admission had subsequently reprocessed, reblended and reassorted the products and marketed them in smaller packages. They have also stated that the Ciba sells these goods to their own customers under their particular label or nomenclature. The authorities have tried to support this order on these grounds.

At the hearing Mr. Sorabji raised the following points :

(1) That in respect of Ciba Atul Dyes the assessment should have been on the

basis of the price charged by the company to Ciba and not on the Ciba prices.

(2) That, in any event, the exise authorities had no jurisdiction to include repacking charges of Ciba of assessable value for the purposes of excise levy u/s 4(a) of the Act.

(3) That the demand notices, in any event, be issued only under rule on the ground of short levy and of demands beyond three months" limitation period wholly incompetent.

(4) That the order of the Collector, dated April 3, 1964, violates the essential principles of natural justice as no personal hearing was given to the company and as the authority abdicated its functions by seeking directions of higher authorities.

2. As regards the first question the point is completely concluded by our decision in Special Civil Application No. 1279 of 1966 decided on March 30, 1970. So far as the Ciba Atul Dyes are concerned, the entire production was sold to Ciba, the sole distributor. Therefore, Ciba could not be considered as independent buyer but only a favoured buyer. These being no wholesale market at the time of removal of these goods because of the sale to the sole buyer, the matter would not be governed by the first part of section 4(a). It is only when Ciba sold these goods wholesale to its customer that for the first time, the wholesale price at the nearest place in the open market could be determined. Therefore, the first contention raised by Mr. Sorabji must fail that the authorities had no jurisdiction to assess the wholesale cash price on the basis of Ciba prices in view of our decision as aforesaid.

3. As regards the second contention of Mr. Sorabji, we have to determine whether repacking charges of Ciba could be taken into account for arriving at the assessable value of these two kinds of dyes. As far as Atul dyes are concerned, there is no dispute on facts that the Ciba is the purchaser only to the extent of less than 3% of the company's production. The entire bulk of the production of the company is, therefore, sold in the wholesale market which exist at the site of the factory to the remaining wholesalers in open market condition. Therefore, the first part of section 4(a) would clearly apply so far as the Atul Dyes are concerned. If the other bulk of wholesale dealers purchases at the prices mentioned at the company's price list, it is this price which would have to be taken into account for assessing value for the purpose of levying excise on these produces of the company by the Atul dyes irrespective of the fact whether one of the purchasers viz. Ciba which is only a purchaser to the extent of less than 3% repacked the goods and sold them in smaller containers. Even Mr. Vakil could hardly dispute this proposition than so far as Atul dyes are concerned the matter was covered by the first part of section 4(a).

4. As far as the Ciba Atul are concerned, however, the material difference which exists is that Ciba was the sole purchaser of these goods at the factory site. Therefore, there was no wholesale market for these goods in the sense of a market over an open market at the factory side. That is why that second part of

section 4(a) would apply in the case of Ciba Atul Dyes only where the prices of Ciba would have to be taken into account. That alone, however, would not justify a different basis being adopted for arriving at the assessable value by including the packing charges. There is neither logic nor principle to justify any distinction being made between these two cases. Mr. Vakil rests his entire argument to make a distinction because of difference of language in two parts of section 4(a). Section 4(a) runs as under :

"4. Determination of value for the purpose of duty. - Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value be deemed to be -

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists or"

As we have pointed out in our earlier decision, section 4(a) provides for three important factors for arriving at the wholesale cash price of the excisable article which is chargeable with excise duty; (1) time factor, (2) locality factor, and (3) method of calculation. The time factor is the time of removal of the excisable article from the factory or any other premises of manufacture or production for delivery. The locality factor is the place of manufacture or production. The method of calculation of the wholesale cash price is the wholesale cash price of an article of like kind and quality to which it is sold or is capable of being sold at the time of removal from the factory or any other premises of manufacture or production, as per the wholesale market rate at such place of manufacture or production, as per the wholesale market rate at such place of manufacture or production. If, however, there is no wholesale market for such article at such place at this relevant time. Then under the second part of Section 4(a) we have to go to the nearest place where such wholesale open market exists. Therefore, the only difference between the two parts is as regards the locality factor that the whole sale cash price is to be taken if the wholesale market exists at the place, at the nearest place where such market exists. The other two factors, however, remain constant, viz. as regards the time factor and as regards the method of calculation. Therefore, even when one has to go to the nearest place where the wholesale market exists. Under the second part of section 4(a), the time factor which has to be taken into account is the time of removal of the excisable article from the factory or the premises of manufacture or production and the method to be applied is also the same method of finding out the wholesale cash price in that market for an article of the like kind and quality at which it is sold or is capable of being sold at that relevant time of removal. Therefore, there is no substance in the contention sought to be made out by Mr. Vakil on the wording of the two parts of section 4(a) which would require us to make any such distinction

between the Atul Dyes and the Ciba Atul Dyes which would lead to this absurd result so as to include packing charges in one case and not in the other. In fact there is intrinsic evidence in section 4(a) itself i.e. the time factor which is provided which governs both the parts which would clinche this issue. If we are to take the wholesale cash price of the excisable article at the time of the removal from the factory or the place of manufacture or product, it is obvious that if there are other activities which have taken place after the removal of the excisable article which has contributed to an increase in the price, those factors would have to be included. What we are concerned with is that the excisable article which was charged with excise duty at the time of removal from the factory or other premises of manufacture or production. There is no dispute in this case that both the Atul dyes or Atul Ciba dyes at the time of their removal from the petitioner company's factory were only in the original state of bulk of packing. It is only when they are removed from the site of the factory or the place of production of manufacture when a subsequent activity takes place by other trader viz. Ciba who packs it in smaller size container. There is also no dispute on facts that even the other trader, who is not the agent of the company but which sells independently its products to its own costumers in bulk packing at the same price and as the one charged by the petitioner company for its bulk packing. It is only when the Ciba adopts these goods for the purpose of its market by repacking them in the smaller containers, in the sizes from 1/4 kilo to 25 kilos, that it levies extra packing charge. Therefore, for the bulk packing admittedly, there is no extra packing charge. Therefore, if we are to see the excisable article which was in the same state in which it left the factory premises, there is no extra charge whatever levied even by Ciba. It is only when the Ciba puts in its extra effort, to repack the goods in smaller containers that extra charge is made. Therefore, this extract charge of the smaller containers could never form part of calculation determining excisable value of the article as it left the place of the factory or the premises of manufacture or production. Mr. Vakil tried to make a distinction between the incidents of excise and the measure of the excise. Mr. Vakil pointed out that on doubt the excise was charged on the manufacture or production of the goods. However, the measure adopted by the legislature was not the cost of its production, but the wholesale cash price. In this contention Mr. Vakil ignores that material fact that the measure which is evolved by the Legislature u/s 4(a) is the measure of the wholesale cash price of the article of the like kind and quality which is sold or is capable of being sold at the time of removable of the excisable article in question from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production or if no wholesale market exists at such place, then at the nearest place where such market exists. Therefore, the method which is laid down for arriving at the measure of this charge clearly envisages an excisable article in the state in which it is removed. If, therefore, there are further operations on the excisable article in the State in which it is removed which contributed to the increase in prices, there would be extraneous considerations, which can find no place and which could have no relevance while applying the

method laid down in section 4(a) for determining the wholesale cash price of the like article at the time of removal whether at the place of removal or production or at the nearest place. In the view of the matter, the charge sought to be levied by the excise authorities on the packing charges of the Ciba on the ground that it had repacked the goods in smaller containers would be wholly ultra vires and outside the scope of section 4(a) Mr. Vakil in this connection had also argues that was to be that wholesale unit is a pure question of fact to be considered and determined by the excise authorities. If, therefore, the wholesale market is even for the smaller containers that price can be taken as the relevant wholesale unit. In this connection Mr. Vakil ignores the fact that this would be true only if the company had this wholesale unit at the time when the article was removed from its factory. If the company had packed its goods in smaller containers and if there was separate wholesale market at the time of removal of such good, of course, such packing charge would be included in the company prices. In the present case, however, this kind of wholesale unit comes into existence only after the goods are removed from the factory and when Ciba as per exigencies and requirements of its customers puts in the extra effort to repack the goods in the smaller containers. Therefore, even on this ground this ultra vires charge by the excise authorities cannot be supported by Mr Vakil. Therefore, on this short ground this petition must be allowed quashing all the impugned orders and the demand notices and the consequential orders in so far as the excise authorities seek to reopen the assessment by levying excise duty on the packing charges.

5. Mr. Vakil has, however, raised a preliminary contention that in the present case that earlier orders were only by way of seeking information or exploratory in nature. It is only when 13 demand notices were issued and were confirmed by the final orders in July 1964 after hearing the petitioners that the excise duty cannot be quantified. As the petitioner company had not filed an appeal against this final order, it has not exhausted their alternative remedies under this Act and, therefore this writ petition must be held to be incompetent. This argument of Mr. Vakil is based on a complete misreading of the earlier orders of the excise authorities. In the first orders at Annexure "A" on October 16, 1962, the Assistant Collector has asked the company to furnish the price list inclusive of packing charges by Ciba, Bombay. The first order is in pursuance to the notice of January 3, 1962, informing the company that separate packing charges should be included in the packing charges. Thus the excise authorities proposed a change in the basis of assessment by including the packing charges. Even the order of the Assistant Collector makes the whole thing clear as he had intimated the company in the final paragraph that if it was aggrieved by this decision it should appeal to the Collector of Central Excise. In pursuance of this order, the Deputy Superintendent had issued on November 1, 1963, the demand on the company for the amount of excise duty on the packing charge from March 1, 1961 to September 30. That is why the company was required to file an appeal. In appeal the Collector by the impugned order, dated April 3, 1964, confirmed this new basis of assessment. Therefore, the original assessment has been

reopened on this new basis as result of these two impugned orders. Further, the demand notices and the show cause notices are merely consequential. That is why in the final orders of July, 1964, the Assistant Collector has merely stated that the demand in question had been raised by the Deputy Superintendent and the order was confirmed in appeal and, therefore, no question arose of confirming the demands in question. If a technical plea of Mr. Vakil is to be met only a technicality, these demand notices are not confirmed and, therefore, there would be no question of any appeal being filed. In fact, even the authorities have always considered that they were seeking to change the basis of the earlier assessment and that is why two earlier orders are passed and the entire basis of assessment was really as per the final order, in pursuance to which consequential steps were taken to issue demand notices. That is why, there are no final confirmation orders passed in July, 1964. In any event, the existence of an adequate alternative remedy is not a fetter. In the exercise of jurisdiction of this Court as it is only one of the factors to be considered. After the decision of the Supreme Court in Bhopal Sugar Industries Limited v. Sales Tax Officer, Bhopal AIR 1967 S.C. 549, the legal position is well settled that the jurisdiction of the High Court under Article 226 is normally not be exercise by entertaining writ petitions against the order of taxing authority when the taxing statute for this nature provides ample remedy by way of an appeal or other proceedings by revision to the party aggrieved and thereby to by pass the statutory machinery. Their Lordship, however, immediately added that is not to say that the High Court would never entertain a petition against the order of taxing officer. The High Court has undoubtedly jurisdiction to decide whether a statute under which a tax is sought to be levied is within the legislative competence of the Legislature enacting it or whether the statute defines the constitutional restriction or infringes any fundamental rights, or whether the taxing authority has arrogated to himself power which he does not possess, or has committed a serious error of procedure which has affected the validity of his conclusion or even where the taxing authority threatens to recover tax on an interpretation of the statute which is erroneous. Their Lordships also pointed out that the High Court may in appropriate cases determine the eligibility to tax on transactions the nature of which is admitted. In the present case, on admitted facts, the assessment is sought to be reopened on the basis which is wholly ultra vires the taxing statute. The excise authorities seek to include in wholesale cash price a packing charge which is wholly extraneous. Such an ultra vires order can surely be quashed by this court even when any alternative remedy exists. In view of the aforesaid settled legal position, therefore, there is no substance whatever in the preliminary objection raised by Mr. Vakil.

6. The second contention raised by Mr. Sorabji must succeed and it is therefore, not necessary to go into the remaining contentions raised by Mr. Sorabji on which we express no opinion.

7. In the result, this petition is allowed by quashing the impugned orders and the impugned demand notices and the show cause notices as well as the final orders

of July, 1964 in so far as the excise authorities seek to reopen the assessment on the company by including the packing charges of Ciba and the excise duty on the score. Rule accordingly made absolute with cost.