

(1976) 12 GUJ CK 0010

In the Gujarat High Court

Case No : Special Civil Application No. 68 of 1975

Cibatul Limited

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-12-1976

Acts Referred:

Central Excise Rules, 1944 — Rule 232

Central Excises and Salt Act, 1944 — Section 3, 3(1), 37(20), 4

Citation : (1979) 4 ELT 498

Hon'ble Judges : S. Obul Reddi, J;N.H. Bhatt, J

Bench : Division Bench

Judgement

N.H. Bhatt, J.—This is a petition by a Company incorporated under the Companies Act, 1956, challenging the issuance of a trade notice, Annexure G to the petition issued by the Collector of Central Excise, Baroda on 25-6-1974 under which he directed the petitioner, the manufacturers of resins inter alia to declare the assessable value for paying Central Excise Duty "equal to the value charged by the brand-name owners to the wholesale market".

2. The short facts are that the five per cent equity share capital of the petitioner company is owned by one Ciba-Geigy of India Ltd., formerly known as Ciba of India Ltd. On or about 24-3-71, the agreement Annexure A, was entered into by the petitioner company with the said company Ciba-Geigy of India Limited under which the petitioners agreed to sell to the said buyers certain Urea formaldehyde resins and certain Melamine formaldehyde resins in accordance with the programme drawn by the seller and the buyer and the petitioners had agreed to supply and sell the same to the said buyers. Thereafter on or about 7-12-71, an agreement was entered into between the petitioners on one hand, one Swiss Company on the other and the aforesaid Ciba-Geigy of India Limited on the third under which the petitioners were authorised to affix on the resins supplied by them to the said buyer company, certain trade marks of which the said Swiss Company were the registered proprietors in India and of which the said buyers were registered or licenced users in India. The said agreement is Annexure B to

the petitions. The department then issued the trade notice, Annexure G, calling upon the petitioners, the manufacturers, to get the name plate of the customers "registered and approved" by the Collector, to declare the assessable value for paying central excise duty "equal to the value charged by the brand-name owners to the wholesale market" and to undertake to make good the difference, if any, in duty resulting, from any change in price already effected by the customers but not known to the licensees at the time of clearance. A further direction, being direction No. 3 is also there in Annexure G, but it being meant for the customers or brand-name owners" under whose orders the goods are manufactured need not detain us because the said customer company namely, the Ciba-Geigy of India Limited, is not before us making any grievance about the said direction.

3. The grievance in the contention of the petitioners is that as per Sections 3 and 4 of the Central Excises and Salt Act, 1944 (the sections being what they were prior to their being recast as per the Act of 1975), the value to be determined is to be 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 a 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. Mr. Gandhi, the learned advocate appearing for the petitioners contended that by the impugned trade notice, an attempt was made by the department to fix the value for the purpose of central excise duty on a new standard different from the one laid down in the above mentioned Sections 3 and 4 of the Act and Sec. 4 in particular. In other words, Mr. Gandhi urged, there was an attempt to levy central excise duty not as per the real sale value, but according to the sale value enhanced by the value charged by the brand-name owners to the wholesale market. Direction No. 2 in the impugned trade notice Annexure G was contrary to the law as interpreted by the Supreme Court in the case of Duli Chand Vs. Delhi Administration, in that case decided 01-14-2-1975, the Supreme Court has reiterated its decision in A.K. Roy v. Voltas Ltd., reported at 1972 (2) S.C.R. 1088 and laid down the law on the point in very clear and lucid language in the following terms : -

"The only relevant price for assessment of value of the goods for the purpose of excise u/s 3(1) of the Central Excises and Salt Act, 1944 would be the wholesale cash price which the manufacturer receives from sale to the first wholesale dealer, that is, when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the customer, whether a long, a short, or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price even though on wholesale-basis, is not

material. If excise were levied on the basis on second or sale sequent wholesale price, it would load the price with a post-manufacturing-element, namely, selling cost and selling profit of the wholesale dealer. Thng would be plainly to the true nature of excise. Secondly, this would alsat violate the concept of the factory gate sale which is the basis of deteromination of value of the goods for the purpose of excise. There can-therefore, no doubt that where a manufacturer sells the goods manufactured, by him in wholesale to a wholesale dealer at arms length and in the usual course of business, the wholesale cash price charged by him to the wholesale dealer less trade discount would represent the value of the goods for the purpose, cash price for which the goods are sold at the factory gate within the meaning of the Act".

The above quotation would make it clear that if the contract between the seller and the purchaser is not an underhand dealing entered into with the avowed object of defeating the levy of excise duty, the price fixed by the parties alone will govern the field. V/e make it, however, clear that in the case of hand, if the department has got any material with them to brand the contract in question as the one not at arms length in the ordinary course of business; their powers to remedy the evil remain unaffected. This, however, would not extend to permitting them to put an arbitrary valuation of the goods on the basis of the value charged by the brand-name owners to the wholesale market. If this is allowed to stand, it would mean that the basis for paying central excise duty is the price which in the words of the Supreme Court in the above-quoted case would be second or subsequent price and which has been termed to be immaterial. The Supreme Court has very clearly stated in the above-quoted case that if the excise were levied on the basis of the second or subsequent wholesale price it would load the price with a post-manufacturing element. The attempt by issuing the direction No. 2 in the impugned trade notice, Annexure G, is the very attempt which has been pulled down by the Supreme Court in the above-quoted case. We have, therefore, no hesitation in holding that the latter part of the Direction No. 2 namely, "equal to the value charged by the brand-name owners to the wholesale market" as put in blanket terms is ultra vires the authority of the Collector of Central Excise, who otherwise u/s 37(20) and Rule 232 of the Central Excise Rules is entitled to issue supplemental directions in the form of a trade notice and above power were fairly and frankly conceded even by Mr. Gandhi for the petitioners.

4. It is to be recalled here that the Atic Industries''s case (Supra) was a case of contract between the manufacturer and the seller commanding 50 per cent of the holding equity shares of the company. In the case on hand the buyer company is commanding only 5 per cent of the equity shares and there is all the more reason for us to place reliance on the said judgment of the Supreme Court.

5. Mr. Vakharia, however, in this connection invited our attention to unreported judgment of the Division Bench of this Court in the Special Civil Application No. 858 of 1974 decided on 8-9-76 1977 E.L.T. (113). He has taken us through the

relevant portions of the judgment, which follows the above-mentioned Atic Industries''s case implicitly as it was duty bound to do so. We do not find anything in that judgment of the Division Bench which would , support the contention of Mr. Vakharia that the above quoted portion of the direction No. 2 in Annexure G should be sustained.

6. With respect of Direction No. 1 in Annexure G, Mr. Vakharia has stated that the real impact of the said Direction No. 1 is not to call upon the manufacturer to get the name plate of the customers registered or approved by the Collector and on behalf of the said Collector, he made a statement that by this Direction No. 1 what was intended was to collect the information of the customers who claim to be entitled to the rights of the trade name. If this is the scope, then no exception could be taken on behalf of the petitioners and in view of this limited interpretation accepted by Mr. Vakharia for the Collector. Mr. Gandhi does not continue his protest against that clause. Clause 3 is confined to the customers and we have already stated that the petitioner have no grievance to be made in that contention. Clause 4 in ex facie the extension of Clause 2 which we are inclined to strike down in its latter part and obviously it shall have to fall through along with it.

7. We, however, make it clear that if the department thinks that this alleged contracts Annexure A and B are only a camouflage to screen the manufacturer of the goods in question by the buyer, it will be open to the department to have recourse to law and it will be perfectly within their statutory powers to take such an action as deemed fit. Equally it will be open to the administration to enquire and find out the real value of the goods for the purpose of duty in strict compliance with Section 4 of the Act as interpreted by the Supreme Court in Atic Industries''s case (supra).

8. The result is that the petition is allowed in part to the extent indicated in the judgments. Rule is made absolute only to that extent.