

(1988) 03 SC CK 0029

In the Supreme Court Of India

Case No : Civil Appeal No's. 1938-39 of 1987

Collector of Central Excise, Madras

APPELLANT

Vs

T.I. Millers Ltd., Madras and T.I. Diamond Chain, Madras

RESPONDENT

Date of Decision : 28-03-1988

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 3(2), 35, 4, 4(1)

Citation : AIR 1988 SC 1154 : (1988) 17 ECC 56 : (1988) 35 ELT 8 : (1988) 2 JT 86 : (1988) 1 SCALE 716 : (1988) 3 SCR 355

Hon'ble Judges : Sabyasachi Mukherjee, J;S. Ranganathan, J

Bench : Division Bench

Advocate : M.K. Banerjee, Solicitor General, A.K. Ganguli and P. Parmeshwaran, for the Appellant; A.T.M. Sampath, for the Respondent

Final Decision : dismissed

Judgement

Sabyasachi Mukharji, J.—These are appeals u/s 35L(b) of the Central Excises and Salt Act, 1944 (hereinafter called 'the Act')- The respondents-T.I. Millers Ltd. and T.I. Diamond Chain manufacture cycle lamps and automative chains. Both these goods are assessable under Item 68 of the Central Excise Tariff. The said respondents filed price lists for the sale of the goods through their distributors, namely, M/s. T.I. and M-Sales Ltd., M/s. Charmvel Agencies and M/s. Ambadi Enterprises Pvt. Ltd. quoting their price to the distributor as assessable value. However, subsequently following the decision of the Madras High Court in a valuation case, the respondents required that the price charged by them from buyers at the factory gate should be accepted as the assessable value and not the price to the distributOrs. The question is whether the price charged by the respondents from buyers at the factory gate should be accepted as the assessable value for the levy of duty u/s 3 of the Act. The Assistant Collector found from the sales pattern of the respondents that the distributors were 'related persons' as per Section 4 of the Act and the price at which the distributors sold the goods should, therefore, be the assessable value.

2. The respondents went up in appeal before the Appellate Collector. The Appellate Collector held that in order to establish mutuality of business interests, direct and indirect between manufacturer and buyer, it should be shown that they have been promoting the business of each other in their own interest and that in the absence of such a finding in the Assistant Collector's order, these could not be held to be related persons. Section 4 of the Act provides that where the duty of excise is chargeable on any excisable goods with reference to value, such value should be determined on the basis of the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale. We are not concerned for the purpose of these appeals with the provisos nor with Sub-section (2) or Sub-section (3) of Section 4 of the Act. Sub-section 4(c) of Section 4 defines 'related person' to mean a person who is so associated with the assessee that they have interest, direct or indirect, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor. The explanation provides that 'holding company', 'subsidiary company' and 'relative' have the same meanings as in the Companies Act, 1956.

3. The words "related person" have been considered by this Court in Union of India (UOI) and Others Vs. Atic Industries Ltd., . Bhagwati, J., as the learned Chief Justice then was, speaking for the Court held that the first part of the definition of "related person" in Clause (c) of Sub-section (4) of Section 4 defines "related person" to mean "a person who is so associated with the assessee that they have interest directly or indirectly in the business of each other". It is not enough, the Court observed, that the assessee has an interest, direct or indirect in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect in the business of the assessee. To attract the applicability of the first part of the definition, it was observed, the assessee and the person alleged to be a related person must have interest, direct or indirect in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The quality and degree of interest which each has in the business of the other may be different, the interest of one in the business of the other may be direct while the interest of the latter in the business of the former may be indirect. That would not make any difference so long as each has got some interest, direct or indirect in the business of the other.

4. In the notice issued by the Central Government seeking to review the Appellate Collector's order, the Central Government indicated that there was an agreement existing between the respondents and their distributors according to which they were the company's distributors for the sale of their goods. Major portion of the sales were effected through M/s. T.I. and M-Sales Ltd. who were the main distributors of M/s. Tube Investments of India Ltd. and its subsidiary companies and rest of the sales through the other two distributOrs. M/s. Tube

Investment of India was the holding company of M/s. T.I. Millers Ltd. The agreement between the assessee and the T.I. and M Sales Ltd. was registered under the Monopolies & Restrictive Trade Practices Act. The Government of India also found that there was a territorial earmarking for the operation of the distributors, who also undertook advertisements and helped the sub-dealers for maintaining show rooms in dealer's premises. The distributors did not deal with competitor's goods. The Government of India also noted that the assessee granted mark up to the distributors to cover their establishment expenses, travelling expenses, advertisement and sundry expenses. On these grounds, the Government of India tentatively considered that it was a fit case for reversing the order of the Appellate Collector who had held that the distributors were not related persons u/s 4 of the Act. The question is, whether the distributors in this case were related persons of the respondents and secondly, whether the expenses incurred for maintaining the show-room, advertisements etc. should also be added to the assessable value. How the value should be computed has been examined by this Court in *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, . There, Pathak, J. as the learned Chief Justice then was, held that the definition of the words "related person" did not suffer from any constitutional infirmity. this Court reiterated that on a true construction of its provisions in the context of the statutory scheme the old Section 4(a) should be considered as applicable to the circumstances of the particular assessee himself and not of manufacturers generally. The Court further reiterated that pursuant to the old Section 4(a) the value of an excisable article for the purpose of the excise levy should be taken to be the price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of whole sale trade at the time and place of removal. Where, however, the excisable article is not sold by the assessee in wholesale trade, but for example, is consumed by the assessee in his own industry the case is one where under the old Section 4(a) the value must be determined as the price at which the excisable article or an article of the like kind and quality is capable of being sold in wholesale trade at the time and place of removal. this Court analysed the position under the Central Excise and Salt Act, 1944 as amended by Act XXII of 1973 that if the price at which the excisable goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal as defined in Sub-section (4)(b) of Section 4 is the basis for determination of excisable value provided, of course, the buyer is not a related person within the meaning of Sub-section (4)(c) of Section 4 and the price is the sole consideration for the sale, that would be the value. The proposition is subject to the terms of the three provisos to Sub-section (1)(a) of Section 4. Where the wholesale price of any excisable goods for delivery at the place of removal is not known and the value thereof is determined with reference to the wholesale price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery should be excluded from such price. It was further held that these principles could not apply where the tariff value had been fixed in respect of any excisable goods

under Sub-section (2) of Section 3. The Court also dealt with the interpretation of definition of 'related person'. The Court further held that the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely, after sales service and marketing and selling organisation expenses including advertisement expenses marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. The assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery. The new Section 4(4)(d)(i) has made express provision for including the cost of packing in the determination of "value" for the purpose of excise duty.

5. The review application, by the change of law, was forwarded to the Tribunal. It was contended before the Tribunal on behalf of the appellant that the distributors were related persons in terms of the judgment of this Court in *Bombay Tyre International* case (supra). Our attention was drawn to a letter dated 10th September, 1981 from the respondents to the Assistant Collector that the mark up allowed to the distributors was to cover their establishment expenses, advertisement, travelling expenses and he pointed out that this mark up included certain elements which have to be included in the assessable value. The Tribunal held that according to the judgment of this Court in *Bombay Tyre International* case (supra) where the sale is effected at the factory gate, expenses incurred on account of charges for services after delivery to the buyer, namely after sale service and marketing and selling organisation expenses, including advertisement expenses could not be deducted from the assessable value. It was further urged on behalf of the appellant that other features like division of territory amongst the distributors and the marginal quantity of direct sales otherwise, as well as the fact that the distributors did not deal in competitor's goods, clearly indicated that these are related persons. learned Counsel drew our attention to the meaning of the term 'ordinarily' given in K.G. Iyer's *Judicial Dictionary* at page 704 and explained that it meant 'habitually', or 'usually', or 'normally'. In this case, ordinarily sales are only through distributors and the sales are made by them on behalf of the manufacturer. learned Counsel pointed out that this was a case where it was an extension of the manufacturer's self to

the point of sale by the distributor. learned Counsel for the revenue urged that it was a case of indirect relationship and came within the ratio of the aforesaid decision of this Court in Bombay Tyre International case (supra). In this case, it was highlighted that manufacturer had interest in the buyer who were their distributors and the distributors were only charging limited commission, maintained showrooms, and did not deal in the products of competitors of the manufacturer. It was further contended that sales of their products as original equipment, could not be considered as sales in the ordinary course of wholesale trade. It was further highlighted that the norm of inter-connected undertakings found in Monopolies & Restrictive Trade Practices Act is not relevant to decide 'related persons' in the Act. It was further argued that mere area restriction is not relevant for proving mutuality of interests, but it has to be shown that the sale was not at an arms length and but a principal to principal transaction. It appears from the letter dated 10th September, 1981 from the appellants to the Department that the distributors paid for their own advertisements. In some case, the manufacturer might release advertisements through the distributOrs. It was also urged that even a sole distributor could be an independent buyer on behalf of the manufacturer and the distributor and in this connection reliance was placed on the observations of this A.K. Roy and Another Vs. Voltas Limited, . After sales service undertaken by the distributors was more in the nature of replacement of defective goods sold, which any manufacturer was bound to do and that is a normal essential service of a distributor.

6. Regarding the 'mark up' allowed by the manufacturer to the distributor as indicating special relationship, it was contended that it was provided for in the context of the requirement to indicate maximum selling price to be marked on the goods, and in fact, it was in this context that the appellants had made a reference to the MRTTP Commission. The Tribunal held that the distributors were not related persons and in the light of the observations of this Court in Atic Industries case (supra) set out hereinbefore. We are of the opinion that what was necessary to find out, was whether the buyer is holding company or subsidiary company or relative of the manufacturer. From the explanation of the relationship furnished in this case, such is not the position. It appears that the link between the respondents T.I. Miller Ltd. company and T.I. & M. Sales Ltd., is the main distributors of M/s. Tube Investments of India Ltd., who are the holding company of the respondents. This relationship does not satisfy the criteria for establishing the related persons concept. These were limited companies at the material time, and it will be difficult to say that a limited company has any interest direct or indirect in the business carried on by one of its shareholdeRs.

7. It has been explained that the mark up in the price was allowed in connection with the requirement to display the maximum sale price. The sales pattern shows also sales to other than distributors and it is not restricted only to the appointed distributors of T.I. India Limited.

8. In the premises the Tribunal's upholding the order of the Appellate Collector,

was right and correct. In the background of the facts mentioned hereinbefore and in the light of the decisions of this Court in Bombay Tyre International and Atic Industries cases (supra), we are of the opinion that the Tribunal was right and there is no cause for interference with the order of the Tribunal. In the premises, we decline to admit the appeals.