
(1980) 01 BOM CK 0012

In the Bombay High Court

Case No : Special Civil Application No. 225 of 1976

Colour Chemical Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-01-1980

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1980) 01 BOM CK 0012

Hon'ble Judges : V.S. Deshpande, Acting C.J.; A.N. Mody, J

Bench : Division Bench

Advocate : T.R. Andhyarujina and S.N. Parekh, instructed by Crawford Bayley and Co, for the Appellant; V.P. Tipnis and J.H. Parekh for respondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

V.S. Deshpande, Actg. C.J.

1. The petitioners are the manufacturers of certain dye-stuffs. Excise duty on an ad valorem basis is payable on the aforesaid dye stuffs in terms of section 4(A) of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"). We are concerned in this case with the duty payable on the dye stuffs manufactured by the petitioners during the period from 1968 to 1975. Section 4 of the Act stood as follows during the relevant times :

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

(a) the wholesale cash price for which an article of the like kind and quantity 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

(b) Where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place at any other place nearest thereto.

Explanation.---In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

The same has not been amended. We are, however, not concerned with the amended section 4. In the year 1960 the petitioners entered into an agreement with the three wholesale purchasers, viz. (1) Messrs Chika (Private) Limited, (2) Messrs Hoechst Dyes and Chemicals (Private) Limited, and (3) Messrs Indokem Private Limited (hereinafter referred to as "the distributors") for the purposes of selling their manufactured articles in the market. Under the terms of the agreement with these distributors, the distributors were to sell the articles according to the price lists fixed by the petitioners. The distributors, however, were to pay the price of the said articles to the petitioners at 12 1/2 per cent, discount in the said rates indicates in the price list. It is suggested that after 24th October, 1974 the rate of discount was slightly changed. Though under the terms of the agreement sale by each one of the distributors was intended to be restricted to a particular territorial division, in point of fact no such restriction was ever placed on any one of the distributors.

2. In terms of the provisions of the Excise Act and the Rules, the petitioners submitted a price list of the said products to the Excise Authorities, the first price list having been submitted on 11th July, 1968. The petitioners claimed that the articles should be deemed to have been sold not for the prices indicated in the price list but for the reduced price at 12 1/2 per cent, thereof, as it was at this discounted price that the goods were actually sold by them to their distributors, i.e. the wholesale purchasers. This contention was rejected by the Superintendent of Central Excise, Thana, by his order dated 24th September, 1969. On appeal to the third respondent, i.e. the Appellate Collector of Central Excise, the same was dismissed on 18th June, 1974. The petitioners revision application to the Central Government was rejected on 17th September, 1975. According to all these authorities under the Excise Act, the excise duty is liable to be levied by reference to the prices indicated in the price list, and not at the discount price received by the petitioners from their distributors, as in the opinion of the Excise Authorities, the said amount reflected "the wholesale cash price" for which the articles were sold or were capable to being sold at the time or removal of the articles from the petitioner's factory. The validity of these orders is challenged in this Special Civil Application under Articles 226 and 227 of the Constitution.

3. Now, though in their orders Excise Authorities have hinted as if the distributors are sole-selling agents of the petitioners, we are unable to see any basis for any such finding. The text of the agreement entered into between the petitioners and their distributors are on the record. Recitals in the said agreement do not justify any conclusion that they are merely sole selling agents of the petitioners, and not the independent wholesale purchasers. The orders also suggest as if the field of the distribution is restricted to certain territorial divisions. Though such restrictions is contemplated under the terms of the agreement, the same does not appear to have been given effect to at any time. At any rate, the petitioners assert that actually all the distributors have been selling the goods throughout India and there is nothing on record to suggest that this assertion of the petitioners is not true. In the memo of appeal of the petitioners it is recited that the petitioners had given identical discount to their wholesale purchasers purchasing other goods from their concern. The Appellate Authority seems to have assumed that the petitioners wanted to suggest that the very same goods were sold by them to other distributors. Apart from the misreading of these recitals in the memo of appeal, we are unable to see any relevant of this circumstance to the decision of the point under consideration.

4. It is unnecessary to discuss this point any further as it is concluded by the two judgments of the Supreme Court. In the case of A.K. Roy and Another Vs. Voltas Limited, , identical question came up for consideration. The manufacturers in that case had sold the goods at the discount of 22 per cent of the prices indicated in the price list, though the sale to such wholesale dealers formed only 5 per cent of their total sales in the open market. The Supreme Court upheld their contention that the sale at 22 per cent discount to the wholesale dealers represented the wholesale cash price of the articles for the purposes of section 4(1) of the said Act. The Supreme Court observed that it was not necessary that there should be a market in the physical sense of the term for finding out as to what the wholesale cash price of the article manufactured and sold by any concern could be. In cases where the manufacturers enter into agreement with dealers for sales of the articles manufactured on certain terms and conditions, it would not follow from that alone that the price for those sales would not be the wholesale cash price for the purposes of section 4(a) of the Act, if the agreements were made at arms length and in the usual course of business. It was further observed that the mere circumstances that the articles are sold to the wholesalers at discount by itself cannot lead to the inference that the agreements were not made at arms length. The test to decide whether the transactions made were at arms length or not was found to be not whether the goods were sold at discount or not, but whether the discount was given for commercial or non-commercial considerations. Where the discount is found to have been given for certain post-manufacturing services required to be rendered by such wholesale dealers, the same was found to be on purely commercial considerations. It appears from the record that in the present case also the distributors were required to incur the expenses of advertisements and other

incidental steps required for getting a market for the manufactured goods. The learned Judges also observed that the mere circumstance that the manufacturers also sell the goods to retailers can have no relevant whatsoever on determining what the wholesale cash price of such articles should be for the purposes of section 4(a) of the Act.

5. The same view has been further affirmed in the subsequent judgment of the Supreme Court in the case of *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, In that case, an attempt was made to take the price at which the wholesale dealers sold the goods in the market, as the basis for determining in the wholesale cash price of the goods for the purposes of levying the excise duty. The learned Judges observed that what price is matched by the subsequent purchasers in the market for the goods sold had no relevant whatsoever, as the excise duty is on the manufacturing costs of the manufacturers, and not on the prices at which anybody also can sell such goods in the market.

6. Mr. Tipnis, the learned Advocate appearing for the respondents, tried to raise the same contentions on which the impugned orders are based. All these contentions are over-ruled in the judgments of the Supreme Court adverted to earlier.

7. The application, therefore, deserved to be allowed. We accordingly allow the application, make the rule absolute in terms of prayers (a) and (b) and set aside the orders passed by the Excise Authorities. The Excise Authorities will now fix the wholesale cash price of the articles manufactured by the petitioners and sold to their distributors at the discounted price at which they have sold goods to their distributors.

8. The petitioners will get their costs.

9. The respondents will refund the amount of Rs. 2,36,768.16 to the petitioners.