(2004) 11 SC CK 0015

In the Supreme Court Of India

Case No : Civil Appeal No. 2174 Of 1999

Commissioner of Central Excise, Calcutta-II — APPELLANT

Vs

TISCO Ltd. — RESPONDENT

Date of Decision : 24-11-2004

Acts Referred:
Central Excises and Salt Act, 1944 — Section 4

Citation : AIR 2005 SC 2888 : (2005) 98 ECC 745 : (2005) 123 ECR 81 : (2004) 174 ELT 307 : (2005) 9 SCC 109

Hon'ble Judges : S. N. Variava, J;AR. Lakshmanan, J

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

1. This Appeal is against the order dated 1st May, 1998 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (in short "CEGAT").

2. Briefly stated the facts are as follows :-

The Respondent herein filed two price lists - one bearing No. 29/P-II-TISCO/91-92 and another bearing No. 8/P-II/TISCO/91-92. Both the price lists were in respect of Balls and Roller Bearings of various specifications. The first price list contained the prices at which the Respondent Company proposed to sell in the wholesale market. The second price list contained the prices at which they proposed to sell the same items to M/s. Tata Engineering arid Locomotive Company (in short "TELCO"), M/s. Tata Robins Frazer Ltd. and M/s. Stark Motors. In the second price list the price to M/s. Tata Robins Frazer Ltd. and M/s. Stark Motors was shown to be the same as the wholesale price however the price to M/s. Tata Engineering and Locomotive Company was shown to be lower.

3. A show cause notice was issued to them as to why the prices to TELCO should not be fixed at the same price as in respect of the sale to the wholesale market and to the other two Companies.

4. The Appellant filed a reply to the show cause notice. Unfortunately, neither

side has placed this reply on record of this Court. However, from the order of the Assistant Collector dated 30th March, 1992 it appears that the only contention taken was that the price in Part II was as per the contract and therefore they should not be approved at the same rate as the price in Part I. It also appears, from the order, that at the personal hearing a further contention was taken that there were two types of customers viz. trade and original equipment manufacturers. It was contended that in case of traders, Part I price was charged whereas in case of original equipment manufacturers the price on the basis of contract was being charged. The Assistant Collector held, and in our view correctly, that for application of Section 4(1)(a) of the Central Excises & Salt Act, 1944, the Company had to show that there was a normal trade practice and that TELCO was a different class of buyer. Material had to be placed to show these aspects. Merely on basis of contracts it could not be said that TELCO was a different class of buyer. The Assistant Collector noted that all the three Companies were Industrial Companies which were original equipment manufacturers. No material appears to have been placed to show why different price was sought to be charged from TELCO only.

5. The Respondent went in Appeal to the Collector (Appeals). The Memo of Appeal is not before us. However, the submission made before the Collector (Appeals) have been set out in his order. The only submission which appears to have been made was that TELCO was a different class of buyer and that therefore they were entitled to charge a different price from TELCO. The Collector (Appeals) allows on the following reasoning :-

"On close study, I find that the appellant had submitted the impugned price lists in part II meant of sale at different prices to different classes of buyers. It is fact that the expression 'class of buyers' is not defined u/s 4 of the said Act. But keeping in view of the definition of "wholesale trade" in terms of Section 4(4)(e) it can be held that dealers, industrial consumers, Govt,, local authorities etc. constitute different class of buyers. As per stipulations of Section 4(a)(i) if an assessee sells their goods at different prices to different class of buyers such prices would be deemed to be the normal prices of such goods if such buyers are not related persons. I like to stress on the connotation, 'not being related person' within the bracket immediately after different classes of buyers stipulated in Section 4(a)(i), and with a view to deny the facility of having part-II prices the approving authority should have some clinching evidence to the effect that such buyers are related persons, In the purported case the Asstt. Collector could not establish any relationship between M/s. TELCO and the appellant. Moreover, whether a particular buyer constitutes a class of buyers or not will depend upon trade practice. Each buyer is class within itself since he can be distinguished from other buyers: Hence, prices charged to a buyer treating it a different class buyers should be normal prices until and unless there is evidence to hold that such buyer is a related person of the assessee."

6. We are unable to agree with the reasoning. Merely because parties are not

related persons does not mean that each buyer becomes a class within itself. The normal rule, u/s 4, is that the value which shall be deemed to be the price at which such goods are ordinarily sold by the assessee in the wholesale trade, where the buyer is not a related person and the price is the sole consideration for sale. Admittedly, in this case the normal price was the price in list 1. This was the price at which the goods were proposed to be sold in the wholesale trade. The proviso to this Section is an exception to the general rule. The proviso comes into play in cases (a) where there is a normal practice in the wholesale trade in such goods and (b) such goods are sold by the assessee at different prices to different class of buyer. To claim benefit of this proviso, a trade practice must be averred and shown to exist and it must be shown that there is a different class of buyer. As set out above, the Collector (Appeals) notes :-

"Whether a particular buyer constitutes a class of buyers or not, will depend upon the trade practice."

Yet the Collector (Appeals) then ignores the fact that there is no averment nor proof of any trade practice. Further, the observations of the Collector (Appeals) that the price charged to a buyer treating it as a different class of buyer should be the normal price unless there is an evidence to hold that such buyer is a related person of the assessee, is a wrong proposition of law. Cogent reasons must be shown as to how the buyer is a different class of buyer. There can be various reasons why a buyer becomes a different class of buyer. A bulk purchaser or persons situated in different locations or different industries for example one being a car manufacturing industry and another being a heavy duty machinery manufacturing industry or third being an electric motor manufacturing industry could all be different classes of buyers. But these are facts which must first be averred and then proved. It is only on the basis of facts averred and shown that a conclusion can be reached that the sale is to a different class of buyer. In this case except for broadly stating that the sale is to a different class of buyer the Collector (Appeals) has not given any 'reason as to how he concludes that TELCO was a different class of buyer. The only reason for concluding that the TELCO was a different class of buyer appears to be because a different price was charged from it. That by itself is not sufficient. On the facts of this case it is clear that there was no material to show that TELCO was a different class of buyer.

7. The Appellant herein carried the matter in appeal to the Tribunal which Appeal has been dismissed by the impugned judgment. The impugned judgment is virtually a one paragraph judgment which reads as follows :-

"4. After hearing the learned J.D.R., we observe that the Commissioner (Appeals) in the impugned order has observed that if an assessee sells their goods at different prices to different classes of buyers, such prices would be deemed to be normal prices of such goods, if such buyers are not related persons; that the Assistant Commissioner could not establish any relationship between M/s. T.E.L.C.O. and the Assessee. The Commissioner (Appeals) also observed that whether a particular buyer constitutes a class of buyers or not, will depend upon the trade practice. Each buyer is a class by itself since he can be distinguished from other buyers. The Commissioner (Appeals), therefore, set aside the Assistant Commissioner's order. The very fact is that the law provides for filing of different prices for different classes of buyers and also the different forms for filing the price lists. There is no reason not to accept the price filed in Part-II until and unless it is shown that the low prices have been charged on extraneous circumstances."

8. The Tribunal, has laid down a general proposition of law. But it has not applied its mind whether that law can be applied to the facts of this case. The Tribunal also does not indicate how and what material was there to show that TELCO was a different class of buyer.

9. Both the orders of the Collector (Appeals) and the Tribunal are unfortunately bereft of any reasoning. Neither of them can be sustained. Accordingly, on facts of this case, the Appeal is allowed. The impugned order and the order of the Collector (Appeals) are set aside. There will be no order as to costs.

