

(2015) 09 SC CK 0177

In the Supreme Court Of India

Case No : Civil Appeal No. 1030 of 2007

Commissioner of Central Excise, Lucknow

APPELLANT

Vs

Bajaj Hindustan Ltd.

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3(2), 4, 4(1)
Sugarcane (Control) Order, 1976 — Section 3(3C)

Citation : (2015) 325 ELT 808 : (2015) 52 GST 773

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : K. Radhakrishnan, Sr. Advocate, Sunita Rani Singh, Shirin Khajuria, H.K. Naik and B. Krishna Prasad, Advocates, for the Appellant; Alok Yadav, Ruby Singh Ahuja, Utsav Trivedi, Chahat Chawla, Sanjeev Singh, Manik Karanjawala and Kanandev Chopra, Advocates,

Final Decision : Allowed

Judgement

1. The Respondent herein is the manufacturer of sugar under the Essential Commodities Act. Part of sugar, at the relevant time was allowed to be sold as "Free-Sale" sugar and part of sugar was to be sold at controlled rates to be fixed by the Government. We are concerned here with the period from March, 1978 to November, 1980. During this period the Central Government has passed orders fixing the rates of controlled sugar. The Respondent was not satisfied with the said fixation and disputed the same by filing a writ petition in the High Court of Allahabad. Some interim orders were passed in the said writ petition filed by the Respondent and other similarly situated manufacturers of sugar, allowing these manufacturers to charge higher price than the price that was fixed by the Government. On the basis of the aforesaid orders passed by the High Court on the sugar which was cleared by the Respondent for sale during the period March, 1978 to November, 1980, higher price as per the orders passed by the High Court was charged. However, the Respondent cleared the goods by paying the excise duty only on the rates that were notified by the Government. Because of

this, show cause notice was issued to the Respondent claiming differential duty. The Respondent filed reply thereto which was not found to be satisfactory and the Assistant Commissioner passed the order confirming the demand of duty contained in the show cause notice. The matter was taken in appeal by the Respondent before the Commissioner. The Commissioner vide order dated 29th June, 2001, held that such a differential duty could have been charged. However, he further found that some of the period for which the Assessee was directed to pay the duty was not covered by the show cause notice and on that ground alone matter was remitted back to the Assistant Commissioner for recalculation of the duty only for the period covered by the show cause notice i.e. March, 1978 to November, 1980. On remand the Assistant Commissioner went into the aforesaid calculations for the aforesaid period and found that the amount realisable on differential duty was Rs. 30,58,904.79. However, the Respondent had claimed that the actual amount during this period would be Rs. 13,54,773.74 only. The Assistant Commissioner gave him opportunity to demonstrate as to how the Respondent was claiming the amount realisable only to the extent of Rs. 13,54,773.74. The Respondent, however, remained uncooperative and did not submit any detail required for requantification. In these circumstances, the Assistant Commissioner confirmed its earlier demand of Rs. 30,58,904.79. This order was upheld by the Commissioner (Appeals). The Assessee carried the matter further before the Tribunal and the Tribunal has allowed the appeal of the Assessee vide impugned order dated 21-7-2006 and set aside the differential duty claimed by the Revenue.

2. While allowing this appeal of the Respondent, the Tribunal has referred to the judgment of this Court to the final order dated 21-5-2004 passed by the Tribunal in its earlier Appeal Nos. E/1631-1633/2004 and E/1641/2004-NB(A) which refers to some circular dated 25-9-2001 issued by the Board. Challenging the correctness of the aforesaid decision of the Tribunal Mr. K. Radhakrishnan, learned Senior Counsel, pointed out that the aforesaid circular issued by the Board was in altogether different context, and that was issued in view of the judgment of this Court in *Malaprabha Co-Operative Sugar Factor Ltd. v. Union of India* 1992 (1) SCC 648 and had nothing to do with the issue at hand.

3. We have heard the learned Counsel for the parties on this aspect and find adequate force in the submission made by Mr. Radhakrishnan. Section 4 of the Central Excises and Salt Act, 1944, which was invoked at the relevant time and deals with the valuation of excisable goods for purposes of charging of duty of excise, reads as under:

"4. Valuation of excisable goods for purposes of charging of duty of excise.-

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be-

(a) 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: Provided that-

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the Assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in Clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the Assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in Clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the Assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the Assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the Place of removal is not known and the value thereof is determined with reference to the 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 shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed Under Sub-section (2) of Section 3.

(4) For the purposes of this section,-

(a) "Assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such

goods are removed;

(c) "related person" means a person who is so associated with the Assessee that they have interest, directly or indirectly, 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.

Explanation.--In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956; (1 of 1956)

(d) "value", in relation to any excisable goods,-

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the Assessee.

Explanation.--In this Sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

(e) "wholesale trade" means sales to dealers, industrial consumers Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail."

4. As per Clause (a) of Sub-section (1) of Section 4, the duty which is payable is on a normal price of the goods i.e. price at which the goods are ordinarily sold by the Assessee to a buyer. As pointed out above, the High Court had passed interim orders permitting the Assessee to charge higher price and thereafter at that price the goods were normally sold by the assessee to the FCI as well as other buyers.

5. Learned counsel for the Assessee has sought to rely upon the proviso (ii) of Section 4 and on that basis he submits that since the price was fixed by the Government under the aforesaid Essential Commodities Act, that was the price fixed under the law and, therefore, in terms of the proviso the excise duty was rightly paid by the Assessee by declaring the price as fixed by the Government. This contention is clearly misconceived.

6. The controversy that arose which affected the sugar industries as a whole was as a result of introduction of Clause 5A of the Sugar-cane (Control) Order and the Bhargava Commission Report of 1974. The contention of the sugar manufacturing units against the then notified price was that since the price had to be fixed Under Section 3(3C) of the Sugar-cane (Control) Order, 1976, taking into account the four factors mentioned therein, such notified price could not

take into account excess sale realisation of free sale sugar, and this being the case, the notified price being an artificially depressed price, the notices were bad in law. It appears that since a prima facie case had been made out, the High Court by interim orders dated 7-1-1974, 1-3-1974 and 25-7-1974 thus allowed the sugar manufacturing companies and cooperative societies to charge the price higher than the notified price so that the excess realisation of free sale sugar would not be taken into account.

7. After various judgments were delivered in the States of U.P. and Maharashtra by the respective High Court, the matter was finally concluded by this Court in Malaprabha Co-Operative Sugar Factor Ltd. (supra). In Paragraph No. 107 thereof this Court ultimately agreed with the contention of the sugar companies and cooperative societies and thus ultimately upheld the higher price as the notified price stating that the excess realisation of free sale sugar could not be mopped up. Paragraph No. 107 reads as under:

"107. We are in agreement with the above observations since the approach to price determination is in the proper perspective. It may also be added that the ruling in Sitaram case is silent as to the impact of Clause 5-A of the Sugar-cane (Control) Order since what came up for decision in that case was the correctness of the zonal fixation of prices. Therefore, we uphold the contention of Mr. Nariman that the changed methodology adopted from July 11, 1975 was directly contrary to the recommendations of Bhargava Commission which have come to be accepted by the Government. Accordingly, we hold that the Government could not, in law, proceed to a determination of the levy price by mopping up 100 per cent of the excess realisation of free sale sugar. This overlooks the fact that the producer had become statutorily entitled to 50 per cent of such excess realisation from October 1, 1974."

8. This being the case, it is clear that the only price that was spoken about even by the interim orders was the price "fixed under any law for the time being in force" and thus an interim order fixing the higher price would also be an order which fixes a price "under any law for the time being in force". In view of the above, the order of the Tribunal is set aside and this appeal is allowed. No order as to costs.