(1989) 06 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition No. 1772 of 1981

Dawn Apparels Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 13-06-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 10
Central Excises and Salt Act, 1944 — Section 4, 4(4)

Citation : (1989) 23 ECR 505 : (1989) 43 ELT 401

Hon'ble Judges : S.P. Bharucha, J

Bench : Single Bench

Judgement

1. This writ petition concerns the application of Section 4 of the Central Excises and Salt Act, 1944, as it stood prior to the amendment which came into force on 1st October, 1975.

2. The petitioners are a subsidiary company of M/s. Dawn Mills Co. Ltd. They manufacture items of apparel, including brassieres, the manufacture of which they commenced in 1972. They entered into an arrangement with Dawn Mills whereunder the latter agreed to buy the entire production of brassieres manufactured by the petitioners at an ex-factory rate based on the petitioners manufacturing cost and manufacturing profits. The marketing and sales efforts in respect of these bras were put in by Dawn Mills and the prices at which they were sold were also fixed by Dawn Mills.

3. On 20th July 1974 the petitioners received a notice from the Superintendent of Central Excise, Bombay, under the provisions of the old Section 4. The notice stated that it was seen from the invoices that the petitioners'' entire production of bras was sold to Dawn Mills and that the price that the petitioners had declared for the purposes of assessment of excise duty was the price at which the petitioners sold them to Dawn Mills. On going through the petitioners'' Memorandum and Articles of Association and the annual report for the year 1972-73, it had been noticed that the petitioners'' sales to Dawn Mills were not

purely on commercial basis. Dawn Mills appeared to have special financial interests in the petitioners'' business transactions. The transactions were not at arm''s length. Though they appeared to be wholesale, they were not so u/s 4. The prices charged by Dawn Mills to various wholesale dealers alone could be the basis for the purposes of assessment of the duty. The petitioners were required to show cause why the prices charged by Dawn Mills should not be approved as the assessable value u/s 4 instead of the price at which the petitioners had sold the bras to Dawn Mills.

4. This show cause notice was followed by a show cause notice dated 16th August 1974 under Rule 10 of the Central Excise Rules, which related to the period 18th August 1973 to June 1974. Another show cause notice dated 16th August 1974 was issued under Rule 10A which related to the period 1st April 1973 to 18th August 1973. Three other show cause notices dated 14th October 1974, 16th December 1974 and 1st January 1975, all under Rule 10-A which related to the periods, July 1974, 16th August 1974 to 31st August 1974, and May 1972 to March 1973 respectively.

5. The petitioners showed cause to the aforesaid notices.

6. In February 1975 orders on the aforesaid notices were passed by the Assistant Collector of Central Excise, Bombay. He said that the petitioners had admitted in their replies that they were the subsidiary company and Dawn Mills the holding company, that Dawn Mills had 2,500 equity shares of Rs. 100/- each in the petitioners'' total equity capital of Rs. 10,000,00/-, and that the Directors of the petitioners had "special attachment of Dawn Mills". He had, therefore, no doubt that the transactions between Dawn Mills and the petitioners were not at arm''s length. Since they were not at arm''s length and in the ordinary course of business, he ordered that the prices charged by Dawn Mills to their dealers or distributors should bet taken as the wholesale cash price within the meaning of Section 4. Accordingly, the demands upon the petitioners were upheld.

7. The petitioners preferred appeals which were disposed of the Appellate Commissioner of Central Excise on 30th January 1976. He held that as the deal between the petitioners and Dawn Mills was not independent or at arm''s length or in the normal course of business, according to the details given in the Assistant Collector''s order, he saw no reason to interfere with that order. The appeal, therefore, was dismissed.

8. The petitioners thereupon preferred a revision application to the Government of India. The order thereon was passed on 28th May 1981. The order noted that it was an admitted position that the bras manufactured by the petitioners were sold to their distributors Dawn Mills who were also their principal company. The petitioners had pleaded that even though they were only a subsidiary of Dawn Mills they were still two separate entities and that the relationship between the two was on principal to principal basis. It was, however, observed that since the petitioners were only a subsidiary of Dawn Mills, who were their sole distributors,

the relationship between the two could not be treated as being at arm''s length as, in such a case, each would be definitely interested in the business of the other. Dawn Mills could not also be treated as wholesale dealers as term was understood in Section 4. The price at which the petitioners were selling the bras to Dawn Mills could not, in the circumstances, form the basis of their assessable value and the assessable value had to be determined on the basis of the price at which Dawn Mills were selling to wholesale dealers. The revision application, accordingly, confirmed the demands made upon the petitioners.

9. This writ petition is filed to assail the orders aforementioned.

10. My attention has been drawn to the judgment of the Delhi High Court in Union of India v. Hind Lamps Ltd., Shikohabad, 1981 (6) E.L.T. 11 , with which I agree, and which squarely covers this case. Upon the facts there, the court said, it could reasonably be held that there was a special relationship between the buyer and the seller. However, the existence of the special relationship by itself did not mean that there was a favoured treatment in the sense that a lower price was charged. In order to make the principle laid down in the Supreme Court judgment in A.K. Roy and Another Vs. Voltas Limited, , applicable, it had also to be established that an extremely low price was being charged. There was no evidence to this effect and it was a mere guess.

11. In the present case also, each of the authorities below has proceeded only upon the basis that there was a special relationship between the petitioners and Dawn Mills, in that the petitioners were a subsidiary of Dawn Mills. No attempt has been made to establish that, in fact, a low price has been charged and/or that Dawn Mills have been accorded any favourable treatment. In the absence of such evidence and merely upon the basis that there is a special relationship such as that of subsidiary and principal, it cannot be held that the price at which the subsidiary sells to the principal is not the correct price for the purposes of assessment of excise duty.

12. The orders of the authorities below must, therefore, be set aside.

13. The authorities shall be entitled to determine afresh upon the aforementioned show cause notices what is, in fact, the assessable value of the bras. They shall be entitled to establish appropriate evidence that the price charged by the petitioners to Dawn Mills is, in fact, a very low price and that Dawn Mills have been accorded favoured treatment in this behalf. The petitioners shall be entitled to advance intimation of such material as the authorities may desire to rely upon for this purpose.

14. Accordingly, the rule is made absolute as aforestated.

15. Mr. Shroff, learned Counsel for the petitioners, applies that the bank guarantee and bond given by the petitioners pursuant to the interim order in this writ petition should stand discharged. Mr. Desai learned Counsel for the respondents, submits that they should remain effective pending determination on

the aforesaid show cause notices. In my view, the submission made by Mr. Desai deserves acceptance. Accordingly, the bank guarantee and bond shall be kept alive pending the determination on the show cause notices by the Assistant Collector of the Central Excise to be made within 4 months from today.

16. No order as to the costs.