

(1990) 01 DEL CK 0018

In the Delhi High Court

Case No : Civil Writ Petition No. 926/76

Escorts Tractors Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-01-1990

Acts Referred:

Citation : (1993) 64 ELT 18

Hon'ble Judges : S.B. Wad, J;M.K. Chawla, J

Bench : Division Bench

Advocate : Shri Ravinder Narain, Mr. P. K. Ram and Ms. A. Mitra, for the Appellant; Shri Rajinder Dutt, for the Respondent

Judgement

M. K. Chawla, J.—In this writ petition, the petitioner company has challenged the legality and the validity of the Central Government's order dated 29th September, 1975 passed in revision, allowing the discount of an amount of Rs. 1,000/- only as against the sum of Rs. 1,750/- given by the petitioner to its distributors M/s. Escorts Ltd., for the purposes of calculating the value of the tractors, u/s 4 of the Central Excises and Salt Act, 1944, as it stood before its amendment under Central Excises and Salt (Amendment) Act, 1973, which came into force on 1st of October, 1975.

2. To appreciate the point in controversy, few facts are necessary to be stated. The petitioner is a public limited company engaged in the manufacture of Ford 3000 agricultural tractors in collaboration with Ford Motor Company of U.S.A. On 17th October, 1969, i.e. much before the excise duty was levied on the tractors, the petitioner entered into an agreement with respondent No. 4, Escorts Ltd., for the sale, promotion, distribution and servicing of the tractors manufactured by the petitioner. This agreement was executed in the ordinary course of business and was based on purely commercial consideration. The excise duty was levied on the tractors at 10 per cent ad valorem from 29th May, 1971. Immediately thereafter, the petitioners approached the Superintendent of Central Excise S.R.P. II, Faridabad, for the determination of the assessable value of the Ford SKD

tractors which was fixed at Rs. 24,795.30 per unit. This value was based on ex-works price of Rs. 26,544.30 per unit as fixed by the Ministry of Food and Agriculture and Community Development and Cooperatives, Department of Agricultural vide their letter dated April 30, 1971, less uniform trade discount given on all tractors at the rate of Rs. 1,750/- per unit. As per the averment out of the said discount, a sum of Rs. 1,000/- was paid by respondent No. 4 to the dealers and a sum of Rs. 750/- only per unit was retained by it solely to meet the expense for sale, distribution, advertising and servicing of the tractors.

3. The Superintendent of Central Excise S.R.P. II, Faridabad, by its order dated ... June, 1971, allowed the petitioners to make a deduction of Rs. 1,000/- per unit of tractor from the gross ex-factory price for the determination of the assessable value but disallowed the deduction of Rs. 750/- per unit which was retained by respondent No. 4. Aggrieved from the said order of the Superintendent of Central Excise, the petitioner appealed to the Dy. Collector, Central Excise and Customs, Chandigarh. This appeal was finally transferred to the Appellate Collector, Central Excise and Customs, New Delhi. Vide order dated 23rd May, 1973, this appeal was dismissed on the short ground that the entire product of the petitioner was marketed through respondent No. 4 and that respondent No. 4 was, in fact, a sole selling agent of the petitioner. The petitioner was not satisfied with the said order of the Appellate Collector and preferred to file the revision before the Central Government u/s 36 of the Act. On 20th September, 1975, the Central Government also dismissed the revision holding that there was no independent sale of the tractors from the factory gate of the petitioner inasmuch as the tractors could reach the wholesale dealer only through respondent No. 4 and an independent wholesale dealer could not get the tractors at the price at which respondent No. 4 purchased the said tractors.

4. As a consequence of the dismissal of the revision petition, the petitioner paid an amount of Rs. 63,300/- by way of excise in excess of what, according to the petitioner was legally livable under the Act for the period from 1-1-1971 to 29-11-1971. The petitioner even though subsequently filed applications for the refund of this amount but the same were rejected on 7th June, 1976. Hence, the present petition.

5. The contention of the learned counsel for the petitioner is that excise is a tax on production and manufacture of goods and while determining the assessable value of goods u/s 4 of the Act, the real value should be found after deducting post-manufacturing selling costs and post-manufacturing and selling profits. In this case, according to the learned counsel, respondent No. 4 retained Rs. 750/- per unit of the trade discount which, in fact is utilised for promotion, sales, distribution and servicing of the tractors manufactured by the petitioner and all these activities represent post-manufacturing and selling cost incurred by the said respondent. The mere fact that there is no sale of tractors at the factory gate of the petitioner to parties other than respondent No. 4 will not make the trade discount retained by respondent No. 4 a non-deductible in determining the

assessable value, particularly, when the transaction between the petitioner and respondent No. 4 are at arm's length, and respondent No. 4 has not been a favored buyer. The revisional authority under the circumstances has erred in overlooking and ignoring the settled legal proposition that the transaction does not cease to be a wholesale transaction merely because the petitioner has entered into an agreement with respondent No. 4 under which certain commercial benefits are conferred on the said respondent in consideration of certain services to be rendered by it.

6. As against this, the contention of the learned counsel for the respondent is that respondent No. 4, the distributor company had 45% participation having four common Directors in the petitioner firm. Both these companies had and are thus covered under the expression "related person". The mutual interest was that M/s. Escorts Tractors Ltd. were giving Rs. 750/- per tractor, while the distributor was incurring expenses on sale, promotion, advertising and servicing etc. It was on the performance of their function that the marketability of tractors, goodwill and production depended and as such, they had a mutuality of interest inter se. The Tribunals thus were justified in leaving the further sum of Rs. 750/- and adding the same to the cost of the tractor which ultimately reached the buyer.

7. On careful consideration of the arguments advanced, we are of the opinion that the conclusion arrived at by the Appellate and Revisional Boards are contrary to facts and well established propositions of law laid down by this Court as also by the Supreme Court. It is not disputed that the Government of India fixed the price of the petitioner's tractor at Rs. 25,544.30 after allowing the trade discount of Rs. 1,000/- to the manufacturer. The following questions that require going into, and need definite answers are :-

1. Whether the petitioner and respondent No. 4 are covered under the expression "related persons" as defined in Section 4(4)(c) of the Act;
 2. Where there is any mutuality of interest in between the petitioner and respondent No. 4 qua the production and sale of the product;
 3. Whether the amount of Rs. 750/- per tractor which is retained by the distributor respondent No. 4 as per the agreement is a post manufacturing expense or the part of the cost of the tractor;
 4. Whether the transaction between the parties is from principal to principal and if not, the effect of the sale of entire production being sold through respondent No. 4 ?
8. According to clause (c) of sub-section (4) of Section 4 of the Act, "related person" means a person who is so associated with the assessed 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 assessed and any sub-distributor of such distributor. While interpreting the expression, "related

persons", the Supreme Court in the case reported as Union of India (UOI) and Others Vs. Atic Industries Ltd., , held it to mean "a person who is so associated with the assessed that they have interest directly or indirectly in the business of each other." In the said case, the Court found that Atul Products Ltd. has interest in M/s. Atic Industries Ltd., since it held 50 per cent of the share capital of that assessed and had interest as shareholder in the business carried on by the assessed. But even then the Court held that it could not be said that assessed, a limited company had any interest, direct or indirect, in the business carried on by one of its shareholders, namely, Atul Products Ltd. even though the shareholding of such shareholders might be 50 per cent. Secondly, it was noted that even though Atul Products Ltd. was a wholesale buyer of the dyes manufactured by the assessed but since the transactions between them were as principal to principal, it was difficult to appreciate how the assessed could be said by virtue of that circumstance to have any interest, direct or indirect, in the business of Atul Products Ltd. The assessed, it was observed, was not concerned whether Atul Products Ltd. sold such dyes at a profit or at a loss. In those circumstances, the first part of the definition of related persons in clause (c) of sub-section (4) of Section 4 of the Amended Act was, Therefore, clearly not satisfied both in relation to Crescent Dyes and Chemicals Ltd., a subsidiary company of Atic Industries Ltd. and neither of them could be said to be a related person vis-a-vis the assessed within the meaning of definition that term.

9. The ratio descend of the Atic Industries fairly and squarely applies to the facts of this case in which it is not the case of the respondent that respondent No. 4 had any direct or indirect interest in the company of the petitioner, nor is there any averment of mutuality of interest between the two except that respondent No. 4 has 455 share capital in the assessed company. The judgment in Atic Industries was followed in the subsequent judgment of the Supreme Court reported as Union of India (UOI) and Others Vs. Playworld Electronics Pvt. Ltd. and Another, and Union of India (UOI) and Another Vs. Hind Lamp Ltd., .

10. Even if it be the case of the respondent that the entire production of the petitioner is marketed through respondent No. 4, even then, in our opinion, the Department cannot include the sum of Rs. 750/- retained by the distributor, to the value of the goods sold through them for the purpose of levy of excise duty. In similar circumstances, it was so held in the case reported as Joint Joint Secretary to the Government of India and Others Vs. Food Specialities Ltd., . In the said case, the respondent M/s. Food Specialities Ltd. had entered into an agreement with M/s. Nestle Product (I) Ltd. to manufacture, on their behalf, sweetened condensed milk, soluble coffee, baby milkfood, milk powder and instant cereal food for sale in India, under certain trade mark. Nestle were obliged to buy the product so manufactured by the respondent according to the detailed quality specification. The products manufactured by the respondent were subjected to excise duty which was questioned before the concerned authorities. Ultimately, the High Court agreed with the respondent and quashed the orders of the excise authorities.

11. The Government of India in appeal before the Supreme Court contended that the value of the goods sold by the respondent to Nestle should, for the purpose of levy of excise duty, include the value of the trade mark under which the goods are sold in the market and that the value of such trade marks should be added to the wholesale price for which the goods are sold by the respondent to Nestle. This contention was repelled by the Supreme Court holding that the wholesale price at which the goods with the trade mark affixed to them, are sold by the respondent to Nestle, as stipulated under the agreement, would be the value of the goods for the purposes of excise duty i.e. the price at which the respondent sells the goods to Nestle in the course of wholesale trade and we fail to see how the value of the trade mark should be added to the wholesale price for the purpose of determining the value of the goods for the purpose of levy of excise duty.

12. In our recent judgment in *United Copiex (I) Ltd. and Another v. Union of India and Others*, (C.W. 411/83) decided on December 1989 (47) E.L.T. 297 (Del.), we have, on similar facts held :-

"The close reading of the impugned order would show that the Assistant Collector has ignored the fact that the buyer makes a wholesale trade of the flaps to the seller and after adding 12% handling charges, the seller makes a further sale. The petitioners have specifically averred that the raw material is sold to them by the seller and they have also attached the receipt showing the separate payments made for such sale of raw material. There is nothing to show that the buyer manufactures the flaps on behalf of the seller as has been held by the Supreme Court decisions cited above. Mere right to reject some goods or that the entire stock of manufactured goods is sold to the seller does not create the relationship envisaged by Section 4(4)(c). That the brand name of the seller is valuable and that the brand name is used by the buyer are also not decisive of the relationship. The learned Assistant Collector has not even addressed to the question of mutuality of interest in the business of buyer and seller which is the most important test laid down by the Supreme Court for deciding the related relationship u/s 4(4)(c) of the Act. Since the impugned order is contrary to the decisions of the Supreme Court, it has to be quashed."

13. In this view of the matter, we are of the opinion that the petitioner and respondent No. 4 are not related persons and they cannot be clubbed together on the basis of their respective and separate cost of production and sale of the tractors. The transactions between the manufacturer and his customer were on principal to principal basis and the price charged by the present petitioner from respondent No. 4 was the sole consideration for the sale of their tractors. The only valid basis for levy of excise duty payable by the petitioner can be the price at which they sell their tractors to respondent No. 4 and not the price at which respondent No. 4 sells the tractor by charging Rs. 750/- as expenses for sale, distribution and servicing of tractors.

14. For the reasons stated above, the impugned order is set aside. The petition

succeeds with costs.

15. It is not disputed that after the dismissal of their revision petition, the petitioners were forced to deposit various amounts on different dates as shown in Annexure "P" to the main petition, by way of excise duty, which in fact was not legally due.

16. Subsequently, the petitioner filed applications for refund of this amount but the same was rejected. In our opinion, respondents have collected, retained and enjoyed the benefit of this amount for sufficient long time without any authority of law. They are bound to return this amount with interest. It is just and proper that the respondents pay interest at the rate of 12% p.a. from the date of collection of amount till the date of actual payment. The respondents are directed to pay the amount with interest within three months from the date of this order.