

(1976) 08 P&H CK 0005

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ No's. 1969, 4420, 4422 to 4424, 4429 to 4436 and 4497/75

Food Specialities Limited

APPELLANT

Vs

Assistant Collector, Central Excise and Customs and Others

RESPONDENT

Date of Decision : 31-08-1976

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(a), 4(b)

Citation : (1978) 2 ELT 162

Hon'ble Judges : Surinder Singh, J;O. Chinappa Reddy, J

Bench : Division Bench

Judgement

O. Chinnappa Reddy, J.—These 14 Civil Writ Petitions (C. W.Ps. Nos. 1969, 4420, 4422 to 4424, 4429 to 4436 of 1975) ; may be disposed of by a common judgment. In all the cases, the petitioner is M/s Food Specialities Limited, Moga, District Faridkot, a company registered under the Indian Companies Act, 1956. M/s Nestle's Products (India) Limited, New Delhi, is the principle Indian branch of Nestle's Products (India) Limited, Nassau, Bahama Islands, a foreign company. Both the Indian company and foreign company are subsidiaries of another foreign company Nestle's Holdings Ltd., Nassau, Bahamas Islands. At all relevant times the petitioner was engaged pursuant to agreement entered into with Nestle's Products (India) Limited, New Delhi from time to time in the manufacture solely of for and on behalf of later, Sweetened Condensed Milk, Soluble Coffee, Baby Milk Food, Milk Powders and Infant Cereal Food for sale in India by Nestle's Products (India) Limited under certain trade marks in respect of which Nestle's was registered as a sole registered users in India. The agreement stipulated that the Indian Company should manufacture for and on behalf of Nestle's and supply to Nestle's such quantities of the food products as Nestle's might specify from time to time subject to a certain, minimum and certain maximum. Nestle's was obliged to buy the products so manufactured by the Indian Company. Nestle's was to give, from time to time, complete and detailed quality and specifications of the products to be supplied to them and the Indian company was required to manufacture the products in strict accordance

with the specifications and instructions given for and on behalf of Nestle's. Prices of the products were determined by the agreements free on rail Moga or free on lorry at factory. The agreements also provided for increase of price or decrease of price by negotiations and after two months notice in writing. All invoices had to be settled within ninety days after the receipt thereof. The Indian Company expressly disclaimed any interest in the trade mark and labels of Nestle's and undertook not to sell any of the said products to any person other than Nestle's. A provision was also made for determination of the agreements and for reference to arbitration in case any dispute or difference arose between the parties. As we said the prices of the products were stipulated in the agreements from time to time. A statement filed by the petitioner along with writ petition shows that the prices suffered a great variation between 1965 and 1975. For example the selling price of "Full Cream Sweetened Condensed Milk- Milkmaid" was enhanced from Rs. 50/- to Rs. 220/- per unit. The price of "Full Cream Powdered Milk-Nespray" was enhanced from Rs. 84/- to Rs. 320/-per unit. The price of "Instant Soluble Coffee-Nescafe" was enhanced from Rs. 60/- to Rs. 157/- per unit. Similarly in respect of other products like Ricory, Lactogen, Maggi etc. also the prices were enhanced from time to time.

2. There is no dispute that the products manufactured by the petitioner for and on behalf of Nestle's are excisable goods under the Central Excises and Salt Act. u/s 4(1)(a) of the Central Excises and Salt Act, the valuation of an excisable articles for the purpose of levy of excise duty is deemed to be the "whole salecash price" for which an article of the like kind and the quality is sold or is capable of being sold at the time of the removal of the article from the factory or if a whole sale market does not exist for such article at such place, at nearest place where such market exists. Section 4(1)(b) provides that where the "wholesale cash price" as mentioned in Clause (a) is not ascertainable the price of the article would be deemed to be the price at which the article of the like kind and quality is sold or is capable of being sold by the manufacturer, at the time of the removal of the article from the factory, or if such article is not sold or is not capable of being sold at such place, at any other place, near thereof. An explanation to Section 4 provides that in determining the price of article under the section, no deduction should be allowed except in respect of trade discount and the amount of duty payable, at the time of removal of article from the factory. Prior to the decision of the Supreme Court in A. K. Roy and Anr. v. Voltas Ltd.. 1977 ELT 177 the High Courts of Andhra Pradesh, Bombay, Calcutta and Mysore have taken the view that if a manufacturers entire production was sold to one or more favoured distributors, it could not be said that there was any wholesale market in the sense of an open market at the gate of the factory where an independent buyer could purchase the goods in wholesale. It was held that in such a case the prices at which the goods were sold by the manufacturers to the favoured distributors could not be taken as the value of goods for the purpose of levy of excise duty. It was further held that the price at which the favoured distributors, in his turn, sold the goods in wholesale or in retail, as the

case may be, should be determined as the value of the goods for the purpose of levy of excise duty payable by the manufacturer. The decision of the several High Courts were over-ruled by the Supreme Court in *A.K. Roy v. Voltas Ltd*, where it was held that in order that wholesale market should exist, it was not necessary that there should be a market in the physical sense of the term where articles of a like kind or quality were or could be sold or that the article should be sold to so called independent buyers. It was pointed out that a wholesale market did not necessarily mean that there should be an actual place where articles were sold and bought on a wholesale basis. It was enough if there was the potentiality of the articles being sold on a wholesale basis. It was further held that the price at which the manufacturer sold the goods to wholesale dealers would not cease to be the "wholesale cash price" for the purpose of Section 4(1)(a) merely because the manufacturer had entered into the agreements stipulating for commercial advantages so long as the parties dealt with each other at arm's length and in usual course of business, without any extra commercial considerations entering into the stipulation of the prices. The Supreme Court also notices that excise was a tax on the production and manufacture of goods and that it was levied only on the amount representing the manufacturing cost plus the manufacturing profit and excluded post-manufacturing cost and the profit arising from post-manufacturing operations, namely, selling profit. In arriving at its conclusion the Supreme Court relied on the decision of the Privy Council in AIR 1932 168 (Privy Council) and AIR 1938 15 (Privy Council) . The decision of the Supreme Court in *A.K. Roy v. Voltas Ltd.*, was reaffirmed in *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, . Acting apparently on the basis of the decisions of the various High Courts rendered prior to the decision of the Supreme Court in *A.K. Roy v. Voltas Ltd.* the Inspector of Central Excise, Moga, proposed to levy excise duty on the products manufactured by the petitioner valuing them not at the prices at which they were being supplied by the petitioner to Nestle's but at the prices at which Nestle's were selling them in the market. The petitioner submitted a representation that the value of the products should be the price charged by them to Nestle's but having regard to the decisions of the various High Courts, they conceded that the price prevailing between them and Nestle's as was not the price at which excise duty was leviable. They represented, however, that the prices at which Nestle's were selling products could not be taken as "wholesale cash price" as those prices were loaded with marketing, selling, advertising, insurance, freight and other expenses incurred by Nestle's. The petitioner, therefore, desired the excise authorities to determine the "wholesale cash price" independently without adopting the price at which Nestle's sold the products in the market. The petitioner preferred an appeal to the Collector of Central Excise in which it was claimed that the price at which they sold the products was loaded with several post-manufacturing costs. The Collector held that there was no whole sale market at the place of manufacture as no independent buyer could purchase the manufactured products in open contemporary conditions. He held that the sale to Nestle's was a sale to a favoured buyer and, therefore, the price prevailing

between the petitioners and Nestle's could not be taken as the price at which the duty could be levied. In regard to the deduction of post-manufacturing cost claimed by the petitioners the Collector held that the petitioners were entitled to claim deductions of trade discount and amount of excise duty only and nothing else. The Collector of Central Excise purported to rely on the decision of Calcutta High Court in Kanai Lall Shaw Vs. Bhattu Shaw, and that of the Andhra Pradesh High Court in Frazair Corporation, Hyderabad v. Collector of Central Excise and Ors.- 1969 (2) A.W.L.R. 57 both of which, we may mention here, were over-ruled by the Supreme Court in A.K. Roy v. Voltas Ltd. The petitioner preferred a revision petition to the Government of India. By that time the petitioner was apparently better advised and, therefore, the petitioner claimed, relying on the decision of the Privy Council in AIR 1932 168 (Privy Council) and AIR 1938 15 (Privy Council) , that the products should be valued at the prices at which they were sold to Nestle's. By the time the Government of India took up the revision petition for consideration, the decision of the Supreme Court in A.K. Roy v. Voltas Ltd., had also been rendered. The Government of India, however, held that the petitioner and Nestle's could not be considered as parties dealing at arm's length as they were not unfamiliar and independent parties, the petitioner being a subsidiary of Messrs Nestle's Products (India) Limited, Nassau, Bahama Islands, manufacturing the goods for them and supplying the same to their Indian branch. It was also observed that the products were produced and sold under the brand name of Nestle's and, therefore, everything that went into the value of the brand name should also go into the value of the goods. The price at which the petitioner sold the products to Nestle's could not be taken as the value for the purpose of levy of excise duty as it did not include the value of the brand name. It is this decision of the Government of India that is canvassed in these 14 writ petitions. Shri H.L. Sibal, learned counsel for the petitioner, argued that in view of the decisions of the Supreme Court in A.K. Roy v. Voltas Ltd. (supra) and in Atic Industries case, the Government of India was in error in holding that the petitioners and Nestle's were not parties dealing at arm's length merely because they were not unfamiliar and independent parties. He further urged that brand name was the property of Nestle's Products (India) Ltd., had included in the price at which the Nestle's sold that products in the market could not possibly enter the "wholesale cash price" at which the products could be sold by the petitioner to Nestle's or any other buyer since the brand name of Nestle's was not petitioner's to sell. In order to appreciate the submission made by the learned counsel it is useful to refer in some detail to the two decisions of the Supreme Court in A.K. Roy v. Voltas Ltd. and Atic Industries v. Assistant Collector of Central Excise, Voltas Ltd. was a company registered under the Companies Act and was engaged in the manufacture of air-conditioners, water coolers and component parts. Therefore, ninety to ninety five per cent of the articles produced by them were sold directly to consumers at list price through their sales organisation. A small part of its production was sold to wholesale dealers in pursuance of agreements entered into with them. The agreements provided that the dealers should not sell the products sold to them except in accordance with

the list price fixed by Voltas Ltd., that Voltas Ltd., would sell the products to them at the list price less 22 per cent discount, that the dealers should give service facilities of the units sold in their territory. The Central Excise authorities levied duty not on the basis of the "wholesale cash price" at Which Voltas sold the products to wholesale dealers but on the basis of the retail price at which the products were sold to consumers. The contention of the Central Excise authorities was that the agreements conferred certain extra commercial advantages upon the wholesale dealers and, therefore, sales to them were not sales to independent purchasers but to favoured ones. The price charged to them could not be presented the "wholesale cash price". It was argued that Section 4(1)(a) visualised a wholesale market at or near the place of manufacture where any wholesale purchaser could purchase the articles, and as the wholesales were confined to the favoured buyers, there was no wholesale market at the place of manufacture, observed:-

3. In *Atic Industries Ltd. v. Assistant Collector of Central Excise and Ors.*, the facts were as follows. Atic Industries manufactured dye-stuffs, which were sold by them to wholesale buyers, ICI India Ltd., and Atul Products Ltd. Seventy per cent were sold to ICI and the remaining thirty per cent to Atul. The price charged by the Atic Industries to ICI and Atul was a uniform price described as "the basic selling price" less trade discount of 18 percent. In their turn, ICI and Atul sold dye-stuffs to two categories of buyers, one the category of Textile Mills and the other the category of distributors. The sales to Textile Mills by the ICI and Atul were at the basic selling price without any deduction, but the sales to the distributors were at a higher price, though with trade discount. The distributors re-sold the dye-stuffs to small consumers at a slightly higher price without any discount. The Central Excise authorities refused to accept the price at which the dye-stuffs were sold to ICI and Atul, that is, the basic selling price less the trade discount of 18 per cent as the value of the articles for the purpose of levy of excise duty. They took the view that the value of dye-stuffs for the purpose of levy of excise duty should be taken to be the price at which ICI and Atul sold the dye-stuffs to the distributors. The High Court of Gujarat whose jurisdiction was invoked under Article 226 of the Constitution, following the decisions of the Andhra Pradesh, Calcutta and Mysore High Courts, decided against the assessee. Bhagwati J. speaking for the Supreme Court, after noticing the decision in the case of *A.K. Roy and Anr. v. Voltas Ltd.* 1977 E.L.T. 177 observed :-

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4. It was argued before the Supreme Court that the price charged to the distributors by ICI and Atul was also "wholesale cash price" and could well be taken as the "wholesale cash price" for the purpose of Section 4(1)(a). The argument was rejected by Bhagwati, J. as violative of the very basic principles underlying the imposition of excise duty he said :-

"There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arms length and in

the usual cause of business, the wholesale cash price charged by him to the wholesale dealer less trade discount would represent the value of the goods for the purpose of assessment of excise. That would be the wholesale cash price for which the goods are sold at the factory gate within the meaning of Section 4(1)(a). The price received by the wholesale dealer who purchases the goods from the manufacturer and in his turn sells the same in wholesale to other dealers would be irrelevant to the determination of the value and the goods would not be chargeable to excise on that basis. The conclusion is therefore inescapable that the assessable value of the dye-stuffs manufactured by the appellants must be taken to be the price at which they were sold by the appellants to ICI and Atul less 18% trade discount, and not the price charged by ICI and Atul to their dealers."

It is clear from what has been said by the Supreme Court in case of Voltas Ltd. and Atic Industries that Section 4(1)(a) of the Central Excises and Salt Act does not insist upon the existence of a physical or real market at the factory gate but contemplates a potential or possible market as well. That the entire production of a manufacturer has necessarily to be sold to a single dealer or limited number of dealers does not militate against the existence of the market contemplated by Section 4(1)(a). Nor do such exclusive buyers become favoured buyers on that account alone. They do not cease to be independent buyers. The sales made to them do not cease to be wholesale sales and the price paid by them does not cease to be wholesale price, when they deal at arms length and do not allow extra commercial considerations to colour the bargain. A crucial test to determine whether a purchaser is a favoured buyer is whether the price charged is a specially low price. Again the basic principle of excise levy is that it is imposed on manufacturing cost and profit and not on post-manufacturing cost and profit. The price at which the distributors who purchases the goods from the manufacturer sells them to other dealers, wholesale or retail, cannot be considered as "wholesale cash price" for the purpose of Section 4(1)(a).

5. If that is the law what are the facts here ? The petitioners and Nestle's may both be the subsidiaries of another company but the relations between them are governed by the agreements entered into between them, Agreements could well be between strangers, if the terms are considered. The agreements contained all the usual terms associated with such transactions. They stipulate, mutually binding conditions, they stipulate the manner of placing of order, they stipulate the manner of supply of the products, they stipulate the prices and they provide for variation of prices. They provide for arbitration in case Of disputes. On their face, the agreements are based on purely commercial considerations. The price charged is not claimed to be a specially low price and no extra commercial considerations are alleged to have entered into the bargain. In actual point of fact there was great escalation of prices between 1965 and 1975, between the petitioner and Nestle's. So it was that the Government of India, in its order, could only say that the parties were not unfamiliar and independent because they were subsidiaries of the same foreign company and, therefore, the could not

be said to deal at arms length. This view is clearly opposed to that expressed by the Supreme Court. When it was expressly averred in paragraph 7(xiv) and (xv) of the writ petition that the prices were fixed on purely "commercial considerations" and that "specially low prices" were not charged, the respondents evaded the issue by answering that these defects were not relevant. It was again repeated "in the instant case, the facts on record show that M/s. Nestle's have special relations with the petitioner as favoured buyer... The argument between the two companies who are subsidiaries of a parent company shows that their transactions are not independent and cannot be said to be at an arms length.... In the instant case, on the basis of the facts on record when the petitioner is manufacturing the excisable goods exclusively for a particular firm who are favoured buyers and when no wholesale market exists at the factory gate, action as provided u/s 4 of the Act has to be taken to arrive at the correct assessable value" This is wrong in view of what has been said by the Supreme Court.

6. It was argued by the learned counsel for the respondents that the price which the petitioner charged to Nestle's did not include the value of the brand name and that it ought to be included. We do not see how it can be. The trade mark is the property of Nestle's and not of the petitioner. The petitioner could not sell to Nestle's what was the property of Nestle's and what was not theirs. It was for Nestle's to include it in the price at which they sell the products to dealers. The value of the brand name could go into neither manufacturing cost nor manufacturing profit. It was clear post-manufacturing or seller's profit. Its inclusion in "wholesale cash price" for the purpose of Section 4(1)(a) could be opposed to the basic principles underlying the imposition of excise duty as explained by the Supreme Court.

7. In the result the orders of the Central Excise authorities and the Government of India are quashed in each case and Central Excise authorities are directed to re-assess the values of the excisable articles on the basis of the prices charged by the petitioner to Nestle's. Excise duty paid will be refunded, There is no order as to costs.