
(1974) 05 AHC CK 0033
In the Allahabad High Court
Case No : Writ Petition No. 2189/73

Hind Lamps Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-05-1974

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Constitution of India, 1950 — Article 226

Citation : (1978) 2 ELT 78

Hon'ble Judges : Satish Chandra, J;H.N. Seth, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Satish Chandra, J.—M/s Hind Lamps Ltd., the petitioner, is a public limited incorporated in 1951. It carried on the business of manufacture and sale of electric bulbs, fluorescent bulbs, miniature bulbs and their components at its factory at Sikohabad. The entire share holding of the petitioner company is held by six Ltd. companies. Of these four are foreign companies incorporated in England and Netherland and two are companies incorporated in India. Since its very inception the petitioner company has long term agreements with six other companies which have been described in the Counter Affidavit as subsidiary companies of the six Companies which are share holders in the petitioner company. The bulbs and fluorescent tubes etc. manufactured by the petitioner company are branded by the petitioners with the trademarks like "PHILIPS", "OSARAM", "MAZDA", "CROMPTION", "BAJAJ" and "KLEER-TON", under which names the customer companies sell these goods. The Petitioner Co. sells the goods manufactured by it to the customer Companies at its ex-factory price. The petitioner company pays Sales Tax on these sales. The price charged by the petitioner company includes manufacturing cost and manufacturers' profit. The petitioner Co. pays Income Tax on its profits from these sales.

2. In their turn, the customer companies sell the bulbs, tubes etc. to the public

at rates higher than those charged by the petitioner company. The customer companies include their selling cost and selling profits.

3. In 1955 excise duty was for the first time imposed on the bulbs and tubes manufactured by the petitioner company. The duty was levied and collected on "Specific" basis. With effect from 1st March, 1969, the base of the Excise Duty, was changed to ad valorem. This change was made in(sic) of electric bulb and fluorescent tubes only. The duty on miniature lamps continued to be levied on "Specific basis",

4. Soon after this change the Excise Department asked the petitioner company to supply it the catalogue of its selling price. The petitioner company complied with it. On 4th June, 1969, the Superintendent of Central Excise, required the petitioner Company to send the price list at which the customer Companies were selling the goods manufactured by the petitioner Company. The petitioner filed an objection that the Price charged by it was the Ex-Factory whole-sale Price and that alone was relevant and material for determining the value of the goods for purposes of calculating the Excise Duty. The Superintendent, however, on 14th July, 1969, insisted that the Price List of the customer companies be submitted. The petitioner company accordingly complied with this request on 9th August, 1969. Thereafter, on 16th August, 1969, the Superintendent of Central Excise passed an order directing the petitioner company to pay Excise Duty on the basis that the Price at which the Customer Companies sold the commodities was its whole-sale cash price. The petitioner company accordingly paid the Excise Duty on that basis. It did not challenge the order dated 16th August 1969, either by way of an Appeal, which is permissible under the Central Excise and Salt Act, or by instituting a Writ Petition in this Court.

5. In 1970 the customer companies increased their prices of electric bulbs and fluorescent tubes. On 16th July, 1970, the Superintendent, Central Excise, passed an order refixing the whole-sale cash price of the bulbs etc. manufactured by the petitioner company, at the increased selling price charged by the customer companies, subject to a deduction of 17 1/2 per cent discount which was being allowed by the customer companies to their respective purchasers. Aggrieved, the petitioner company filed an Appeal against this order.

6. In 1971 the customer companies again increased their selling prices of electric bulbs and fluorescent tubes. On 4th December, 1971, the Superintendent, Central Excise, passed an order increasing the wholesale cash price for the purpose of determining the Excise Duty payable by the petitioner company in accordance with the increase in price made by the petitioner's customer companies.

7. On 17th March 1972 the Excise Department converted the method of levy of duty on miniature bulbs from "Specific" to ad valorem basis. By an order dated 27th October, 1972, the petitioner company was directed to pay excise duty on miniature bulbs on the basis of the selling price of this commodity charged by the

customer companies. The petitioner company went up in Appeal against this order as Well.

8. The appeal directed against the order dated 16th July, 1970 was decided by the Appellate Collector on 22nd March", 1973. He held that in view of the agreement the petitioner company cannot sell its product to any party other than the customer companies, that they were only maru-lacluring goods on account of the customer companies, that no evidence had been brought forth to the effect that the agreement for marketing their-products for the above parties had been entered into at arms length and in the ordinary course of business and that the petitioner's prices were according to the voltage of the product and not according to the different band names under which they are ultimately sold. It was held that the petitioner Company had declared that the prices indicated at which the six parties mentioned above (Namely the customer companies) market the goods and as such the determination of the value for the purposes of duty u/ s 4 of the Central Excise and Salt Act has to be based on the wholesale cash price at which the products are sold by the above six parties. On these findings the Appeal was dismissed.

9. The appeal against the order dated 4th December, 1971 was disposed of by the Appellate Collector by his order dated 24th May, 1973. This order records the same findings as were mentioned in the earlier Appellate Order. This Appeal was also dismissed.

10. It appears that the appeal filed by the petitioner against the third order dated 27th October, 1972, is still pending disposal.

11. According to the petitioner it has paid a sum of Rupees 3,68,84,541.33 as Excise Duty during the year 1969 to 1972 on the basis of the impugned orders, treating the selling price of the customer companies as the whole-sale cash price of the manufacturer namely, the petitioner. The Petitioner company has stated that it has been made to pay approximately Rs. 30,00,000/- per year excessive duty on account of the Department treating the customer companies selling price as the manufacturer whole-sale price.

12. The petitioner's case is that its Ex-Factory Price was in Law the whole-sale cash price within the meaning of Section 4 of the Central Excise and Salt Act.

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This provision came up for consideration before the Supreme Court in A. K. Roy v. Voltas Ltd. 1977 L.L J. 177. In that case Voltas Ltd. had agreement with whole-sale dealers. The company gave 22 per cent discount to the whole sale dealers. On behalf of the Department it was contended before the Supreme Court that the whole-sale dealers conferred certain extra-commercial advantages upon them and so the sales to them were not sales to independent purchasers but to favoured ones, and, therefore, the price charged would not represent whole-sale cash price as mentioned in Section 4(a) of the Act.

13. Repealing the submission the Supreme Court held that for a whole-sale market to 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 are or could be sold or that . articles should be sold to a sot-called independent buyers. A whole-sale market within the meaning of Section 4(a) can also mean the potentiality of the articles being sold on a whole-sale basis. If the articles were sold whole-sale to traders, even though the articles are sold to them on the basis of an agreement which conferred certain commercial advantages upon them, it cannot be said that there-is no whole-sale market. So, long as the sales are not to retailers they will be whole sale sales. The fact that no other person could purchase the articles whole-sale from the manufacturing company did not detract from the sales being whole-sale. If there is an actual price for the goods themselves at the time and place of sale, and if that is a whole-sale cash price Clause (a) of Section 4 would be applicable.

14. After referring to certain High Court decisions, the Supreme Court held that the price of sales to whole-sale dealers would represent the whole-sale cash price for the purpose of Section 4(a) of the Act even though the manufacturer were to enter into agreements with dealers for whole-sale sales of the articles manufactured on certain terms and conditions, it would not follow from that alone that the price for those sales would not be the "whole sale cash price" for the purposes of Section 4(a) of the Act if the Agreements were made at arms length and in the usual course of business.

15. Adverting to the question as to what is the meaning of the term "whole-sale Cash Price", the Court held that u/s 4 of the Act the real value included only the manufacturing cost and the manufacturing profit and excludes post-manufacturing cost and profit arising from post-manufacturing operation, namely, selling profit. Referring to the manufacturer giving 22 per cent discount to the wholesale dealers, the Court held that a trade discount is a percentage deduction from the regular list or catalogue price of goods.

It observed :

"As there was no case for the appellants that there was any secret arrangement between the whole-sale dealers and the respondent in respect of the sales to them or that the price of the articles was under-stated in the agreement or that any extra-commercial advantages to the dealers were taken into account on fixing the price, we do not think that we should go into the question whether the discount allowed to the whole-sale dealers was "Trade Discount" or not for the purpose of the Explanation."

16. This case is applicable to the present one on all fours. The petitioner company manufactures bulbs and tubes etc. It sells them to what it calls its customer companies, The sales are bulk sales. The price charged by the petitioner company has been stated to be its manufacturing cost plus manufacturers profit. This is evident from the act that the company pays Income

Tax on income derived from these sales. The fact that the petitioner is treated as the manufacturer is further evident from the circumstance that the Government charges Sales Tax at the point of manufacture from the petitioner company.

17. The Appellate Collector found that the petitioner company was manufacturing these commodities on account of the customer companies. It is difficult to appreciate the implication of this finding. Since its very inception the petitioner company has long term agreement with the customer companies for the sale of its entire manufactured product. When the petitioner company has selling agents who take off its entire production, it may be said that it was manufacturing goods for being sold to the customer companies. But that would not lead to the conclusion that the petitioner is a dummy company or that the petitioner is not the manufacturer.

18. In the Counter Affidavit the case suggested for the Department appears to be that the petitioner is company under the complete control of the customer companies. Assuming that it is the true and correct legal position, then the petitioner could not be called upon to pay excise duty as the manufacturer. The several customer companies would then be manufacturers and they alone would, then be the manufacturer and they alone would, in Law, be liable to pay Excise duty. The fact that the Department is treating the petitioner company as the manufacturer and making it liable for excise duty precludes it from taking the plea that the petitioner is a dummy company or a benamidar for the customer companies. It may be borne in mind that the customer companies are not shareholders of the petitioner company: they are alleged to be subsidiaries of the share-holder companies.

19. The Appellate Collector also found that the petitioner had brought forth no evidence to show that the agreements for marketing their products with the customer companies were entered into at arms length and in the ordinary course of business. This finding appears to have been recorded to distinguish the Supreme Court decision in A. K. Roy's case (Supra). The Appellate Collector has not discussed that case nor noticed that the Supreme Court observed that it was not the case of the Department that there was any secret arrangement between the whole-sale dealers and the manufacturer in respect of sales to them, or that the price of the articles was under-stated in the agreements, or that any extra-commercial advantages to the dealers were taken into account in fixing the price. The petitioner company could not be expected to prove the negative. Its case throughout was that the agreements with the customers companies were commercial transactions entered into in the ordinary course of business. Ever since the company's very inception the Department has been treating the petitioner company as the manufacturer which sell its goods to those customer companies only. The fact that the petitioner company has been paying Sales Tax on Sales effected by it to the customer companies coupled with the fact that the petitioner company is being, held liable for Income Tax on the profits earned by it on these transactions of sales, prima facie show that the agreements of sale with

the customer companies were ordinary commercial transactions entered into in the usual course of business, If the Department's case was that the customer because of extra-commercial considerations, the burden was upon it to establish facts which may lead to that inference. But the appellate order is singularly silent upon this aspect. It does not give any findings which may go to indicate any extra-commercial consideration entering into the fixing of ex-factory price by the petitioner company.

20. The view of the Appellate Collector that the prices submitted by the petitioner company indicated the price charged by the customer companies is neither here nor there. The Supdt of Central Excise had insisted upon the petitioner submitting the selling price of the customer companies. The petitioner company submitted it under protest and with a clear objection that this price list was irrelevant and immaterial. The submission of the price list could not be treated as in any way acquiescence in the position that those prices were the petitioner's whole-sale cash price. The price charged by the petitioner company includes its manufacturing cost and the manufacturing profit. The sale to the customer companies is on a whole-sale basis. The prices charged by the petitioner company evidently is "whole-sale cash price" within the meaning of Section 4(a) of the Central Excise Act. The view of the Department as well as the appellate orders cannot be sustained.

21. The Superintendent, Central Excise, passed an order dated 16th August, 1969. This order was appealable, but the petitioner company did not go up in Appeal. It did not even come to this Court under Article 226 of the Constitution within a reasonable time. The present petition which was instituted on 5th April 1973, was much beyond the usually prescribed period of ninety days. In the Writ Petition there is no explanation why this order was not challenged within the usually prescribed period of time. The Petitioner company seems to have acquiesced in that order, Hence it is not entitled to any relief in respect of this order.

22. In the result the Writ Petition succeeds and is allowed with costs. The orders passed by the Supdt., Central Excise, on 16th July, 1970, and 4th December, 1971, are quashed and so are the appellate orders dated 22nd March, 1973, and 24th May, 1973. We need not set aside the order dated 27th October, 1972, passed by the Superintendent, Central Excise, because that is the subject matter of an appeal which is still pending. The petitioner would be entitled to refund of excise duty paid in virtue of the aforesaid orders.