
(1989) 01 MAD CK 0080
In the Madras High Court
Case No : Writ Appeal No. 89 of 1981

Lucas T.V.S. Limited

APPELLANT

Vs

Assistant Collector of Central Excise and Others

RESPONDENT

Date of Decision : 06-01-1989

Acts Referred:

Citation : (1990) 28 ECR 92

Hon'ble Judges : Thanikkachalam, J;Nainar Sundaram, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Thanikkachalam, J.—The appellant is the petitioner in W. P. No. 4563 of J 976. For the purpose of convenience, we adopt the summary of parties as set out in the writ petition. The petitioner filed the Writ petition for the issue of writ of certiorarified mandamus to quash the order passed by the second respondent herein dated 18.3.1976 as confirmed by the respondents 3 and 4 and for refund of the excess duty paid by the petitioner by mistake of law.

2. The question that arose for consideration in the writ petition was and now arising in this writ appeal is 4(a) of the Central Excises and Salt Act, 1944 hereinafter referred to as the Act, as to what is the basis to determine the assessable value for the purpose of levying excise duty. M/s. Lucas T.V.S. Limited, the petitioner, is the manufacturer among other products, starter motors, wiper motors and parts thereof viz. starter armatures and wiper armatures. These items fall under items 30(3) and 30(4) of the Central Excise Tariff. With effect from 1.3.1973, they became assessable to duty at 20% ad valorem. It was stated that these goods are sold to the manufacturers of internal combustion engines and motor vehicles as original equipments. They are also sold as spares to service and replacement market through the distributors of the petitioner.

3. The prices of the goods sola as spares for service and replacement market

through the distributors of the petitioner differ from the prices charged to the original equipment manufacturers. In fact, the prices charged for the goods sold as original equipments were lower than the prices charged for the said goods sold as spares in replacement market through the distributors. The petitioner had paid excise duty based on the prices declared by it with effect from 1.3.1973 pending determination of the correct assessable value according to Section 4 of the Act

4. The petitioner's distributors in the service market are:

1. M/s. Lucas Indian Services Limited, Madras -2 ;
2. M/s. India Motor Parts and Accessories, Madras 2; and
3. M/s. T.V.S. and Sons Limited, Madurai -1.

The Assistant Collector of Central Excise (first respondent) on 1.7.1974 decided that with effect from 1.3.1973, the petitioner should pay excise duty in respect of the goods sold even as original equipments to manufacturers on the wholesale cash price at which their distributors sold the goods to dealers. Therefore he called upon the petitioner to file revised price list and pay the dues in duty on all past clearances of goods from 1.3.1973 till the date of finalisation of the prices. In view of this the petitioner was paying excise duty on the goods sold to original equipment manufacturers on the price at which it was sold by the distributors.

5. Subsequently, on 27.11.1975 the petitioner filed a petition before the Collector of Central Excise stating that in view of the various decisions of the Supreme Court and other High Courts, the petitioner was liable to pay duty in respect of these goods only on the wholesale cash price sold by them to the original equipment manufacturers and not on the basis of the price at which the distributors sold the goods to their customers. According to the petitioner by mistaken impression of law the petitioner had been paying the duty in excess of the duty payable in law and therefore, the first respondent was liable to refund the excess duty paid by mistake of law.

6. By reply dated 18.3.1976, the second respondent has stated that there was no case for re opening the issue already concluded the appeal preferred by the petitioner against this order was dismissed by the Central Board of Customs and Excise, New Delhi (third respondent) and further citation against this order was also discountenanced by the Government of India (4th respondent) by its order dated 24.10.1973. It is under these circumstances the petitioner filed this writ petition. In the writ petition the petitioner contended that it was paying duty on the goods sold to original equipment manufacturers on the prices at which it was sold by the distributors because of their mistaken impression of law and therefore, the petitioner filed petition on 27.11.1975 before the Collector of Central Excise claiming refund of duty paid in excess. The petitioner raised various grounds justifying the refund of excessive duty paid by mistake of law. In view of various reasons stated in the writ petition the petitioner contended that

duty paid in far excess of the duty payable in law should be refunded by the first respondent.

6. In the counter affidavit filed on behalf of the respondents 1 and 2, it was stated that on a scrutiny of the marketing pattern of the petitioner, it was found that the prices charged for the goods sold as original equipment manufacturers were lower than the prices charged for the said goods sold as spare parts in the replacement market. It was further stated that the goods were generally marketed by the petitioner through its above said three distributors. According to the respondents the transactions between the petitioner and the distributors were not at arm's length since some of the directors are common to both, the petitioner's manufacturing firm and that of the distributors. In such circumstances, the respondents came to the conclusion that the wholesale cash price charged by the distributors to their dealers would constitute assessable value for the assessment of the goods. Hence, the respondents stated that no excess collection of duty had been made from the petitioner warranting any refund of the same.

7. The learned single Judge considering the submissions made by the parties and on going through the records and by placing reliance on the judgments of the Supreme Court in the case of A.K. Roy and Another Vs. Voltas Limited, and in the case of Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, and another decision of the Kerala High Court in Tech. Industries v. Assistant Collector, Central Excise 1980 TR 2280 held that the petitioner in the writ petition has not made out a case for the issue of the writ as prayed for and the petitioner is not entitled to the refund of the alleged excess excise duty. Accordingly, he dismissed the writ petition.

8. It is against the order of the learned Single Judge the present writ appeal has been preferred Before us, learned Counsel appearing for the petitioner contended that the decision of the first respondent that the petitioner should pay excise duty in respect of the goods sold even as original equipments to manufacturers on the wholesale cash price at which their distributors sold the goods to dealers is unreasonable. According to the learned Counsel, the petitioner was paying excise duty based on the prices declared by them pending determination of the true assessable value in terms of Section 4 of the Act, It was submitted that in view of the direction given by the first respondent to file a revised price list and pay the dues in duty on all past clearances of goods from 1.3.1973 till the date of finalisation of the prices the petitioner was paying duty on the goods sold to original equipment manufacturers on the prices at which they were sold to the distributors. According to the petitioner, this payment was made on a mistaken impression of law. it was further submitted that in view of the decisions of the Supreme Court in the case of Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, : Cus and in the case of A.K. Roy and Another Vs. Voltas Limited, the appellant is entitled to the refund of the excess duty paid by mistake of law. The learned Counsel further contended that there is no ground

for the respondents to come to the conclusion that the transaction between the appellant and some of the distributors is at arm's length. According to the learned Counsel, the fact that no appeal has been filed against the order of the Assistant Collector dated 7.1.1974 will not disentitle the petitioner from claiming refund of excess duty paid by mistake of law. The learned Counsel for the petitioner submitted that his client by mistake of law was obliged to pay duty on the sale by the distributors.

9. On other hand, the learned Additional Central Government Standing Counsel for the respondents contended that the petitioner was filing price list for its products from 1.3.1973 onwards under Rule 173(c) of the Central Excise Rules, 1944; they were approved provisionally under Rule 9(b) of the Central Excise Rules pending final determination of the duty payable; it was found that the prices charged for the goods sold as original equipments were lower than the prices charged for the said goods sold as spare parts in the replacement market and such transactions were not at arm's length and it was decided that the wholesale cash price charged by the distributors to their dealers would constitute assessable value for the assessment. According to the learned Additional Central Government Standing Counsel, the assessable value of the goods for levy of excise duty was finalised on this basis and therefore, it is incorrect on the part of the petitioner to contend that excise duty was collected by the Department without the sanction of law. According to the learned Additional Central Government Standing Counsel, the Assistant Collector had already passed an order dated 7.1.1974 to the effect that the transactions between the petitioner and the distributors cannot be considered as transactions at arm's length in view of the decisions of the Supreme Court in the case of M/s. Voltas Limited and hence the wholesale price at which the assessable goods are sold to the distributors cannot be accepted as a wholesale cash price for assessment u/s 4(1) of the Central Excises and Salt Act, 1944. According to the learned Additional Central Government Standing Counsel, without filing the appeal against the above said order of the Assistant Collector dated 7.1.1974, the petitioner cannot now ask for the refund of excess duty stated to have been paid by it by mistake of law. He further pointed out that inasmuch as the order of the Assistant Collector dated 7.1.1974 was passed in view of the judgment of the Supreme Court in the case of M/s. Voltas Limited, it cannot be said that such an order is an illegal order and hence the duty paid in pursuance of such an order is due to mistake of law. It was, therefore, contended that the order passed by the learned Single Judge is quite correct and reasonable and no interference is called for.

10. We have heard both the learned Counsel appearing for the petitioner as well as the learned Additional Central Government Standing Counsel. We have already set out the facts in detail. Section 4 of the Act, 1944, as it stood before 1.10.1975 was as under:

4. Determination of value for the purpose of duty: "Where under this Act any

article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be-

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery of the place of manufacture or production or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists ; or

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold, is capable of being sold by the manufacturer or producer, or his agent, at the time of removal of the article chargeable with duty from each factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place at any other place nearest thereto.

Explanation.- In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of the trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid.

11. The learned Counsel for the petitioner relied on the two decisions of the Supreme Court reported in A.K. Roy and Another Vs. Voltas Limited, in the case of A.K. Roy v. Voltas Limited and in the case of Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, . Similar facts had arisen in both these cases. In the case of A.K. Roy and Another Vs. Voltas Limited, the Supreme Court observed that for the purposes of Section 4 (a) of the Act, it is not necessary for a wholesale market to exist in the physical sense of the terms, where articles of a like kind or quality are or could be sold. It was further observed that a wholesale market could also mean,

potentiality of the articles being sold on a wholesale basis.

What was necessary was that the articles could be sold wholesale to traders. It was further observed that the application of Section 4(a) of the Act did not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of the like kind and quality should have been sold. If there was an actual price for the goods themselves at the time and place of sale and if that was wholesale price, the clause was not inapplicable for want of sale of other goods of a like kind and quality.

12. So also in the case of Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, the question that arose was as to how the value of the dyestuffs manufactured by the appellants should be determined u/s 4 of the Act. The appellants therein contended that the value should be the price at which the appellants sold in wholesale to the two wholesale buyers, less an uniform trade discount of 18%. The Excise authorities took the view that the value should

be the price at which the wholesale buyers had sold the dyed stuffs to the distributors, without taking into account the discount given to the distributors. Before the Supreme Court, the Excise authorities raised the contention that Section 4(a) of the Act did not provide that in every case the wholesale price charged by the manufacturer should be taken into consideration and not the wholesale price charged by the buyers who sold the product also in wholesale to the next buyers. While answering this question the correct legal position was explained in paragraphs 12 and 13 of the said judgment. The Supreme Court ultimately held as under:

There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arm's length and in the usual course 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(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 dyed 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.

13. It is significant to note that in both these cases, according to their facts, there was no finding rendered by the Central Excise authorities that the transaction between the seller and the buyer was not at arm's length. On the other hand in the present case there is an earlier order of the first respondent that the transaction between the petitioner and its distributors is not at arm's length. There was no appeal filed against the said order passed by the first respondent on 7.1.1974. In view of the above position, the above said two judgments of the Supreme Court cannot be availed of by the petitioner.

14. Another decision cited by the learned Counsel for the petitioner is that reported in Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, in the case of Union of India v. Bombay Tyre International Ltd. This case deals with the scope of Section 4 of the Central Excises and Salt Act (10f 1944) before amendment. The primary question that arose in that case was whether while valuing the article for the purpose of excise duty post manufacturing expenses have to be deducted or not. In that case, the Supreme Court while following the earlier two decisions in the matter of ascertaining what is the assessable value for the purpose of levying the excise duty u/s 4 of the Act, held that where the sale is effected at the factory gate, expenses incurred by the assessee up to the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the

manufacturer after clearance) charges for other services after delivery to the buyer namely, after sales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted.

15. Another decision cited by the learned Counsel for the petitioner was that reported in 1986, Vol. 62, Sales Tax Cases 327. in the case of Commissioner of Sales Tax v. Auraiya Chamber of Commerce. According to the facts appearing in the pronouncement, for the assessment years 1949 50 and 1951 52, Sales Tax Officer passed assessment orders on the respondent in respect of certain forward transactions and the respondent paid the sales tax thereon. At that time there was no period of limitation for the refund. Thereafter, on 2.5.1954, the Supreme Court in the case of Sales Tax Officer v. Budh Prakash Jai Prakash reported in (1954) 5 S.T.C. 198 held that the levy of sales tax on forward transactions was ultra vires. After coming to know of the decision, the respondent filed revision in 1955 for quashing the assessment orders but the revision was dismissed as barred by limitation. Thereafter, the respondent filed application before the Sales Tax Officer for refund of the amount deposited pursuant to the assessment orders as under a mistake of law. The Sales Tax Officer dismissed that application as barred by limitation. On these facts, the Supreme Court while affirming the decision of the High Court held that the levy and collection of sales tax on forward contracts was ultra vires; the tax was collected without the authority of law and the State had no right to the money and the tax was refundable to the respondent, from the beginning, the realisation of the tax was illegal and a right to refund was embedded in the fact of payment and the obligation to refund in the case of excess realisation was recognised in the scheme of the Act. The facts appearing in that case are different from the facts appearing in the case under appeal before us. There is no prior order or adjudication in the present case to the effect that the collection of excise duty u/s 4 of the Central Excises and Salt Act, 1944 was in any manner ultra vires. Therefore, this decision also will not render any help to the petitioner.

16. Another decision cited by the learned Counsel for the petitioner was that reported in S.M. Kala and Others Vs. University of Rajasthan and Another, in the case of Assistant Collector Central Excise v. M.R.F. Ltd. wherein the Supreme Court while considering Section 4 of the Act held as under:

Excise duty is a ratio of the assessable value. Ad valorem excise duty is computed only on assessable value after arriving of such assessable value by making proper permissible deductions. Excise duty cannot be computed without proper determination of the assessable value, namely, assessable value exclusive of permissible deductions. Even in the cum duty sale price, the same principle must be followed to arrive at the assessable value. To compute an excise duty as a pre determined amount without making the permissible deductions for reducing the cum duty selling price is a fallacy both legally and mathematically. The ad valorem excise duty can only be computed after reducing the assessable value by permissible deductions and then applying the tariff rate to the

assessable value. To reverse this sequence is to misinterpret the scheme and mode of levy of excise duty on the assessable value.

17. The learned Counsel for the petitioner also placed reliance on the judgment of this Court in the case of *Brakes India Ltd., Madras v. The Assistant Collector of Central Excise* 1987 WL.R. 443 : 1988 (15) ECR 307. The question that arose in that case was whether the six wholesale dealers with whom the appellant Company deals on the basis of wholesale transactions of sale of its products can be said to be related persons within the meaning of Section 4(4)(c) of the Central Excises and Salt Act 1944. While deciding this question this Court has held as under:

Before a person can be described as a related person for the purpose of Section 4 of the Central Excises and Salt Act, it has to be first established that such person is associated with the assessee and this association has to be in the nature of having an interest which may be direct or indirect in the business of each other. In other words, it is not enough that the assessee has an interest in the business of another person, that alone will not make such other person a related person. The prerequisite of such other person being a related person is that such other person must also have an interest in the business of the assessee. In other words there has to be a mutuality of interest in the business of each other and unless this mutuality of interest in the business of each other is established, it would not be possible to describe the person as being a related person. Though the definition of "related person" itself clearly spells out the concept of this mutuality of interest, the controversy is also now settled by the decision of the Supreme Court in *Union of India (UOI) and Others Vs. Atic Industries Ltd., .*

13. Our attention was also drawn to a Full Bench decision of the Kerala High Court in the case of *Tech. Industries v. Assistant Collector* reported in 1980 TL.R. 2280 wherein while dealing with similar situation, the Full Bench of the Kerala High Court raised the following three points and answered the same in the following manner:

(1) When goods which are the subject of levy to excise duty are sold wholesale and there is no extra commercial element fixing the sale price in such sales should be the assessment to duty be made on the basis of such sales or whether they should be made only on the basis of sale price of goods like kind and quality;

(2) When evidence establishes that goods of the same quality and kind are sold at different wholesale cash price in the usual course of business, should the highest of these be adopted for assessing duty as the price at which the goods are capable of being sold? If not, how is the wholesale cash price to be determined in such a case?

(3) Whether the sales to Indian Oxygen are sales; the price realised whereunder represent the wholesale cash price within the meaning of that term as used in Section 4 of the Act as it stood prior to amendment by Act 22 of 1973?

As regards the first point, the Bench observed as follows;

The contention that wholesale cash price shall not be determined on the basis of the price at which the goods subjected to duty are sold or are capable of being sold and that must necessarily depend only upon the price of other goods of like kind and quality does not therefore appeal to us.

As regards the second point, the Bench observed as follows:

Since we propose to dispose of the petition before us on the last of the points urged by the learned Central Government Pleader by way of answer to the petitioner's case, we are leaving this difficult question open.

As regards the third point, the Bench observed as follows:

Wholesale cash price envisages a deduction in respect of trade discount for the purpose of assessment of value of the article u/s 4 of the Act. Such trade discount is an incident normal in all sale to dealers. The term wholesale dealer is defined in the Act in Section 2(k) and that refers to a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture. What was contemplated by Section 4(a) of the Act as it stood at the relevant time was not sale to consumers in bulk but sale to the trading community in wholesale. We are therefore unable to hold on the facts that the price at which goods were sold to M/s. Indian Oxygen was a wholesale cash price.

19. On the basis of the decisions cited by the learned Counsel for the petitioner, the main contention raised is that the Supreme Court in the case of Voltas Limited and in the case of Atic Industries held that the value of the goods for the purpose of excise must take into account only the manufacturing costs and manufacturing profit and it should not be loaded with post manufacturing profit arising from the post manufacturing operation. According to the learned Counsel, in this the price fixed was loaded with post manufacturing profit arising from the post manufacturing operation. According to the learned Counsel, in this case the price fixed was loaded with post manufacturing profit such as expenses incurred by the distributors and therefore the value, as determined by the Department cannot be considered as correct assessment value of the goods as contemplated in the abovesaid two decisions of the Supreme Court and u/s 4(a) of the Act. It was, therefore pleaded that since the value fixed by the Department is against what is stated in the above said decisions of the Supreme Court, such fixation of the value of the goods is illegal and a mistake of law has crept in. Therefore, according to the learned Counsel for the petitioner, the Department had no authority to levy, such excise duty and any collection made by the Department in pursuance of the earlier order of the first respondent dated 7.1.1974 is illegal, and unauthorised and therefore, any excess excise duty collected without the authority of law should be refunded to the petitioner.

20. It has to be seen that the order passed by the first respondent dated 7.1.1974 is based upon the judgment of the Supreme Court in the case of M/s.

Voltas Limited. It is on the basis of the order dated 7.1.1974, the petitioner paid the excise duty. The petitioner did not prefer any appeal against the order passed by the first respondent dated 7.1.1974. In such circumstances, the said order of the first respondent has become final and cannot be reopened

21. The learned Counsel for the petitioner further relied upon a decision rendered in the case of *Soft Beverages (Pvt.) Ltd. v. Union of India* 1982 ELT 119 : 1982 ECR 304 D. In that case, it was contended that the appellant is entitled to refund of duty paid and collected under mistake of law. It was held that refund of duty paid and collected under the mistake of law cannot be denied, even if the duty has already been recovered from the customer. In other words, the refund of duty cannot be denied by the Government on the principle of unjust enrichment. To the facts of the present case, the said pronouncement has no application.

22. Learned Additional Central Government Standing Counsel rightly contended that inasmuch as no appeal was filed against the order of the first respondent dated 7.1.1974, the said order has become final and is not open for review from any angle. In order to support this contention, learned Counsel for the Department relied on various decisions reported in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, ; *Anath Bandhu Deb Vs. Dominion of India*,

23. We have noted that the Assistant Collector of Central Excise relying on the decision in the case of *M/s. Voltas Limited*, concluded that the transactions between the petitioner and their distributors were not at arm's length. This finding is still in force. Without challenging this finding by the appropriate process of an appeal, it is not permissible for the petitioner to raise objections in the proceedings for refund. In view of the aforesaid factual position we consider that the order passed by the learned single Judge is quite correct and reasonable. Therefore we are unable to interfere with the order passed by the learned single Judge in the writ petition. Accordingly, the order passed by the learned Single Judge in the writ petition is confirmed and this writ appeal filed by the petitioner is dismissed but without costs.