

(1979) 06 KL CK 0012
In the High Court Of Kerala
Case No : W.A. No. 302 of 1978

Madras Rubber Factory Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise and Others

RESPONDENT

Date of Decision : 20-06-1979

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 4, 4(2)

Constitution of India, 1950 — Article 243, 248

Government of India Act, 1935 — Section 100, 2, 4(1)

Citation : (1979) CENCUS 331 : (1979) 4 ELT 397 : (1979) 2 ILR (Ker) 642 :
(1979) 2 ILR (Ker) 267

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.;A.N.G. Balagangadharan Nair, J

Bench : Division Bench

Judgement

V.P. Gopalan Nambiyar, C.J.—The appellant, The Madras Rubber Factory Ltd., Madras, is a company registered under the Companies Act with its registered office in Madras. It is engaged in the manufacture of automobile tubes, tread rubber both with and without cushion, and other rubber products sold under the name and style of "Mansfield". Its factory is located at Vadavathoor in Kottayam District in this State. It started its manufacture of rubber products from the financial year 1969-70. Its products are supplied to its depots at various places throughout the country. In so doing, it has incurred expenses of storage, transportation, insurance, etc. In the matter of costing rubber, the practice seems to have been to strike the average price called the "billing price" after taking into account all these heads of expenses, and to transfer to the depots the stock at the said billing price. The depots in their turn sell to the dealers or consumers.

2. The question agitated in this petition is regarding the levy of excise duty on the articles produced and sold by the petitioner. In brief, the excise duty was sought to be levied on the value of the goods calculated after taking into account not only the post-manufacturing profit but also the post-manufacturing cost. The post-manufacturing costs and expenses taken into account comprise, as

indicated, such items as freight, transportation charges, interest charges, travelling expenses of agents, insurance etc. The petitioner has 32 depots throughout the country. There are no factory gate sales but the sales are only through depots to dealers and consumers. The dealer is entitled to 7 1/2% commission from the consumer. Section 3 of the Central Excises and Salt Act, 1944 (referred to for convenience, where necessary, as the Act) provides for the levy of excise duty on excisable goods produced or manufactured in India at the rates set forth in the I Schedule. The Schedule I classifies the commodities and fixes the rates based on "the number, area, length, quantity or value. For instance, item 16 is "tyres", and, in the case of tyres, the excise duty is 40% ad valorem plus special duty at 20%.

3. The case of the petitioner in short is that a duty of excise is a tax on the production or manufacture of goods; and that it had been explained by the Supreme Court in *A.K. Roy and Another Vs. Voltas Limited*, , that Section 4 of the Excise and Salt Act, which provides that the real value of the goods for purposes of excise duty should be found after deducting the selling cost and the selling profit, can signify that the real value can include only the manufacturing cost and the manufacturing profit. The argument proceeds that expenses incurred by the petitioner's sales organisation which pertains to the post-manufacturing stage and selling profit, would not enter into the assessable value for purposes of excise duty. After the pronouncement of the Supreme Court in *A.K. Roy and Another Vs. Voltas Limited*, , there was an amendment of the Central Excises and Salt Act by Act 22 of 1973 by which Section 4 was amended. The provisions of the amending Act would be noticed immediately. The new section was brought into force on 1-10-1975 by a notification dated 8th August, 1975. Rules were also made on that date called the Central Excise Valuation Rules, 1975. The 4th respondent, namely, the Collector of Customs and Central Excise, Cochin, issued notices to the petitioner to file declaration about the price lists of their goods chargeable with ad valorem duty for determination of value, and in pursuance of the same the petitioner complied, showing the manufacturing cost and the manufacturing profit of their goods. Exts. P1, P1(a), P1(b), and P1(c) represent these lists, and Ext. P1(c) is a copy of the covering letter enclosing the lists. Exts. P2, P2(a), P2(b) and P2(c) are the orders of the respondents disallowing the deduction claimed by the petitioner. The 1st respondent, the Assistant Collector of Central Excise, had allowed only 2.8% out of 6.4% claimed by the petitioner as representing freight, octroi and other taxes. The petitioner claimed six items of post-manufacturing expenses, and four of these were disallowed by the 1st respondent. The deduction thus disallowed included 2.8 per cent of the basic price (selling price minus excise duty) representing freight, octroi and other charges, having a direct bearing on the case. The petitioner was directed to file the declaration in Form No. 7 instead of in Form No. 5. The writ petition is to quash Exts. P2, P2(a), P2(b) and P2(c) as illegal and without jurisdiction.

4. Sections 3 and 4 of the Central Excises and Salt Act as they stood prior to the

amendment by Act 22 of 1973, read as follows :

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After the amendment by Act 22 of 1973, the Sections stand thus :

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5. The controversy agitated in this writ petition turns on the scope and significance of the amendment, and how far, if any, it has been effected a change in the law as expounded by judicial decisions prior to the amending Act of 1973.

6. The gist of the argument is that the nature of excise duty is well-settled by judicial decisions as a duty on manufacture or production of the goods. Therefore it is said, that post-manufacturing expenses and post-manufacturing cost cannot be taken into account for purposes of excise duty, and if they are, the levy cannot pass as excise duty.

7. The concept of excise duty has been the subject matter of innumerable decisions. The fountain source of these has been the pronouncement of the Federal Court in *In re : C.P. Motor Spirit Act*, AIR 1939 Federal Court 1, an opinion delivered by the Federal Court in its advisory jurisdiction. The reference was under the provisions of the Government of India Act, 1935. Entry 45 of List I of the 7th Schedule of the Constitution, and entry 43 of List 2 of the 7th Schedule of the Government of India Act corresponds to entry 54 of List 2 of the 7th Schedule of the Constitution. In the course of the judgment of Chief Justice Gwyor, we get the following observations :

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8. We may then notice the judgment of the Nine-Judge Court in *In re: Sea Customs Act*?AIR 1963 S.C. 1760. In paragraph 25 of the said report, occurs the following :

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9. We shall extract the two legislative entries. Entry 84 of List I of the 7th Schedule of the Constitution and Entry 54 of List II:

"84. Duties of excise on tobacco and other goods manufactured or produced in India except?(a) alcoholic liquors for human consumption; (b) opium Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry".

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of list I".

With the lines squarely drawn between the above two legislative entries, one for the Union and the other for the States, it is contended that there must be a dividing line between the two, to define where manufacture or production ends

and also begins. May be, in Thackeray's phrase "thin walls do their bounds divide", but however tenuous, a line of division must be found at least by a process of judicial interpretation. The argument of counsel for the petitioner was that post manufacturing expenses pertain to sale and not to manufacturers or production, and a duty which takes into account those post-manufacturing expenses, cannot partake of the nature of an excise duty. Alternatively he would contend that Section 3 authorises the levy of an excise duty; and if that Section 4 of the Act as amended in 1973 permits the taking into account of post-manufacturing expenses, the resultant levy would fall outside the legislative periphery of entry 84 of list 1, and outside the scope and content of the leviable duty as demarcated by Section 3 of the Act. In either event, counsel for the petitioner would argue that Section 4 would have to be read down to square with that the impost sanctioned by Section 3 and with the legislative power under Entry 84 of List 1 of Schedule 7 of the Constitution.

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13. Petitioner's counsel further highlighted this aspect of the borderline between excise duty and sales tax, by reference to a decision of the Federal Court, another of the Privy Council, and a third, of the Supreme Court. We proceed to examine those cases.

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16. We then turn to the Supreme Court's pronouncement in *Tata Iron and Steel Co., Ltd.*'s case AIR 1958 SC 452. That related to the provisions of the Bihar Sales Tax Act of 1947 passed under the provisions of the Government of India Act, 1935. The Court stated :

"(10) The vires of Section 4(1) read with Section 2(g), second proviso, is also questioned on the ground that it is in reality not a tax on the sale of goods but is in substance a duty of excise within the meaning of Entry 45 in List 1 of the Seventh Schedule to the Government of India Act, 1935, with respect to which the Provincial Legislature could not, u/s 100 of that Act, make any law. Our attention is drawn to Cl. (ii) of the second proviso which contemplated a sale of the goods by the producer or manufacturer thereof. It is urged that, according to this clause, tax was not imposed on all sales of goods produced or manufactured in Bihar, but was imposed only on those goods produced or manufactured in Bihar, which were sold by the producer or manufacturer. It is pointed out, as and by way of an illustration, that if the goods produced or manufactured in Bihar were taken out of the Province of Bihar and then gifted away by the producer or manufacturer to a person outside Bihar and that person sold the goods, he would not be liable under the proviso. This argument, however overlooks the fact that under Cl. (ii) the producer or manufacturer became liable to pay the tax not because he produced or manufactured the goods, but because he sold the goods. In other words the tax was laid on the producer or manufacturer only qua seller and not qua manufacturer or producer, as pointed out in 1942 FCR 90 : AIR 1942

FC 33) In the words of their Lordships of the Judicial Committee in Governor-General in Council v. Province of Madras, 72 Ind. App. 91 at p. 103 AIR 1945 98 (Privy Council) at p. 101) (D), "a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods and not on sales or the proceeds of sale of goods." If the goods produced or manufactured in Bihar were destroyed by fire before sale the manufacturer or producer would not have been liable to pay any tax u/s 4(1) read with Section 2(g), second proviso. As Gwyor, C.J. said in 1942 FCR 90: AIR 1942 FC 33 at p. 102 (of FCR) : at p. 35 (of AIR) the manufacturer or producer would be "liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory." In our judgment both lines of the argument advanced by the learned Attorney General in support of points 1 and 4 are untenable and cannot be accepted".

The principle was thus recognised by the above decision that selling expense or post-manufacturing expense has no connection with production or manufacture of goods but pertains to the region sale.

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18. The learned Central Government Pleader contended that whatever be the position under the Act before its amendment in 1973, after the said amendment, it is permissible and possible to levy a duty of excise on the value of the goods as determined by Section 4. It was pointed out that the criterion for the levy u/s 4(1)(a) was the "normal price in the course of wholesale trade for delivery at the time and place of removal where the buyer is not related personally". It is the case of the petitioner that this Section would not apply to it, as it has no factory gate sale. That is quite apart from its contention that the Section itself is ultra vires. The Central Government Pleader also placed reliance in Section 4(1)(b) where a power is given to determine the value of the goods in such manner as may be prescribed. But neither this power nor the power to determine tariffs as provided in the First Schedule to the Act, and as relied on the Central Government Pleader, would carry with it a power to cross the frontiers of the Levy sanctioned by Section 3 of the Act. Both by reason of the legislative entry Entry 84 of List 1 and by reason of the express provision of Section 3, the power is only to levy a duty of excise, as explained by the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, , Atic Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, and Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., not to mention the other cases referred to already. The very nature of excise duty requires a proximate connection with production or manufacture. At any rate, what has passed beyond the region of manufacture and production and entered the domain of sale, cannot pass as excise duty. It appears to us clear enough that the inclusion of post-manufacturing expenses would indicate that the levy is something other than a duty of excise.

19. The Central Government Pleader placed reliance on Section 4(2) of the Act as amended, which provides that where the price for delivery at the time and place of removal is not known and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price. The argument of the Central Government Pleader was that for the computation of value of goods u/s 4 provision was made for deduction of the cost of transportation alone and of no other charge. Positively, he argued that every other item of post-manufacturing expense could be included in the value of goods. We are afraid this is not the precise scope of the provision. In the circumstances, and against the background we would not be justified in applying the latin maxim that express mention of the one is exclusion of all the rest. Section 4(2) does not, to our mind interdict the deduction of other types of expenses. Besides, if the inclusion of these other types of expenses would be destructive of the nature and character of the permissible levy, that is sufficient to introduce a vitiating element, in the imposition. Such indeed, was the ruling of the Patna High Court in *The Tata Engineering and Locomotive Company Ltd. v. S.N. Guha Thakurta* -- 1911 E LT 14 a copy of the judgment was tendered for perusal. SLP filed against the same, it was said, was dismissed by the Supreme Court. In its judgment, the Patna High Court after noticing the provisions of Section 4, observed that it was not disputed that under the amended Section 4(1) (a), a wholesale cash price will be the normal price. To attract Section 4(1)(a) what is required is to determine the normal price which will be price at which it is ordinarily sold to buyers in the course of wholesale trade. It found that there was no force in the contention that Section 4(2) provides for the only deduction that had to be made in assessing the value of the goods; and that other post-manufacturing charges could be included. Counsel also drew our attention to the judgment of the Madras High Court in Writ Petition No. 4497 of 1976 [1979 ELT 117]. There again the contention that post-manufacturing charges will have to be included, was rejected. It was observed that excise duty was one on production and manufacture of the goods and therefore post-manufacturing expenses on profits must be excluded from consideration in determining the wholesale value of the excisable goods.

20. Attention was also called to a judgment of the Allahabad High Court in Civil Misc. Writ No. 179 of 1976 [1977 ELT 1]. That was concerned with the question of sale to a related person. Strictly speaking, it has no application to the case before us.

21. The Central Government Pleader strongly urged that even on the argument of counsel for the appellant, we would not be justified in holding the assessment to be unjustified and wrong. The complaint, at the most, could only be that a small margin of post-manufacturing expenses have entered the reckoning; but shorn of this, the rest of the levy could certainly pass as a duty of excise. It was therefore contended that the levy in pith and substance is to be regarded as a duty of excise. Were the matter *res Integra*, we might have had to evaluate

the argument; but, we are afraid, we cannot countenance it, in the light of the decisions of the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, , Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, and Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., , which we have noticed already.

22. The Central Government Pleader had one other argument to sustain the levy. He contended that the power of taxation was available to the Union Government under the residuary powers under Article 243 of the Constitution read with the Entry 97 of List 1 of the 7th Schedule. The Article and the Entry give power only with respect to a matter "not enumerated in Concurrent List" or State List. The duty is expressly termed an "excise duty". That seems to be clearly referable to Entry 84 of List 1; and we see no case for pressing into service the residuary powers under Article 248 and Entry 97 of List 1. Section 3 of the Act again expressly refers to the duty as a duty of excise. In these circumstances, we are afraid we cannot sustain the levy under the residuary powers pressed into service by the learned Central Government Pleader.

23. We are therefore of the opinion, that the respondents were wrong in insisting on the post-manufacturing expenses and the post-manufacturing profits to be included in the reckoning for determining excise duty. In the light of the decisions noticed, this is vitiated. The learned Judge was wrong in holding otherwise.

24. We allow this appeal and set aside the Judgment of the learned Judge. The result is that O.P. No. 4578 of 1975 would stand allowed and Exts. P2, P2(a), P2(b) and P2(c) which stand quashed, leaving the respondents free to act in accordance with law and in the light of the observations contained in this judgment. There will be no order as to costs.