

(1983) 09 BOM CK 0026
In the Bombay High Court
Case No : Writ Petition No. 190 of 1981

Mahindra and Mahindra Limited

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 25-09-1983

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1984) 16 ELT 76 : (1982) 138 ITR 670(1)

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. By this petition filed under Article 226 of the Constitution of India, the petitioners are challenging the order dated November 27, 1980 passed by the Assistant Collector, Central Excise, Bombay Division "R" rejecting the claim for refund of Rs. 3,29,446.90 and Rs. 6,19,223.40.

2. The facts which gave rise to this petition are required to be stated to appreciate the grievance of the petitioners against the impugned order. The International Tractor Company of India Limited was engaged in the manufacture of tractors at their factory at Kandivli, Bombay. The maximum retail sale prices of the tractors were controlled by the Central Government under the orders issued under the Essential Commodities Act, 1955. The Company entered into a distributorship agreement with Voltas Limited (hereinafter referred to as the "Voltas") on March 17, 1970 and under the said agreement Voltas were appointed the sole distributors of the tractors manufactured by the Company. It is required to be stated that no excise duty was leviable on tractors manufactured by the Company prior to May 29, 1971 when for the first time Item 34A(3) was inserted providing excise duty 10% ad valorem on the manufacture of the tractors. The agreement between the Company and the Voltas was to remain in operation for a period of five years from February 26, 1970. The International Tractor Company was merged with the petitioner Company with effect from November 1, 1977 under an order dated March 9,

1978 passed by this Court and the entire assets and liabilities as well as entire undertaking of the Company has vested in the petitioners.

3. The petitioners initially paid excise duty on the tractors manufactured by them on the basis that the price charged by the Company to Voltas was the assessable value. The Department, however, claimed that the price charged by Voltas to their dealers was the assessable value and demanded a sum of Rs. 35,855.70 as duty short-levied for the months of June and July 1971. The duty was paid by the petitioners under protest. On October 3, 1971, the petitioners filed a new price list with the Superintendent of Central Excise and the assessable value declared was on the basis of the price charged by Voltas to their dealers. The petitioners claim that such value was given due to an error arising out of the stand taken by the excise authorities for the period of June and July 1971. The price list filed by the petitioner Company was approved on December 15, 1971. The maximum retail prices of tractors were fixed by the Government of India under the Tractors (Price Control) Order, 1967 and all the tractor manufacturers in India were informed of the price fixed. The price accepted by the Government in the case of tractors manufactured by the Company was Rs. 20,005/- per unit and the excise duty payable was Rs. 1,905/- per unit and the total price was Rs. 22,890/-. On the basis of the letter issued by the Government, the petitioners submitted a price list to the Superintendent of Central Excise on November 13, 1971 and also claimed that the excess excise duty has been paid in respect of tractors and the petitioners were entitled to claim a refund.

4. On October 3, 1972, the petitioners filed a refund application claim for an amount of Rs. 3,29,466.90 on the basis that the assessable value for the purpose of excise duty in respect of the manufacture of the tractors should be the sale price to the Voltas. On April 9, 1974, the Assistant Collector, Central Excise, Bombay, issued show cause notice to the petitioners to show cause as to why the application for refund should not be rejected. The petitioners sent their reply on April 22, 1974 and the Assistant Collector rejected the application by his order dated March 15, 1975 holding that as the petitioners-assesses had regularly submitted the price list and the same has been accepted by the Superintendent and the petitioners have not filed any appeal against the order of the Superintendent, the claim for refund is not maintainable. The petitioners carried an appeal before the appellate Collector against the order passed by the Assistant Collector but the appeal ended in dismissal by an order dated February 20, 1976 on the identical grounds. The appellate Collector also held that as the price list was approved and the petitioners did not file any appeal against the order, the refund claim was not maintainable. The petitioners preferred revision petition against the order of the appellate authority before the Joint Secretary to the Government of India and the revision was allowed by an order dated June 20, 1979 and the matter was remitted back to the Assistant Collector for fresh disposal. The Additional Secretary to the Government of India held that the decision taken by the authorities below was unsustainable in law and the Assistant Collector should take a decision in accordance with law and examine

the refund claim of the petitioners on merits as expeditiously as possible. The refund claim which was remitted back for reconsideration to the Assistant Collector was for the period from October 4, 1971 to February 11, 1972.

5. The petitioners filed application for refund of Rs. 6,19,223.40 on February 8, 1973 for the period commencing from February 14, 1972 to December 21, 1972. This claim for refund was also on the basis that the assessable value for the purpose of excise duty on the manufacture of the tractors should be the price at which the tractors are sold to Voltas. The Assistant Collector, by an order dated July 31, 1976 rejected the claim on the ground that the transaction between the petitioners and Voltas was not at arms length as Voltas had shares in the petitioner Company. The holding of the Voltas in the petitioners' Company was only 9% and only 3 Directors out of the 10 Directors of the petitioner Company were also Directors on the Board of Voltas and those three Directors did not participate when the resolution was passed by the petitioner Company to enter into a distributorship agreement with the Voltas. The petitioners carried an appeal against the order of the Assistant Collector and the same was allowed by order dated December 9, 1976 and the matter was remanded back to the Assistant Collector for a fresh consideration. Accordingly, both the refund applications for an amount of Rs. 3,29,466.90 and Rs. 6,19,233.40 for the two different periods were required to be reconsidered on merits by the Assistant Collector. Though the revisional authority had directed disposal of the refund applications expeditiously, the order was passed by the Assistant Collector for only on November 27, 1980 rejecting both applications on the ground that the price at which the petitioners sold their tractors to Voltas do not represent the wholesale price and it is necessary to levy excise duty on the basis of the price charged by the Voltas to the customers. The petitioners have filed the present petition under Article 226 of the Constitution of India to challenge the legality of this order.

6. Shri Setalwad, learned counsel appearing in support of the petition, submitted that u/s 4 as it stood prior to October 1975, the assessable value has to be determined on the basis of the wholesale cash price and unless it is established by the Department that the price charged by the manufacturer was concessional or specially low price on account of extra-commercial considerations, the price at which the manufacturers sold the goods should be accepted for the purpose of assessment.

Monday, the 5th September, 1983

It was further urged that no material has been produced by the Department in the present case at any stage to establish that the price charged by the petitioners to Voltas was a concessional or specially low price and, therefore, the assessable value should be one for which the petitioners sold tractors to Voltas. The provisions of Section 4 of the Central Excises and Salt Act, 1944 as it stood prior to 1975 did not permit a second stage price recovered by a person other than the manufacturer to be regarded as the assessable value.

7. On behalf of the respondents, return sworn on August 30, 1983 by Shri A.R. Mirchandani, Assistant Collector of Central Excise, Bombay Division "R" is filed to resist the reliefs sought by the petitioners. It is claimed in the return that the agreement between the petitioners and the Voltas though styled as distributorship agreement is really an agreement of agency under which the Voltas were carrying out certain activities which are really the activities connected with manufacture. Though the return raises some other contentions about the petitioners' failure to exhaust the legal remedies provided by way of appeal and revision against the impugned order, Shri Dalal, learned counsel appearing on behalf of the respondents, has restricted his submissions only to one point and that is, that the agreement between the petitioners and Voltas is not at arms length.

8. Section 4(a) of the Central Excises and Salt Act, 1944 prior to its amendment in October 1975 read as under :-

"Where under this Act, article is chargeable with duty at a rate dependent on the value of the article, such value 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, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists."

The Supreme Court considered the ambit of the expression "wholesale cash price" in Section 4(a) of the Act in the case of A.K. Roy and Another Vs. Voltas Limited, . Voltas Limited which was respondent before the Supreme Court had entered into agreements with wholesale dealers from different parts of the country for sale of their products. The Supreme Court considered what are the relevant factors to determine the wholesale cash price and came to the conclusion that a wholesale market does not always mean that there should be an actual place where articles are sold and brought on a wholesale basis. It was held that price of sales to wholesale dealers represents "wholesale cash price", even if there is no actual place where articles are brought and sold on a wholesale basis. It was further held that if a manufacturer were to enter into agreements with dealers on wholesale basis for the sale of the articles manufactured, on certain terms and conditions conferring commercial advantage, still it would not follow from that alone that the price of those sales would not be the "wholesale cash price" for the purpose of Section 4(a) of the Act, provided the agreements were made at arms length and in the usual course of business. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations, e.g., because he is relative of the manufacturer, the price charged for those sales would not be the "wholesale cash price". Once wholesale dealing at arms length are established, the determination of the wholesale cash price for the purpose of Section 4(a) of the Act may not depend upon the number of such wholesale dealings. The Supreme Court in a

later decision in the case of *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, reiterated the principles and observed that the value of the goods for the purpose of excise must take into account only the manufacturing cost and manufacturing profit and it must not be loaded with post-manufacturing profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the purpose of assessment of excise duty. With this background, it is necessary to consider whether the agreement between the petitioners and Voltas as at arms length.

9. The first and the foremost thing to be noted is that on the date of the agreement i.e. March 17, 1970, the tractors manufactured by the petitioners were not liable to payment of excise duty and the excise duty was levied for the first time on May 29, 1971 under Tariff Item No. 34A(3) of the Central Excise Tariff. The agreement was for a duration of 5 years and under the distributorship agreement, it was the duty of the Voltas to assess the market conditions for the sale of tractors, to place orders in advance, to promote sales and the Voltas were obliged to purchase tractors as per the orders placed by them in advance. It was further agreed that regardless the time that might lost till the Voltas received payment from the dealers, they would pay for the tractors purchased by them from the petitioners within 18 days of taking delivery of the tractors. It was the responsibility of the Voltas under the agreement to store such tractors until they are finally sold and to transport them and to maintain All India Sales Organisation. The Voltas had also undertaken to carry out the necessary pre-sale training activities and to provide after-sale service in respect of the tractors. The Voltas were also to share the advertising expenses incurred for the promotion of the tractors. It was also the duty of the Voltas to carry large stocks and bear the consequential interest charges, to provide for a large and comprehensive all India Organisation. It is the claim of the petitioners that gross margin earned by Voltas for undertaking the diverse sales and promotional activities amounted roughly to Rs. 600/- per tractor, which is approximately 4% of the sale price of the tractors at the relevant time.

10. Shri Dalal submitted that the agreement between the petitioners and Voltas is really not a distributorship agreement but is in the nature of agreement agency. The learned counsel relied upon Division Bench decision of this Court in the case of *Amer Dye-Chem Limited and another v. Union of India* and another reported in 1981 E L T 348 and submitted that the mere use of the word "Distributor" would not lead to the conclusion that the agreement is not an agreement of agency. The Division Bench observed that the distributor in the commercial world is understood to be person who distributes goods of the manufacturer to the consumer and in so doing he acts for and on behalf of the manufacturer. The distributor normally is, therefore, an agent of the manufacturer for the purpose of reaching out the goods to the consumers. Shri Dalal relied upon this observation and claims that Voltas were merely acting as Agents of the petitioners for reaching out the tractors to the consumers. The

submission is not correct, as the Division Bench has further observed in the judgment that in the case of the buyer who purchases goods on payment of a commercial price to the manufacturer and transaction in effect is a sale, such a buyer is different from the distributor earlier noticed, though even such a buyer is sometimes described as a distributor. The distributor in such a case is in fact a wholesale buyer and the property in the goods passes to such a buyer. The submission of Shri Dalal, therefore, that as the agreement between the petitioners and the Voltas was described as a distributorship agreement, it should be treated as an agreement of agency cannot be accepted.

11. Shri Dalal then submitted that under the agreement, the Voltas were required to carry out the activities of the manufacturers and, therefore, what the petitioners intended to do was to transfer some of the activities of the manufacturers to Voltas with a view to reduce the assessable value for the purpose of excise. In support of this submission, reliance is placed on three or four conditions under the agreement. It was urged that the Voltas were required to maintain a Sales Organisation and such a condition was not necessary in the agreement if the petitioners had sold the tractors to Voltas because then it was wholly irrelevant to provide as to how the Voltas should dispose of those tractors to the consumers. The condition under the agreement which provides that Voltas were to store the tractors till they are sold to the consumers was also relied upon to claim that the agreement was not at arms length. The provision which required Voltas to carry out after-sale service and the condition which required the petitioners to share half the amount spent on advertisements were highlighted to claim that the price for which the tractors were sold to Voltas did not reflect the true price. It was urged that the price at which the tractors were sold by the petitioners to Voltas was far less than the market price because certain activities required to be performed by the manufacturers were taken over by the Voltas. It is not possible to accept this submission. In the first instance, on the date when the agreement was entered into, the tractors were not liable to be assessed for excise duty and, therefore, there was no occasion to prepare an agreement with an intention to avoid the duty. Secondly, the conditions requiring Voltas to set up Sales Organisation and to provide after-sale service are the usual conditions provided in the agreement with the wholesale buyer and such conditions were also in existence in the agreement which was considered by the Supreme Court in the Voltas' case. The fact that the Voltas were required to store the tractors till they are sold to the consumers cannot be treated as transfer of manufacturer's activity in favour of the buyer. The fact that the expenses in regard to the advertisements were to be shared by the petitioners and Voltas merely indicate that both the wholesale buyer and the petitioners were interested in having greater production and sale thereof and that condition, in my judgment cannot be considered as relevant to reach the conclusion that the agreement was not at arms length.

12. Shri Dalal relied upon the order passed by the Supreme Court in a group of appeals on May 9, 1983 and which is reported in 1983 Excise Law Times 869

Union of India and others v. Bombay Tyre International Limited, etc. etc. The learned counsel submitted that in accordance with the order passed by the Supreme Court, no amount is deductible from such price in respect of advertisement or publicity expenses incurred by the assessee or expenses in connection with the storage of finished excisable goods or any other expenses incurred by the assessee upto the date of delivery. The reliance upon this order of the Supreme Court on the facts of the present case is of no assistance to Shri Dalal as once it is concluded that the petitioners - the manufacturers - had sold the tractors to Voltas, then the question of deduction of expenses incurred by Voltas limited in connection with the storage or Sales Organisation or advertisements has no relevance while ascertaining the assessable value. It is now well-settled that the burden to establish that the agreement between the manufacturers and the wholesale buyers is not at arms length is on the Department and the reference can be usefully made to the decision in the case of Standard Electric Appliances. v. Superintendent of Central Excise and another reported in 1979 Excise Law Times 53 and the decision of this Court in the case of Amar Dye-Chem Ltd. and another v. Union of India and another reported in 1981 Excise Law Times 348. In my judgment, the order passed by the Assistant Collector, Central Excise, declining to grant refund is clearly erroneous and cannot be sustained. The petitioners are entitled to the refund of the amount of Rs. 3,29,446.90 and Rs. 6,19,223.40 in accordance with the refund claim filed by them. Shri Setalwad submitted that the amount should be paid along with interest at the rate of 18% and urged that the amount was withheld by the department without any reason for over a number of years. In my judgment, this is not a fit case to grant interest to the petitioners and it would suffice if a direction is given to the department to refund the amount within a period of four weeks from today.

13. Accordingly, the rule is made absolute and the respondents are directed to refund an amount of Rs. 3,29,446.90 and Rs. 6,19,223.40 to the petitioners within four weeks from today. In case, the amount is not paid to the petitioners within four weeks, then the respondents shall pay interest on the said amount at the rate of 12% per annum from the date of filing of petition, i.e. February 6, 1981 till the date of payment. The Department shall also finalise the provisional assessment on the basis that the assessable value declared in the provisional assessment is correct and such finalisation should be completed within a period of four months from today. The respondents shall pay the costs of the petitioners.