

(1979) 01 MAD CK 0046

In the Madras High Court

Case No : Writ Petition No. 4417 of 1978

Nagpal Petro-Chem. Limited

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

Date of Decision : 25-01-1979

Acts Referred:

Central Excise (Amendment) Act, 1973 — Section 4
Central Excises and Salt Act, 1944 — Section 3, 4, 4(1)

Citation : (1979) CENCUS 97 : (1979) 4 ELT 117

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Natarajan, J.—The petitioner is a public limited company with its registered office situate in Bombay. Under a technical collaboration agreement with Messrs Witco Chemicals Corporation, U.S.A., the petitioner is engaged in the manufacture of petro-chemical products at its factory at Manali, Madras. The products of surphonates manufactured by the petitioner are excisable goods and they fall under Tariff Item No. 15-AA of the First Schedule to the Central Excises and Salt Act 1 of 1944 (hereinafter referred to as the Act). According to the petitioner, there is not much demand for sulphonates at Madras, though the petitioner has a wholesale price at factory gate and there are instances of sales at wholesale rates at the factory gates at Manali. On the other hand, the petitioner's products are in great demand at Bombay where about 80 per cent of the total production of the products are sold. Messrs Sikri and Grover are the main buyers for sale of the products of the petitioner, at Bombay. Sikri and Grover, who have selling branches at Bombay, Calcutta, New Delhi and Madras, sell the petitioner's products to dealers, manufacturers and public sector undertakings. There is no discrimination in the prices at which the petitioner's products are sold to Sikri and Grover when compared with the prices at which they are sold to wholesale buyers. But, of necessity, the petitioner has to include post-manufacturing expenses such as cost of transportation, insurance, packing, octroi, sales tax and

overheads of branches, in the price at which the products are sold to Sikri and Grover. If the sales are effected on deferred terms, the selling price also carries a premium of interest. On account of this, whenever Sikri and Grover sell the products to dealers, manufacturers etc., their price will include excise duty, octroi, sales tax, packing and forwarding charges etc., included in their purchase price.

2. The petitioner company does not have bonded warehouses in different parts of the country. Therefore, excise duty is paid at the gate of the factory. The payment of excise duty will have therefore, to be on the basis of the wholesale price at factory gate, and not at the price at which the products are sold to Sikri and Grover at Bombay, even though more than 75 per cent of the petitioner's products are sold to Sikri and Grover, because the sales rate at Bombay comprehends within itself post-manufacturing expenses also.

3. Section 3 of the Act provides for levy of excise duty to all excisable goods which are produced or manufactured in India at the rates contained in the First Schedule to the Act. Section 4 of the Act, as it originally stood, provided for determination of value for the purpose of levy of excise duty on the following basis --

(a) 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 removal of the article, from the factory or other premises for delivery at the place of manufacture or production, or

(a)(i) if a wholesale market does not exist for such article, at such price, at the nearest place where such market exist, or

(b) where such price is not ascertainable, the price at which an article of the like kind or quality is sold or is capable of being sold by the manufacturer or producer, at the time of removal of the article, from such factory or other premises, for delivery at the place of manufacture or production, or

(c)(i) if such article is not sold at such place, at any other place nearest thereto. Section 4 contained an explanation which laid down that in determining the price of any article under the section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article from the factory.

4. Section 4 was amended by the Central Excises and Salt (Amendment) Act, 1973, dated 19th May 1973, and the new section came into force with effect from 1st October, 1975. The amended section provided for the determination of the value of the excisable goods in different ways i.e. depending upon the sale being to a related person or not, and depending upon the different prices at which the goods are sold to different classes of buyers. It also provided for the determination of the value where the normal price of such goods is not ascertainable on account of the goods not being sold at the place of manufacture.

5. In view of the amendment effected to Section 4, the Revenue called upon the

petitioner to file a fresh price-list in accordance with the new section. The petitioner accordingly tiled a revised price-list, but the Revenue insisted that the assessable value should be that value at which Sikri and Grover sell their products at Bombay. There was protracted correspondence between the petitioner and the respondents on the question of fixation of value but to no avail.

6. The petitioner's contention in its affidavit is that since no change has been effected to Section 3 of the Act which is the charging section, the amendment effected to Section 4 cannot alter things in any manner and, in any case, since its products are capable of being sold and are actually being sold, though in small quantity, at wholesale rate at factory gate, it is that rate which must be taken as the price for levy of excise duty, and not the price at which Sikri and Grover sell the products at Bombay. The view taken by the Revenue, that the price of the petitioner's products should be determined with reference to the sale figures of Sikri and Grover at Bombay, is opposed to the dictum contained in *A.K. Roy and Another Vs. Voltas Limited*, and *National Tobacco Co. of India Ltd. Vs. Collector of Central Excise and Others*, . The first respondent though not entitled to do so has included post-manufacturing expenses for determining the wholesale price at the place of removal and consequently, he has failed to exercise jurisdiction given to him to determine the assessable value by finding out the wholesale price which would have been charged by the petitioner for its products at the factory gate.

7. The petitioner, therefore, prays for the issue of a writ of certiorari or any other appropriate order or direction to quash the orders of the respondents holding that the assessable value of the petitioner's products will be determined on the basis of the price at which the goods are sold by Sikri and Grover to wholesalers and dealers at Bombay.

8. The respondents have filed a detailed counter-affidavit and they have controverted all the contentions of the petitioner in its affidavit. It is pointed out that sulphonates manufactured by the petitioner are mainly marketed at Bombay through the distributors, Sikri and Grover and since the local demand is negligible, more than 80 per cent of the petitioner's products are sold at Bombay through the said distributors. Besides Sikri and Grover, the Indian Oil Corporation Ltd. is also a distributor for the products manufactured by the petitioner, but that Corporation has not purchased any quantity of product from the licence. With the coming into force of amended Section 4 of the Act, the petitioner was required to furnish a price list to be effective from 1st October-1975 along with relevant particulars. The petitioner filed a price-list in accordance with Section 4(1)(a) of the Act. But, since the Revenue was of opinion that the sales are to a related person, the revised price-list should be in accordance with Clause (iii) to the proviso to Section 4(1)(a) of the Act i.e. the price charged by the distributors to wholesale dealers. In spite of the petitioner contending that the price of the products should be fixed on the basis of the wholesale price at factory gate, the second respondent finally held that the price should be on the basis of the rates

charged by the related person, Sikri and Grover, as the assessable value in terms of Clause (iii) of the proviso to Section 4(1)(a) of the Act. The respondents have stated that the method of valuation prescribed by Section 4(1)(a) can be relied upon only where the wholesale buyer is not a related person. On the other hand, if the goods are generally sold through related persons, then the normal price should be reckoned in terms of Clause (iii) of the proviso to Section 4(1)(a) i.e. the price charged, by the related person to wholesale dealers. Inasmuch, as the petitioner itself has stated that the bulk of its goods are sold through Sikri and Grover at Bombay, it is the price at which Sikri and Grover sell the products to dealers, manufacturers and public sector undertakings that must be taken as the normal price. The respondents have stated that the amended Section 4 has made significant changes in the old Section 4 and the new Section has specifically provided for two types of evaluation i.e. (1) cases where the goods are sold through a non-related person and (2) cases where the goods are sold through related persons. Section 4, as amended, does not envisage determination of the price at which the products are capable of being sold in wholesale at the time of delivery from the factory. Rule 6 of the Valuation Rules has no application to the present case, because Clause (iii) of the proviso to Section 4(1)(a) will, directly apply. The ratio laid down in the cases cited by the petitioner can provide no assistance to it because those cases were decided with reference to the method of evaluation laid down by the old Section 4, The impugned orders do not conflict with Section 3 in any manner. It is not correct, to say that post-manufacturing expenses have been taken into consideration in determining the value of the goods. Since the valuation has been done in accordance with Clause (iii) of the proviso to Section 4(1)(a), the provisions of the Act have not been contravened in any manner and, therefore, the petitioner's grievance is misconceived.

9. Having regard to the contentions of the petitioner and the respondents, that falls for consideration in this petition is whether the respondents are entitled to treat Sikri and Grover as a related person to the petitioner and, on the basis of such treatment, invoked the application of Clause (iii) of the proviso to Section 4(1)(a) to the petitioner's case and say that they will fix the normal price of sulphonates manufactured by the petitioner at the rates at which they are sold by Sikri and Grover, to wholesale dealers in the market. The term "related person" has been defined in Section 4(4) as follows --

" "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and distributor of the assessee, and any sub-distributor of such distributor."

From the definition it may be seen that a holding company, a subsidiary company, a relative and a distributor of the assessee can all be treated as a "related person" to the assessee. But, in the instant case, the petitioner contends that though the bulk of its products are purchased by Sikri and Grover

and marketed by it to wholesalers, Sikri and Grover are not a related person. In support of this contention, it is pointed out that the petitioner himself sells its products at wholesale price at factory gate and such sales are independent sales by the petitioner and merely because the instances of such sales are not many, the respondents cannot ignore the factum and legal consequences of those sales. Then again, it is stated that the concessions except the usual trade discount are offered to Sikri and Grover when sales are effected to them at Bombay and, on that score too, Sikri and Grover cannot be treated as a related person. The answer of the respondents to these contentions is that because the bulk of the goods are sold to Sikri and Grover, and they, in turn, market the goods to wholesalers, it must be taken that Sikri and Grover are a "related person". I am afraid the statement of the respondents in this behalf cannot be accepted- It was held by the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, , that "wholesale cash price" has to be ascertained on the basis of transactions at arms length unless the department is able to prove the existence of a special or favoured buyer to whom a specially low price is charged because of extra commercial considerations. The abovesaid dictum of the Supreme Court has been expressed in the following manner --

"There can be no doubt that, the "wholesale cash price" has to be ascertained only on the basis of transactions at arms length. 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" for levying excise u/s 4(a) of the Act (before amendment). A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis. Once wholesale dealings 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".

10. This view has been reiterated in a later case, Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, in the following words : --

"It was not the case of the Excise authorities at any time that specially low prices were charged by the appellants to ICI and Atul because of extra commercial considerations or that the agreements were anything but fair and reasonable or arrived at on purely commercial basis".

11. Therefore, the test for determining a person as a related person will be whether the sales effected to that person by the manufacturer are on favourable or advantageous terms on account of extra commercial considerations. In the case on hand, the respondents do not say that the products of the petitioner have been sold to Sikri and Grover at more advantageous terms than the wholesale rate charged by the petitioner at factory gate. As already stated, the only ground given by the respondents for classifying Sikri and Grover as a related person is that the bulk of the petitioner's products are sold to that firm

and it is from that firm the wholesalers have to purchase the petitioner's products. Mr Chnegalvarayan would, however, say that the dicta of the Supreme Court were rendered when old Section 4 was in force, but in view of the amendment effected by Act 22 of 1973, it is open to the respondents to treat Sikri and Grover as a related person in terms of Section 4(4)(c) and, if Sikri and Grover is treated as a related person, the next logical step will be to fix the wholesale price for the petitioner's products at the rates at which the products were sold by the related person to the wholesalers, the arguments contained a fallacy. It is true the amended section gives the definition of "related person" and the proviso to Section 4(1)(a) gives power to the assessing authorities to go into the question whether the wholesale rate given by the assessee for the purpose of excise assessment is with reference to sales held at arms length or sales effected to related persons. Even so, there is no escape from the position that in order to classify a person within the terminology of "related person", the department must prove that the person and the assessee have direct or indirect interest in the business of each other. This is made clearly by the definition of the term "related person" contained in Section 4(4)(c). The respondents, however, have not put forward any material to show that Sikri and Grover on the one hand and the petitioner on the other have direct or indirect interests in the business of each other. The resultant position is that the respondents have no; shown a nexus of interest between the petitioner and the alleged related person in the business of each other, nor have they shown that the bulk of the petitioner's products have been sold to Sikri and Grover at such concessional rates . as to lead to the inescapable conclusion that extra-commercial consideration have weighed with the assessee to charge such a concessional rates to Sikri and Grover. On this one ground alone, the petitioner's challenge of the impugned order has to be sustained.

12. Taking the second argument of the petitioner's counsel, it proceeds on the basis that inasmuch as the petitioner has a wholesale market at factory gate, even though the sales at factory gate are not many, the respondents are not entitled to ignore the rates at which those sales have been effected and contend that they will take only the rates at which Sikri and Grover have sold the products to wholesalers as the normal price of the goods for the purpose of excise. Another contention of the petitioner's counsel is that, of necessity, the petitioner has to incur railway freight, insurance, handling charges etc, when the products are taken to Bombay and sold to Sikri and Grover at that place and therefore, post-manufacturing expenses and profits would also be included in the rates at which the products are sold to Sikri and Grover ; and in turn, when Sikri and Grover sell those products to wholesalers, post-manufacturing expenses on products passed on to them by the manufacturers would also be included in their sales figures and, as such, the excise authorities are not entitled to take the sales figures of Sikri and Grover as the normal price for the products because these figures contain in them post-manufacturing expenses and profits as well. It appears to me that both these contentions are unassailable. u/s 3 of the Act,

excise is a tax on the production and manufacture of goods. Therefore, post-manufacturing expenses and profits must be excluded from consideration in determining the wholesale market value of the excisable goods. Even the amended Section 4, sub-sec (1) (a) says that the normal price of the goods should be taken to be the price at which such goods were ordinarily sold by the assessee in the course of wholesale trade for delivery at the time and place of removal, subject to the condition the buyer is not a related person and the price is the sole consideration for the sale. Inasmuch as the petitioner effects a few sales at wholesale market rate at the factory gate itself, it is that rate which has to be taken as the normal price of the products, especially when the respondents have not shown that such sales have not taken place or that such sales were to related persons or that the sales were effected on other considerations than of price alone. Secondly, the respondents have also not placed materials to show that the rates at which the goods have been sold at Bombay to Sikri and Grover are lesser in value than the wholesale market rate for sales effected at factory gate. On account of all these factors also, the petitioner's challenge about the correctness of the impugned order has to be sustained.

13. In view of this conclusion, it is not necessary to go into the question that Clause (iii) of the proviso to Section 4(1)(a) is ultra vires. The writ petition will stand allowed and the rule nisi will be made absolute. However, there will be no order as to costs.