

(1988) 08 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 1336 of 1987

New India Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-08-1988

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(1), 4(4)
Constitution of India, 1950 — Article 226, 32

Citation : (1988) 19 ECR 188 : (1988) 37 ELT 547

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Judgement

1. This petition makes a claim of refund of excise duty amounting to Rs. 1,25,34,988.97 Ps. paid by the petitioners under protest. The petitioners are manufacturers of photographic printing papers. They effect sales of their aforesaid product through Agfa Gvearte India Limited under agreement of distributorship. The said Agfa are their sole distributors.

2. By a notice dated 8th May, 1974 (Ex."A"), Respondent No. 2, the Assistant Collector of Central Excise called upon the petitioners to show cause why the price list submitted by the petitioners should not be rejected and why excise duty should not be collected on the sale price of the distributors Agfa to their customers in the market. By order dated the 30th December, 1974 (Ex.B) the respondent No. 2 levied duty on the price charged by Agfa. By a notice dated 31st January, 1975 the petitioners were directed to pay the differential excise duty for the period 1st March 1974 to 20th May 1974 amounting to Rs. 99,631/- which amount was paid by the petitioners on the 11th March 1975 under protest. Aggrieved by the aforesaid levy, the petitioners preferred an appeal to the Collector which appeal was dismissed as according to the Collector, Agfa being the sole distributor was a related person. The petitioners were thus liable to pay duty on the sale price of Agfa. Aggrieved by that order the petitioners filed in this Court, Misc. Petition No. 841 of 1976 which they later withdrew. The petitioners continued to pay the excise duty on the price charged by Agfa under protest.

They, however, filed their periodic refund claims in respect of the differential between the duty assessed on the sale price of Agfa and that on the sale price of the petitioners to Agfa. On the 11th of September, 1984 the petitioner submitted their price list (Ex.K) along with their Agreement with Agfa and by an order dated the 31st October, 1984 (Ex.L) Respondent No. 2 approved the price list charged by the petitioners to Agfa. The petitioners thus started paying excise duty on their sale price to Agfa with effect from 1st November, 1984. This development regarding the acceptance of the petitioners' claim for payment of duty on their sale price to Agfa was probably occasioned on account of the decision of the Supreme Court in the case of Bombay Tyres International Ltd. reported in 1983 (14) ELT 1896 and in the case of Atic Industries Ltd. reported in Union of India (UOI) and Others Vs. Atic Industries Ltd., .

3. Emboldened by this stance of the Department the petitioners, by their applications dated 11-8-1986 (Ex.E), 29-9-1986 (Ex.F) and 7-4-1987 (Ex.G) made their consolidated refund claims for the period 1st November 1981 to 31st October 1984 in the sum of Rs. 60,19,238.65 Ps. 1st November 1978 to 31st October 1981 for Rs. 42,77,358.59 and 1st March 1974 to 31st October 1978 for Rs. 22,38,391.73 Ps. Respondent No. 2 by his two notices both dated the 23rd February, 1987 (Exs.H and I) called upon the petitioners to show cause why the aforesaid refund application should not be rejected and by his order dated 3-4-1987 (Ex. J), the aforesaid refund applications were rejected except that refund was granted in respect of the period 10th September, 1984 to 31st October 1984. Being aggrieved by the order of the respondent No. 2, rejecting the claim of the petitioners for refund of the excess excise duty paid under protest, the petitioners have filed the present petition. 4. Mr. Hidayatullah, the learned Counsel appearing in support of the petition submitted that having regard to the pronouncements made by the Supreme Court in the cases of Bombay Tyres International and the Atic Industries Ltd., the recovery of excise duty on the basis of the sale price of Agfa was wholly unjustified. Agfa, though in loose parlance was described as their distributor was in fact the purchaser of the products manufactured by the petitioners. Merely because Agfa was the sole purchase of the products of the petitioners, the same did not justify an interference that Agfa was a related person of the petitioners. Thus, the levy of duty based on the sale price of Agfa to its customers was illegal. Since the duty charged by the respondents on the aforesaid basis was paid by the petitioners under protest, the respondents were bound to refund the same.

5. It is common ground that the excise duty that was charged was on the basis of the sale price not of the petitioners but of Agfa. In the case of the Union of India v. Bombay Tyres International Ltd. reported in 1983 (14) E.L.T 1896, the Supreme Court had laid down that the price at which the excisable goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal is the basis for determination of assessable value provided, of course, the buyer is not a related person and the price is the sole consideration for sale. On a proper interpretation of the

definition of "related person" in sub-section (4)(c) of Section 4, the words "a relative and a distributor of the assessee" do not refer to any distributor but they are limited only to a distributor who is a relative of the assessee within the meaning of the Companies Act 1956. The definition of "related person" should be so read that the words "a relative and a distributor of the assessee" should be understood to mean a distributor who is a relative of the assessee. As regards the other provisions of the definition of "related person", that is to say, "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, subsidiary company....." In other words, the Supreme Court held that the "related person" meant a relative and a distributor of the assessee i.e. a distributor who is a relative of the assessee, and the distributor and the assessee have interest in the business of each other.

6. In the case of Union of India (UOI) and Others Vs. Atic Industries Ltd., the Supreme Court held that if the transaction between the manufacturer and his customer were on principal to principal basis and the whole-sale price charged by the assessee to the customer was the sole consideration for the sale and no extra commercial considerations entered in the determination of such a price, the customer cannot be held to be "related person" merely because he holds 50% shares in the manufacturing Company. For treating the customer as a related person the person who is sought to be branded as a "related person" must be a person who is so associated with the assessee that they have interest directly or indirectly in the business of each other. Thus it is not enough that the assessee has an interest directly or indirectly in the business of a person alleged to be related person nor is it enough that the person alleged to be a related person has any interest directly or indirectly in the business of the assessee. It is essential that the assessee and the person alleged to be a related person must have interest direct or indirect in the business of each other.... In cases, where 50% share of the manufacturing Company is held by the customer Company, the customer Company can be said to be having interest in the manufacturing Company as a shareholder but for this reason, it cannot be said that the manufacturing. Company has any interest direct or indirect, in the business carried on by one of its shareholders even though the shareholding of such shareholders may be 50%. In the absence of mutuality of interest in the business of each other, the customer Company cannot be treated to be a "related person".

7. In the case of Amar Dye-Chem Ltd. v. Union of India reported in 1981 E.L.T. 348, a Division Bench of this Court was pleased to hold that, a "distributor" as understood in commerce is a person who distributes the goods of the manufacturer to the consumers and in doing so, he acts for and on behalf of the manufacturer. Therefore, a distributor normally is, an agent of the manufacturer for the purpose of distributing the goods to the consumers. However, he is not a buyer of goods from the manufacturer on his own account and does not himself pay price for the goods purchased before the goods are passed on to the

consumers. Merely by the use of word "distributor" in the price list or the forwarding letter, it cannot be said that distributor was a "related person". Whether a distributor falls within the definition of "related person" depends on the real substance of the transaction between the manufacturer and the distributor. If the distributor buys the goods and the price was the sole consideration for the sale and the transaction was at arm's length, he cannot be categorised as a "related person". Since in the instant case the price of goods was paid by the distributor in his capacity as a buyer, sales to such a buyer will, fall within the provisions of Section 4(1)(a) of the Central Excises Act and as such he cannot be categorised as a "related person" falling u/s 4(4)(c) *ibid*. In the case of buyer who purchases goods on payment of a commercial price to the manufacturer and transaction in effect is a sale, such a buyer even though a kind of distributor is different from the distributor who acts as an agent of or on behalf of a manufacturer. In such a case, the distributor is in fact a wholesale buyer and the property in the goods passes to such a buyer. It is wholly immaterial whether the price is paid in cash or the goods are supplied on credit. Since the distributor is in effect, an agent for and on behalf of a manufacturer the transaction between the two in such a case is not a transaction of sale on principal to principal basis. Similarly, even though in the agreement, the buyer may be referred to as a distributor or agent the nomenclature used is not conclusive of the relationship and one will have to go to the substance of the transaction. If the "distributor" does not fall within the definition of "related person" as provided in Section 4(4)(c) of the Central Excises Act, the action of the Department in withdrawing the approved price list is not sustainable in law, and consequently, an amount of duty paid in excess is eligible for refund.

8. Having regard to the aforesaid decisions, it will have to be held on the facts of the present case that Agfa, though in the Agreement has been described as the sole distributor of the petitioners, are in fact purchasers of the products of the petitioners in their individual capacity. A specimen of the agreement between the petitioners and Agfa, which was filed in the present proceedings shows that the Agfa was to take up the total production of the photographic printing papers manufactured by the petitioners by way of purchase. The purchase price in respect of the said photographic printing papers payable by Agfa was to be agreed upon between the parties and Agfa was entitled to sell the said photographic printing papers purchased by it from the petitioners at such prices as Agfa may determine from time to time. Thus, if Agfa were the purchasers of the goods manufactured by the petitioners, action on the part of the respondents in levying excise duty on the sale price of Agfa is clearly erroneous and illegal. In view of the pronouncement of the Supreme Court and of this Court quoted hereinabove, it is abundantly clear that Agfa cannot be termed as a "related person" of the petitioners so as to justify the collection of excise duty on the sale price of Agfa. This being the position in law, it will have to be held that the action of the Department in collecting excise duty not on the sale price of petitioners to Agfa but on the sale price of Agfa to its customers is illegal.

9. The next question that falls for consideration is whether the petitioners would be entitled to the refund of this excess excise duty paid under protest. Mr. R. V. Desai, the learned Counsel appearing on behalf of the respondents had raised several technical pleas as debarring the petitioners from claiming the refund of the said levy. He firstly submitted that the petitioners had an alternate, efficacious remedy of an appeal against the decision of the Assistant Collector which appeal lay to the Collector and if the petitioners were aggrieved by the order of the Collector a revision lay to the Government of Maharashtra. Since the petitioners have not availed of the said remedy which the Central Excises and Salt Act provided, it was not open to the petitioners to claim the relief of refund in the present writ petition. It may be mentioned that this contention was not raised by Mr. Desai as a preliminary objection to the maintainability of the present writ petition at the commencement of the hearing of this petition but was raised at a much subsequent stage when Mr. Hidayatullah had crossed 2/3rd of the stage of his submissions raised in this petition.

10. Mr. Desai placed reliance on the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, wherein the Supreme Court had dismissed the petitions before it on the short ground that the petitioner in that case had an equally efficacious, alternate remedy by way of an appeal and thereafter of a revision application etc. In that case the Supreme Court, however, held that the Rule regarding non-interference on account of there being an alternate, efficacious remedy did not apply to an assessment under an ultra vires provision as such an assessment cannot be regarded as a part of an act and an assessment under such a provision would be wholly without jurisdiction.

11. Mr. Desai further relied upon the case of the Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , where the Supreme Court while dealing with the interim orders passed had occasion to criticise the grant of indiscriminate interim orders by High Courts while entertaining writ petition under Article 226 of the Constitution of India.

12. In my judgment, the aforesaid decision relied upon by Mr. Desai cannot further his contention that it was not open to the petitioners to approach this Court in a writ petition on account of an alternate, efficacious remedy being available. In the first case relied upon, an exception has been carved out that such a bar would not apply to actions which were beyond the scope of the provisions of the Act under which the action purported to be taken. The second case does not lay down the proposition canvassed by Mr. Desai. In the case of East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, while dealing with the provisions of the Imports and Exports (Control) Act, 1947 and the Sea Customs Act, 1878 it was found that the Customs Authorities had no jurisdiction to initiate the proceedings or make an inquiry under the said provisions in respect of certain acts alleged to have been done by the appellants. The respondents, Customs authorities it was held, could most certainly be prohibited from proceeding with the same and hence a writ

petition was maintainable. It was further held that a Tribunal could not ignore the law declared by the highest Court in the State and initiate proceedings in the direct violation of the law so declared.

13. If one applies the aforesaid decision to the facts of the present case, it is apparent that the respondents have ignored the law declared by the Supreme Court in the aforesaid cases of Bombay Tyre International and Atic Industries Ltd. and have proceeded to collect the excise duty in violation of the law so declared. It, therefore, cannot be held that it is not open to this Court to exercise its writ jurisdiction merely on the ground that a remedy of appeal and revision is open to the petitioners. It has been held in the case of Union of India (UOI) Vs. Tarachand Gupta and Bros, that, the words "a decision or order passed by an officer" must mean a real and not a purported determination. A determination, which takes into consideration factors which the officer has no right to take into account, is no determination. In such cases the provision excluding jurisdiction of civil courts cannot operate so as to exclude an inquiry by them. In that case the Supreme Court relied upon the case of Anisminic Ltd. v. The Foreign Compensation Commission reported in (1969) 1 All E.R. 208 which stated :

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the Tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the Tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

14. In view of the aforesaid observations, I have not hesitation in holding that the availability of an alternate remedy of appeal and revision is no bar to the petitioners approaching this Court by this petition. The impugned action of the respondents is one which is divorce the provisions of the Central Excises and Salt Act as declared by the Supreme court in the aforesaid cases of Bombay Tyre International and Atic Industries Ltd. The said action can thus legitimately be assailed in the present writ petition.

15. Mr. Desai further contended that the petitioners had challenged the action on

the part of the Department in levying the impugned excise duty by filing in this Court a writ petition being Writ Petition No. 841 of 1976 which the petitioners withdrew. The petitioners while withdrawing that petition had not availed of the liberty to file a fresh petition on the same cause of action. The present petition was, therefore, not maintainable. The petitioners were also estopped from raising the same contention which they had impliedly given up by withdrawing the said petition. Mr. Desai relied upon the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, wherein dealing with the effect of the withdrawal of a writ petition filed under Articles 226 and 227 of the Constitution of India without permission to file a fresh petition, it was held that the principle underlying Rule-1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission.

16. It has to borne in mind that the aforesaid case relied upon by Mr. Desai did not relate to a tax matter but related to the grant of a permit to a stage coach under the Motor Vehicles Act and the same can have no bearing on the decision of the issue at hand.

17. Mr. Desai further relied upon the decision of Neptune Wires P. Ltd. Vs. Union of India, , wherein this Court on the facts of that case found that the petitioner therein had paid the excise duty under protest. The petitioner had invited an appealable order which was passed and yet the petitioner did not care to prefer an appeal. It could not be said that the duty had not been collected in accordance with law. It was clear that the duty had not been paid by the petitioner and collected by the respondents under a mistake of law and therefore it was clear that the petitioner had not made out a case for invocation of the jurisdiction under Article 226 of the Constitution of India.

18. Though at first flush the said decision may appear to support the contention of Mr. Desai, on a closest scrutiny it would appear that, that decision itself carves out an exception in cases where the duty paid by the petitioner and collected by the Excise authorities was not in accordance with law. It was held that when the duty is collected without the authority of law, the jurisdiction of the Court under Article 226 of the Constitution can be invoked. The said jurisdiction can also be invoked if the duty has been paid and collected by mistake of law which mistake

must naturally be common to both the parties.

19. In the case of Dunlop India Ltd. and Madras Rubber Factory Ltd. Vs. Union of India (UOI) and Others, , it has been laid down that there is no estoppel in law against a party in taxation matter. If a party, in order to clear the goods for customs, has given the classification in accordance with the wishes of the authorities or even under some misapprehension, and if the law allows it a right to ask for refund on proper appraisal and which is actually applied for the party cannot be estopped from making such application and ask for such refund.

20. In the case of Leukoplast (India) Ltd. Vs. State of Goa, , this Court has held that there is no estoppel in law against a party in a taxation matter. Therefore, the submission on behalf of the revenue that the petitioners are barred to come out now with a case that the products are drugs and medicines in view of their own understanding of the said products cannot be accepted.

21. In view of the aforesaid decisions it must be held that the contention of Mr. Desai based on the principles of estoppel is without any substance. Mr. Desai further submitted that the present petition has been filed after undue delay and the same suffers from laches. Hence, the present petition is liable to be dismissed on that account. I am not impressed by this submission as the petitioners have all alone been paying the excise duty claimed by the respondents under protest. When their protest against the claim of the Department was negatived in the year 1975, they preferred an appeal which was dismissed. Though they had withdrawn their Misc. Petition No. 841 of 1976, they continued to pay under protest and did lodge a consolidated refund claims on the 11th of August, 1986, 29th September, 1986 and 7th April, 1987 and when the said refund applications were rejected on the 3rd of April 1987 they preferred the present writ petition. On the present facts, I would be loath to refuse to interfere on the technical plea of delay or laches raised on behalf of the Department. This is more so as I have found that the collection of the levy is without jurisdiction. The claim of refund made by the petitioners cannot be allowed to be throttled on such technical pleas.

22. The aforesaid discussions would ordinarily have been sufficient to dispose of the present petition in favour of the petitioners but for one more submission advanced by Mr. Desai on behalf of the Department viz. that the petitioners cannot be permitted to be unjustly enriched by grant of the relief claimed in this petition. Mr. Desai pointed out that the petitioners had not borne the burden of the additional excise charged upon them but had passed on that liability on to their consumers and it is only the ultimate consumers who have borne the burden of the additional levy. Since it is not possible for the petitioners to trace their ultimate consumers to repay the additional payments made by them, the grant of any relief in the present petition would unjustly enrich the petitioners which could not be permitted to be done. Mr. Hidayatullah on the other hand submitted that this being a fiscal matter, the State cannot be permitted to retain with itself a duty illegally collected. If the State had no authority to collect this

excess levy, it was bound to refund the same to the petitioners. Such a liability could not be avoided on the plea of unjust enrichment.

23. After having heard the learned Counsel appearing on either side, I am of the view that there exists a difference of opinion between different benches of this Court on this issue. It has been held in the cases of *Rapidur (India) Ltd. Vs. Union of India* and another, ; *Assistant Collector of Central Excise, Kalyan Division and another Vs. Dipsi Chemicals Pvt. Ltd. and another*, ; *Miranda Limited and Another Vs. Union of India (UOI) and Others*, ; *Associated Bearing Co. Ltd. v. Union of India* 1988 (33) E.L.T. 785 and *Finolex Cables Ltd. v. Union of India* 1983 (35) E.L.T. 343 that the aforesaid principle of unjust enrichment would not apply. As against the same, I am pointed out the decision in Writ Petition No. 2204 of 1988 decided by Justice Sawant and Justice Kantharia on the 6th July, 1988, wherein a contrary view has been expressed by placing reliance in the case of *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, ; *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, ; *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, ; *U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others*, ; *State of Madhya Pradesh Vs. Vyankatlal and Another*, ; *Ogalc Glass Works Ltd. v. Union of India* 1979 ELT 468 : 79 B.L.R. 37.

24. It has been pointed out in the case of *Jaisri Sahu Vs. Rajdewan Dubey and Others*, that law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is, therefore, desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question, and a contrary decision is given without reference to the earlier decision. When two such conflicting decisions are placed before a later Bench, the correct procedure to follow in such a case would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities without taking upon itself to decide whether it should follow the one Bench decision or the other.

25. In the case of *Ambika Prasad Mishra v. State of U.P.* reported in : [1980]3SCR1159 it has been observed :-

"It is fundamental that the nation's constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow-up. This, if permitted, may well be a kind of judicial destabilisation of State action too dangerous to be indulged in save where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shake-up."

26. In view of the aforesaid conflict, I see no option but to resort to Rule-28 of the Original Side Rules and report to the learned Chief Justice with request to

refer this issue for being decided by Full Bench in order to resolve the aforesaid conflict.

27. The question that arises is where the tax admittedly, or has been held to be, levied and collected by the State without the authority of law, refund of the tax must be granted to the assessee or applying the principle of unjust enrichment, no refund should be made to the assessee unless he can pass on the benefit to the ultimate consumer.

28. On the one hand, Article 265 of the Constitution lays a mandate that no tax shall be levied or collected except by authority of law. Hence, the State if found to have collected a tax without the authority of law cannot be permitted to retain it in view of the provisions of the Constitution as also the Act. On the other hand the assessee who has paid that tax and has passed on the burden to the ultimate consumer cannot be permitted to unjustly enrich himself if the benefit of the said refund cannot be passed down to the ultimate consumers. The question whether the State in such a case could be directed to make the refund and whether the said benefit could as far as possible be granted to the ultimate consumer who had ultimately suffered the said levy, would undoubtedly be a matter which would draw the attention of the Court. In a case like the present one the question whether the amount of refund could be directed to be utilised for subsidising the prices of photographic papers so as to reach the benefit to the retail consumers being the closest to those who have borne the unjust levy may be a subject matter which could be considered.

29. In view of my finding that the Department was not justified in collecting excise duty on the price charged by Agfa, I declare that the Department was not justified in collecting excise duty over and above the one due on the sale price of the petitioners to Agfa. The prayer clause regarding the refund of the excise levy will have to be decided after the decision of the issue by the Full Bench.

30. I direct that the present petition be placed before the learned Chief Justice with my request for referring the aforesaid issue for being decided by the Full Bench.