

(1987) 09 BOM CK 0058
In the Bombay High Court
Case No : Suit No. 1300 of 1976

Pure Drinks Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-09-1987

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Civil Procedure Code, 1908 (CPC) — Section 34, 80
Evidence Act, 1872 — Section 115
Limitation (Amendment) Act, 1961 — Article 115

Citation : (1987) 3 BomCR 231 : (1989) 22 ECR 589

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : A. Hidaytullah and M.H. Kapadia and S.M. Parkar, instructed by Daphtary Ferreira and Diwan, for the Appellant; C.J. Shah and T.R. Rao, A.G.P., for the Respondent

Judgement

Sujata V. Manohar, J.—The plaintiffs manufacture soft drinks i.e. non alcoholic beverages and carbonated beverages. At all material times they marketed their products under the name of Coca Cola, Fanta and Soda Special.

2. Prior to 1970 the plaintiffs' beverages were not liable to any excise duty. Under the Central Excises and Salt Act, 1944 the excise duty was levied for the first time on aerated waters with effect from 1st March, 1970 when new Item 1-D was introduced in the First Schedule to the said Act. Thereafter the Assistant Collector, Central Excise, Bombay Division IV, called upon the plaintiffs to file a price-list of the products manufactured by the plaintiffs. Thereupon the plaintiffs furnished the necessary price lists from time to time. The price lists furnished by the plaintiffs mentioned that the plaintiffs were supplying their products to the wholesale dealers through the plaintiffs' salesmen in the plaintiffs' trucks and that no discount or commission was being paid by the plaintiffs to the wholesale dealers. The price lists so submitted were approved by the defendants from time to time. The plaintiffs paid excise duty as per the approved price lists. These

price lists included transport charges or freight incurred by the plaintiffs for supplying their products in their trucks up to the wholesale dealers" premises. The plaintiffs contend that on account of inclusion of these charges which are post-manufacturing charges in the price lists, they have paid duty on transport charges and freight under a mistake of law. The present suit is to recover the excise duty paid by the plaintiffs on transport charges incurred by the plaintiffs for supplying their products in their own trucks up to the wholesale dealers" premises. The particulars of claim in the present suit are set out in Exh. H to the plaint. The claim for recovery of excise duty so paid is for the period 31-5-1973 upto 7th January, 1975 together with interest at 18% per annum. The present suit was filed on 14th July, 1976. Prior to the filing of the suit the plaintiffs gave a notice dated 11th May, 1976 u/s 80 of the Code of Civil Procedure.

3. The defendants have denied their liability to pay to the plaintiffs the amount claimed. Several issues of law were raised in the Written Statement. After the filing of the suit however, a number of these issues have been covered by various decisions delivered by the Supreme Court and this High Court. In the light of these decisions and defendants have very fairly not pressed issues Nos. 1 and 2, which deal with the suit being barred by section 40(1) of the Central Excises and Salt Act, 1944 and the claim being not covered by Rule 11 of the Central Excise Rules, 1944. The parties have also agreed that in the event of the plaintiffs succeeding in the suit in respect of either the entire claim or a part of the claim, the claim should be referred to the Assistant Collector of Central Excise, Divn, G-I, Bombay for determination of the exact amount of central excise duty to be returned to the plaintiffs. In view of this agreement, there are no disputed questions of fact in the present suit. The remaining issues relate to the question whether the suit of plaintiffs is barred by the law of limitation; whether the plaintiffs came to know of the decision of the Supreme Court in the case of A.K. Roy v. Voltas Ltd., in June/July 1973 as alleged in para 15 of the plaint and whether the plaintiffs waived any irregularity in the assessment of duty because the plaintiffs themselves had included the transport charges in the price lists.

4. According to the plaintiffs, in the price lists submitted by them, from time to time, they included the transport charges for transporting the goods from the factory to the premises of the wholesale dealer under a mistake of law because they wrongly believed that such charges were includible. In para 15 of the plaint they have stated that they discovered the correct legal position that such transport charges were not includible in the price of their products for payment of excise duty when they came to know of the Supreme Court judgment in the case of A.K. Roy and Another Vs. Voltas Limited, some time in June or July 1973. The defendants however, allege that the judgment of the Supreme Court was delivered on 1st December, 1972 and it was reported in January 1973. They rightly contend that the plaintiffs have not led any evidence to show that they came to know about the mistake of law only in June or July 1973.

5. The defendant further contend that the judgment of the Division Bench of the

Bombay High Court in the same case was delivered as far back as on 11th August, 1970 and it was this date which must be taken as the relevant date for discovery of mistake of law.

6. In the case of Golden Tobacco Co. Ltd. v. Union of India , reported in 1983 E.L.T. 2238 (Bom.) Madon, J. (as he then was) dealt with a similar contention raised before him. I respectfully agree with his conclusions. He has observed (vide para 20) that the controversy between the parties in "Voltas" case was not directly concerned with transport charges. In that case the manufacturers were charging two prices, one in respect of direct sales to the consumers and the other to their distributors. The question was which of the prices should be taken for the purpose of determination of assessable value of the goods manufactured by Voltas. There was no question of any deduction of post-manufacturing expenses to be made from either of the prices charged by Voltas for arriving at the assessable value of these goods. Any observation about post-manufacturing expenses in the judgment of the Division Bench would therefore be obiter. He has also observed that even these observations in the judgment of the Division Bench of the High Court are not the same as what was held by the Supreme Court. When the matter went before the Supreme Court, the Supreme Court did state that in determining the assessable value, all that was to be taken into account was the manufacturer's cost plus the manufacturer's profits and that the post-manufacturing costs arising out of post-manufacturing operations such as freight, octroi and other charges were to be excluded. Therefore, the earliest date that might be taken into account for the purpose of realising the correct position in law can only be the date of decision of the Supreme Court judgment in Voltas" case.

7. The contentions which have been raised here relating to the date of discovery of mistake are academic because in the present case the plaintiffs have not sought to recover duty paid under a mistake of law for any period prior to the date of discovery of mistake. The entire claim of the plaintiffs is for the period after the Supreme Court judgment in Voltas" case. This judgment was delivered in December 1972 and was reported in January 1973 while the claims here relate to the period May 1973 to January 1975.

8. The plaintiffs have filed this suit to recover excess duty paid for a period of three years prior to the date of the suit i.e. within 3 years of payment, as money received by the defendants without the authority of law. The claim for the period 31st May, 1973 to July 1973 has been included because the plaintiffs were required to give two months" notice u/s 80 of the CPC for filing the present suit. Hence it is not disputed that they are entitled to make a claim for this additional period of two months over and above the period of three years. Under Art. 115 of the Limitation Act, 1963 the plaintiffs are entitled to file a suit within a period of 3 years from the date of payment for recovery of the amount so paid. The entire claim is within the period of limitation.

9. It is alleged by the defendants that these were voluntary payments made by

the plaintiffs because in their price lists the plaintiffs had themselves included the cost of transportation. Hence the plaintiffs are not entitled to recover these amounts. However, when such excise duty is collected by the State without any authority of law, it is the duty of the State to refund the tax. The plea of estoppel does not apply to duty or tax which is collected without the authority of law. (See in this connection Golden Tobacco case supra).

10. It is an accepted position that under old section 4 of the Central Excises and Salt Act, 1944, which was then in force, and in the light of the decision of the Supreme Court in Voltas case and the recent judgment of the Supreme Court in Union of India v. Bombay Tyre International Ltd., reported in 1983 E.L.T. 1896 (S.C.), in determining the assessable value of goods for the levy of excise duty, the cost of freight or other transport charges from factory to the premises of the wholesale dealer are deductible as post-manufacturing expenses. It was, however, pointed out by Mr. C.J. Shah, learned Counsel for the defendants, that where the freight is averaged and the average freight is included in the wholesale cash price so that the whole sale cash price at the factory gate is the same as the wholesale cash price at a place outside the factory gate, the average freight which is included in such wholesale cash price has to be deducted in order to arrive at real wholesale cash price at the factory gate. See in this connection Union of India v. Bombay Tyre International Ltd., (supra). In the present case also the wholesale cash price of the plaintiffs at places other than the factory gate is the same as their wholesale cash price at the factory gate. The plaintiffs have also thus included in their wholesale cash price the average freight. The plaintiffs have annexed to the plaint certificates given by their chartered accountants which include, inter alia, transport charges for each relevant year. In the particulars of claim at Exh. H. they have mentioned transport charges per case in respect of various claims which are included in Exh. H. On the basis of this material it will be open to the Assistant Collector of Central Excise to determine the freight for transporting the goods from the factory to the premises of the wholesale dealer, and to calculate average freight included in the wholesale cash price on which duty was wrongly collected. He shall quantify the duty paid for the suit period, on average freight so determined, which duty is required to be refunded to the plaintiffs. The Assistant Collector of Central Excise to determine the quantum of duty to be refunded to the plaintiffs as aforesaid within a period of four months from today. The defendants are ordered and directed to pay to the plaintiffs the amount so determined within four months thereafter.

11. The plaintiffs have claimed interest at the rate of 18% p.a. on the excess duty collected by the defendants from the date on which the duty was collected till payment. In the case Elpro International Ltd. Vs. Joint Secretary, Govt. of India, Ministry of Finance and Others, , the Supreme Court has awarded lumpsum interest of Rs. 50,000/- on duty which was wrongly collected. In the case of Metal Distributors Ltd. and another Vs. Union of India and others, as also in the case of Atul Products Ltd. Vs. Union of India and others, the latter

following the two earlier judgments, interest was awarded at the rate of 12% on excise duty which was collected without the authority of law. In the circumstances of the case and in the interest of justice it would be just and fair to award to the petitioners interest at the rate 12% per annum from the date the duty was collected till payment.

12. The issues are answered as follows :

Issue 1 and 2 : Not pressed. Issue 3 No. Issue 4 and 5 : The plaintiffs are entitled to claim a refund of excess excise duty; the excess amount to be determined in the light of this judgment by the Asst. Collector of Central Excise, G-I Division, Bombay as stated hereinabove. Issue 6 : Not proved. Issue 7 : No. Issue 8 : Quantum of refund to be determined by the Asst. Collector of Central Excise, G-I Division, Bombay. Issue 9 : Yes, at the rate of 12% per annum. Issue 10 : As above.

13. There will be a decree in favour of the plaintiffs and against the defendants for payment to the plaintiffs of excise duty collected on the cost of transportation of the plaintiffs' goods from their factory to the premises of the wholesale dealers for the period 31st May, 1973 to 7th January, 1975 together with interest thereon at the rate of 12% per annum from the date of collection of duty till payment and costs of the suit. By consent, the quantum of such excess duty collected to be determined by the Assistant Collector Division G-I, Bombay as hereinbefore stated.