

(1965) 03 BOM CK 0037

In the Bombay High Court

Case No : Misc. Application No. 52 of 1963

Queen's Chemists Mfg. Department

APPELLANT

Vs

G. Koruthu and Another

RESPONDENT

Date of Decision : 10-03-1965

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : AIR 1967 Bom 338 : (1966) 68 BOMLR 597

Hon'ble Judges : Tarkunde, J

Bench : Single Bench

Advocate : S.J. Sorabjee and H.H. Yadnik, for the Appellant; S.S. Rangnekar, for the Respondent

Judgement

1. This petition has been filed under Article 226 of the Constitution to challenge the validity of an order passed by the Collector of Central Excise Bombay, who is the first respondent to this petition, under the Central Excises and Salt Act, 1944. The petitioners are a firm engaged in the manufacture of pharmaceutical products, including an ointment known as "Grams Cutter" and a balm known as "Queen's balm". Their factory is situated at Tardeo in Bombay. By the Finance Act of 1961 an item was included in the First Schedule to the Central Excises and Salt Act, 1944. by which an *valorem* duty of 10 per cent, was imposed on certain types of patent and proprietary medicinal preparations. It is not disputed that the petitioner's said products, viz. Germs cutter and Queen's balm, were thus subjected to an *ad valorem* duty of 10 per cent. under the Central Excises and Salt Act 1944. The manner in which the value of the products is to be ascertained for the determination of the duty is laid down in S. 4 of the said Act, and the dispute raised by the petitioners arises on the interpretation of some of the terms of that section. That section is in the following terms:

"4. Determination of value for the purposes of duty; Where under this Act, any 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 for delivery at the place 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, or

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation: In determining the price of any article under this 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 chargeable with duty from the factory or other premises aforesaid."

Now, the petitioners sell their products (including Germs cutter and Queen's balm) to their sole distributors M/s. Bhogilal Premchand and Co. M/s, Bhogilal Premchand and Co., hereafter referred to as the Distributors, sell these products to wholesale dealers and sub-agents at considerably higher prices. The main contention of the petitioners is that for the purpose of assessing the excise duty payable by them, the basis should be the prices at which they (the petitioners) sell the products to the Distributors, and not the prices at which the distributors sell the products to wholesale dealers. The second contention of the petitioners is that, supposing, the first respondent was right in accepting the price list of the Distributors as the basis for the assessment of excise duty, the first respondent was in error in not allowing certain deduction to which the petitioners were entitled.

(2) I will first deal with the petitioners' contention that the assessment of excise duty should have been made on the basis of the prices charged by them to their Distributors. It will be noticed that S. 4(a) provides that for the purpose of assessing excise duty the value of the article shall be deemed to be "the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold". The other clauses of S. 4(a) provide that the wholesale cash price is to be ascertained with reference to the time at which the dutiable article is to be removed from the factory or any other premises of manufacture or production, and with reference to the place of manufacture or production if a wholesale market exists there, and in other cases the nearest place where such a market exists. Section 4(b) applies where the wholesale cash price is not capable of being ascertained in the manner provided by S. 4(a). In that case, the price of the article is to be deemed to be the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent.

(3) In support of the first contention of the petitioners mentioned above, Mr. Sorabjee argued that the provision applicable to the determination of the value of the petitioners' products was S. 4(b), and not S. 4(a) as held by the first respondent. Mr. Sorabjee argued that the petitioners' products in question are patented pharmaceutical preparations, and their value cannot be determined with reference to the wholesale price of any other article. "of the like kind and quality". According to Mr. Sorabjee, these products are *suigeneris*, and their value must be determined under S. 4(b) by ascertaining the price at which the petitioners sell these products, as it cannot be determined by ascertaining the wholesale price of articles "of the like kind and quality" as provided by S. 4(a). This argument is fallacious, because the expression "an article of the like kind and quality" occurs both in S. 4(a) as well as in S. 4(b). That expression must be deemed to include an article of the same kind and quality as the dutiable article, as well as an article of similar kind and quality. It is clear from the findings of the first respondent that the wholesale cash price of the petitioners' said products was capable of being ascertained at the time when the articles liable to duty were manufactured by the petitioners and were to be removed from the petitioners' factory. The first respondent was, therefore, right in determining the value of the articles under S. 4(a), and not under S. 4(b).

(4) It was next argued by Mr. Sorabjee that even if it is held that S. 4(a) applies to the present case and not S. 4(b), the wholesale price of the said products should have been fixed according to the price at which the petitioners sell these products to their Distributors, and not according to the price at which the Distributors sell these products to wholesale dealers. According to the terms of S. 4(a) the wholesale cash price is to be determined with reference to "the place of manufacture or production", and only where a wholesale market does not exist at such a place, with reference to "the nearest place where such market exists". Mr. Sorabjee pointed out that the expression "the place of manufacture or production" does not mean the whole geographical area of the town or city in which the factory of the petitioners is situated, but the more limited area of the factory and the connected premises of the petitioners. According to Mr. Sorabjee, there is a wholesale market for the said products at the petitioners' factory, because the said products are delivered by the petitioners to their Distributors at the place where the factory is situated. Now, I agree with Mr. Sorabjee that the expression "the place of manufacture or production" means the factory and the connected premises, and not the whole city of Bombay in which the factory is situated. I do not, however, agree that there is any wholesale market for the above products at the place of manufacture or production. A wholesale market necessarily means a place where wholesale traders can purchase the goods in question in wholesale units. No market comes into being at the place of manufacture or production simply because the said products are delivered by the petitioners to their Distributors at that place. There being no wholesale market for the said products at the place where they are manufactured, the first respondent was right in determining the wholesale price of the said products in

accordance with the wholesale price at which the Distributors sold the goods in Bombay to wholesale dealers.

(5) This conclusion finds support in a decision of a single Judge of the Calcutta High Court in *National Tobacco Co. of India Ltd. Vs. Collector of Central Excise and Others*, . The petitioners in that case had claimed that the wholesale price of their products which was to be determined in accordance with Section 4(a) of the Central Excises and Salt Act, 1944, should be the price at which the petitioners sold their products to their two stockists at the place of manufacture, and not the higher price at which the stockists sold the products to wholesale traders. Rejecting the argument that there was a wholesale market for the products in question at the place of manufacture, the learned Judge observed:

"The word "wholesale market" must mean a place where the article in question is habitually sold to anybody who wishes to make a purchase or sale. It is equally obvious that just because a factory manufacturers the articles at a particular place, and sells them there to its stockists or dealers, will not by itself convert it to a wholesale market"

(6) The above decision was approved and adopted by a Division Bench of the Mysore High Court in *Amco Batteries (P) Ltd, Bandalore v. Assistant Collector, Central Excise, Bangalore*. AIR 1963 Mys 216. The petitioners in that case used to sell their products to as many as 14 Distributors each of whom was the sole Distributor for a specified zone in India. It was held that the Distributors could not be regarded as independent buyers that they were in the position of favoured buyers, and that there could not be said to be a "wholesale market" at the factory site, nor could the price charged to the Distributors be considered as the "wholesale cash price" for the purpose of S. 4(a).

(7) The second contention of the petitioners is that,. supposing that the petitioners' products were liable with excise duty on the basis of the wholesale price charged by the Distributors, the first respondent erred in not allowing certain deductions from that price before assessing the excise duty payable on the products. It will be noticed that the Explanation to S. 4 of the said Act allows deductions to be made in respect of "trade discount, and one of the grievances of the petitioners is that no trade discount was allowed by the first respondent on the wholesale prices fixed by the distributors.

(8) In appreciating this contention some additional facts are required to be noticed. It has been found that the Distributors market the products in the mofussil through sub-agents who get a commission of 12 1/2 per cent out of which a commission of 10 per cent is made over to all dealers who purchase the products from the sub-agents. In Bombay proper, all sales are effected at the rates shown in the price list of the Distributors without even a 10 per cent discount. However, gifts in kind are annually given by the sole Distributors to Bombay dealers and the gifts are said to be valued at 10 per cent of the total price paid by the dealers for the said products. it was further ascertained that the

sole Distributors gave a "quantity discount" of 9 dozen for every 6 1/4 gross of supply; that is to say, 9 dozen bottles were given free to a purchaser who purchased 75 dozen bottles (i.e 6 1/4 gross).

(9) In refusing to make any deduction from the price list of the Distributors on account of trade discount, the excise authorities held, in the first place that the wholesale market which was to be taken into consideration in this case was the market in Bombay and not in any of the mofussil places. This view of the excise authorities was clearly right. The excise authorities further held that the trade discount contemplated by S. 4 is a "cash" discount, and not a discount given in the shape of gifts in kind. As no discount in cash was given by the sole Distributors to Bombay dealers the excise authorities refused to make any deduction in the rates shown in the price list of the sole Distributors.

(10) According to Webster's Third New International Dictionary, the expression "trade discount" means "a percentage deduction from the list price of goods allowed by a manufacturer or wholesaler to customers engaged in trade". This implied that the concession which is given to purchasers would have the character of a trade discount. If the concession operates as a deduction from the price payable by the purchaser I do not think that the gifts which are given annually by the Distributors to wholesale dealers can be looked upon as deductions in the price payable by the dealers for the products purchased by them. Mr. Sorabjee pointed out that the value of the gifts given to the dealers works out at 10 per cent of the purchase price paid by them during a particular year. Mr. Sorabjee, however, told me, in response to an inquiry which I made, that it is the Distributor who decides what gifts are to be given to various dealers, and that the dealers do not have the right of deciding what gifts should be given to them. The value of the gifts cannot be regarded as a trade discount. I do not, however, find an adequate reason why the excise authorities should have refused to make any deduction for the "quantity discount" which is allowed by the Distributors to the wholesale dealers. There is no reason to suppose that a trade discount must always be in the form of money and cannot be in the shape of goods. All that is necessary is that a trade discount must operate as a deduction of the price chargeable to the purchaser. A quantity discount has precisely the same effect as a money discount, because in both cases there is a deduction in the price charged to the purchaser. To take a concrete instance a distributor may announce that the list price of 10 articles of a certain product will be Rs. 100 and that every purchaser will get a money discount of 10 per cent. In that case, a purchaser will pay Rs. 90 for 10 articles of the product. Alternatively, the distributor may announce that the list price of the product will be Rs. 90 for 9 articles, and a quantity discount (which is another name for "trade allowance") will be made in the form of one article being given free to a purchaser of 9 articles. In that case also, a purchaser will purchase 10 articles for Rs. 90. There is no reason why a deduction for trade discount should be made in the former case, and not in the latter.

(11) On behalf of the respondents Mr. Rangnekar pointed out that the quantity discount which is being allowed by the Distributors may not be available to all wholesale purchasers of the products in question. There is, however, no finding of the excise authorities to that effect. The excise authorities appear to have refused to make any deduction for the quantity discount on the ground, which I find erroneous, that the quantity discount cannot amount to a trade discount. It will, therefore, be necessary to give a direction that the first respondent should hear the petitioners again, and, after ascertaining such other facts as may be required, modify the impugned order if necessary so as to make such deduction for quantity discount as may be found permissible on the facts established before him.

(12) It was further argued by Mr. Sorabjee that certain additional deductions should have been made from the list price of the Distributors on account of freight, packing, handling, advertisement etc. In support of this contention reliance was placed on the aforesaid decision of a Division Bench of the Mysore High Court in Air 1963 Mys 216. As mentioned above, the learned Judges in that case approved the action of the excise authorities in adopting as the wholesale price the price charged by the distributors to wholesale dealers, and not the price charged by the manufacturers to the distributors. The learned Judges, however, held that in determining the wholesale cash price of the goods in question, certain deductions are required to be made from the price charged by the distributors to wholesale purchaser. According to the learned Judges, those deductions should be of "the expenses that were likely to have been incurred" by the distributors, and "the discount to which they are ordinarily entitled" Now, I must say, with great respect, that I am unable to appreciate how these further deductions can be made in assessing the wholesale cash price under S. 4 of the said Act. The Explanation to S. 4 specifically provides "In determining the price of any article under this 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 chargeable with duty from the factory or other premises aforesaid" No reasons have been given by the learned Judges in the above case in support of their view that deductions in addition to these mentioned in this Explanation have to be allowed. I cannot, therefore, accept Mr. Sorabjee's argument that the excise authorities were in error in not allowing further deductions for freight, packing, handling, advertisement etc.

(13) As stated above there will be a direction to the first respondent that he should again hear the petitioners with regard to their claim for deduction for "quantity discount",. and, after ascertaining such further facts as may be required, make such alteration as may be necessary in his appellate order dated 18th August, 1962 (Exh. K to the petition). He should decide the question on the basis that the quantity discount in the present case amounts to a trade discount. If , a result of any alteration in the said order, any amount becomes refundable to the petitioners, the same should be refunded. Subject to this direction, the petition is dismissed. The petitioners will pay the respondents' costs of the

petition.

(14) Petition dismissed.