(1987) 04 MAD CK 0006

In the Madras High Court

Case No : Writ Petition No. 259 of 1981

Sankar Electrical (P) Ltd. APPELLANT

Vs

Assistant Collector of Central Excise, Madurai and Others RESPONDENT

Date of Decision : 23-04-1987

Acts Referred:
Central Excises and Salt Act, 1944 — Section 4

Citation : (1988) 17 ECC 274 : (1989) 20 ECR 334 : (1987) 31 ELT 61

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Judgement

1. The matter arises under the Central Excises and Salt Act 1 of 1944, hereinafter referred to as the Act. The first-respondent in respect of electric

fluorescent lighting tubes manufactured by the petitioner and sold on wholesale basis to M/s. Genera Electric Company of India (P) Ltd., Calcutta,

hereinafter referred to as the Company, held that the price of such sales could not be taken to be the ''wholesale cash price'' within the meaning of

Section 4(a) of the Act as the section stood prior to 1-10-1975, and held that the excisable value of such tubes could be only at the rates at the

rates at which they were in turn sold by the company. Section 4 of the Act, prior to its substitution with effect from 1-10-1975 read as follows :

Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall 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

manufacture or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or the 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 my 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.

2. It is made clear that whenever Section 4 or clause (a) thereof is referred to in this order, the reference is only to that provision prior to its

substitution with effect from 1-10-1975. On this basis, there was a demand on the petitioner of duty under the Act. The petitioner took up the

matter by way of an appeal to the second-respondent and there was no success before the second-respondent and this obliged the petitioner to go

by way of a revision to the third-respondent and that revision has also been dismissed. The orders of respondents 1 to 3 are being put in issue in

this Writ Petition.

3. The short point that arises for consideration on the submissions made by Mr. S. Ramalingam, learned counsel for the petitioner, is as to whether

the prices at which the tubes were sold by the petitioner on the wholesale basis to the company should be taken as the wholesale cash price u/s

4(a) of the Act. Respondents 1 to 3 have heavily relied on the agreement entered into between the petitioner and the company on 9-9-1968 to say

that the agreement was not entered into at arms length, and hence the wholesale price of the transactions between the petitioner and the company

could not be taken to be the wholesale cash price. The pronouncement of the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, has

discussed the question as to when an agreement between a manufacturer and a wholesale dealer could not be characterised as one made at arms

length and in the usual course of business. Paragraphs 18 and 19 of the said pronouncement require extraction as follows :

We do not think that these decisions insofar as they hold that the price of sales to wholesale dealers would not represent the ''wholesale cash

price'' for the purpose of Section 4(1) of the Act merely because the manufacturer has entered into agreements with them stipulating for

commercial advantages, are correct. If a manufacturer were to enter into agreements with dealers for wholesale sales of the articles manufactured

on certain terms and conditions, it would not follow from that alone that the price for those sales would not be ''wholesale cash price'' for the

purpose of Section 4(a) of the Act if the agreements were made at arms length and in the usual course of business.

There can be no doubt that ''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 consideration, e.g. because he is relative of the

manufacturer, the price charged for these sales would not be the ''wholesale cash price'' for levying excise u/s 4(a) of the Act. A sole distributor

might or might not be a favoured buyer according to 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. The fact that the appellant sold 90 to 95 per cent of the

articles manufactured to consumers direct would not make the price of the wholesale sales of the rest of the articles any the less the ''wholesale

cash price'' for the purpose of Section 4(a), even if these sales were made pursuant to agreement stipulating for certain commercial advantages,

provided the agreement were entered into at arms length and in the ordinary course of business.

4. The principles stated above, if they can be put as heads of tests, may be done as follows :

(i) Merely because the manufacturer has entered into agreements with the wholesale dealer stipulating for commercial advantages, it would not be

correct to say that the prices of sales to such wholesale dealer would not represent the ''wholesale cash price'' for the purpose of Section 4(a) of the Act;

(ii) If a manufacturer were to enter into agreements with the dealers for wholesale sales of the articles manufactured on certain terms and

conditions, it would not follow from that alone that the price for those sales will be ''wholesale cash price'' for the purpose of Section 4(a) of the

Act, if the agreements were made at arms length and in the usual course of business;

(iii) If there is a special or a favoured buyer to whom a specially low price is charged because of extra commercial considerations, e.g. he is relative

of the manufacturer, the price charged for those sales would not be ''wholesale cash price'' for levying excise u/s 4(a) of the Act;

(iv) 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;

(v) Once wholesale dealings at arms length are established, the determination of ''wholesale cash price'' for the purpose of Section 4(a) of the Act

may not depend upon the number of such wholesale dealings;

(vi) The fact that the manufacturer sold 90 to 95 per cent of the articles manufactured to consumers direct would not make the price of the

wholesale sales of the rest of the articles any the less the ''wholesale cash price'' for the purpose of Section 4(a), even if these sales were made

pursuant to agreements stipulating for certain commercial advantages.

5. Excise is a tax on the production and manufacture of goods and Section 4 of the Act provides for arriving at the real value of such goods. When

there is a fair and reasonable price stipulated between the manufacturer and the wholesale dealer in respect of the goods purely on commercial

basis that should necessarily reflect a dealing in the usual course of business, and it is not possible to characterise it as not arising out agreement

made at arms length. In contrast, if there is a special or a favoured buyer to whom a specially low price is charged, because of extra-commercial

considerations, the price charged could not be taken to be fair and reasonable, arrived at on purely commercial basis, as to be counted as the

''wholesale cash price'' for levying excise duty u/s 4(a) of the Act. The criterion is as to whether the price stipulated is a fair and a reasonable price

struck on purely commercial basis or a specially low price not reflecting the normal fair and reasonable price for such wholesale dealing. If is only

in the latter case, it cannot be counted as ''wholesale cash price'' for levying excise duty u/s 4(a) of the Act. It is only those agreements that could

be characterised as agreements not made at arms length and in the usual course of business because they were motivated by extra-commercial

considerations and do not reflect the fair and reasonable price. Merely because the manufacturer entered into agreements with wholesale dealers,

stipulating for commercial advantages, we cannot eschew the prices stipulated as not representing the ''wholesale cash price''. The ultimate test is to

find out as to whether the price stipulated is fair and reasonable. Conferment of certain extra-commercial advantages would not militate against the

price being fair and reasonable. The that the wholesale dealer have to sell at a higher price need not necessarily be a factor to be taken note of to

frown upon the price arrived at under the agreement between the manufacturer and the wholesale dealer and to eschew it as not ''wholesale cash

price'' for levying excise duty u/s 4(a) of the Act. In its subsequent pronouncement in Atic Industries Ltd. v. M. H. Dave, Asstt. Collector of

Central Excise and others 1978 E.L.T. 444 : 1975 II S.C.W.R. 46, the Supreme Court, stressed upon the aspect of price being fair and

reasonable arrived at on purely commercial basis, and the irrelevancy of the price obtained by the wholesale dealer on his sales. The following

observations found therein may be extracted :

Moreover, it was not in dispute between the parties that the agreements entered into by the appellants with ICI and Atul were made at arms

length and in the usual course of business. 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................... ....The Price received by the wholesale dealer who purchases the goods from the

manufacturer and in his turn sells the same in wholesale to other dealers would be irrelevant to the determination of the value and the goods would

not be chargeable to excise on that basis.

6. In the present case, as rightly contended by the learned counsel for the petitioner, respondents 1 to 3 are solely guided by the terms of the

agreement entered into between the petitioner and the company, which by themselves are not decisive on the point as to whether the price

stipulated was fair and reasonable arrived at on purely commercial basis which could be called the wholesale cash price for Section 4(1) of the

Act. Respondents 1 to 3 have not adverted to the question as to whether specially low prices have been charged, because of extra-commercial

consideration. In my view, there has been a wrong approach by respondents 1 to 3 to the question in issue, and in the interests of justice, the

matter requires re-investigation, review and re-adjudication by the first authority, namely, the first-respondent, who can appropriately deal with the

matter, taking note of and applying the principles discussed above. Accordingly, the orders of respondents 1 to 3 impugned in this Writ Petition are

quashed and the matter is remitted to the file of the first-respondent for him to re-consider and dispose of the same on merits, as directed above,

after affording adequate opportunity to the petitioner to make its say in the matter. No costs. I will be in the interests of both revenue and the

petitioner that an expeditious disposal is given by the first-respondent. Hence, he is directed to dispose of the matter within a period of three

months from the date of the receipt of a copy of this order.

