

(1988) 04 MAD CK 0015
In the Madras High Court
Case No : Writ Petition No. 259 of 1981

Sankar Electrical (P) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-04-1988

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1989) 39 ELT 25

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : S. Ramalingam, for the Appellant; T. Somasundaram, Additional Central Government Standing Counsel, for the Respondent

Judgement

1. This Writ Petition coming on for hearing on this day upon perusing the petition and the affidavit filed in support thereof the order of the High

Court, dated 21.1.81 and made herein, and the counter and Reply affidavits filed herein and the records relating to the order in No. 1153/1980 dt.

31.10.80 confirming the order of the 2nd respondent made in App. 183/78 dt. 25.1.78 and confirming the order of the 1st respondent made in C.

No. V/32/301/73 dt. 4.9.76 comprised in the return of the writ made by the High Court and upon hearing the arguments of Mr. S. Ramalingam,

Advocate for the petitioner, and or Mr. T. Somasundaram, Additional Central Govt. Standing Counsel for the respondents, the Court made the

following order :-

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. General 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 he held that the excisable value of such tubes could be only 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 1.10.1957 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 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 or 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.

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.

2. 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 manufacture 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 in so far as they hold that the price of sales to wholesale dealers would not represent the "wholesale cash price" for the purpose of Section 4(a) 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 and conditions, it would not follow from the alone that the price for those sales would not be the "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 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. 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 can 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, provided the

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

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 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;

(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 a

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.

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 of agreement made at arms length. In contrast, if there is a special or a favoured buyer to whom 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. It 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 agreement 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 price 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 fact 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. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, , 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 Actual were made at arms

length and in the usual course of business. It was not the case of the Excise Authorities at any time the specially low prices were charged by the appellants ICI and Actual because of extra commercial considerations or that the agreements were anything but fair and reasonable or arrived at on purely commercial basis.

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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 to the determination of the value and the goods would not be chargeable to excise on that basis.

3. 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 and reasonable arrived at on purely commercial basis which could be called the wholesale cash price for Section

4(a) 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. It 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.