(1976) 10 MAD CK 0009

In the Madras High Court

Case No : Writ Petitions No''s. 1234, 1304 and 1491 of 1972

Sharda Silicate and Chemical Industries APPELLANT

Vs

Collector of Central Excise and Another RESPONDENT

Date of Decision : 06-10-1976

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173J
Central Excises and Salt Act, 1944 — Section 4

Citation : (1979) 4 ELT 20

Hon'ble Judges : Koshal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Koshal, J.—By this judgment I shall dispose of three petitions, viz, W.P. Nos. 1234, 1304 and 1491 of 1972, the facts giving rise to which

may be briefly stated. The petitioner in each of them is a firm known as M/s. Sharada Silicate and Chemical Industries, Coimbatore. It

manufactures and sells sodium silicate on which excise duty is leviable in accordance with the provisions of the Central Excises and Salt Act, 1944

(hereinafter referred to as the Act) on an ad valorem basis. It has been selling its product at different rates to different customers, of whom there

are three main categories. In the first category fall soap manufacturers who purchase all their requirements of sodium silicate from the petitioner

firm. The second category consists of soap manufacturers who purchase sodium silicate from the petitioner firm as well as from other concerns.

The third category comprises parties other than soap manufacturers. Customers falling in the first category are sole suppliers of sodium silicate by

the petitioner firm at rates which are lower by Rs. 2 per quintal as compared to the rates which obtain in the case of customers in the third category

have to pay for their purchases of sodium silicate at rates Rs. 2 per quintal higher than those obtaining in the case of customers falling in the second

category.

2. All along the petitioner firm was paying excise duty on the amount of prices actually recovered by it from various customers even though such

prices differed from customer to customer as pointed out above. On 5-6-1971, the Inspector of Central Excise, Coimbatore, wrote to the

petitioner firm a letter stating inter alia --

It is observed that the concessional sale price charged to the three soap manufacturers (viz. Arian Soap Co., Golden Soap Manufacturing Co.

and Indian Cottage Industries) are exclusive to them as they are stated to be getting their entire requirements from this factory only. This is stated to

be only an oral understanding and that there is no written agreements and contract with these three soap factories. Even though there are other

soap manufacturers (viz. Iyanan Soap Works, Tuticorin, Sarvadayan Sangh) who lift substantial quantities of silicate from this factory, the benefit of

lower sale price applicable to the three soap manufacturers is not given to them. This lower sale price cannot therefore be taken as a genuine

wholesale cash price for purposes of assessment. The higher price charged to other soap factories can alone be taken as the wholesale cash price

for purposes of Section 4 of the Central Excises and Salt Act, 1944.

The letter required the petitioner firm to explain why recovery of duty reckoned on the higher price mentioned therein be not made from it for the

period from 1-3-1970 to 31-1-1971.

3. In reply to the letter above mentioned, the petitioner firm asserted that it was the sole Judge of the prices to be charged by it from various

customers that it was fully within its rights to allow different rates for the sale of sodium silicate to different customers and that excise duty could be

charged by the concerned authorities only on the basis of the actual price.

4. The stand taken by the petitioner firm did not find favour with the Superintendent of Central Excise, Coimbatore (the second respondent), Who,

on 24-12-1971, issued a notice to it stating that duties short levied were recoverable from it under Rule 10 of the Central Excise Rules (hereinafter referred to as the Rules) and requiring it to snow cause why the same be not recovered. In reply to this notice, the petitioner firm reiterated its

earlier stand but was visited with a demand notice dated 5-5-1972, requiring it to pay a sum of Rs. 7,766.16 on account of excise duty short

levied. This demand was confirmed by the Assistant Collector, Central Excise, Coimbatore on 22-5-1972, by an order which is based on

substantially the same reasons as appeared in the letter dated 5-6-1971, and have been extracted above.

5. The petitioner firm challenges the legality of the show cause notice dated 24-12-1971, the demand notice dated 5-5-1972, and the order of the

Assistant Collector dated 22-5-1972, through writ petitions Nos. 1234, 1304 and 1491 of 1972 respectively arid prays that the same be quashed

by writs of certiorari.

6. The first contention raised by learned counsel for the petitioner firm covers a question of limitation. According to the provisions of Rule 10 read

with Rule 173J of the Rules, a demand for excise duty short levied can be made only within a year of the period to which it relates. This

proposition of law is conceded on behalf of the respondents before me, who are the Collector of Central Excise, Coimbatore and the

Superintendent of Central Excise, Coimbatore. Demand from the petitoner firm for the duty short levied was for the first time made on 5-6-1971,

so that it could not relate to the period prior to 5-6-1970. The demand made relates to the period from 1-3-1970 to 31-1-1971, and is clearly

time barred in so far as the period from 1-3-1970 to 4-6-1970 is concerned in respect of the period last mentioned, therefore, the entire

proceedings are illegal and to that extent the show cause notice dated 24-12-1971, the demand notice dated 5-12-1972, and the order dated 22-

5-1972 are liable to be struck down and are hereby quashed.

7. The only other contention raised by learned counsel for the petitioner firm is that it was liable to pay duty only on the price actually realised by it

even though such price varied -- from customer to customer so long as the variation was solely motivated by trade considerations. In this

connection reliance is placed on the provisions of Section 4 of the Act as it stood prior to the year 1973, when it was amended --

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 is an article of the like kind and quality 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.

8. Dealing with the expression ''wholesale cash price'' their Lordships the Supreme Court observed in A.K. Roy and Another Vs. Voltas Limited,

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

distributor might or might not be a favoured buyer according as terms of 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 agreements stipulating for certain commercial advantages, provided

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

9. In the face of these observations, it cannot be disputed that excise duty would be leviable on the prices charged by the manufacturer, provided it

is charged on a wholesale basis, even though certain concessions are made available to the purchaser so long as those concessions are motivated

by trade considerations and do not flow from extra-commercial considerations. In the present case, there is no allegation that the fixation of lower

prices charged from the first and second categories of customers was motivated by considerations other than trade considerations. On the other

hand, the circumstances would indicate that very proper trade considerations prevailed with the petitioner firm in showing favour to the two

categories of customers in the matter of fixation of lower prices. The second category of customers consists of soap manufacturers who lift very

large quantities of the product of the petitioner firm and presumably such quantities are far in excess of those purchased by customers comprised in

the third category. There is thus a very rational commercial basis for giving more liberal trade concessions to the second category of customers as

compared to the third category thereof. Again, as stated above, the first category of customers are soap manufacturers who buy all their

requirements of sodium silicate from the petitioners firm only. It is safe to assume that such requirements embrace quantities larger to a substantial

extent than those purchased by customers pertaining to the second category and in this view of the matter, there is every reason why preference in

the matter of fixation of price"" should be shown to the first category as compared to the second category. This again would involve nothing but

very proper trade considerations. I may add that there is not even an allegation that any of the customers of the petitioner firm are related to it by

ties of blood, marriage or friendship so that the giving of concession in the matter of price to any of them by reason of an extra-commercial

consideration is practically ruled out. It follows that the price charged by the petitioner firm from each of its customers, even though it varies from customer to customer has to be taken as the wholesale cash price for the purpose of Section 4 of the Act. Consequently the demand made by the

respondents for excise duty short levied is wholly unjustified.

10. In the result, all the three petitions succeed and are accepted. The show cause notice dated 24-12-1971, the demand notice dated 5-5-1972

and the order dated 22-5-1972, are all quashed. The parties will, however, bear their own costs.