

(1977) 01 PAT CK 0018

In the Patna High Court

Case No : Civil Writ Jur. Case No. 704 of 1976

Tata Engineering and Locomotive Co. Ltd.

APPELLANT

Vs

S.N. Guha Thakurta, Superintendent of Central Excise and
Others

RESPONDENT

Date of Decision : 05-01-1977

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 3(2), 4, 4(1), 4(2)

Citation : (1977) 1 ELT 14 : (1977) 10 PLJR 469

Hon'ble Judges : K.B.N. Singh, C.J;B.S. Sinha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

K.B.N. Singh, C.J.—In this writ application the petitioner has prayed for quashing the order, dated the 1st of October, 1975 of the Assistant Collector of Central Excise, Jamshedpur (respondent No.2), asking the petitioner to furnish price lists in Part IV of the Proforma treating the Regional Sales Offices of the petitioner as "related persons" (Annexure 2) as also to quash his orders on various price lists (Annexure 5 series) refusing the petitioner's claim for deduction of post manufacturing cost for purpose of finding out the assessable value u/s 4 of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"). The petitioner has also prayed for issuance of necessary directions to the respondents to treat the wholesale cash price ex-works at Jamshedpur as the value for levying excise duty and to refund the excess amount realised as excise duty with effect from the 1st October, 1975, in respect of vehicles by the Regional Sales Offices.

2. The petitioner is well-known Tata Engineering and Locomotive Company Limited, a company registered under the Indian Companies Act, having its factory at Jamshedpur for manufacturing commercial motor vehicles and carrying on business. The petitioner sells vehicles to its dealers. Government, State Transport Undertakings, the Director General of Supplies and Disposals including

Army and various industrial units as well as a few miscellaneous parties (customers). The petitioner also clears vehicles for sale to its various Regional Sales Offices with which we are concerned in this writ petition. Section 3 of the Act provides for levy and collection of excise duty, in such manner as may be prescribed on all excisable goods which are produced or manufactured in India at the rates set forth in the First Schedule, to the Act. In accordance with the rates set forth in the First Schedule, excise duty on the motor vehicles manufactured by the petitioner company is payable at the rate of twelve and half per cent ad valorem as mentioned under Item No. 34. Section 4 of the Act, as amended and in force from the 1st October, 1975 provides for valuation of the excisable goods for the purpose of charging excise duty, the relevant portion of which will be quoted hereinafter. In substance it provides that where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale. This is called to be the normal price.

3. As required by the first respondent on the 15th September, 1975, the petitioner submitted a price list of motor vehicles effectively from the 1st October, 1975, the date of enforcement of amended Section 4, with a covering letter of the even date (Annexure 1). In the letter the petitioner stated that from its factory at Jamshedpur, it sells motor vehicles to its dealers, Government parties, transport undertakings, the Director General of Supplies and disposals including Army and various industrial units as well as a few miscellaneous parties (customers). The petitioner also stated that on payment of excise duty, it cleared motor vehicles from the Jamshedpur works to its Regional Sales Offices, which are twenty-one in number, and dealers in Nepal and for export. By a letter dated the 1st October, 1975, respondent No. 2 approved the price list in respect of the class of buyers mentioned in the petitioner's letter, but stated that the price list in respect of different Regional Sales Offices should be submitted in Part IV of the Proforma relating to sales to or through "related persons". It was also stated that for day to day work, the price lists in respect of the regional sales offices were approved, subject to the condition that fresh price lists in Part IV of the Proforma were submitted on or before the 20th October, 1975 (Annexure 2).

4. The petitioner, by a letter dated the 3rd October, 1975, wrote to respondent No. 2 objecting to treating the sales by regional sales offices as sales to or through "related persons" and asserted that the Regional Sales Offices were not different bodies, nor had they separate entity, and that those were parts and parcels of the petitioner's organisation, and sales through them could not be treated as sales through "related persons", as defined u/s 4(3)(c) of the Act, and, therefore, the despatch to the Regional Sales Offices should be assessed at the "normal price" ex-work at Jamshedpur, as are applicable for dealers and other classes of buyers, like the Government etc., for whom the clearance is

directly made from the factory The petitioner, on the same date, also wrote a letter to respondent No. 3 to the effect that respondent No. 2 was not correct in treating the sales through the Regional Sales Offices as sales through "related person". By a letter dated the 30th September, 1975, the petitioner also explained to the authorities concerned as to what are the post-manufacturing expenses, which are sought to be deducted from the price of vehicles delivered at various Regional Sales Offices (Annexure 6). They being transport charges to Regional Sales Offices and interest charges from the date the vehicles leave the works up-to-date of sale and selling expenses etc., could not be subject to excise duty. The price list in respect of sales from the Regional Sales Offices may be treated for information only. On the 15th October, 1975 the petitioner without prejudice to its right prayed for a month's time (Annexure 7). On the 30th of October, 1975, under protest the petitioner filed price lists for sales Ex-Regional Sales Offices in Form IV maintaining the Regional Sales Offices are not "related persons". The petitioner in the price lists claimed deduction in respect of transport charges of the vehicles from factory to Regional Sales Offices and other post-manufacturing operational charges as contained in Annexures 5 to 5/e. Respondent No. 2 allowed transportation charges and rejected the other post-manufacturing charges by his orders of different dates recorded in Annexure 5 series.

5. The grievance of the petitioner is that the second respondent while allowing the deduction of transportation charges, only has refused to allow the other post-manufacturing expenses from the gross price to arrive at the assessable value (of sales through the Regional Sales Offices), as contemplated u/s 4 of the Act, and has passed orders dated the 4th, 6th and 16th December, 1975 and 23rd and 25th February, 1976, on respective price lists, which are Annexure 5 series, mentioned above. On the 15th October, 1975, the petitioner, without prejudice to its rights, wrote to respondent No. 2 a letter under protests praying for one month's time to take necessary steps in connection with the letter, dated the 1st October, 1975 (Annexure 7) and the petitioner's representative discussed the entire matter with him. Thereafter the petitioner wrote another letter, dated the 30th October, 1975 [Annexure 7(a)], furnishing price lists for sales ex-regional sales offices, pointing out that the regional sales offices were not "related persons" within the meaning of Section 4(3)(c) of the Act, and are petitioner's own establishments and own departments. The petitioner's case is that there is no difference between ex-works wholesale price and ex-regional sales offices sale price for the purpose of excise duty, as the latter price is a bit higher only adding the cost of transporting and handling charges of the nature of post-manufacturing expenses.

6. In the counter affidavit filed on behalf of the respondents it was admitted that the Regional Sales Offices of the petitioner are not being treated "related persons". Transfer of the vehicles from the factory to the various Regional Sales Offices for sale cannot be said sales as postulated u/s 4(1)(a) of the Act. The transfer of motor vehicles under the circumstances from the factory to the

Regional Sales Offices attracts Section 4(2) of the Act and as such only cost of transport is to be deducted from the price at which the vehicles are sold by the Regional Sales Offices.

7. In view of the admission made by the respondents in the counter affidavit, which has also been supported in course of argument on behalf of the respondents, the Regional Sales Offices of the petitioner cannot be treated as "related person". On the concession made, Annexure "2", asking the petitioner to submit price lists in respect of different Regional Sales Offices in Part IV of the Proforma relating to sales to or through the related person, must be quashed.

8. Mr. Joshi, learned counsel for the petitioner, has submitted that excise duty is leviable only on manufacturing cost and manufacturing profit, and, therefore, the price to be charged by the manufacturer for the sale of wholesale goods could represent the real value for the assessment of excise duty and post manufacturing operation cannot be taken into account for purposes of levy of excise duty. Learned counsel has relied on two decisions of the Supreme Court, namely, the case of A.K. Roy and Another Vs. Voltas Limited, and the case of Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, in support of his submission. The learned Standing Counsel appearing for the Union of India, however, has submitted that as the Regional Sales Offices of the petitioner are own offices of the petitioner, the transfer by the factory to the Regional Sales Offices is not a sale and, therefore, liable to assessment under Sub-section (2) of Section 4, which permits only deduction of the price of transport where selling price is not known. The rival contention of learned counsel for the petitioner falls for consideration in this case.

9. It will be necessary at this stage to refer to the relevant portions of amended Section 4 of the Act :

"Valuation of Excisable Goods for purpose of charging of Duty of Excise?

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall subject to the other provisions of this section be deemed to be?

(a) the normal price whereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the assessee and the buyer have no interest, directly or indirectly, in the business of each other and the price is the sole consideration for the sale :

Provided that?

(i) Where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall subject to the existence of the other circumstances specified in clause (a), be deemed to be normal price of such goods in relation to each such class of buyers.

(ii) Where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed shall in relation to the goods so sold, be deemed to be the normal price thereof.

(iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail.

(b) Where the normal price of such goods is not ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under Sub-section (2) of Section 3".

Sub-section (4) defines "assessee", "place of removal", "related person", "value" and lastly "wholesale trade" under clause (e), which reads as follows :

"wholesale trade" means sale to dealers, industrial consumers, Government, Local authority and other buyers, who or which purchase their requirements otherwise than in retail."

Before the amendment Section 4 read as follows;?

(4) 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 the producer, or his agent, by 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".

10. The true scope of old Section 4 and what is meant by "wholesale market" and "wholesale cash price" came to be considered by the Supreme Court in the case of *Voltas (supra)* and *Mathew, J.* held as follows :

"Excise is a tax on the production and manufacture of goods (see *Union of India v. Delhi Cloth and General Mills* (1963) 1 S C R 586A1R 1963 S C 791 . Section 4 of the Act, therefore, provides that the real value should be found after deducting the selling cost and selling profits and that the real value can include only the manufacturing cost and the manufacturing profit. The section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing operation, namely, selling profit. The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the articles".

* * * *

"... for a wholesale market to exist, it is necessary that there should be market in the physical sense of the term where articles of a like kind or quality are or could be sold or that the articles should be sold to so-called independent buyers. Even if it is assumed that the latter part of Section 4(a) proceeds on the assumption that the former part will apply only if there is a wholesale market at the place of manufacture for articles of a like kind and quality, the question is what exactly is the concept of wholesale market in the context. A wholesale market does not always mean that there should be an actual place where articles are sold and bought on a wholesale basis. These words can also mean the potentiality of the articles being sold on a wholesale basis. So, even if there was no market in the physical sense of the term at or near the place of manufacture where the articles of a like kind and quality are or could be sold, that would not in any way affect the existence of market in the proper sense of the term provided the articles themselves could be sold wholesale to traders, even though the articles are sold to them on the basis of agreements which confer certain commercial advantages upon them. In other words, the sales to the wholesale dealers did not cease to be wholesale sales merely because the wholesale dealers had entered into agreement with the respondent under which certain commercial benefits were conferred upon them in consideration of their undertaking to do service to the articles sold, or because of the fact that no other person could purchase the

articles wholesale from the respondent."

* * * *

"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 special or favoured buyer to whom a specially low price is charged 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 as 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."

Relying on the decision in the case of Vacuum Oil Co. v. Secretary of State for India in Council, 59 Ind App 258 Mathew, J. also held that "the essence of the idea is that the purchase must be wholesale purchase and not a retail one". The said decision was referred with approval in the case of Atic Industries Ltd., and Bhagwati, J., who delivered the judgment of the Bench, observed as follows :

"The value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling profit and that would be wholly incompatible with the nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions."

11. Judged in the background of the decisions, the provisions of amended Section 4 have to be construed. Section 4(1)(a) lays down that the "normal price" will be the price at which the goods are ordinarily sold by the assessee to a buyer in the course of "wholesale trade" for delivery at the time and place of removal, where the assessee and the buyer have no interest, directly or indirectly, in the business of each other and the price is the sole consideration for the sale. The first proviso provides for situation where "normal price" in wholesale trade may be different for different classes of buyers under the circumstances mentioned therein. It is not disputed that the petitioner's vehicles are sold to buyers in course of wholesale trade and it is the "wholesale cash price" which will be the "normal price" thereof under the amended provision of Section 4(1)(a) of the Act. Undoubtedly, therefore, the value of the vehicles for the purpose of charging excise duty will be the aforesaid "normal price". The

Learned Standing Counsel on behalf of the Union of India, however, submitted that as the transfer by the petitioner to the Regional Sales Offices is not sale within the definition of that expression as given in Section 2(h) of the Act, there is no sale at the factory but the sale is at the Regional Sales Offices, and, therefore, Section 4(2) will apply and not Section 4(1) of the Act.

12. Section 4(2) is a residuary section and it applies only to such cases where the price of any excisable goods at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, which is not the situation in the instant case. What is manufacturing cost and manufacturing profit on which excise duty is to be levied is known in the case of the petitioner's vehicles, even in the case of those which are removed to its Regional Sales Offices. Therefore, Section 4(2) of the Act will be clearly inapplicable. To attract Section 4(1)(a) what is required is to determine the "normal price" of an excisable article which price will be the price at which it is ordinarily sold to a buyer in the course of wholesale trade which is not locking in the instant case.

13. There is also substance in the contention of Mr. Joshi that even if Section 4(2) were to apply, the sub-section does not lay down that only the cost of transportation to the place of delivery shall be excluded from such price. It only emphasises the fact that as goods have to be moved its transport cost must be excluded. On its analogy other post manufacturing cost or charges may also have to be excluded in appropriate cases. It is not without significance that even in the case of vehicles transferred by the petitioner to its Regional Sales Offices excise duty is collected at the time of the removal of the vehicles from the factory.

14. In the result, the writ petition is allowed and the orders of respondent No. 2 treating the petitioner's Regional Sales Offices as "related persons" in Annexure 2 and refusing deduction of post manufacturing charges in arriving at the assessable value in Annexure 5 to 5(e) are quashed. The respondents are further directed to refund the excess amount of excise duty already collected in respect of the vehicles cleared from the 1st of October, 1975. onward. In the circumstances of the case, there will be no order as to costs.

B.S. Sinha, J.

I agree.