
(1979) 11 BOM CK 0003

In the Bombay High Court

Case No : Miscellaneous Petition No. 1647 of 1975

Union Carbide (India) Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-11-1979

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1990) 27 ECR 158 : (1979) 4 ELT 633

Hon'ble Judges : B. Lentin, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B. Lentin, J.—The petitioner is a public limited company which manufactures Polythene Granules in its factory at Chembur, Bombay. The petitioner's products are sold all over India at uniform sale prices at all points of sales. On 22nd September, 1975, the petitioner submitted to the excise authorities several price lists. In respect of its Bombay sales the price in Bombay was shown in the price list. In respect of the petitioner's other sales out of Bombay separate price lists were submitted to the excise authorities showing the same uniform price plus the actual cost of freight in each place. On 3rd October, 1975, an order was passed by the Superintendent, Central Excise, rejecting the petitioner's out-of-Bombay price lists on the ground that the normal price for delivery at Bombay was known with the result that under the new Section 4 of the Central Excises and Salt Act, 1944, it was not permissible for the petitioner to file separate price lists. By its letter dated 6th October 1975 addressed to the Superintendent, Central Excise, the petitioner objected to the latter's interpretation of Section 4 and stated that the duty would be paid by the petitioner under protest. On 15th October 1975, the Assistant Collector passed an order that since the price for delivery at Bombay was available u/s 4(1)(a) there was no justification in approving the prices u/s 4(2)/4(4)(d)(iii) as claimed by the petitioner. Thereupon on 17th December 1975 the petitioner filed the present petition for an appropriate writ

setting aside the orders dated 3rd October 1975 and 15th October 1975 and for the refund of the amount of Rs. 1,83,401.92 paid by the petitioner under protest. It is not in dispute that the total amount paid by the petitioner under protest for the period 1st October 1975 till 31st December 1975 is Rs. 2,66,861.39.

2. Mr. Setalvad, the learned Counsel appearing on behalf of the petitioner, challenged the impugned orders on three grounds. Firstly, Mr. Setalvad urged that no sales were effected by the petitioner for delivery at the place of removal u/s 4(1)(a) with the result that the provisions of Section 4(2) were attracted and hence the assessable value had to be ascertained by excluding the cost of transport to the place of delivery. In the alternative, he urged that the cost of transport actually incurred by the petitioner from the petitioner's factory in Bombay to various sales depots out of Bombay was a post-manufacturing expense and must therefore be excluded from the assessable value. He also urged that the new Section 4 is ultra vires the Constitution. On the other hand, it was urged by Mr. Joshi, the learned Counsel appearing on behalf of the respondents, that the petitioner's case was covered by Section 4(1)(a), as the normal price of the petitioner's goods would be the price at which they were removed from the factory gate.

3. At this stage, a reference to the relevant provisions of the new Section 4 is pertinent. The new Section 4 which came into force with effect from 1st October, 1975, provides for the valuation of excisable goods for purposes of charging of duty of excise. The relevant portions thereof read as under:

(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 thereof, 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 buyer is not a related person and the price is the sole consideration for the sale.

Sub-section (2) reads as under:

(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.

4. In this case, it is not in dispute that in fact there was no factory-gate sale. What the petitioner did was to transport the goods from the factory to the warehouses or premises of its customers, the transportation charges being paid by the customers. This is brought to the forefront from the note in the petitioner's price list (Ex. "B" to the petition), wherein it is stated that the prices shown in the price list are ex-godown Bangalore, Baroda, Bulsar, Calcutta, Delhi,

Gauhati, Jaipur, Kanpur, Kota, Madras, Patna and Rajpura and that deliveries in Bombay will be made by the petitioner at the customer's premises, freight being on customers' account. Mr. Setalvad is therefore correct when he says there being no factory-gate sales there could be no factory-gate price with the result that the provisions of Section 4(2) would be attracted. It is not possible to accept Mr. Joshi's reply that in construing Section 4(1)(a) a common sense view must be taken inasmuch as because the freight was to be paid by the customers at their premises, the rest of the amount would be the factory-gate price. What Section 4(1)(a) postulates is that in order to arrive at the normal price there should be a factory-gate sale, and not that the normal price should be inferred, as suggested by Mr. Joshi. The provisions of a taxing statute must be construed by the interpretation of the words and phraseology of the section without resorting to inferences and common sense which may like the Chancellor's foot vary from person to person. In the affidavit-in-reply filed by the Assistant Collector of Central Excise, the respondents themselves have stated that the petitioner sells its products to their Bombay customers for delivery at the customers' premises. Thus on the showing of the respondents themselves there are no factory-gate sales at all. There is nothing in Section 4(1)(a) from which it can be construed that even though there is no factory-gate sale, there can be a factory-gate price. It is the concept of delivery, at the factory-gate that is the predominant factor in Section 4(1)(a). It is this concept that is conspicuous by its absence in the case of the petitioner's sales. The result is that the provisions of Section 4(1)(a) not being applicable, the residuary provisions of Section 4(2) would come into the picture under which the cost of transportation from the place of removal to the place of delivery must be excluded from the price.

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5. Assuming that Section 4(1)(a) is applicable even so what cannot be gainsaid is that the cost of transportation from the petitioner's factory to various sales depots is a post-manufacturing expense and therefore must be excluded from the assessable value. What the petitioner claims is a deduction of that post-manufacturing element consisting of the actual amount expended for transporting the finished articles from its factory at Chembur to the various depots. The real value of the goods under the old Section 4 or normal price under the new Section 4, must be ascertained by inclusion only of the manufacturing cost and manufacturing profit and after deducting the selling cost and selling profit. Excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and profit arising from post-manufacturing operation, namely, selling profit. This is the ratio laid down by not less than two decisions of the Supreme Court, namely, in *A.K. Roy v. Voltas Ltd.* 1977 E.L.T. 177 : 1990 (26) ECR 138, and in *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, and has been followed by the Division Bench of this Court in *Indian Tobacco Co. Ltd. v. Union of India* 1979 E.L.T. 476 : 1976 Cus 49D, and in *Century Spinning and Manufacturing Co. v. Union of India* 1979

E.L.T. 199. Those decisions were under the old Section 4. However, while interpreting the new Section 4, the same ratio laid down by the Supreme Court in Voltas case and Atic Industries case has been followed by not less than six High Courts in India, namely, by the Andhra Pradesh High Court in Indo-National Ltd. v. Union of India 1979 E.L.T. 334 : 1981 ECR 651D, the Madras High Court in Nagpal Petro-Chem. Ltd. v. Assistant Collector 1979 ELT 117 : 1979 Cen Cus 97D, the Kerala High Court in Madras Rubber Factory v. Assistant Collector 1979 E.L.T. 397, the Delhi High Court in Madras Rubber Factory Ltd. v. Union of India 1977 E.L.T. 173, the Patna High Court in Tata Engineering and Locomotive Co. Ltd. v. S.N. Guha and Thakura 1977 E.L.T. 14 : 1977 Cen Cus 47D and the Gujarat High Court in Cibatul Ltd. v. Union of India 1979 E.L.T. 407 : 1979 Cen Cus 404D.

6. In the circumstances, looked at from any angle, the transportation cost being a post-manufacturing expense must be excluded from the assessable value and cannot be taken into account in assessing the normal price of the goods as contemplated by Section 4(1)(a).

7. Mr. Setalvad's challenge pertaining to the vires of Section 4 now become: academic and does not survive.

8. In the result/the petition is allowed in terms of prayer (a). On the question of the refund of Rs. 2,66,861.39 paid under protest for the period 1st October 1975 till 31st December 1975, the respondents shall within one month from today consider the price lists submitted by the petitioner in the light of this judgment and shall within one month thereafter refund the amount refundable to the petitioner. There will be no order as to the costs of the petition. Rule is made absolute accordingly.