

(1989) 07 CAL CK 0018
In the Calcutta High Court

Case No : Appeal No. 764 of 1983 in Writ Petition No. 190 of 1981

Union of India (UOI)

APPELLANT

Vs

Mahindra and Mahindra Ltd.

RESPONDENT

Date of Decision : 11-07-1989

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1989) 43 ELT 611

Hon'ble Judges : C. Mookerjee, C.J.; Sujata Manohar, J

Bench : Division Bench

Advocate : R.V. Desai and C.J. Shah, S. Shankararamakrishnan and K.C. Sidhwa, for the Appellant; Atul Setalvad, instructed by Little and Co., for the Respondent

Judgement

C. Mookerjee, C.J.—The short point in this appeal is whether the learned Single Judge was right in holding that the price charged by the Petitioner-Respondent Company to its sole distributors M/s. Voltas Ltd. represented the wholesale cash price within the meaning of Section 4(a) of the Central Excises and Salt Act, 1944 (as the said provision stood before 1-10-1975) for determination of excise duty on the tractors manufactured by the Petitioner-Respondent Company. Before we deal with the question, we may briefly set out the facts.

2. The International Tractor Company of India Ltd. with which the Petitioner Company subsequently had merged during the period from 4th October 1971 to 11th February 1972 and from 14th February 1972 to 12th October 1972 had sold diverse number of tractors of the said Company to M/s. Voltas Ltd. under a distributorship agreement dated 17th March 1970. The said distributor Company in turn had sold the said tractors to various parties. In the event the said sales during the two periods in question were on the basis of principal to principal without any extra commercial considerations as claimed by the Petitioner-Respondent which was upheld by the learned Single Judge, undisputedly the price paid by the said distributor Company should be considered as the wholesale

cash price for the purpose of determination of excise duty upon the goods manufactured by the International Tractor Company of India Ltd. with which the present Petitioner had subsequently merged on 3rd November 1977. On the other hand, if the said transaction between the manufacturer Company and the distributor Company amounted to an agency agreement for reaching the wholesale buyers of the manufacturer Company's products for the purposes of Section 4(a), what would be relevant would be the price charged by the distributor Company to the other wholesale purchasers of the manufacturer Company's products. We note that for the two periods in question, viz., 4th October 1971 to 11th February 1972 and 14th February 1972 to 12th October 1972, excise duty had been assessed taking the price charged by the distributors M/s. Voltas Ltd. as the wholesale cash price of the tractors manufactured by the Company. During the third period, however, viz., 13th October 1972 to 30th September 1975, goods were cleared by paying provisional duty on the basis of the price charged by the manufacturer Company to its distributor. In the event the contention of the Petitioner-Respondent be upheld regarding the wholesale cash price of its products, it would be entitled to the refund of the amounts set out in the order of the learned Single Judge.

3. Having heard the learned Counsel for both sides and having perused the materials on record, we are in entire agreement with the learned Single Judge that in the present case the price charged by the manufacturer Company for sale of its products to the distributor had been rightly held by the learned Single Judge to be the wholesale price within the meaning of Section 4(a) for the purpose of assessment of excise duty. Accordingly, the refund claims made by the Petitioner Company were wrongly rejected by the Assistant Collector after remand made by the Appellate Collector.

4. The law on the point is well settled. We will, therefore, deal with the same in brief before dealing with the terms of the agreement under which the transactions in question took place between the manufacturer Company and the distributor Company. In the well known case of A.K. Roy and Another Vs. Voltas Limited, after referring to the decisions of the various High Courts, Mr. Justice Mathew in paragraph 18 of his judgment had observed that the said decisions of the High Courts insofar as they held 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 had entered into agreements with them stipulating for commercial advantages were not correct. The learned Judge had proceeded to observe that if the 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 the wholesale cash price for the purpose of Section 4(a) of the Act if the agreements were made at arm's length and in the usual course of business. (Vide paragraph 18). In paragraph 19 of his judgment the learned Judge in the case of A.K. Roy v. Voltas Ltd. (supra) observed:

"There can be no doubt that wholesale cash price has to be ascertained only on the basis of transactions at arm's 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 as terms of the agreement with him are fair and reasonable and Were arrived at on purely commercial basis."

5. In the case of *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, the same view was taken about the indicia of the wholesale cash price within the meaning of Section 4(a) of the Central Excises and Salt Act (as the said provisions stood prior to 1st October 1975). Bhagwati, J. (as he then was) in paragraph 13 of his judgment in *Atic Industries*" case (*supra*) had reiterated that where a manufacturer sold the goods manufactured by him in wholesale to a wholesale dealer at arm's length and in the usual course of business, the wholesale cash price charged by him to the wholesale dealer less trade discount would represent the value of the goods for the purpose of assessment of excise. The learned Judge, in the course of his judgement, had also recognised that there might be successive sale transactions before the goods ultimately reach the hands of the retail buyers. But what was material for determination of the wholesale cash price would be the price charged by the manufacturer to the first wholesale buyer without any extra-commercial considerations.

6. It is not necessary to lengthen our judgment by referring to other reported decisions on the point because they also speak in the same voice in respect of the concept of wholesale cash price within the meaning of Section 4(a) of the Central Excises and Salt Act.

7. Mr. Setalvad appearing on behalf of the Respondents has rightly summed up the legal position by submitting that in each case the crucial question would be whether under a distributorship agreement, property passes to the distributor and the risk taken is also placed upon the distributor. In other words, whether the sale had been on a principal to principal basis or on the basis of merely an agency agreement for reaching out the wholesale buyers of the manufacturer's products, the nomenclature of the agreement was not relevant. In the above view, it is material to examine the terms of the agreement of distributorship. Mr. Desai appearing on behalf of the Appellants and Mr. Atul Setalvad appearing on behalf of the Respondents both referred to various terms of the distributorship agreement. Having perused them, we find no reason to doubt in any other way about the nature and effect of the said agreement between the manufacturer Company and its distributor M/s. Voltas Ltd. Under the said agreement made on 17th March 1970 between the present Petitioners" predecessor the International Tractor Company of India Ltd. and M/s. Voltas Ltd., the Company had granted the latter sole and exclusive right to sell in the whole of India its products listed in

Schedule including parts thereof. Under Clause 3(b) of the said agreement, the Company was to sell to Voltas the products at the Company's net transfer prices in effect on date of despatch by the Company. During, special handling cost and similar special charges in preparation for despatch would be extra and were added to the invoice price for the products at not. Under Clause 3(c) of the said agreement, Voltas undertook to pay to the Company any excise duty levied due to Voltas' failure to produce an acceptable agricultural certificate within the time, if any stipulated by the Excise authorities. We may note that at the date of the execution of the said agreement the products of the Company were not assessable to excise duty and subsequently excise duty came to be levied in the year 1971. Clause 12 of the agreement would be very material under which the relationship established between Voltas and the Company was that of buyer and seller on principal to principal basis i.e. Voltas buying the products from the Company for its own account for resale to the purchasers. Voltas was not, in any sense, an agent of the Company and had no authority to bind the Company in any manner or transaction whatsoever. With the delivery of the products by the Company to Voltas, the ownership in the products vested in Voltas. Clause 13(a) further springs out the real nature of relationship between the two parties. The same was in the following terms :-

"The Company will accept no responsibility for loss or damage to the products from any cause after delivery by the Company from its factory to Voltas or its dealers and other outlets or to a customer of Voltas."

We may also refer to Clause 4 of the agreement under which the terms of payment for all products purchased by the distributor Company was net cash 18 days from the date of delivery.

8. We are unable to accept the submission made on behalf of the Appellate that in view of the provisions relating to sharing the advertising expenses referred to in Clause 15 of the agreement and the competing lines referred to in Clause 17 thereof, the agreement between the Company and its distributor was not at arm's length. Mr. Setalvad has rightly submitted that both the Company and the distributor had mutual interest in maximising the sale of the products in question. In the above view, these provisions relating to advertising, etc., were in furtherance of the said desire on the part of the Company and its distributor and in no way affected the real nature of the transactions which appeared to be sales on principal to principal basis. The learned Single Judge has at considerable length dealt with the terms of the agreement and since we are in full concurrence with the observations of the learned Single Judge, we hold that the rule has been rightly made absolute in favour of the Petitioners - Respondents.

9. The Appeal has no merit and is accordingly dismissed with costs.