

State of U.P. and anr. Vs. Union of India (Uoi) and ors.

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Court : Allahabad

Decided On : Apr-03-1980

Reported in : 1985(20)ELT6(All)

Judge : Satish Chandra, C.J. and ;H.N. Seth, J.

Acts : Indian Companies Act; [Central Excise Act, 1944](#) - Sections 3(1) and 4; [Constitution of India](#) - Article 226

Appeal No. : Civil Misc. Writ No. 475 of 1975

Appellant : State of U.P. and anr.

Respondent : Union of India (Uoi) and ors.

Disposition : Petition dismissed

Judgement :

H.N. Seth, J.

1. In the year 1960 the petitioner State of U.P. took on lease a glass-factory that was till then being run by M/s. Vibhuti Glass Works Ltd., a company incorporated under the Indian Companies Act. It manufactured glass bottles and supplied them to its customers after packing them in straw and gunny bags. It had to under the Central Excises and Salt Act, pay excise duty calculated on the basis of the value of the bottles manufactured by it. The petitioner claims that it calculated the value

of the bottles manufactured by it by including the cost of packing charges as well and paid the excise duty calculated On 10th September, 1971 a Division Bench of Mysore High Court, in the case of M/s. Alembic Glass Industries Ltd. V. Union of India-Writ Petition Nos. 548 and 3436 of 1970 held that while determining, for purposes of computation of excise duty, the value of the articles manufactured by Messrs Alembic Glass Industries Ltd. The Excise Authorities were not justified in including the value of packing charges in the assessable value of the Glass articles manufactured by the company. The State of U.P then realized that it had been made to over pay the excise duty on the glass bottles manufactured by it by including the packing charges therefore in their assessable value, in circumstances similar to that in which M/s. Alembic Glass Industries Ltd. Had been, in the case before the Mysore High Court, made to pay the same. Accordingly, on 27th March, 1973 it moved an application before the Collector, Central Excise, Varanasi praying that for purposes of levying excise duty on glass bottles manufactured by it, the price list submitted by it should be approved without including the packing charges therein and that the excise duty payable thereon should be calculated accordingly. It further prayed that the excess excise duty already paid on the amount of packing charges be refunded to it.

2. The Assistant Collector vide his order dated 5th July, 1973 rejected the aforesaid request made by the petitioner. He held that it was necessary for the petitioner to pack the bottles manufactured by the before delivering the to it customers. Such packing being a process incidental to the completion of the manufactured articles, its cost had to be included in the assessable value to be determined under Section 4 of the Central Excises and Salt Act, 1944, moreover, the decision of the Mysore High Court was not binding upon the Government of India in relation to cases arising out-side the jurisdiction of that court. He, therefore, did not find any justification for exempting the duty referable to packing charges which went to constitute the assessable value of the articles manufactured by the petitioner.

3. Being aggrieved the petitioner went up on appeal before the Appellate Collector, who observed that at the time of hearing of the appeal, the petitioner admitted that no consignment of the goods manufactured by them was cleared without packing

that goods when presented at the factory gate at the time of their clearance for assessment were packed in straw and gunny bags. It admitted that the value of packing charges was being realized from the customers. The whole sale price of the goods manufactured by the petitioner depended upon the manner in which the article was delivered in the normal course of business that is with or without packing. As in the instant case, it was admitted that all goods manufactured by that petitioner were cleared from the factory in packed condition, the cost of packing had to be included in the assessable value. In the result the Appellate Collector, vide his order dated 31st December, 1974 dismissed the appeal and upheld the order made by the Assistant Collector.

4. Being aggrieved the petitioner has approached this Court for relief under Article 226 of the Constitution. It prays that the two orders passed by the Assistant Collector, Central Excise and the Appellate Collector, Central Excise, be quashed and the respondents be directed not to require the petitioner to pay excise duty on packing charges on the bottles manufactured and sold by it and that they should confine their demand to the assessable value of the articles namely the price of the bottles minus the packing charges. The respondents should also be asked to refund a sum of Rs. 6,19,304.05 paise to the petitioner which they have, up to the year 1973-74, illegally collected by way of duty on packing charges. The petitioner further prayed that the respondents be directed to re-calculate the excise duty payable by the Vibhuti Glass Work Ltd. Right up to the year 1961-62 and to refund the excess realization made by them.

5. On behalf of the respondents it is claimed that the two orders passed by the Assistant Collector, Central Excise and the Appellate Collector, Central Excise are perfectly valid and that in the circumstances of the case, the value of the packing charges has been correctly included in the assessable value of the articles manufactured by the petitioner.

6. Section 3(1) of the Central Excises and Salt Act, 1944 lays down that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in, or imported by land into any part of India. Item No. 23-A of Schedule I provides for

payment of ad valorem duty at the rate mentioned therein on the manufacture of glass and glassware which expression includes within its ambit glass bottles as well. Section 4 of the Act, which lays down the criteria for determining the value of goods for purposes of calculating duty, runs thus:-

'Where under this Act, any article is chargeable with duty at a rate depending 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) * * * * *

Accordingly, the value of the glass bottles manufactured by the petitioner for purposes of computation of excise duty payable thereon is the wholesale cash price for which bottles are sold or are capable of being sold at the time of their removal from the factory or any other place of manufacture or production. The expression wholesale cash price obviously means the money consideration which the purchaser agrees to pay to the manufacturer for purchasing the goods in wholesale. It may be that while determining the price of the goods for which the manufacturer agrees to sell them to its customers, it takes into account the production and incidental costs as also the profits which he, in the normal course, expects to earn by selling the goods in wholesale. The whole of the consideration which he received for the sale of the goods is its price and it is not capable of being split so as to make parts of it referable to various factories which go to make up the price. In each case what has to be seen is as to what amount is being charged by the manufacturer for transferring property in the goods to the wholesale purchaser. In a case where a manufacturer agrees to sell the goods in the wholesale at the factory gate after putting them in a certain condition it is but natural that while quoting the price for such goods he would also take into consideration the cost incurred by him in putting the goods in that condition but then what the customer pays to the manufacturer for purchasing the goods in that

condition is the price for which the property in the goods is transferred to him. It is possible to visualise a case where the manufacturer agrees to transfer the property in the goods manufactured by it in the same condition in which they are manufactured for certain money consideration and further agrees with the customers to pack those goods on payment of packing charges. In such a case the packing charges collected by the manufacturer will not form part of the assessable value of the goods for purposes of calculating the excise duty payable thereon. It will thus be seen that each such transaction has to be scrutinized with a view to find out the precise money consideration for which the manufacturer agrees to transfer the property in the goods manufactured by him to its customer.

7. In the case of A.K. Roy and Anr. v. Voltas Ltd. -1973 S.C. 225), the Supreme Court, while interpreting the provision of Section 4(a) of the Act pointed out that wholesale market does not always mean that there should be an actual place where the articles are sold and bought on wholesale basis. These words can also mean the potentiality of the articles being sold on a wholesale basis. So even if there is no market in the physical sense of the term at or near the place of the manufactured articles of like kind and quality are or could be sold that would not in any way effect 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. If there is an actual price for the goods themselves at the time and place of sale and if there is a wholesale cash price the Clause is not inapplicable for want of sale of other goods of a like kind and quality. It pointed out in paragraph No. 18 of the judgment that the price of sales to wholesale dealers would continue to represent the whole- sale cash price for purposes of Section 4(a) notwithstanding that the manufacturer has entered into an agreement with them stipulating for commercial advantages. If a manufacturer wants to enter into agreement with dealers for wholesale 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 wholesale cash price for the purposes of Section 4(a) of the Act, if the agreements were made at arms length and in the usual course of business. It then proceeded to clarify that the wholesale cash price

had to be ascertained on the basis of transaction at arms length but if there is a special or favoured buyer to whom a specially low price is charged because of extra commercial considerations for example because he is relative of the manufacturer the price charged for these sales would not be the wholesale cash price for levying excise duty under Section 4(a) of the Act. The Supreme Court further pointed out that excise is a tax on production and manufacture of goods. Section 4 of the Act, therefore, provides that the real value should be found after deducting the sale cost and selling profits and that the real value can include only the manufacture during cost and the manufacturing profits. The Section makes it clear that the excise is levied only on the amount representing the manufacturing cost plus manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation namely selling profits. 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 article.

8. Observations made by the Supreme Court in the aforementioned case make it clear that whatever cash price that a manufacturer charges from a customer in the normal course of business for selling the goods in wholesale at the factory gate is the wholesale cash price and that it is this amount which represents the manufacturing cost plus the manufacturing profits. Of course, any amount charged by the manufacturer over and above the price (cash consideration for transferring property in the goods sold) in the wholesale would not go to form part of the sale price.

9. This matter has been made absolutely clear in a subsequent decision of the Supreme Court in the case of *Atic Industries Ltd. v. H H Dava*-1975 I SCC, 499 wherein the learned Judges of the Supreme Court observed thus:

'There is, therefore, no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arms length and in usual course of business the wholesale cash price charged by him to the dealer

less trade discount would represent the value of the goods for purposes of assessment of excise. That would be whole sale cash price for which the goods are sold at the factory gate within the meaning of Section 4(a)'

10. We now proceed to consider the facts as brought out in various affidavits filed in the present case and to examine whether there is any in merit petitioner's submission [that it had been made to pay excise duty on an amount which did not represent any part of the consideration for which the petitioner had agreed to transfer property in the goods manufactured by it to its customers. It is not disputed that the petitioner had been supplying the glass bottles manufactured by it to Ayurved Sewa Ashram (P) Ltd., Varanasi, Sri Krishna Gyanodaya Sugar Mills Ltd., Patna and (the Government of India Delhi Milk Scheme, Delhi on wholesale basis. In paragraph No, 12 of the petition the petitioner stated that whereas some purchasers require it to despatch glass bottles without any packing whatsoever, some of the purchasers require them to despatch them in packed condition and the mode of packing Varied from purchaser to purchaser. The respondents did not, in their counter affidavit, admit this fact. A perusal of the impugned order passed by the Assistant Collector and the Appellate Collector shows that the petitioner admitted before those authorities that no consignment of goods manufactured by it was cleared without packing and that the goods when presented at the factory gate at the time of their clearance; and for assessment to duty were packed in a straw and gunny bags. In the circum- stances it is not possible for us to accept and to act upon petitioner's .assertion made for the first time in paragraph No. 12 of the petition. It appears to us that the petitioner had been selling the glass bottles manufactured by it on wholesale basis to its customers after packing them in straw and gunny bags. It is also significant to note that even after the judgment of the Mysore High Court was brought to petitioner's notice and it moved the application dated 27th March, 1973 before the Assistant Collector, Central Excise claiming that no excise duty should be levied on the value of packing charges which was being separately shown in the proforma submitted by it, it admitted that till then it did not make any provision with regard to packing charges in the price list submitted by it and urged that this was so because the price list had been submitted in the proforma indicated by the Department. Although in this application the petitioner explained the loss which it

was suffering because of non-exclusion of packing charges from the assessable value of the goods manufactured by it. It did not even whisper that the amount mentioned in the price list in fact represented only the consideration for which the petitioner had agreed to sell the goods manufactured by it to its customers in wholesale but also consideration for what it had undertaken to do after the goods had been sold. There is nothing in the application even to remotely suggest the petitioner had at any time agreed to supply the bottles to its customers in unpacked condition or that if any customer agreed to take delivery of goods in unpacked condition the price charged from them would be correspondingly reduced. There is also no averment in the application that in case a particular customer wanted the goods to be packed in special packing the charges in respect of the packing in straw and gunny bags were deducted and the cost of the special packing was added thereto. It is true that in the appeal filed before the Appellate Collector the petitioner did mention that the mode of packing varied from customer to customer and no one rate of particular type of packing could be realised from an unwilling customer and that different customers obtained delivery of bottles in following conditions:-

- (1) Some customers demanded bare bottles without packing,
- (2) Some customers demanded bottles in crate/carton,
- (3) Some customers demanded bottles wrapped in paddy straw and then packed in second-hand gunny bags,
- (4) Some customers demanded bottles wrapped with paddy straw and packed to new gunny bags,

but, then any avowment that any goods was supplied to any customer without packing at a rate lower than that mentioned in the price list got approved by the petitioner or, that any discount representing the cost of packing material and charges thereof was given to any customer, is conspicuous by its absence. It may be that while taking the whole sale price of the article manufactured by it the petitioner, also took into account the expenses that will have to be incurred in packing them in, what it called normal packing (each individual bottle to be

Wrappedd with paddy straw and packed in second hand gunny bag),, and, the petitioner may , have charged something extra when the customer required it to supply goods in some special type of packing but then there is nothing on the record to show 'that there was any case in which the petitioner had agreed to accept anything less than the price shown in the price list for the sale of goods supplied by it to its customer in unpacked condition. Annexure '10' to the petition is a copy of a letter dated 3rd July,-1974 said' to have been ,written by one of petitioners customers Ayurved Sewa Ashram Private Ltd. 'stating that the petitioner was on several occasions unable to meet its demand because a. paucity of packers. They were prepared to accept delivery of bottles in unpacked conditipn and hoped that because of this the petitioner would reduce the price of the bottles, However there is no mateerial on the record to show as to what the outcome of the request made by Ayurved Sewa Ashram was. It is not known if the petitioner agreed to reduce the price of the bottles supplied to Ayurved Sewa Ashram in unpacked condition. If at all the contents of the, letter indicate that the petitioner had agreed to sell the bottles to Ayuryed Sewa Ashram on payment of certain price after packing them and as the Sewa Ashrani was prepared to take delivery of the goods in unpacked conditin it wanted the petitioner to reduce its price. The letter does not indicate, either that Ayurved Sewa Ashram of any , other customer of the petitioner had agreed to purchase the bottles at a price lwer than that mentioned in. the approved price list and that it were the packing charges together with. The agreed price that came to be mentioned in the price list got approved by, the petitioner.

11 In the circumstances we are not satisfied that the petitioner has been' made to pay excise duty or anything other than the cash price for the wholesale of the goods manufactured by it. It is, accordingly, not entitled to any relief claimed in the writ petition.

12. We, however, find that there is some confusion in the minds of the Excise Authorities' also in this regard when they claim that the value of the packing material being a part of the manufacturing process, it has necessarily to be added to the price for which the petitioner agrees to sell the goods to its customer in wholesale, for the purpose of determining their assessable value. This leads to an,

apprehension that even if the contract of sales entered into between the petitioner and its customers in the normal course, specifically provides for payment of price for sale of bottles and also for payment of additional charges for packing them, the amount of packing charges will for the purposes of calculating the assessable value of the articles, have to be added to its price (the consideration for which the property in the goods, was agreed to be, transferred). This stand on behalf of the respondents is, for the reasons mentioned above, in our opinion not tenable. Of course, as pointed out by the Supreme Court in the case of A.K. Roy v. Voltas Ltd.-1973 S.C. 225), the price charged at a low rate for extra commercial consideration cannot, for purpose of Section 4(a) be considered to be the wholesale price of the goods. Accordingly, where; contrary to trade practices in the dealing, of particular goods in wholesale, the manufacturer enters into an agreement with the producer splitting up the consideration for which the property in goods are transferred with a view to reduce the amount of duty payable, he will be doing so for extra commercial consideration and the price indicated in such agreement may not indicate the wholesale price and the excise authority may not feel itself bound by such splitting. We, accordingly, while approving the price list of the articles manufactured by the petitioner in future the respondents should scrutinize the nature of various transactions in the normal course of business entered into between the petitioner and its customers with a view to find out the amount of money charged by the petitioner for agreeing to transfer the property in the goods and not to include therein any amount which forms part of consideration for anything other than the agreement to transfer property in the goods to the purchaser.

13. So far as the case of Alembic Glass Industries Ltd. v. Union of India and Ors. - Writ Petition Nos. 548 and 3436 of 1970 decided by a Division Bench of the Mysore High Court on 10th September, 1971 relied upon by the petitioner is concerned, we find nothing therein which runs counter to what has been stated by us above. In that case the glass containers manufactured by M/s. Alembic Glass Industries Ltd. were being purchased by their customers some times in un-packed condition but quite often the buyers required them to be packed and despatched to them. In one, the bottles were packed in grass and gunny bag and in the other card board or green board cartons were used for packing. The type of packing

depended upon the customers' instructions. The customers who bought the bottles in grass and gunny packing were not charged anything extra for packing but those who insisted on carton packing were charged actual cost of the packing material. Even this was not charged if the buyer themselves supplied the cartons for packing. The authorities under the Act took the view that where the customers supplied the cartons for packing and the petitioner supplied the goods in the cartons, the company should notionally work out the packing charges on the basis that the said packing material was purchased and used by the company at its cost. They accordingly levied the excise duty on the wholesale price of the bottles and the packing charges. Further up to June 1, 1968, the approved price list did not mention the packing charges but it was separately shown in the invoices. From June 1968 the company was forced to include the packing charges in the price list of its article and the same was separately shown in the invoices prepared by the company. The petitioner claimed that wholesale price of the article to any of its purchaser throughout remained the same and the extra charge collected by it in the circumstances did not go to constitute the wholesale price of the goods and no duty could be levied in respect thereof. The Excise Authorities justified their action before the Mysore High Court on the following two grounds :-

- (1) packing is a process incidental or ancillary to the completion of manufactured glass containers; and
- (2) the assessable value of the glass containers must include their packing charges under Section 4 of the Act.

On the first point High Court held that packing was not incidental or ancillary to the manufacturer of the bottles. So far as the second point was concerned, it found that the price list approved by the authorities did not show that the wholesale price mentioned therein was inclusive of packing charges (it thus appears that the court assumed that in certain circumstances the wholesale price may be fixed taking into consideration the packing charges as well). During the period in dispute they were at the instance of the authorities separately shown in the price list as without that they refused to clear the goods from the bonded house. The packing charges were separately shown in the invoice of the company. In the result the court held

that the packing charges realised by the company did not form part of the sale price of the goods sold and no excise duty was leviable in respect thereof. It did not hold that even in a case where the goods were agreed to be supplied packed in gunny bags and for which packing the company did not charge anything extra from the customer, still for purpose of determining the assessable value of the goods cost of said packing had to be excluded from the price realised by it.

14. In the result we find no merit in this petition, which, subject to observations made above, is dismissed. Parties are directed to bear their own costs.

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