Superintendent of Central Excise and ors. Vs. Madras Rubber Factory Ltd.

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Court : Kerala

Decided On : Apr-01-1976

Reported in : 1979(4)ELT89(Ker)

Judge : P. Govindan Nair, C.J. and; G. Viswanatha Iyer, J.

Acts : Central Excises Act, 1944 - Sections 3 and 4; Companies Act

Appeal No. : W.A. Nos. 461 and 462 of 1975

Appellant : Superintendent of Central Excise and ors.

Respondent : Madras Rubber Factory Ltd.

Disposition : Appeal dismissed

Judgement :

Govindan Nair, C.J.

1. These appeals are from a common judgment disposing of O.P. Nos. 1290 of 1973 and 1524 of 1973 [1977 E.L.T. (J 85)] both moved by the respondent to these appeals, the Madras Rubber Factory Ltd. In O.P. No. 1290 of 1973 the first prayer was to 'issue a writ of mandamus or any other appropriate writ, direction or order to forbear the respondents from levying excise duty on items other than on the manufacturing costs and manufacturing profits' and the first prayer in O.P. No. _1524 of 1973 was to issue 'a writ of mandamus or any other appropriate writ,

direction or order directing the respondents herein to refund the excise duty of Rs. 17,58,383.91 collected on items other than on the manufacturing costs and manufacturing profits in respect of the petitioner's products manufactured at their factories in Kottayam including the Muttambalam Unit from the period May 1970 onwards covered by Exts. P2 to P9'. Additional prayers have been added in that O.P. by orders dated 28-2-1974 on C.M.P. No. 13722 of 1973 and 3-6-1975 on C.M.P. No. 3146 of 1974. '

2. The learned Judge observed thus in paragraphs 6 and 7 of the judgment: -

'6. Hence the petitioner is entitled to succeed in O.P. 1290 of 1973. The respondents will levy excise duty on items manufactured by the peti-tionei taking into account the manufacturing cost and the manufacturer's profit and that would be determined in accordance with what has been said in this judgment.

7. The connected petition, O.P. 1524 of 1973, is for refund of the amounts wrongly collected as excise duty in the past. Of course, no relief was obtained from the department by the petitioner in the light of the view taken by it. But in the light of what I have said about the liability to pay excise duty, the question calls for a fresh approach. Since I am directing the authorities to look into the matter of the liability of the petitioner that should apply equally well to the prayer for refund also. That also will be gone into afresh in the light of what has been said in this judgment. The petitions are allowed as indicated... .'

3. In these appeals the learned Advocate-General who appeared for the appellants contended before us that the view taken by the learned Judge in the judgment under appeal that the ad valorem excise duty chargeable on the articles manufactured by the respondent in these appeals must be related to the manufacturing costs plus the manufacturing profits alone, is not justifiable in view of the provision in Section 4 of the Central Excises and Salt Act, 1944, for short the Act, We shall examine this contention. Before we do so, it is necessary to advert to Section 3 of the Act which may be termed as the charging section. That section has insisted 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 India and a duty on salt manufactured in, or

imported by land into, any part of India as, and at the rates, set forth in the First Schedule'. It is clear from the section that the duties of excise are imposed on all excisable goods which are produced or manufactured in India and in the case of salt, also imported by land into any part of India. Schedule 1 in item 16 deals with tyres and defines tyre as a pneumatic tyre in the manufacture of which rubber is used, and includes the inner tube and the outer cover of such a tyre. Tyres for motor vehicles are dealt with separately and cycle tyres other than motor cycle tyres have also been separately dealt with and there is an omnibus provision for all other tyres. In relation to all these articles ad valorem fees at varying percentages have been provided under item 16 of Schedule 1 and item 16A dealt generally with rubber products enumerated therein. Un4er this item also the fee chargeable is ad valorem. The most important section with which we are concerned is Section 4 which we shall extract in full.

* * * *

4. The facts of the cases relevant for our purposes have been briefly stated in the judgment under appeal in these terms :

'...The petitioner is the Madras Rubber Factory Limited,

a company registered under the Companies Act. It is engaged in the business of manufacturing automobile tubes, tread rubber with cushion etc, These goods are sold under the trade name 'Mansfield'. The petitioner is having a factory at Kottayam in which factory the manufacture of automobile tubes and other rubber products was commenced from 1970.

The petitioner company has a sales and technical organisation independent of the manufacturing units. There is no ex-factory price for the products manufactured by the petitioner and normally no contract is entered into for the sale of its product for delivery at the factory gate. On the other hand the goods are sent over to the sales depots of the petition!

company situate in various places in India and irrespective of the distance of the depots from the factory or its location goods are sold at a uniform price in all these

depots. There are two prices fixed for the products, one of them is the billing price and the other the price at which it is sold to the consumers. The billing prices are the prices at which the goods are sold at the depots to dealers. As stated earlier this is the same all over India. The prices at which the dealers are to sell these goods to the consumers are again uniform throughout India.

The petitioner has all along been paying excise duty under Section 3 of the Central Excises and Salt Act, 1944, on the basis of the billing price of the goods manufactured....'

5. The contention before the learned Judge by the respondent herein that the excise duty must be based only on the actual cost of production or manufacturing costs, plus manufacturing profits has been accepted by the learned Judge. The short question therefore arising for decision is whether the view taken by the learned Judge is the correct view to take. The learned Advocate-General contended that the view taken by the learned Judge requires reconsideration. According to the Advocate General the billing prices will be the prices on which ad valorem excise duty will have to be calculated in view of the latter part of Section 4(a) of the Act.

6. It appears that the judgment in the original petitions which gave rise to these appeals was rendered on the principle of the decision of the Supreme Court in A.K. Roy and Anr. v. Voltas Ltd., AIR 1973 S.C. 225 wherein Section 4 of the Act came up for interpretation. Before we refer to the relevant passages from this judgment we have to emphasize certain aspects which are clearly discernible from the wording of the section itself. The wholesale cash price is a price for which an article is actually sold or is capable of being sold. This necessarily implies that there need not be actual sale of the article, in order to visualise a wholesale cash price for that article. The other aspect which we wish to emphasise is that the sale contemplated by the section must beat 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. These, we think, are very important aspects for if the price should be at the time of the removal of the article chargeable for delivery at the place of manufacture, by no stretch of

imagination, can that price comprehend any freight or insurance or amounts expended for promotion of sale by a manufacture who may have sales organisations elsewhere and who may choose to carry his goods from the place of manufacfure to distant parts in India. What we have said above is on all fours with the observations of the Supreme Court in A.K. Roy and Anr. v. Voltas Ltd., AIR 1973 S.C.225. We shall refer to certain passages in paragraphs 9 and 10 of the judgment.

'We do not think that for a wholesale market to exist, it is necessary that there should be a 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 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 lit 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 agreement which confer certain commercial advantages upon

them... We also think that the application of cl. (a) of Section 4

of the Act does not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality should have been sold. If there is an actual price for the goods themselves at the time and place of sale and if that is a 'wholesole cash price', the clause is not inapplicable for want of sale of other goods of a like kind and quality.'

7. We must refer to one more paragraph in the judgment, paragraph 21 which reads as follows : -

'21. Excise is a tax on the production and manufacture of goods (see-Union of India v. Delhi Cloth and General Mills, (1963) Supp 1 SCR 586-AIR 1963 SC 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 cost and the profit arising from 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 ....'

In the light of these observations of the Supreme Court it is evident that the billing prices for which the articles manufactured by the respondents are sold to the various depots all over India do not represent the manufacturing cost plus the manufacturing profit alone. The goods have to be taken to far off places and to nearby places and it appears that the respondent has struck an average as the uniform cost of transport which is added and the billing price fixed for sale to the depots wherever they are situate. This is only a means by which a uniform price is fixed for the goods to be supplied to the depots wherever they are situate in India. But the important aspect is that price, termed the billing price, reflects not only the manufacturing cost and the manufacturing profit but the freight, insurance and the sale promotion cost and the portion of the cost attributable to overheads as far as the sales organisation is concerned. This was the specific contention of the respondent and the contention is acceptable. On the wording of the section and as it is interpreted by the Supreme Court, there is no justification For taking the billing price, unless it be as contended by the learned Advocate-General that it is possible to postulate that on the facts of the cases it is the latter part of Section 4 (a) of the Act that should apply. We must therefore now turn to that aspect- The

Advocate-General contended that it is an admitted fact that the respondent does not effect any sales of the manufactured articles at the site of manufacture. It is also contended that there is no material and not even an averment that there are sales of articles of like kind and quality at the site of manufacture. It was therefore urged that the authorities were right in taking the billing price which represented the wholesale cash price at the nearest place where such market existed. This argument fails to take note of two specific relevant factors. In paragraph 7 of the original petitions it has been categorically stated that the articles manufactured

by the respondent are capable of being sold at the time of removal of the articles at the place of manufacture. Though we have been taken through the various paragraphs in the counter affidavits, paragraphs 5 to 9, we are not able to find any specific denial of the averment in paragraph 7 of the original petition. We have therefore to proceed on the basis that the articles are capable of being sold at the place of manufacture at the time of removal from the factory. The Supreme Court has further held that market does not mean that there should be a physical market in the sense that there is a place to which the articles could be taken and where such or like articles could ordinarily be sold. If the articles are capable of being sold at the time of removal and at the site of manufacture even in the absence of any evidence of actual wholesale cash price for such sales, such cash price of sale will have to be ascertained by reference to established factors. What the learned Judge has directed in the judgment under appeal is that from the billing price such amounts as can legitimately be attributed to freight and insurance and sale promotion, efforts, must be eliminated and the wholesale cash price ascertained. It is of course not for this court to suggest anything more than this and we are not able to discern any error in these directions. The view taken in AK. Roy and Anr. v. Voltas Ltd., AIR 1973 S.C. 225 has been quoted with approval by a later decision of the Supreme Court in Atic Industries Ltd. v. H.H. Dave, Asstt. Collector of Central Excise and Ors., AIR 1975 S.C. 960. The matter has been elaborated in paragraph 12 of the judgment.

8. The Advocate-General contended that the observations made by, the Supreme Court in paragraphs 9 and 10 of the judgment in A.K. Roy and Anr. v. Voltas Ltd., AIR 1973 S.C. 225 and even in the decision Atic Industries Ltd. v. H.H Dave,

Asstt. Collector of Central Excise and Ors., AIR 1975 S.C. 960 are obiter and invited our attention to the decision in H.H. Maharaja- . dhiraja Madhav Rao Jivaji Rao Scindia Bahadur and Ors. etc. v. Union of India. AIR 1971 S.C. 530. and took us through paragraphs 324, 325 and 326 and contended that the observations in such and similar cases are of varying strength and being obiter dicta we should not place too much weight on those observations. The observations made by the Supreme Court in H H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur and Ors. etc. v. Union of India, AIR 1971 S.C. 530 are observations made by the Supreme Court itself with regard to the court's earlier decision. It is certainly open to the Supreme Court to make those observations or even overrule the earlier decisions as has been held In re : Bengal Immunity (AIR 1955 S.C. 661). But we do not think that the High Courts can ignore even observations made by a superior court which are in their nature obiter. We think we are bound by these observations. We must add that we are not satisfied that the particular observations on which reliance was placed by the respondent were obiter. In both the decision the Supreme Court had to deal with the scope and ambit of Section 4 bearing in mind the concept of Excise Duty and Section 3 of the Act, and construe Section 4. The facts of the case in A.K. Roy and Anr. v. Voltas Ltd., A.I.R. 1973 S C. 225 indicated that certain percentages of the goods were sold on the basis of agreements at the time of removal at the place of manufacture and the prices of such sales were known. Nevertheless it was contended that there was no market at the place of manufacture. So it was necessary to interpret the section and explain the true import. This is, what has done by the Supreme Court. The observations in the judgment which we have extracted cannot therefore be held to be obiter.

9. We see no reason to interfere with the judgment under appeal. We dismiss both these appeals. There will be no order as to costs,