

Kanpha Labs, Madras Vs. Union of India and Two ors.

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Court : Chennai

Decided On : Nov-17-1982

Reported in : 1983(13)ELT947(Mad); (1983)IIMLJ129

Judge : Ramanujam, J.

Acts : [Central Excise Act, 1944](#) - Sections 3, 4, 4(1) and 4(2)

Appeal No. : Writ Petition No. 11631 of 1981

Appellant : Kanpha Labs, Madras

Respondent : Union of India and Two ors.

Advocate for Def. : K.N. Balasubramaniam, Addl. Central Govt. Standing Counsel

Advocate for Pet/Ap. : A.R. Ramanathan, Adv.

Judgement :

ORDER

1. The petitioner herein is a licensed manufacturer of drugs and medicines covered by Tariff Item 14-E of Schedule I of the Central Excises and Salt Act, 1944, and excise duty is payable in respect of drugs and medicines manufactured by them on an ad valorem basis under the said Act. The petitioner submitted a price list which included only the manufacturing cost and the manufacturer's profit to the Excise authorities for their approval and the second respondent herein

rejected the same and returned it for re-submission after showing correctly the assessable value. Aggrieved by the said order of the second respondent dated 24-12-1981, the petitioner has approached this Court for the issue of a writ of certiorified Mandamus to quash the said order of the second respondent and to direct the respondents to forbear from levying and collecting excise duty from the petitioner by including the post-manufacturing expenses, namely, distribution cost, onward freight, promotional expenses, cost of packing materials, picking charges and trade concession in the assessable value of the drugs and medicines manufactured by the petitioner. In this writ petition, the petitioner has attacked the constitutional validity of Section 4(1)(a) proviso (ii) of the Central Excises and Salt Act, 1944, as amended by Central Act 22 of 1975 which provides that where a price is fixed for an article under any law for the time being in force, then such price shall be deemed to be the normal price referred to in clause (a) of Section 4(1). According to the petitioner, the second proviso referred to above enables the excise authorities to equate the price fixed under any other statute on the normal price fixed under Section 4(1)(a) and if the price fixed under any other statute includes the post-manufacturing expenses incurred by the manufacturer, then such a provision which enables the authorities to include post-manufacturing expenses as well in the value to be fixed for the purpose of ad valorem duty will be contrary to the charging section 3 which enables the levy of excise duty on the goods manufactured which normally includes the manufacturing charges as well as the manufacturer's profit. It is also pointed out in the writ petition that the excise duty leviable under the Central Excises and Salt Act, 1944, can only be levied on the manufacturing cost plus manufacturer's profit and not on the manufacturer's post-manufacturing expenses incurred for the purpose of facilitating the sale of the goods and this position has been established by the various decisions of the Supreme Court and the High Courts and, therefore, Section 4(1)(a) proviso (ii) in so far as it enables the excise authorities to take into account the retail price which normally includes the post-manufacturing expenses should be taken to be unconstitutional. It has also been pointed out by the petitioner that even otherwise the impugned order of the second respondent passed on 24-12-1981 is erroneous and illegal in that the second respondent has taken the view that after S. 4 was amended, it enables the excise authorities to levy excise duty even on the post-

manufacturing expenses as well and that view cannot be taken as legally tenable.

2. In the counter affidavit filed on behalf of the respondents it has been stated that whatever was the position before Section 4 was amended, after the amendment, under proviso (ii) to Section 4(1)(a) the excise authorities are bound to take the statutory fixation of the price or the maximum price of the goods under any law for the time being in force as the normal price of the goods within the meaning of Section 4(1) and such being the legal position, the authorities have no other alternative except to take the statutory fixation of the price of the maximum price for the articles as the normal price. As regards the petitioner's attack on the validity of the said proviso (ii) to Section 4(1)(a), the respondents have merely stated -

'There is no attempt in the Act to impose sales tax in the guise of excise duty. The Parliament is free to enact what is assessable value, and the Parliament is sovereign enough to enact that where price is not the result of forces in the market place but a law that is the basis for assessable value.'

Thus, the counter affidavit has not sufficiently met the attack made by the petitioner on the validity of the proviso (ii) to Section 4(1)(a).

3. Before me, the learned counsel counsel for the petitioner contends that both before or after the amendment of Section 4, the excise duty can be imposed under the Central Excises and Salt Act, 1944, only on the price of the manufactured goods, in the wholesale market. Before the amendment, Section 4(1) provided that excise duty is chargeable on any excisable commodity with reference to the wholesale price the goods will fetch if sold at the factory gate. After the amendment, Section 4(1) provides that the excise duty is chargeable on excisable goods taking its normal price, the normal price being the price at which the goods are ordinarily sold by the manufacturer to buyer in the course of a wholesale trade. Therefore, according to the learned counsel, even after the amendment, the wholesale price can only be taken as the basis for the purpose of the levy of excise duty and not the retail price which normally includes the post-manufacturing expenses incurred by the manufacturer as also the expenses incurred by the retailer and his profits. It is also contended by the learned counsel for the petitioner that the duty of excise being a duty on the manufacture, the duty cannot be

imposed on a retail price which includes not only the manufacturing cost and manufacturer's profits but also the post-manufacturing expenses, and retailer's profit. According to the learned counsel, the second proviso to Section 4(1)(a) runs counter to the basic idea contained in Section 4(1)(a) of the normal price which refers only to a price which a manufacturer charges in the course of a wholesale trade and that if the second proviso is understood as enabling the excise authorities to levy excise duty even on a retail price fixed under any other law for the time being in force deeming it to be a normal price, then that will be contrary to the charging section 3 and also exposes the provision to constitutional attack on the ground that in the guise of levying duty of excise, a duty is levied on the post-manufacturing expenses as also the retailer's profits. The learned counsel has referred to the decisions of the Supreme Court in *A. K. Roy v. Voltas Ltd.* AIR 1973 S.C. 325 : 1977 E.L.T. 177 and *Atic Industries Ltd. v. N. H. Dave, Assistant Collector, Central Excise and others*, : 1978(2)ELT444(SC) which had been rendered before the amendment of Section 4, and says that the ratio of the decision in those case still governs the interpretation of Section 4 as amended. The said decisions of the Supreme Court have been followed by a Division Bench of this court in *India Tobacco Co. Ltd. v. Union of India* 1979 E.L.T. 476, and *Century Spinning and Manufacturing Co. v. Union of India*, 1979 E.L.T. 199. The amended provision in Section 4 came up for consideration before the various High Courts in India and in those decisions it has been held that the ration laid down by the Supreme Court in the above two cases still holds good.

4. Recently, Padmanabhan J. had to consider the scope of Section 4 as amended in *Messrs. Dunlop India Ltd. v. Union of India*, 1981 2 MLJ 322 The learned Judge has taken the view that even under Section 4 as amended, the ratio of the Supreme Court decision that the post-manufacturing expenses such as selling and administration expenses cannot be added to the manufacturing cost and manufacturer's profit for the purpose of levying excise duty holds good and, therefore, even after the amendment of Section 4, excise duty cannot be levied on post-manufacturing expenses and, as such, the post-manufacturing expenses will stand excluded for the purpose of levy of excise duty. Padmanabhan J. if I may say so with respect, has considered the question elaborately after referring to an almost all the relevant decisions on the point and ultimately came to the

conclusion that it is settled law that excise is a tax on production or manufacture of the goods and consequently the value of the goods for the purpose of excise duty is taken to mean only the manufacturing cost and the manufacturing profit, that it must not be loaded with post-manufacturing expenses such as selling and administrative expenses etc., and that it is one of the basic concepts of levy of excise duty that it should be levied on the basis of the sale price at the factory gate and said concept is discernible in Section 4, both before its amendment and after its amendment. The learned judge has observed as follows :-

'Normally the value of the goods for levy of excise duty has to be determined with reference to the price at which the goods are sold at the factory gate. The Section 4(1)(a) as it stood prior to the amendment stated that the value of the goods with reference to the levy of excise duty shall be the wholesale cash price for which the article is sold by the manufacturer. The amended section provides that the value of excisable goods shall be the normal price at which the goods are ordinarily sold by the assessee to a buyer in the course of a wholesale trade. However, the amended section has not done away with the basic principle that excise duty is a levy only on the production or manufacture of goods. Consequently, notwithstanding the amendment of Section 4 of the Act, the value of the goods for the determination of excise duty can only take in manufacturing cost and manufacturing profit and cannot be loaded with post-manufacturing expenses as laid down by the Supreme Court in *Voltas* case and *Atic Industries* case. The fact that Section 4(2) of the Act after amendment states that transportation charges have to be excluded in the determination of the value for the purpose of levy of excise duty, does not mean that every other post-manufacturing expenses can be included in arriving at the value of the goods for the levy of excise duty.'

I am in entire agreement with the view expressed in that case. Excise duty is a duty on manufacture and, therefore, the excise duty is leviable only on the manufacturer's cost which normally takes in the manufacturing cost and the manufacturer's profit. Keeping this concept of excise duty in mind, the Legislature enacted Section 4 for fixing the assessable value of the goods taking into account the price the goods fetched in the wholesale market.

5. Section 4(1) before its amendment took into account the ex-factory wholesale price for the purpose of levy of excise duty. After the amendment, however, it has introduced the notion of normal price which also attracts the price the manufacturer gets in the course of a wholesale trade. Both before or after the amendment, Section 4 does not take into account the retail price of the goods manufactured as it ordinarily includes not only the manufacturing cost and the manufacturer's profit, but also the post-manufacturing expenses either incurred by the manufacturer or by the retailer and the retailer's profit. Having regard to the characteristics of the duty of excise, in the guise of levy of excise duty, the State cannot levy duty on the post-manufacturing expenses as also the retailer's profit. This is a well-established proposition and it is unnecessary to multiply references to decisions in support of that propositions. As a matter of fact, the amended provision in Section 4(1) also takes the place obtained in the course of wholesale trade by the manufacturer as the normal price on which the excise duty is chargeable. However, in this case, the petitioner's contention is that proviso (ii) to Section 4(1)(a) makes a departure from the normal concept of excise duty in that it allows the excise authorities to levy excise duty even on the retail price and, therefore, it should be taken to be constitutionally bad. The impugned proviso (ii) is extracted below :

'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 sold, be deemed to be the normal price thereof.'

6. According to the proviso, wherever a price or a maximum price has been fixed under any law for the time being in force, then such goods or such maximum price shall be deemed to be the normal price. This proviso enables the levy of excise duty on the maximum price under any statute for the goods manufactured treating them as normal price.'

7. In this case, the petitioner is a manufacturer of pharmaceuticals and for the goods manufactured under the Drugs Price Control Order, 1979, the maximum prices have been fixed. According to the respondents, the excise duty can be levied at the prices or maximum prices so fixed without reference to the price list submitted. According to the petitioner, the prices fixed under the Drugs Price Control Order, 1979, are only for the retailers, and, therefore, the price fixed under the Drugs Price Control Order, 1979 includes the post-manufacturing expenses as well as the retailer's profit and therefore this provision which enables the authorities to levy excise duty on retail price which includes items other than the manufacturing cost and manufacturer's profit should be struck down as being unconstitutional. It is no doubt true that if the provision in proviso (ii) enables the respondents to levy excise duty on retail price which normally takes in the pre-manufacturing expenses as well as the retailer's profit, then the provision should be taken to run counter to the charging Section 3 and the normal concept of excise duty. However, I find that proviso (ii) does not specifically say that the price or maximum price to be fixed under any law for the time being in force will be the retail price but on the other hand it makes a reference only to the wholesale trade. The price can be fixed by any other law for the time being in force, either for retail or wholesale trade and so long as the provision does not refer to the retail price, the provision can be constructed as referring only to the wholesale price or to the maximum wholesale price if any fixed under any statute. It is well-established that the courts are to interpret a statutory provision, as far as possible, in such a way as not to invalidate the provision. In this case, since the provision does not refer to the retail price fixed under any statute, it should be taken to refer only to the wholesale price or the maximum wholesale price. If it is so read, then the provision is consistent with Section 3 as well as the main part of Section 4(1)(a) and as such valid.

8. The learned counsel for the petitioner would say that under the Drugs Price Control Order, 1979, the price is fixed only for retail and not for wholesale. If that be so, then authorities cannot take that fixation of such retail price into account for the determination of assessable value by invoking the second proviso. In the face of the interpretation of proviso (ii) which I have chosen to adopt, that proviso cannot be held to be valid as conflicting with the charging section as also the main

provision in Section 4(1)(a) . However, in so far as the impugned order passed by the second respondent is concerned, as already stated, it proceeds on the erroneous basis that under proviso (ii) to Section 4(1)(a) the excise duty can be levied even on the post-manufacturing expenses. That view is obviously incorrect. The reasoning given by the second respondent in the impugned order is as follows :-

'I am unable to accept the factory's contention that the post-manufacturing expenses should be deducted from the NEP for arriving at the assessable value. There are clear provisions under Section 4(1)(a) proviso (ii) of Central Excises and Salt Act, 1944, that a price fixed under any law for the time being in force the maximum fixed under any such law should form the assessable value. No provisions are made under the said section for the deduction of a so-called post-manufacturing expenses. In the case of Messrs Kanpha Labs (Madras) Madras 3, it is not in dispute that the price fixed for their medicines under question is a statutory price fixed under Drug Price Control Order, 1979. Therefore, this should correctly form the assessable value without the deduction of the so-called post-manufacturing expenses.'

9. According to him Section 4(1)(a) proviso (ii) enables the excise duty being levied on a statutory price fixed under the Drugs Price Control Order, 1979 taking the same as the assessable value and no deduction of the so-called post-manufacturing expenses could be made therefrom. In this case, the petitioner's claim before the second respondent while submitting the price list was that the retail price fixed under the Drugs Price Control Order, 1979, includes post-manufacturing expenses, that the post-manufacturing expenses worked out on the basis of rule 11 of the Drugs Price Control Order, 1979, came to 88 per cent and that should be allowed as a deduction. The learned counsel for the respondents would say that the claim of 88 per cent of the cost for the manufacturing expenses cannot be accepted. It is no doubt true that the claim made by the petitioner for deduction of as much as 88 per cent as manufacturing expenses cannot straightway be allowed and the second respondent can go into the question as to what is the actual manufacturing expenses in respect of particular items of drugs or medicines manufactured by the petitioner. For that purpose, the respondents

can either take the retail price under the Drugs Price Control Order, 1979 and give deduction for the actual post-manufacturing expenses incurred or work out the cost of manufacture and the manufacturer's profits from the books of account maintained by the petitioner.

10. In this view of the matter, the order of the second respondent dated 27-12-1981 is quashed with a direction to the second respondent to determine the assessable value according to law and after excluding the post-manufacturing expenses. There will be no order as to costs.

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