Atic Industries Ltd.

Vs

H. H. Dewa, Asstt. Collector of Central Excise and Others

Civil Appeal No. 1868 of 1970

(P. N. Bhagwati, A. C. Gupta, N. L. Untwalia JJ)

14.02.1975

JUDGMENT

BHAGWATI, J. -

1. This appeal, on certificate of fitness obtained under Article 133(1)(a) of the Constitution, is directed against a judgment of the High Court of Gujarat dismissing Special Civil Application No. 1279 of 1966 preferred by the appellants challenging the assessment to excise duty of certain dye-stuffs manufactured by them. The facts giving rise to the appeal are few and may be briefly stated as follows :

2. The appellants carry on business of manufacturing dye-stuffs in factory situate in a small township called Atul in Bulsar district in the State of Gujarat. The dye-stuffs manufactured by the appellants were, throughout the period relevant to this appeal, sold by them in wholesale units to two wholesale buyers, namely, ICI (India) Ltd. (hereinafter referred to as ICI) and Atul Products Ltd. (hereinafter referred to as Atul) under respective agreements entered into by them with ICI and Atul. Seventy per cent of the dye-stuffs manufactured by the appellants were sold to ICI, while the remaining 30% to Atul. The price charged by the appellants to ICI and Atul was a uniform price described as "the basic selling price" less trade discount of 18%. ICI and Atul, in their turn, resold the dye-stuffs purchased by them from the appellants to two categories of buyers. One was the category of textile mills and other large consumers, while the other was the category of distributors. The sales by ICI and Atul to the textile mills and other large consumers were at the basic selling price without any discount, but so far as the distributors were concerned, the sales to them by ICI and Atul were at a higher price, though with trade discount. ICI charged a higher price but allowed 10% trade discount, while Atul charged a slightly lower price and allowed two and a half per cent trade discount. The prices were, however, so adjusted that the net selling prices charged by ICI and Atul to the distributors were almost the same. The distributors, in their turn, resold the dye-stuffs purchased by them from ICI and Atul to the small consumers at a slightly higher price referred to as "small consumers price". No discount was given by the distributors to the small consumers.

3. The position which therefore, obtained during the relevant period was that the appellants sold the dye-stuffs manufactured by them in whole-sale units, 70% to ICI and 30% to Atul, at the basic selling price, less trade discount of 18% : ICI and Atul in their turn resold a part of the dye-stuffs in retail units to the textile mills and large consumers at the basic selling price and the balance in wholesale units to the distributors at higher selling prices with 10% trade discount in case of ICI and 2 1/2% trade discount in case of Atul, the net selling prices charged by both of them, however, being the same; and the distributors, in their turn, resold the dye-stuffs to small consumers in retail units at the small consumers price. It may be pointed out that though Atul initially charged a lower

selling price and gave a trade discount of 2 1/2%, it fell in line with ICI and adopted the same selling price as ICI with trade discount of 10% from and after May 1, 1963.

4. There was no excise duty on dye-stuffs prior to March 1, 1961, but with effect from that date excise duty was imposed for the first time on dye-stuffs, including those manufactured by the appellants. The excise duty chargeable under the relevant entry in the first Schedule read with Section 3, sub-section (1) of the Central Excise and Salt Act, 1944 was ad valorem, and it was, therefore, necessary to determine the value of the dye-stuffs manufactured by the appellants for the purpose of assessing the excise duty payable on them. Section 4 of the Act provided how the value of an article chargeable with duty at a rate depending on its value shall be determined for the purpose of assessment of excise duty. It said :

> Determination of value for the purposes of duty - Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value be deemed to be -
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> (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, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or
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> (b) where such price is not ascertainable, the price at which an article of the like kind and quality sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.
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> Explanation - In determining the price of any article under this section no abatement or deduction shall be allowed except in respect of trade discount and amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid.

The question arose as to how the value of the dye-stuffs manufactured by the appellants should be determined on a proper application of the rule laid down in Section 4. The appellants contended before the excise authorities that for the purpose of assessing the excise duty, the value of the dye-stuffs manufactured by the appellants should be taken to be the price at which the appellants sold the same in wholesale units to ICI and Atul, less a uniform trade discount of 18% which the appellants at the relevant time gave to these two wholesale buyers. This contention was not accepted by the Superintendent of Central Excise who was the original assessing authority. He took the view that the value of the dye-stuffs for the purpose of assessment of excise duty should be taken to be the price at which ICI and Atul sold the dye-stuffs to the distributors and no deduction should be allowed in respect of the discount given by them to the distributors since it was not uniform, being 10% in case of ICI and 2.1/2% in case of Atul. The appellants appealed against the assessment to the Assistant Collector of Central Excise, but the appeal was unsuccessful and the assessment was confirmed. That led to the filing of a further appeal to the Collector of Central Excise. This appeal resulted in some gain, little though it was, as the Collector of Central Excise held that in determining the assessable value, trade discount of 2.1/2% which was given to Atul by the distributors should be

allowed to be deducted from the price charged by ICI to the distributors. This was, however, plainly illogical. If the price charged by ICI was taken as a basis, trade discount of 10% should have been allowed as that was the discount given by ICI to the distributors. Trade discount of 2.1/2% given by Atul on the lower price charged by it to the distributors could not be deducted from the price charged by ICI to the distributors which was fixed at a higher figure because of the larger trade discount of 10% given by it to the distributors. The assessable value determined by the Collector of Central Excise was a strange hybrid. The appellants preferred a revision application to the Central Government against the order of the Collector of Central Excise. The Central Government in revision rejected the main contention of the appellants that the value of the dye-stuffs should be arrived at the price at which the same were sold by the appellant to ICI and Atul less 18% trade discount allowed to them. The reason for rejecting this contention was that since dye-stuffs manufactured by the appellants were "available to an independent buyer in open market conditions at prices at which these are sold by them to the sole distributors, M/s. ICI Ltd. and M/s. Atul Products Ltd., these prices cannot be adopted as the basis of "ad valorem assessment" under Section 4 of the Act. The Central Government, however, observed that these dye-stuffs were "available to any independent buyer in open market conditions at the sole distributors prices", that is, at the prices charged by ICI and Atul to the distributors and, therefore, these prices should form the basis of assessment after allowing discount of 10% on the prices charged by ICI from the beginning and 2.1/2% on the prices charged by Atul upto April 30, 1963 and 10% thereafter and on this basis directed refund of the excess duty collected by the excise authorities.

5. The appellants were obviously not satisfied with this rather trivial and insignificant success and since their main plea was negatived by the Central Government, they filed a petition in the High Court of Gujarat under Article 226 of the Constitution challenging the validity of the various orders made by the excise authorities culminating in the order of the Central Government and seeking a writ directing the Union of India to refund excess duty amounting to Rs. 1,26,229.80 illegally recovered from the petitioners in respect of the said products otherwise than on the basis of the prices charged by the petitioners to the said wholesale buyers viz. ICI and Atul.

The Division Bench which heard the petition took the view, following certain decisions of the Calcutta, Mysore, Andhra Pradesh and Bombay High Courts, that where the entire production is sold by a manufacturer to one or more favoured distributors, there is no wholesale market in the sense of open market at the site of the factory where an independent buyer can purchase the goods in wholesale and in such a case the price at which the goods are sold by the manufacturer to the favoured distributors cannot be taken to be the assessable value of the goods but the assessable value must be taken to be the price at which the favoured distributors, in their turn, sell the goods in wholesale and if not in wholesale, then in retail. The Division Bench accordingly held that the price charged by the appellants to ICI and Atul less 18% trade discount could not be adopted for determining the assessable value of the dye-stuffs since ICI and Atul were favoured distributors and not independent buyers and the Central Government was right in taking the price charged by ICI less 10% trade discount and the price charged by Atul less 2.1/2% trade discount as the assessable value because "that was the wholesale cash price at which the independent buyers could get these goods in the nearest wholesale market at the relevant time". The appellants being aggrieved by the decision of the High Court preferred the present appeal after obtaining certificate of fitness from the High Court.

6. It would be seen from the judgment of the High Court that the only ground on which the High Court negatived the contention of the appellants that the price charged by the appellants to ICI and Atul less 18% trade discount should be taken as the assessable value was that ICI and Atul were

favoured distributors and apart from them, no independent buyer could purchase the dye-stuffs in wholesale market at or near the place of manufacture so as to attract the applicability of the first part of Section 4(a) This ground of course, at one time, looked highly plausible, supported as it was by decisions of several High Courts. But now, after the recent decision of this Court in A. K. Roy v. Voltas Ltd. ((1973) 3 SCC 503 : 1973 SCC (Tax) 261 : (1973) 2 SCR 1088) stands completely decimated. The facts of that case are a little interesting and require to be noticed in order to understand the true ratio of the decision.

7. The respondent in that case carried on inter alia business of manufacturing air-conditioners, water-coolers and their component parts. It effected direct sales to consumers at list prices and the sales so effected came to about 90% to 95% of its production during the relevant period. It also sold its articles amounting to 5% to 10% of its production to wholesale dealers from different parts of the country in pursuance of agreements entered into with them. The agreements provided among other things that the dealers should not sell the articles sold to them except in accordance with the list prices fixed by the respondent and the respondent would sell the articles to them at the list prices less 22% discount. The dealers were also required under the agreements to give service to the units sold in their territory. Excise duty on the basis of ad valorem value was imposed on air-conditioners, water-coolers and parts of water-coolers from March 1, 1961. The respondent claimed, in accordance with Section 4(a), that the list prices after deducting the discount of 22% allowed to the wholesale dealers should be taken to be the wholesale cash price for ascertaining the real value of the articles. This claim was resisted by the excise authorities and the respondent was therefore constrained to file a writ petition in the High Court of Bombay. The High Court allowed the petition holding that the list prices at which the articles were sold to the wholesale dealers, less 22% discount allowed to them under the agreements, represented the wholesale cash price and excise duty was accordingly chargeable under Section 4(a). The excise authorities thereupon preferred an appeal by certificate to this Court.

8. The same argument was advanced before this Court on behalf of the excise authorities which has found favour with the High Court in the present case. The excise authorities contended that the agreements with the wholesale dealers conferred certain extra-commercial advantages upon them, and so, the sales to them were not sales to independent purchasers but to favoured ones, and, therefore, the price charged would not represent the "wholesale cash price" as mentioned in Section 4(a) of the Act. They argued that Section 4(a) visualizes a wholesale market at the place of manufacture where articles of like kind and quality are sold or could be sold and that it also postulates a market where any wholesale purchaser can purchase the articles, and, as no articles of a like kind and quality were sold, at or near the place of manufacture, and as the wholesale sales were confined to the favoured buyers, there was no wholesale market at the place of manufacture. It was further argued that "articles of a like and quality" is a phrase which suggests goods other than those under assessment and that one must disregard the price fetched by the sale of the goods themselves.

9. This argument was squarely negatived by the Court. Mathew, J., speaking on behalf of the Court, explained the true scope and meaning of section 4(a) and its applicability in a situation of this kind in the following words : [SCC p. 506, paras 10-11 SCC (Tax) p. 264]

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 a 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 at 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 agreements which confer certain commercial advantages upon them. In other words, the sale to the wholesale dealers did not cease to be wholesale sales merely because the wholesale dealers had entered into agreement with the respondent under which certain commercial benefits were conferred upon them in consideration of their undertaking to do service to the articles sold, or because of the fact that no other person could purchase the articles wholesale from the respondent. We also think that the application of clause (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 'wholesale cash price', the clause is not inapplicable for want of sale of other goods of a like kind and quality.

The learned Judge then referred to the decision of the Privy Council in Fort Motor Company of India Limited v. Secretary of State for India in Council (65 IA 32 : AIR 1938 PC 15 : 172 IC 771) and pointed out that : [SCC p. 507, para 12, SCC (Tax) p. 265]

This case is an authority for the proposition that mere existence of the agreements between the respondent and the wholesale dealers under which certain obligations were undertaken by them like service to the articles, would not render the price any the less the 'wholesale cash price'. To put it in other words, even if the articles in question were sold only to wholesale dealers on the basis of agreements and not to independent persons, that would not make the price for the sales anything other than the 'wholesale cash price'. The argument that what was relevant to determine the 'wholesale cash price' under clause (a) of Section 30 of the Sea Customs Act, 1878, was the price of goods of a like kind and quality was negatived by the privy Council by saying that goods under assessment may, under clause (a) be considered as members of their own class even though at the time and place of importation there are no other members and that the price obtained for them may correctly represent the price obtainable for goods of a like kind and quality at the time and place of importation.

Then with reference to the decisions of the various High Courts, which had taken a different view, the learned Judge observed : [SCC p. 509, para 19, SCC (Tax) p. 267]

We do not think these decisions, in so far as they hold 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 manufacturers had entered into agreements with them stipulating for commercial advantages, are correct, and proceeded to add :

> If a 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 arms length and in the usual course of business.

There can be no doubt that the 'wholesale cash price' has to be ascertained only on the basis of transactions at arms 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 under Section 4(a) of the Act. A sole distributor 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. Once wholesale dealings at arms length are established, the determination of the wholesale cash price for the purpose of Section 4(a) of the Act may not depend upon the number of such wholesale dealings. The fact that the respondent sold 90 to 95 per cent of the articles manufactured to consumers direct would not make the price of the wholesale sales of the rest of the articles any the less the 'wholesale cash price' for the purpose of Section 4(a), even if these sales were made pursuant to agreements stipulating for certain commercial advantages, provided the agreements were entered into at arms length and in the ordinary course of business.

It is not necessary for attracting the operation of Section 4(a) there should be a large number of wholesale sales. The quantum of goods sold by a manufacturer on wholesale basis is entirely irrelevant. The mere fact that such sales may be few or scanty does not alter the true position.

On this view, it was held that the respondent was liable to be charged with excise duty on the basis of the price payable by the wholesale dealers, after deducting 22% discount, under Section 4(a).

10. This decision provides a complete refutation of the view taken by the High Court in the present case. In fact, the present case is much stronger than the Voltas' case (supra). In the Voltas' case, 90 to 95 percent of the production was sold by the manufacturer in retail and only a small percentage, namely, 5 to 10 per cent was sold in wholesale and yet the price charged by the manufacturer to the wholesale dealers less trade discount of 22% was taken as 'the wholesale cash price' for assessment of value under Section 4(a). Here, on the contrary, no retail sales at all were effected by the appellants and the entire production was sold in wholesale to ICI and Atul under agreements entered into with them. Moreover, it was not in dispute between the parties that the agreements entered into by the appellants with ICI and Atul were made at arms length and in the usual course of business. It was not the case of the excise authorities at any time that specially low prices were charged by the appellants to ICI and Atul because of extra-commercial considerations or that the agreements were anything but fair and reasonable or arrived at on purely commercial basis. The wholesale dealings between the appellants and ICI and Atul were purely commercial dealings at arms length and the price charged by the appellants for sales in wholesale made to ICI and Atul less trade discount of 18% was, therefore, clearly 'wholesale cash price' within the meaning of Section 4(a) and it did not make any difference that the wholesale dealings of the appellants were confined exclusively to ICI and Atul and apart from these two, no independent buyers could purchase the dye-stuffs in wholesale from the appellants.

11. The excise authorities, robbed of what they thought was a strong argument prior to the decision in Voltas' case (supra), then tried to fall back on a subsidiary argument in an attempt to save the assessments. They contended that all that Section 4(a) provides is that the value of the articles sought to be charged to excise duty shall be deemed to be the wholesale cash price for which the articles is sold or is capable of being sold and it does not say which wholesale cash price shall be taken to be the value of the article - that charged by the manufacturer to the wholesale dealer or that charged by the wholesale dealer who having purchased the article from the manufacturer sells it in wholesale to another dealer. The latter price, they pointed out, would equally be the wholesale cash price within the meaning of Section 4(a) as it would be the price at which the article is sold or in

any event capable of being sold in the wholesale market and there is no reason why it should not be taken to be the value of the article for the purpose of assessment under Section 4(a). The contention, therefore, was that the price charged by ICI and Atul to the dealers less trade discount allowed to them should be taken to be the assessable value of the dye-stuffs and not the price charged by the appellants to ICI and Atul discount of 18%. This contention is without force and must be rejected. It violates two basic principles underlying imposition of excise duty.

12. In the first place, as pointed as pointed out by Mathew, j., in Voltas' case (supra) : [SCC p. 510, para 22, SCC (Tax) p. 268]

excise is a tax on the production and manufacture goods . . . . Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profit 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 value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing cost or profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealers selling cost and selling profit and that would be wholly incompatible with the nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions. In fact the more common and less expensive the goods, there would be greater possibility of more than one tier of wholesale transactions. For instance, in a textile trade, a manufacturer may sell his entire production to a single wholesale dealer and the latter may in his turn sell the goods purchased by him from the manufacturer to different wholesale dealers at State level, and they may in their turn sell the goods to wholesale dealers at the district level and from the wholesale dealers at the district level the goods may pass by sale to wholesale dealers at the city level and then, ultimately from the wholesale dealers at the city level, the goods may reach the consumers. The only relevant price for assessment of value of the goods for the purpose of excise in such a case would be the wholesale cash price which the manufacturer receives from sale to the first wholesale dealer, that is, when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the consumer, whether along a short or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with a post-manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in the Voltas' case (supra). Secondly, this would also violate the concept of the factory-gate sale which is the basis of determination of value of the goods for the purpose of excise.

13. There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arms 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. That would be the wholesale cash price for which the goods are sold at the factory-gate within the meaning of Section 4(a). The price received by the wholesale dealer who purchases the goods from the manufacturer and in his turn sells the same in wholesale to other dealers would be irrelevant to the determination of the value and the goods would not be chargeable to excise on that basis. The conclusion is, therefore, inescapable that the assessable value of the dye-stuffs manufactured by the appellants must be taken to be the price at which they were sold by the appellants to ICI and Atul less 18% trade discount, and not the price charged by ICI and Atul to their dealers.

14. We, therefore, allow the appeal, reverse the judgment of the High Court and quash and set aside the assessments to excise duty made by the excise authorities on the dye-stuffs manufactured by the appellants. We direct the respondents to refund to the appellants forthwith the amount collected in excess of the correct duty of excise leviable in accordance with the principles laid down in this judgment. The respondents will pay to the appellants costs in this Court as well as in the High Court.

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