

Union of India and Others

Vs

Bombay Tyre International Ltd. and Others

civil appeals nos. 2269, 3330, 3119-20 and 388 of 1980; 2769, 2808, 3260 (ncm), etc. of 1979; 2619, 683-86, etc. of 1977; 4019-20 and 1285 of 1976; 50, 3972, 1373-76, 307-10 and 885-90 of 1978; 569, 1113, 1773, etc. of 1981 and 642-45, 168, 3509, etc. of 1982 and special leave petitions nos. 4851-86, 1409-10 and 4588 of 1977; 4027-29 of 1978; 3870 and 9789 of 1980; 6883, 4041 and 6772 of 1981; 4020 of 1976; 6841 and 10794 of 1982 and tc nos. 79-83 of 1982 and 18-19, 25-28 of 1983 and dp nos. 400 of 1977 and 1685-91 of 1979

(P. N. Bhagwati, R. S. Pathak, A. P. Sen JJ)

09.05.1983

ORDER

We make the following order for reasons which we shall give later [Ed. : See later in this volume.] :

(A) The position prior to the amendment of Section 4 of the Central Excises and Salt Act, 1944 by Act XXII of 1973 :

The value of excisable article for determining the excise duty leviable on it under the Central Excises and Salt Act, 1944 shall be taken to be :

- (i) The price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of whole-sale trade at the time and place of removal;
- (ii) Where the excisable article is not sold by the assessee in wholesale trade, price at which the excisable article or an article of the like kind and quality is capable of being sold in wholesale trade at the time and place of removal;
- (iii) Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at place outside the factory gate, the price at which the excisable article is sold in the wholesale trade at such place, after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place; and
- (iv) Where the wholesale price of the excisable article or an article of the like kind and quality is not ascertainable, the price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by the assessee at the time and place of removal or if the excisable article is not sold or is not capable of being sold at such place, then the price at which it is sold or is capable of being sold by the assessee at any other place nearest thereto.

The wholesale cash price at the factory gate is basis for determination of value of an excisable article and whatever be the wholesale cash price at which the excisable article is sold in wholesale

trade at the factory gate, would represent the value of the excisable article on which excise duty is leviable and no deduction from such wholesale cash price is permissible except in respect of trade discount and the amount of excise duty payable at the time of removal of the excisable article from the factory or any other premises of manufacture or production. No amount is deductible from such price in respect of advertisement or publicity expenses incurred by the assessee or expenses in connection with the storage of excisable article or expenses of the sales organisation or any other expenses incurred by the assessee upto the date of delivery.

Where sale in the course of wholesale trade is affected by the assessee through its sales organisation at a place or places outside the factory gate, the price at which the excisable article is sold at such place or places is to be taken as the value of the excisable article after deducting only the cost of transportation of the excisable article from the factory gate to the place or places where it is sold, but without any deduction in respect of advertisement or publicity expenses, cost of storage of the excisable article at the factory premises and at the place or places where it is sold as also the expenses of the sales organisation and any other expenses incurred by the assessee upto the date of delivery.

So far as the cost of packing is concerned, no deduction is permissible in respect of such cost from the wholesale cash price of the excisable article at the factory gate, whether the packing be primary packing or secondary packing and whether its cost is shown separately or as include in the wholesale cash price. Whatever packing is necessary for the purpose of putting the excisable article in a condition in which it is generally sold in the wholesale market at the factory gate, the cost of such packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate. If, however, any special secondary packing is provide by the assessee at the instance of a wholesale buyer which is not generally provided as a normal feature of wholesale trade, the cost of such packing shall be deducted from the wholesale cash price.

We may make it clear that where freight is averaged and the averaged freight is included in the wholesale cash price so that the wholesale cash price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price must be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged upon it.

(B) The position under the Central Excises and Salt Act, 1944 as amended by Act XXII of 1973 :

- (i) The price at which the excisable goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal as defined in sub-section (4)(b) of Section 4 is the basis for determination of excisable value provided, of course, the buyer is not a related person within the meaning of sub-section (4)(c) of Section 4 and the price is the sole consideration for the sale. This proposition is subject to the terms of the three provisos to sub-section (1)(a) of Section 4;
- (ii) Where the price of excisable goods in the course of wholesale trade for delivery at the time and place of removal cannot be ascertained for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in the manner prescribed by the Central Excise (Valuation) Rules, 1975 should be taken as representation the excisable value of the goods;

(iii) Where wholesale price of any excisable goods for delivery at the place of removal is not known and the value thereof is determined with reference to the wholesale price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery should be excluded from such price;

(iv) Of course, these principles cannot apply where the tariff value has been fixed in respect of any excisable goods under sub-section (2) of Section 3;

(v) On proper interpretation of the definition of 'related person' in sub-section (4)(c) of Section 4, the words "a relative and a distributor of the assessee" do not refer to any distributor but they are limited only to a distributor who is a relative of the assessee within the meaning of the Companies Act, 1956. So read, the definition of 'related person' is not unduly wide and does not suffer from any constitutional infirmity. It is within the legislative competence of Parliament. It is only when an assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through such a related person that the price at which the goods ordinarily sold by the related person in the course of wholesale trade at the time of removal to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell goods in retail is liable to be taken as the excisable value of the goods under proviso (iii) to sub-section (1)(a) of section 4;

(iv) The position as regards the admissibility or otherwise of deductions is the same under the amended Section 4 as it was under that section as it stood unamended. No deductions can be made from the wholesale price determinable under sub-sections (1) and (2) of Section 4 save and except in respect of (a) trade discount; (b) the amount of excise duty, sales tax and other taxes, if any, payable in respect of the excisable goods; and (c) averaged freight. No other expenses incurred by the assessee, such as, expenses of advertisement or publicity or expenses of storage of finished excisable goods or expenses of sales organisation or expenses of primary and secondary packing (save and except special packing in terms set out in relation to the unamended Section 4) shall be deductible from the wholesale price determinable under sub-sections (1) and (2) of Section 4 for the purpose of determining the value of the excisable goods for levy of excise duty.

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