

Collector of Central Excise, Madras

Vs

M/s Indian Oxygen Ltd

Civil Appeals Nos. 2349-61 of 1988

(Sabyasachi Mukharji JJ)

02.08.1988

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. These appeals are under Section 35-L (b) of the Central Excises and Salt Act, 1944 (hereinafter called the Act) directed against the decision of the Customs Excise (Gold) Control Appellate Tribunal, New Delhi, (hereinafter called 'the CEGAT').
2. The respondent M/s Indian Oxygen Ltd., Visakhapatnam, are manufacturers of dissolved acetylene gas and compressed oxygen gas (hereinafter called the gases). the respondent was supplying these gases in cylinder at their factory gate. For taking delivery of these gases, some consumers/customers used to bring their own cylinders and take the delivery, while others used to have the delivery in the cylinders supplied by the respondent. For the purpose of such supply of cylinders, certain rentals were charged by the respondent and also to ensure that these cylinders are returned properly, certain amount of deposit used to be taken from the customers. On those deposits notional interest @ 18 per cent per annum was calculated. These two amounts with which we are concerned, namely, the rentals of the cylinders and the notional interest earned on the deposit of cylinders, are the subject matters of the dispute herein. Whether these two amounts were includible in the value under Section 4 of the Act, is the question. The revenue's case is that the notional income on deposit of cylinders and the rental are part of the assessable value and, hence, should be included in computing the assessable value. The respondent, however, disputed that. They had neither included such rentals nor the interests received from the buyers in the price list for the assessment. Therefore, the revenue issued show cause notice to the respondent. In their reply the respondent stated that the deposits from buyers were only to ensure return of the gas cylinders from the customers.
3. The Assistant Collector Central Excise, Visakhapatnam, by an order dated June 3, 1965 held that the respondent had to pay excise duty on the interest earned @ 18 per cent during the relevant period. He further held that since the respondent had suppressed this fact from the revenue, in the past five years, under Rule 8 read with Section 11-A of the Act, these are includible. He also included the rentals of these cylinders in the value. On an appeal, the Collector of Central Excise, Madras, upheld the said order with certain modifications.
4. Dissatisfied with the aforesaid, the respondents appealed to the CEGAT. In its order under appeal, the Tribunal observed, inter alia, as follows :

As regards charge on account of rental for the cylinders and the interest which

accrues on account of deposit receipts for the supply of gases in returnable cylinders, we are not persuaded that either of these charges is related to the cost of manufacture of the goods as such.

5. The Tribunal, therefore, under Section 4 deleted form the value, rentals for the cylinders and interest which accrued on account of deposit receipts for the supply of gases. Hence, this appeal by the Collector.

6. It is well settled that the levy under the Act, is on the manufacture. Under Section 4 (1) (a) of the Act, excise duty is chargeable on any excisable goods with reference to value, such shall, subject to the other provisions of this section, be deemed to be the normal price thereof, that is to say, the price at which such 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, where the buyer is not a related person and the price is the sole consideration for the sale. Here the sale is of the gases. The levy is on the manufacture of gases and the excisable goods are these gases.

7. The scope of Section 4 has been explained by this Court in *Union of India v. Bombay Tyre International Ltd.*, as well as the ramifications thereof in *Assistant Collector of Central Excise v. Madras Rubber Factory Ltd.* In the light of the aforesaid principles it has to be borne in main that the supply of gas cylinders is ancillary to the supply of gases but it is strictly not incidental thereto because there are classes of persons who can take delivery of these gases without supply of cylinders by the respondent and in those cases no question of charging rental nor interest on those deposits for cylinders, would arise. It is true that the gas being a commodity of peculiar nature, had to be delivered in cylinders but these cylinders might be supplied either by the supplier as an ancillary activity or brought by the consumer or purchasers at their own risk and cost. For purchasers taking it in their own cylinders supplied by them, there was no charge for them. This is not an activity for the manufacture of gases. This is ancillary to it but not incidental. Any income either in the shape of interest on deposits, notional or real, may be earned on the deposit for the safe return of cylinders, or any rental would be though ancillary but would not be the price for the manufacture. these might be profits or gains, if any, of any ancillary or allied venture. If that is the true position, then on the principle under section 4 (1) (a) of the Act, the Tribunal was right in excluding these two amounts while computing the value of the excisable goods.

8. Mr. A. K. Ganguli, learned counsel appearing for the revenue, sought to urge before us that there are two different classes of buyers, one class of such buyers was who used to bring their own cylinders and the others used to get their supplies through the cylinders of the suppliers. According to him, different rates for these two classes of buyers, in fact, constitute two different markets and are permissible. This, according to him, is contemplated under the first proviso to Section 4 (1) (a) of the Act, which reads as follows :

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a) be deemed to be the normal price of such goods in relation to each such class of buyers.

9. There may be different classes of buyers for different classes of goods. Section 4 (1) (a) of the Act emphasises that if the goods is of the same type, the prices should also be the same. the proviso to the said section postulates that where in accordance with normal practice such goods, namely, the

gases are sold to different classes of buyers then different prices may be charged. If gases had been sold to different classes of buyers at different rates, it is possible that there might be different markets for the same. But here the charges like rentals for the cylinders and the notional interest income, are for ancillary or allied services and that is not an activity of manufacture. Hence, Section 4 (1) (a) proviso can be of no avail to the revenue.

10. It is a case of two different suppliers. One is supply of gases and the other is incidental supply of cylinders for rent. In that view of the matter in our opinion the Tribunal was right in the view it took. The interest, notional or real, accruing on deposits for the safe return of cylinders as well as the rentals would not constitute part of the assessable value.

11. In the aforesaid view of the matter the order of the Tribunal needs no interference. The appeals, accordingly, fail and are dismissed. There will be no order as to costs.

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