M/S. Snow White Industrial Corporation, Madras

Vs

Collector of Central Excise, Madras

Civil Appeal No. 4159 of 1984

(Sabyasachi Mukharji, S. Ranganathan JJ )

28.04.1989.

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. This is an appeal under Section 35-L(b) of the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act') from the judgment and order of the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'the Tribunal') dated the 20th January, 1984.

2. The appellants are the manufacturers of `Supercem Waterproof Cement Paint', hereinafter called as the 'Product', and other allied products in their factory at Madras. They manufacture and market this product throughout India. It is stated that the appellants are a small manufacturing firm with no branches and/or sales offices in any other State, city or town. In these circumstances, an agreement for sale described as an 'agreement of Sale' dated 1st May, 1962 was entered into with Gillanders Arbuthnot & Co. Ltd., of Calcutta, hereinafter called `Gillanders'. The said company has a very big sales organization having its offices located at all important places in the territory of Union of India and they market goods of all types, not only of the appellants herein, but also of several other reputed manufacturers through their well staffed offices in all the States of India. The appellants vide their letters dated 23rd April, 1979 and 15th May, 1980 to the excise authorities, had claimed a refund of Rs. 2,39,153.63 on account of excess excise duty paid on the assessable value on the basis of price at which the Gillanders had sold the products to its customers, during the period July, 1977 to March, 1979. Both the Assistant Collector by his order dated 29th May, 1980 and the Collector by his order dated 24th March, 1981 rejected the contention of the appellants and held that the assessable value is the price at which Gillanders sold the goods.

3. The Tribunal in its order dated 20th January, 1984 referred to relevant clauses in the said agreement dated 1st May, 1962 and came to the conclusion that it was abundantly clear from the conditions that the title to and the ownership in the goods consigned to Gillanders was not to pass to them. According to the Tribunal a sine qua non of a sale is that the title should pass from the seller to the purchaser. When once that were not so, according to the Tribunal, then it was futile to contend that it was an agreement for sale. The Tribunal on an analysis of conditions of agreement, came to the conclusion that the true character of the agreement was that it was an agreement for sole selling agency and not an agreement for sale. The Tribunal also referred to the expression 'a related person' in the definition given by Section 4(4)(c) of the Act and held that Gillanders was a related person and, therefore, the assessable value of the goods for levy of excise duty must be on the basis of the price at which Gillanders ordinarily sold these in the course of wholesale trade less the transportation cost and other permissible deduction such as duty of excise and sales tax, if any, subject to proof. Aggrieved thereby, the appellants have come up in this appeal to this Court.

4. The first question that was canvassed and which requires to be determined is whether the agreement dated 1st May, 1962 is in agreement for sale or is one for sole selling agency.

5. In the said agreement, the appellants have been described as a partnership firm carrying on business at Madras and referred to as 'The Manufacturer' and Gillanders of Calcutta described as 'the Selling Agents'. The agreement, inter alia, stated that the selling agents had agreed to stock adequate quantities of the product for the purpose of sale thereafter. The manufacturer however agreed to accept return of all stocks held by the selling agents for a period of more than two years and replace such stocks free of all changes, provided the lids of the containers were intact and sealed. The agreement further stated that all consignments would be dispatched by the manufacturer at Railway risk. In case there was any damage or shortage in transit the selling agents would lodge a claim on the Railways, provided, however, that the manufacturer should take all suitable actions for recovery of the damages from the Railway authorities and should reimburse the selling agents all losses and damages that they might suffer in the premises. It was further agreed that in consideration of the premises, the manufacturer should pay the selling agents a discount, namely, 17 1/2% on the transfer prices of all materials supplied against the orders received from the selling agents from its offices at Calcutta, Kanpur, Delhi and Bombay; 18 per cent on the transfer prices of all materials supplied against the orders received from the selling agents from its Madras Office. It also provided for an additional cash discount of 1 1/2 per cent on the net transfer price, that is to say, transfer price less the discount specified above provided the selling agents paid the price of the goods supplied by the manufacturer within 30 days from the date of the bills by the manufacturer in respect of orders placed by the selling agents from its offices at Calcutta, Bombay, Madras and Delhi and within 45 days from the date of the bill by the manufacturer in respect of orders placed by the selling agents from it Kanpur office. It also provided for an additional turnover discount of 1 per cent on the transfer prices over and above the discount specified above provided the total sales calculated at the selling prices exceeded Rs. 4 lakhs per annum and 1 1/2 per cent on the transfer prices on such amount exceeding Rs. 4 lakhs per annum. In calculation of the turnover figure of Rs. 4 lakhs, the orders received by the manufacturer directly from the Government would not be taken into consideration. The manufacturer would normally, the agreement provided, expect the selling agents to pay all bills within 60 days from the date of such bills to the selling agents. The selling agents agreed to send to manufacturer the necessary 'C' Declaration Forms under the Central Sales Tax Act as quickly as possible in respect of sales made directly to the selling agents. The manufacturer further agreed to supply the selling agents with all necessary publicity materials and to advertise at their own cost at regular intervals through the media of the daily press, trade journals, government publications and cinema slides and in all such advertisements should mention that the selling agents were the sole selling agents of the products. The manufacturer also agreed to supply the selling agents reasonable quantities of sample free of charge. All expenses such as godown rent, transport charges, postal and telegram charges, bank commission etc., connected with the sales of the products, it was stipulated, would be borne by the selling agents. It was, inter alia, provided that the selling prices and transfer prices of the product would be mutually agreed to from time to time between the manufacturer and the selling agents. Current selling prices and transfer prices were set out in the schedule to the agreement. It was stipulated also that the selling agents might allow any discount to any dealer at their discretion. The manufacturer agreed to execute and dispatch orders to all dealers outside the State of Madras, provided firm instructions were received to that effect from the selling agents, to eliminate unnecessary handling charges. The agreement provided that in such cases, the manufacturer would credit the selling agents with their usual commission after deducting therefrom any discounts which might be allowed to the dealer on the specific instructions of the selling agents. The manufacturer further agreed to execute such orders against the guarantee of the

selling agents. In the case of direct orders to dealers outside the State of Madras, the selling agents might quote either FOR station of dispatch or destination terms. If the goods supplied by the manufacturer were found to be sub-standard goods or inferior in quality the manufacturer should at this own cost take back the goods and replace the goods of satisfactory marketable quality at its own cost. The manufacturer should not be responsible for failure to deliver or for any delay in delivery if such failure or delay was due to act of God or enemies of the State, wars, revolution, embargo, riots, civil or political disturbances, strikes, lockouts declared due to circumstances beyond the control of the manufacturer, shortage of labour, cut or failure of power supply or service, force majeure or any other cause beyond their control. The agreement, it was stipulated by clause 19 thereof, would remain in force for one year from the date of the agreement. But the parties had the right to terminate the agreement by giving three months notice in writing to either side. It was further stipulated that if the agreement was terminated whether by the manufacturer or by the selling agents, the manufacturer should accept return of all unsold stocks lying with the selling agents at their various branches and to reimburse the selling agents with the net value of such stocks at the transfer prices in force on the date of the termination of the agreement. There was arbitration clause and other clauses which are not material for the present purpose.

5. The Tribunal analysed the agreement and emphasised that Gillanders were described as sole selling agent of the product of the appellants throughout India. It also noticed that the appellants were to supply to the Gillanders with advertisement material. The Tribunal also noted the clause which provided that the stocks left over unsold beyond two years from their receipt with Gillanders could be returned to the appellants who were bound to replace these. The tribunal noticed that it was not the appellant who was to prefer claims for recovery of damages from the carriers. The Tribunal referred to the clause which stipulated that Gillanders were to promote sales of the product throughout India and were not to handle sales of any other material likely to conflict with the sales of the appellants' product. It noted that any reduction in price during the currency of the agreement was to be duly reflected in the price of stock lying unsold with Gillanders. Although, the appellants retained the right of sale directly to large Government consumers, Gillanders were to follow up such transactions and were to be paid an over-riding commission of 2 1/2 per cent. Where, however, Gillanders tendered for Government supplies and followed it up, they were to be paid a commission of 5 per cent. In all other cases, they were to earn a commission, described, however, as a discount and additional cash discount apart from total sales discount in case where total sales exceeded Rs. 4 lakhs, on the orders received from Gillanders. The Tribunal also referred to the clause which provided that on termination of the agreement by either party, unsold stocks lying with the Gillanders were to be returned to the appellants. On an analysis of the aforesaid aspects of the clauses, the Tribunal came to the conclusion that the title to and ownership of goods, continued with the appellants and did not pass to the Gillanders. In order to be sale, the title should pass from the seller to the purchaser for a price. If it is not so, the Tribunal noted, then it was not sale. The Tribunal came to the conclusion that it was an agreement for sole selling agency and not an agreement for sale. The question is whether the Tribunal was right on this aspect.

6. On behalf of the appellants, Shri P. P. Rao contended that it has to be emphasised that there was no flow back of the profit to the manufacturer and that was absent in the instant case. He also referred to the fact that there two prices - transfer price and selling price and there was good deal of different between these prices. He submitted that read in the proper prospective, there was no agency. He emphasised that there was stipulation for payment of sales tax and these were separately specified - one was described as selling agent and the second one the real purchaser.

7. It is well settled that in a situation like this, whether there was an agreement for sale or an

agreement of agency, must depend upon the facts and the circumstances and the terms of each case. Such facts and terms must be judged in the background of the totality of the circumstances. All the terms and conditions should be properly appreciated. It is also correct that though the appellants described the Gillanders as selling agent, but that is not conclusive. And it is also correct to state that the difference of the prices between the transfer and the selling prices is suggestive of an outright sale. In W. T. Lamb and Sons v. Goring Brick Company Ltd. ((1932) 1 K B 710), by an agreement in writing certain manufacturers of bricks and other building materials appointed a firm of builders' merchants "sole selling agents of all bricks and other materials manufactured of their works". The agreement was expressed to be for three years and afterwards continuous subject to twelve months' notice by either party. While the agreement was in force, the manufacturers informed the merchants that they intended in the future to sell their goods themselves without the intervention of any agent, and thereafter they effected sales to customers directly. In an action by the merchants against the manufacturers for breach of the agreement, it was held both by Justice Wright in the Trial Court and on appeal by the Court of Appeal, that the effect of the agreement was to confer on the plaintiffs the sole right of selling the goods manufactured by the defendants at their works, so that neither the defendants themselves nor any agent appointed by them, other than the plaintiffs, should have the right of selling such goods. In those circumstances, it was held that the agreement was one of vendor and purchaser and not of principal and agent. Lord Justice Scrutton was of the view that in certain trades the word "agent" is often used without any reference to the law of principal and agent. Lord Justice Scrutton was of the view that the words "sole selling agent" in the contract had a distinct meaning implying that the manufacturers were to sell to no one but the merchants who paid them the fixed price, and the merchants sold, and they were the only persons to sell, to various builders and contractors. Lord Justice Slesser was of the view that the agreement in the present case was somewhat difficult to understand, because in one and the same document the same parties were described as "merchants" and as "sole selling agents", the first being a correct, but the second one an incorrect description, according to the Lord Justice. It was held that the agreement was one an incorrect description, according to the Lord Justice. It was held that the agreement was one of vendor and purchaser. Referring to some of the contract terms in the instant case, Shri Rao submitted that in this case also, the terms referred to by the Tribunal and emphasised before us by Shri Mahajan, learned counsel for the respondent, were merely indicative of the fact that the parties described a 'purchase upon terms' as "sole selling agent". It was an agreement whereby the purchaser upon terms was described as "sole selling agent", submitted Shri Rao.

8. This Court had occasion to consider this aspect in Gordon Woodroffe & Co. v. Sheikh M. A. Majid & Co (1966 Supp SCR 1 : AIR 1967 SC 181 : (1967) 2 MLJ 66). In that case, the respondent was a trader in hides and skins and the appellant was an exporter. During the period January to August, 1949, there were several contracts between them. The Contracts mentioned that the appellant was buying the goods for resale in U. K. The price quoted was CIF less 2 1/2 per cent. The contracts also provided that time should be the essence of the contract, that the sale tax was on respondent's account, that the respondent was answerable for weight as well as quality, that there should be a lien on the goods for moneys advanced by the appellant, and that any dispute regarding equality should be settled by arbitration according to the customs of the trade in the U. K. The course of dealing between them showed that before the goods were shipped these were subjected to a process of trimming and reassortment in the godowns of the appellant with a view to make these conforming to London standards, that the goods were marked with the respondent's mark and that premium were paid to the respondent in case the goods supplied were of special quality. The respondent filed a suit on the original side of the High Court praying that an account should be taken of the dealings between himself and the appellant on the ground that the appellant was his

agent. The appellant's case was that there was an outright purchase of the respondent's goods and that the appellant was not an agent of the respondent. The trial Judge dismissed the suit. On appeal, the High Court held that the appellant acted as a del credere agent of the respondent and directed the taking of accounts. In appeal to this Court, it was contended by the appellant that the terms of the contracts and the course of dealing between the parties showed that the appellant was not the agent of the respondent but was an outright purchaser of the goods and that there was a settled account between the parties which the respondent could not reopen. This Court held that the appellant was the purchaser of the respondent's goods under the several contracts and not his agent for sale, and therefore, the view taken by the High Court was not correct. It was reiterated that the essence of sale is the transfer of the title to the goods for price paid, or to be paid, whereas the essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods, and the agent would be liable to account for the proceeds. On the terms of the contract and the course of dealing between the parties, the contract was not one of agency for sale but was an agreement of sale. The appellant purchased the goods from the respondent at 2 1/2 per cent less and sold them to the London purchasers at the full price so that the 2 1/2 per cent was its margin of profit and not its agency commission. This point was emphasised by Shri Rao as a point similar to the instant case. This Court held therein that the fact that the goods were sent with the respondent's mark, that the premium was paid outside the terms of the contract that the appellant considered it fair and just to pay the whole of the premium to the respondent or to share it with him, and that additional burden with respect to weight and quality was thrown on the respondent, had no significance in deciding the nature of the contract. This Court was also of the opinion that the clause with regard to lien was considered with the transaction being an outright sale, because the appellant was acting as creditor of the respondent and charged interest on advances only till the date of shipment of the goods when it became the purchaser of the goods from the respondent. It was held that an agent could become a purchaser when the agent paid the price to the principal on his own responsibility. This was another aspect which was emphasised in the facts of the present case by Shri Rao. In that case, however, before the goods were shipped to London, these were subjected to a process of trimming and reassortment in the godowns of the appellant with a view to make them conform to London standards. In that process, the defendants often called upon the plaintiff to replace the pieces found defective. If the defendants were merely acting as agents, this Court observed, the process of trimming and resorting in the godowns to make the goods conform to London standards and specifications would be unnecessary, for in that case the defendants were merely bound to ship the goods as these were delivered to them. Another important feature of the transaction was that in several contracts, time was fixed for delivery of the goods. This Court found that if the defendants were acting only as the agents for the sale, there was no reason why there should be a stipulation that time should be the essence of the contract. On behalf of the plaintiff, reference was also made to the fact that the contract provided for a lien on all the goods covered by the contracts for all moneys advanced by the defendants, including expenses incurred and interest thereon. But it was emphasised that in making such advances, the defendants were only acting as creditors of the plaintiff and were therefore, entitled to charge interest on such advances till they actually purchased the goods from the plaintiffs. The Court found that the primary object of the contract was that there was a purchase by the defendants from the plaintiff of the goods for resale in the U. K. and in keeping with that object, the buyer stipulated with the seller for delivery of the goods abroad and for that purpose adopted a CIF form of sale. This Court referred to the principle that an agent could become a purchaser when an agent paid the price to the principle on his own responsibility. Reference was made to the passage from Blackboard Wright, 'Principal and Agent', Second Edn., page 5, at page 10 of the Report, where it was stated that in commercial matters, where the real

relationship was that of vendor and purchaser, persons were sometimes called agents when, as a matter of fact, there relations were not those of principal and agent at all, but those of vendor and purchaser. If the person called an 'agent' was entitled to alter the goods, manipulate them, to sell them at any price that he thought fit after these had been so manipulated, and was still only liable to pay them at a price fixed beforehand, without any reference to the price at which he sold them, it was impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of principal and agent existed to this Court in that case.

9. Reliance was also placed on Tirumala Venkateswara Timber and Bamboo Firm v. Commercial Tax Officer ((1968) 2 SCR 476 : AIR 1968 SC 784 : 21 STC 312), where the concept of 'sale' in the background of the Andhra Pradesh General Sales Tax Act, 1957 was considered. At page 480 of the report, this Court observed that as a matter of law, there is a distinction between a contract of sale and a contract of agency by which the agent is authorized to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a court of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the delivery of the goods to a person who is to sell these, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship. Shri Mahajan, learned counsel appearing for the respondent, drew our attentions to Section 182 of the Indian Contract Act, and submitted that in the circumstances of this case, the clauses emphasised by the Tribunal clearly established that this was an agreement of agency and not a sale.

10. As mentioned hereinbefore, it depends on the facts and circumstances of each case to determine the true nature of the dealings between the parties. In the instant case the most important fact suggesting agency was the clause which enjoined that the stocks left over unsold beyond two years from their receipt could be returned to the appellants who were bound to replace these. Shri Rao, however, suggested that the appellants were manufacturing paint which was liable to lose its efficacy and quality after lapse of time and as the appellants were keen for its reputation, such a clause was inserted to ensure that the bad quality goods or stale goods did not, through Gillanders, go to the market and damage the reputation of the appellants. This should be considered with the fact that the appellants were to prefer all claims for recovery of damages from the carriers and any reduction in price during the currency of the agreement was to be duly reflected in the price of stock lying unsold with Gillanders and the obligation that on the termination of the contract by either the appellant or Gillanders, unsold stocks lying with the latter were to be returned to the former. In the aforesaid light we are of the opinion that the Tribunal was right in considering this agreement as the agreement for sole selling agency and not as an outright sale. If that is the position and that (sic) the first ground, in our opinion, taken by the Tribunal cannot be assailed.

11. Shri Rao had contended that the Tribunal was wrong in holding that Gillanders were related persons in terms of section 4(4)(c) of the Act. He submitted that the concept of 'having interest directly or indirectly in the business of each other' has to be judged independently of the transaction in question. He drew our attention to the various authorities for the proposition that the purpose of introduction of definition of 'a related person' by the Central Excise and Salt (Amendment) Act, 1973 to contend that the distributors have to be related and that such relationship ought to be found out independently of the transaction in question. Our attention was drawn to the observations of this Court in A. K. Roy v. Voltas Ltd. ((1973) 3 SCC 503 : 1973 SCC (Tax) 261 : (1973) 2 SCR 1089),

where at page 1093 of the Report (SCC p. 506), this Court noted that the appellants had contended that the agreements with the wholesale dealers conferred certain extra-commercial advantage upon them, and so, the sale to them were not sales to independent purchasers. Our attention was also drawn to the observations of this Court that decision cited before this Court in the above case were correct insofar as these held 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 manufacture had entered into agreements with them stipulating for commercial advantages. It was laid down that if a manufacture turer 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 agreement were made at arms length and in the usual course of business. This, however, Mr. Rao related only in explaining the state of law before the Amendment Act 22 of 1973.

12. Our attention was also drawn to the observations of this Court in Union of India v. Bombay Tyre International Ltd. ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347), where this Court explained the purpose of the introduction of 'related person' in the new Section 4(4)(c) and the transactions of related person covered under Section 4(4)(c) of the Act after amendment. In that context, it was contended that where there was such relationship independent of the transaction in question which conferred certain additional or extra-commercial advantage only on the persons involved in such relationship could be considered to be related persons. It was submitted that in the instant case that was not so. Our attention was drawn to the observations of this Court in Union of India and Others v. Atic Industries Ltd. ((1984) 3 SCC 575 : 1984 SCC (Tax) 217 : (1984) 3 SCR 930), at page 937 of the Report (SCC p. 579), where this Court held that on a proper interpretation of the definition of 'related person' in Section 4(4)(c), the words "relative and a distributor of the assessee" did not refer to any distributor but they were limited only to a distributor who was a relative of the assessee within the meaning of the Companies Act, 1956. So read, the definition of "related person" was not unduly wide and did not suffer from any constitutional infirmity. This Court explained the nature of relationship required by the person to have 'interest directly or indirectly in the business of each other' under Section 4(4)(c) of the Act. Our attention was also drawn to the observations of this Court in Collector of Central Excise v. T. I. Millers Ltd., Madras and T. I. Diamond Chain, Madras (1988 Supp SCC 361 : 1988 SCC (Tax) 347).

13. Having regard however to the fact that we have come to the conclusion that the Tribunal was right in holding that the transaction with the Gillanders was not a transaction of sale but an agreement for agency, there was, therefore, no sale in favour of Gillanders as contended for by the appellants. If that is the position, then the first sale was by the Gillanders to the customers of the market. Then the price of that sale would be the assessable value under Section 4 in this case. The decision of the Tribunal is, therefore, right in any view of the matter, and this aspect of the matter referred to by the Tribunal is not necessary for us to determine to dispose of this appeal. In that view of the matter, the decision of the Tribunal must be upheld.

14. Shri Rao, however, further submitted that there were certain other claims like cost of transportation and other permissible deduction such as duty of excise and sales tax, which should have been deducted from the value subject to proof by the appellants. Shri Rao submitted that apart from this, there were other permissible deductions as envisaged by this Court in Assistant Collector of Central Excise v. Madras Rubber Factory Ltd (1986 Supp SCC 751 : 1987 SCC (Tax) 115 : (1987) 1 SCR 846). It may be observed that apart from cost of transportation, excise duty and sales tax, other charges were not sought to be deducted by the appellants in the appeal and were not canvassed before the Tribunal too nor in the ground of appeal, there was any such claim. Shri Rao,

however, submitted that in view of the decision of this Court in Madras Rubber Factory's case (1986 Supp SCC 751 : 1987 SCC (Tax) 115 : (1987) 1 SCR 846), the appellants should not be denied the benefit of these deductions , if they are otherwise entitled to. Though, strictly speaking that is beyond the scope of the appeal in view of the contentions raised in the appeal before the Tribunal and in view of the grounds of appeal taken by the appellants before us, but in the interest of justice, we permit the appellants to have these benefits as finally settled by this Court in Madras Rubber Factory's case (1986 Supp SCC 751 : 1987 SCC (Tax) 115 : (1987) 1 SCR 846). We are informed that the said decision of Madras Rubber Factory (1986 Supp SCC 751 : 1987 SCC (Tax) 115 : (1987) 1 SCR 846), is under review in this Court. Therefore, we are of the opinion that subject to the order passed in that review matter, such deductions, as may ultimately be held to be deductible be permitted to the appellants upon proof. With these observations, the appeal fails and is accordingly dismissed with no order as to costs.

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