

# CALCUTTA HIGH COURT

National Tobacco Co. of India Ltd

Vs.

Collector of Central Excise

Matter No. 218 of 1958

(D.N. Sinha, J.)

05.02.1960

## ORDER

**D.N. Sinha, J.**

1. The petitioner in this case, the National Tobacco Co. of India Ltd., carries on the business of manufacturing cigarettes and tobacco at Agarpara, in 24 Parganas. As such manufacturer, it has to pay excise duty on the value of cigarettes manufactured by it. In this case, we are not concerned with anything else. The rate at which the excise duty is levied, changes from time to time, and it is unnecessary for me to go into the details thereof. It is sufficient to say that at the relevant time, which concerns the years 1955 to 1957, the duty was levied upon a slab system. For example, if the price was within a slab exceeding Rs. 10/- but not exceeding Rs. 15/- per thousand, then there was a particular rate of duty to be charged. If, however, the price was within the next slab, namely higher than Rs. 15/- but not exceeding Rs. 20/- per thousand, then the duty payable is very much more. It follows that if the price is even a few annas more than the maximum limit of the slab, the rate of duty becomes calculable at the higher rate. It is, therefore, to the interest of the manufacturer to keep the value within the lower slab, and it is always the headache of the Excise Authorities to ensure that this is properly calculated, so that the higher duty is not deliberately avoided. As is to be expected, in the case of a large-scale manufacturer like the petitioner, special arrangements have to be made for the levy of excise duty. Every day, thousands of cigarettes are produced and sold, and until a special machinery is set up, business could not be conducted. In this particular case, the procedure followed was as follows : The Excise Authorities maintain an office at the factory site. It is the practice of the petitioner to advise the Central Excise Authorities every quarter, in January, April, July and October, of the price structure of all brands of cigarettes produced by it. This is done by the issue of a quarterly consolidated price-list. This price-list is submitted to the Excise Authorities, who verify the same from the market and then issue a certificate. Even before a certificate is issued, a provisional approval is made, followed by the final certificate when the verification is completed. A

specimen copy of Such a certificate is annexed to the petition and marked as Exhibit 'A'. A specimen copy of the price-list issued by the petitioner company is Exhibit "B" to the petition. This is the form in which it was drawn up, up to the quarter beginning April, 1957. This price-list had 9 columns and gave details of (1) brand, (2) net assessable price, (3) duty, (4) distributor's commission, (5) distributor's selling price, (6) dealer's commission, (7) dealer's selling price, (8) retail price par packet and per tin and (9) remarks. At the hearing of this application, a point of dispute arose about the heading "distributor's selling price'. The question was whether it meant the price at which the distributor sold in the market to an independent buyer, or whether it was the price at which the company sold to the distributor. The application had to be adjourned for verification of this fact, and it is now admitted that the 'distributor's selling price" is the price at which the distributor sold to an independent buyer. Actually, all the nine headings are not very important for our purposes. An example would make this clear. The net assessable price of a brand of cigarette manufactured by the petitioner company namely 'personal preference', per thousand, was Rs. 66/7/- for the quarter beginning January, 1955. This was arrived at in the following manner: The distributor's selling price was shown as Rs. 83/5/-. From this had to be deducted the duty of Rs. 12/8/-, surcharge of Rs. 3/2/- and the distributor's commission of Rs. 1/4/- leaving a net assessable price of Rs. 66/7/- per thousand. As I have stated above, the company in its quarterly price-list set out the distributor's selling price, which was then verified by the Excise Authorities, and a certificate given; As a rule, however, a provisional sanction was given on the basis of the price-list, and the excise duty collected provisionally on that basis, and later on, any short-fall would be realized in accordance with law. This kind of price-list was not issued by the company until the quarter beginning July, 1957, when the form was suddenly changed. A copy of the new kind of price-list which then began to be issued by the company, is Exhibit 'C' to the petition. In this list, only six headings were shown, as follows : (1) brand, (2) net assessable price, (3) duty, (4) stockist's prices (5) retail price per packet and per tin and (6) remarks. It will be observed that the heading 'distributor's selling price' or the 'distributor's commission' have disappeared. At the hearing of this application, the meaning of this heading, "stockist's price" was again the subject matter of dispute. The application being adjourned, the matter was verified and it is now admitted that it means the price at which the company sells at a wholesale price to its stockists. According to the petitioner, this change in the price-list was made, because, for purposes of calculation of excise duty, the particulars given in the original price-list were too many, and many of the headings were completely unnecessary. According to the respondents this change in the price-list was deliberately effected, in order to avoid payment of excise duty. It is pointed out that the basis of calculation under Section 4 of the said Act, is not the price at which the company sells to its stockists or distributor as the case may be, but the 'wholesale cash price', that is to say, the price at which the goods are capable of being sold in a wholesale market, to an independent buyer. It is pointed out that the rate of calculation is on the slab system, and sometimes a difference of a few annas in the price made a vast difference in the calculation of the excise duty. It is said that an attempt has been made to make the sale appear well within the lower slab, although the wholesale cash price in an independent market is very much higher. Actually, this is the entire dispute in this particular case. Before I proceed to

consider the law on the subject, it is necessary to mention a few facts, which have led to the making of this application. I have already stated that the Excise Authorities are not prepared to accept the prices at which the company sold its goods to its stockist as the basis of calculation. On the 5th November, 1958 the Deputy Superintendent, Central Excise, wrote to the factory manager of the petitioner company as follows :

"It has been decided that henceforth all assessments of cigarettes should be made on the basis of the wholesale cash selling price at which the stockist or agents are selling the same to an independent buyer in an open market. The assessable value should be worked out by deducting general trade discount if any, declared and Central Excise Duties chargeable and other local taxes.

Accordingly you are requested to furnish such price-lists immediately for determining correct assessable values. An early action to this effect may please be taken, thereby enabling me to implement the aforesaid instructions for assessments with an immediate effect".

2. On the 7th November, 1958 notice was served upon the petitioner under rule 10 of the Central Excise Rules, 1944 demanding payment of the sum of Rs. 167072.40 nP. as Basic Excise Duty and Rs. 76574.85 nP. as Additional Central Excise Duty within ten days from the date of notice. The sums demanded were the differential Basic and Additional Central Excise Duty chargeable on 'No. 10' brand cigarettes cleared from the factory during the period 10-8-58 to 5-11-58 on account of short levy of Central Excise Duty, as established after final verification of prices, from the "local wholesale market'. On the 12th November, 1958 a notice of demand was issued, purporting to be under Rule 10A of the Central Excise Rules, 1944, upon the petitioner demanding payment of the sum of Rs. 616467.44 np, as Basic Central Excise Duty and Rs. 210492.15 np. as additional central excise duties within ten days from the date of the notice. Sums demanded are stated to be the differential Basic and Additional Central Excise Duties shareable on 'No. 10' brand cigarettes cleared from the factory during the period 1-10-57 to 9-8-58 on account of short-levy of Central Excise Duties, On the 13th November, 1958 a notice of demand was issued, purporting to be under Rule 10A of the Central Excise Rules 1944 demanding payment of the sum of Rs. 40726.48 n.P. as basic central excise duty and Rs. 16958.50 np. as additional central excise duty, within ten days from the date of the notice. Sums demanded are stated to be the differential Basic and Additional Central Excise Duties on several brands of cigarettes mentioned in the notice, cleared from the factory during various periods extending from 11-1-58 to 21-1-58 as mentioned in the said notice.

3. The only other fact I have to mention is that the company admittedly sells cigarettes to its Stockists, who are also called distributors, under an agreement, a copy whereof is annexed to the petition and marked as Ext. 'J'. The agreement shows that the stockists or distributors are not to be considered as agents of the company, but they are subject to a great many restrictions. For example, during the subsistence of the agreement, they were not to act as stockists, distributors,

dealers or agents of any competing manufacturer or dealer. They have to make periodical reports of their stocks, which must always be open to the inspection of the company and they are to sell to dealers and retailers charging only the prices fixed in that behalf by the company, which price the company may change from time to time at its absolute discretion. Such agreements are terminable upon giving one month's notice on either side. In view of the facts mentioned above, it is now possible to pin-point the actual dispute between the parties. As a matter of fact, the company manufactures its cigarettes at its factory at Agarpara. It has a number of stockists in Calcutta. I have been informed that actually there are only two stockists. According to the petitioner, the wholesale cash price at which it sells to its said stockists in Calcutta, is the wholesale cash price to be considered under Section 4 of the said Act. According to the respondents, such is not the case. Whatever may be the argument put forward, by and on behalf of the respondents before me at the hearing of this application, it must not be forgotten that the respondents declared the principle upon which the assessment was to be made, in the letter dated 5th November, 1958 the material portion of which I have set out above. According to that letter, the assessment should be made on the basis of the wholesale cash selling price at which the stockists or agents are selling to an independent buyer in an open market. I must presume that this is the basis on which the calculations have been made, for purposes of assessment and the issue of the demand notices. On behalf of the petitioner; the learned Advocate General has taken three points. The first is that the method of calculation envisaged in the letter dated 5th November, 1958 is wrong in law and violative of the provisions of Section 4 of the said Act. The Second point is the point of limitation. With regard to the first notice under Rule 10 dated 7th November, 1958 no objection as to limitation is taken. It is stated, however, that the other two notices have been wrongly issued under Rule 10A of the Central Excise Rules of 1944 because the proper rule applicable would be Rule 10; and as such, they are barred by limitation. The third point that has been taken is that the abrupt change in the matter of assessment that was effected by the Excise Authorities, was done without any notice to the petitioner and without telling it as to the reason why the stockists' price was not to be considered as the wholesale cash price under Section 4 of the Act, and thus the petitioner company had no opportunity of making any representation, but was suddenly confronted with demands for large sums, and that this was not in conformity with the Rules of natural justice.

4. In my opinion, both the parties have proceeded on a wrong footing and upon an incorrect interpretation of Section 4 of the Act, which I shall now proceed to consider. The relevant part of Section 4 which we have to consider runs as follows :

"4. Determination of value for the purpose of duty. Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be -

(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 for delivery at the place 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

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is 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, any other place nearest thereto.

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 the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid".

5. In this case, the matter comes within Sub-Section (a), because it is nobody's case that the price is not ascertainable. It is, therefore, necessary to see as to what that Sub-Section lays down. 'It is apparent that the first point to be considered [is the place at which the wholesale cash price is to be determined. The 'wholesale price', means the price which a wholesale dealer and not a retail dealer charges for his goods, when he sells them in wholesale units. These wholesale units may be different for different classes of goods, and at different places, and have to be determined with reference to the practice of the trade at the place-where the wholesale value is to be determined. Coming to the location where the wholesale cash-price is to be determined, the first location to be considered is the factory or any other premises-where it is manufactured or produced for delivery for manufacture or production. The point of time at which the calculation must be made is the point of time when the goods are removed from the said location. If the provisions of the Sub-Section stopped here, then it is obvious that all we had to do was to find out at what rate the manufacturer sold or could sell, for a wholesale cash price, goods at the location above named. But the sub Section lays down a further restriction. It is only when a wholesale market exists at the location, for the particular article in question, that such calculation is permissible. The word 'wholesale market' must mean a place where the article in question is habitually sold to anybody who wishes to make a purchase or sale. It is equally obvious that just because a factory manufactures the articles at a particular place, and sells them there to its stockists or dealers, will not by itself convert it to a wholesale market. Whether it is a 'wholesale market' at that location would depend upon a variety of questions, namely as to whether goods were really being sold wholesale, and as to whether anybody wishing to purchase the goods could do so at the location. Doubtlessly, this is what is intended by the Excise Authorities while using the expression 'independent buyer'. If a manufacturer sells to a restricted number of stockists at the location, subject to special conditions, it does not follow that there exists a wholesale market at such a location. Now if there is no wholesale market at the location then the location to be considered is the nearest place where such a market exists. Whether a wholesale market exists at a certain place is a question of facts to be determined upon a consideration of the factors indicated above. The point to be remembered here is that this particular wholesale market, which is to be considered, must not be any wholesale market, but the market which is situated at the 'nearest

place', that is to say a place nearest to the factory or premises for manufacture or production for delivery etc., where such a wholesale market exists. Not only is the location to be considered from this point of view, but it must be carefully remembered that one of the most essential things to be considered is that at that wholesale market, must be sold, the same goods or goods of the like kind and quality. Then again, even if there is no actual sale of such goods, it would be sufficient to establish that at such a wholesale market, such goods were capable of being sold. Finally, another most important thing to be considered is that it will not do to go p to such a wholesale market and calculate the wholesale cash price at any time. It must be calculated with reference to the time when the goods are removed from the factory or the place of manufacture or production for delivery etc.

6. The calculation, therefore, is dependent on various factors and is by no means a simple affair- Let us now come to the letter dated 5th November, 1958 the relevant part whereof has been set out above, and which contains the principles upon which the excise authorities have based their calculation and/or propose to base their calculation. The first thing that appears clear is the fact that the authorities are not willing to accept the price at which the company sells to its stockists, as the wholesale cash price mentioned in Section 4. To this extent, the excise authorities are more correct and the stand taken by the petitioner company cannot be accepted. The sale by the company to a few stockists, either at the factory, or in Calcutta which is stated to be the nearest wholesale market, by virtue of an agreement containing restrictive covenants, cannot by itself satisfy the provisions of Section 4. That stand must be rejected at once. Rut on the other hand, the principle enunciated by the Excise Authorities in the letter dated 5th November, 1958 is not wholly in conformity with the provisions of Section 4, which I have explained above. In that letter, it has been definitely laid down that the basis should be the wholesale cash selling price at winch the stockists or agents are selling the same to an independent buyer in "an open market'. It does not follow the wordings of Section 4. 'An open market' may be a market which may not be a wholesale market at all or it may be a wholesale market which does not deal with the article in question or articles of a like kind and quality, or it may not be a wholesale market which is nearest to the place where the factory is situated or the place of production for delivery etc. According to the letter it is sufficient if it is 'an open market' which means as open market situated in any part of the country. Then again, the wholesale cash price for the articles and/or goods of a like kind, have to be calculated at a point of time when the goods are removed from the factory and not at a later date when the Stockist sells to dealers etc. but this is not followed in the letter. In my opinion, the principles of calculation for assessment set out in the letter dated 5th November, 1958 are not correct, and would not lead to a proper assessment. In my opinion therefore, the interpretation made by both the parties is wrong and the proper method of calculation should be as follows : The determination of excise duty in terms of Section 4 of the Act, depends on the determination of the value for the purpose of duty, for the calculation of which there are three factors, which are as follows :

1. The location where the calculation is to be made.

2. The time at which the calculation should be made.
3. The method of calculation. These headings may be explained as follows :
  1. The location where the calculation is to be made.
    - (a) The location is the factory, or any other premises of manufacture or production for delivery at the place of manufacture or production, if there is a wholesale market at such a location, for the sale and purchase at a wholesale cash price, of the goods in question, or goods of the like kind and quality. "Wholesale price' means, the price which a wholesale dealer and not a retail dealer charges for his goods, when he sells them in wholesale units. What will constitute a 'wholesale unit' will have to be determined with reference to the practice of the trade at the place where the goods are sold. A 'wholesale market' is where goods in question, or goods of a like kind and quality, are sold or are capable of being sold to an independent buyer, meaning thereby, any one who intends to effect such, a purchase or sale, upon payment of the proper price, without restriction.
    - (b) If there is no wholesale market at the site of the factory, or any other premises of manufacture or production for delivery at the place of manufacture or production, then the nearest wholesale market to such a place, where such a market exists.
  2. The time at which the calculation should be made. The time at which the calculation is to be made, is the time of the removal of the article from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production. If a wholesale market exist at the site of the factory, or premises of factory, or premises of manufacture etc., then the determination of the time-element is very simple. But where there is no wholesale market at the site of the factory or the place of manufacture etc., a calculation has to be made, at the location of the nearest wholesale market. In that event, the calculation must be made at a point of time when the goods were removed from the factory or premises of manufacture etc., which means a determination of the wholesale cash price that the goods would have fetched at the nearest wholesale market at the time of such removal etc. If there is no wholesale market, at the site of the factory and/or place of manufacture etc., and if at the time of removal no actual transaction can be discovered at the nearest wholesale market, then the excise authorities must investigate and discover the nearest transaction in point of time. This however will be permissible only when the next transaction takes place at a short distance of time, otherwise a notional calculation will have to be made as to what the wholesale cash price would have been in such a wholesale market, at the requisite point of time, for the goods in question, or goods of similar quality. In other words, what will have to be determined is as to what would be the wholesale cash price that such goods would have fetched in such a wholesale market, at or about the time when the goods were removed from the factory and/or premises of manufacture or production etc.
  3. Method of calculation.

I have already stated above that the determination of value for the purpose of duty, is based on the wholesale cash price for which the article in question, or an article of the like kind and

quality, is sold or is capable of being sold, at the time and at the location above-mentioned. I have also mentioned above what is meant by a 'wholesale market' and 'wholesale price', and how the calculation is to be made. It must be remembered that in this case I am only interpreting Sub-Section (a) of Section 4 of the Act and not Sub-Section (b), which deals with the case where the prices are not ascertainable. As the goods manufactured by the petitioner company have a wide market, it is not suggested by anyone that there is no wholesale market for them and that the wholesale cash price is not ascertainable.

7. These being the tests to be applied, it is easy to see that the stand taken by the petitioner company, namely that the value to be considered is the wholesale price at which it sells to its stockists at Calcutta, cannot be accepted. Firstly, Calcutta may or may not be the location to be considered, because the location must be determined after considering the factors above mentioned. Secondly, a sale to one or two stockists, at a price arbitrarily fixed by the company, is not necessarily the wholesale cash price that can be obtained at a wholesale market, located in accordance with the principles, mentioned above. The essence of the determination of the wholesale cash price for a wholesale market is that, it must be an open market or a 'market overt', where any purchaser willing to purchase or sell the same goods or similar goods would be able to operate. This precludes any artificial or arbitrary price put on excisable goods by the manufacturer. It is to be remembered however that the excise authorities must use a great deal of circumspection in such matters. The determination as to whether a wholesale market exists at the site of the factory or the premises of manufacture or production etc., or which is the nearest wholesale market, or the price at which the goods or goods of like kind and quality are capable of being sold must necessarily be a complicated question, and must be determined carefully upon evidence, and not arbitrarily. Such determination cannot wholly be made ex parte, that is to say, behind the back of the assessee. A satisfactory determination can only be made by giving all information to the assessee and after giving the assessee an opportunity of establishing his own point of view, or checking and/or challenging any material or evidence upon which the excise authorities wish to depend. As I have pointed out above, the principles followed by the excise authorities in this case cannot also be supported. The principles embodied in the letter dated 5th November, 1958 quoted above do not accurately lay down the principles to be followed. In so far as it rejects the price at which the petitioner company sells to its stockists, the stand is justified, for reasons given above. It does not however follow that the calculation can be made on the basis of the wholesale cash selling price at which the stockists or agents are selling the same to an independent buyer. Such a sale may not be either in the necessary location or at the necessary point of time, and the method of calculation would then be wrong and not in consonance with the method of calculation laid down in Section 4 of the Act. If the excise authorities depend on any price-list issued by the company, it should be made plain that such price-list should be drawn up in accordance with the principles mentioned above, otherwise such a price-list cannot form the basis of assessment. Although the first calculation and the determination, of the location etc., will be a complicated one once the location is determined and the method of calculation above-mentioned followed, the complexity would disappear for future calculation, although careful statistics of

market prices must be maintained. This disposes of the first point argued by the learned Advocate General. It is clear that the calculation that has been made by the Excise authorities, upon which the demand notices are based, must be set aside and/or quashed. In view of this, both the parties have requested me not to deal with the point of limitation at present, but keep the point open, to be canvassed if and when an assessment has been made upon the proper basis and the correct figures are known. I think this is a reasonable course to adopt. Coming now to third and the last point, namely, a violation of the rules of natural justice, I have already pointed, out above, that the determination of value for the purpose of duty, to be made under Section 4, involves, or might involve, complicated factors, and a determination could only be done after gathering materials or evidence upon which alone the calculation, can be based. Obviously, this cannot be done wholly behind the back of the assessee. The evidence upon which it has proposed to rely should be disclosed to the assessee and although the proceedings are not to be considered as akin to a judicial trial, the rules of natural justice must be observed, and the assessee must be given proper opportunity of testing the materials upon which the authorities wish to rely, and of providing materials on their own behalf.

8. For the reasons aforesaid, this Rule must be made absolute and the assessments already made, upon which the demand notices were issued under Rule 10 or 10A must be quashed and/or set aside by a writ in the nature of certiorari and there must be issued a writ in the nature of mandamus, directing the respondents not to take any further proceedings based on the said notices, unless a proper assessment has been made. Nothing in this order will prevent the respondents from proceeding to take any steps that may be necessary for such assessment, or for the realization of the revenue in accordance with law. As I have stated above, the point of limitation has not been decided by me in this case and is kept open.

9. There will be no order as to costs.

Rule made absolute.