

CALCUTTA HIGH COURT

Collector of Central Excise

Vs.

Shankarlal Agarwalla

A.F.O.O. No. 177 of 1966

(Sinha, C.J. and Arun K. Mukherjea, J.)

11.05.1967

JUDGMENT

Sinha, C.J.

1. The facts in this case are shortly as follows : The respondents carry on business in co-partnership as manufacturers of rubber and canvas goods including shoes, under the name and style of Olympia Rubber Works, at No. 10. Pay mental Garden Lane in Calcutta. Under the Finance Act 1954 foot-wear is dutiable under the Central Excises and Salt Act, 1944 (hereinafter referred to as the "said Act") at the rate of 10% ad valorem. How the valuation is to be determined for the purpose of calculating duty appears from section 4 of the said Act. the relevant part whereof is set out below :

"(4) Determination of value for the purpose of duty.

(a) Where under this Act any article is with duty at a rate dependent on the value of the article such value shall be deemed to be 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 of 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."

This section came to be construed by me in the case of *National Tobacco Co. of India Ltd. v. Collector of Central Excise*¹, The learned Judge in the court below has relied upon

¹ AIR 1961 Cal 477

it and Mr. Roy Choudhury for the appellant does not dispute its correctness. Briefly speaking, the procedure should be as follows :- "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, in a wholesale market. These wholesale units may be different for different classes of goods at different places. First, we must determine the location where the wholesale cash price is to be determined. The word "wholesale market", means a place where the article in question is habitually sold to anybody who wishes to make a sale or purchase at. wholesale prices. Normally, the wholesale price to be taken into account, would be the wholesale price in the nearest wholesale market. It is not that a factory cannot be a wholesale market, if it can be shown that goods are habitually sold there at wholesale rates to every one who wishes to sell or purchase. But the mere fact that a factory manufactures the articles at a particular place and sells them there to its stockists- or dealers will not by itself convert it into a wholesale market. What would be the location of the nearest whole-sale market and the particular wholesale price for a specified class of goods must be determined upon the facts of each case. If the precise goods, in question are not sold in the nearest wholesale market, then it might be necessary to consider the price of goods of like kind and quality. Lastly, if no actual sale of those goods is discernible in any market within reasonable proximity, it might be sufficient to establish that such goods were capable of being sold at such prices in the nearest wholesale market. So far as the time is concerned, the calculation must be made with reference to the time when the goods are removed from the factory or the place of manufacture or production for delivery.

2. Before I come to the precise points that have arisen in this case, it will be necessary to state a few more facts. According to the rules, before removing the goods from the factory, manufacturers have to make a return in a form known as the A1 form. Strictly speaking, goods cannot be removed before assessment is made and the duty paid. Under certain conditions a provisional assessment is permissible. Also, instead of paying in cash on every occasion, the manufacturer may open an account current with the Excise authorities which is credited or debited as the case may be on each occasion and then the account is periodically adjusted. These provisions will be considered in greater detail on the question of limitation which has been raised. In practice, what happened is that, in order to facilitate the rapid removal of the goods, the respondents in their said business made up a consolidated price list from time to time and the Central Excise authorities approved of the same. Goods were allowed to be removed upon an assessment made on the strength of the consolidated price lists. Unfortunately, these assessments do not conform to the conditions laid down in the rules for a provisional assessment. Even if it was unintended, the result is that the assessments are in a form which cannot but be declared as final assessments. As will appear shortly, this has given rise to a very serious question of limitation. The respondents were served with the following notices of demand purported to be under Rule 10-A of the Central Excise and Salt Rules, 1944 (hereinafter referred to as the "said Rules") :

Date

Amount

(1) Date of notice 28th Rs. 1,234.68 nP for short levy during the period 1st October 1957 to Jan. 1958 31st December 1957.

- (2) 18th March 1958 Rs. 497.40 nP. for short levy during the period 1st Jan. 1958 to 31st Jan. 1958.
- (3) 18th July 1959. Rs. 17,233.95 nP. for short levy for the period 4th June 1958 to 27th September 1958.
- (4) 18th July 1959. Rs. 2,160.03 nP. for short levy for the period 17th December 1958 to 3rd June 1958.

3. Before we come to the question of limitation, I shall first of all deal with the question of valuation for the purpose of assessment under Section 4 of the said Act. I have already stated that the method of calculation is to locate the nearest wholesale market and then to find out the wholesale cash price in such a market, at the time of the removal of the article from the factory, for delivery. In this case what happened was that upon an inspection of the books and documents of the respondents it was found that the respondents sold their entire product of footwear to a partnership firm called Messrs Santlal Bansidhar and they in their turn sold the goods to other wholesalers. The case for the appellants is that Messrs Santlal Bansidhar are the sole selling agents or distributors of the respondents and that the sale to them cannot be considered as a sale in the wholesale market. Their case is that Messrs, Santlal Bansidhar sold their goods to other wholesalers selling in the wholesale market and this denotes the real whole sale price. On the other hand, the case of the respondents is that Messrs. Santlal Bansidhar were not the agents of the manufacturer, but independent dealers and the sale to them represented a sale in the nearest wholesale market and the price paid by them were the wholesale prices on the basis of which, duty was chargeable. The point in dispute is therefore, a very short one. According to the respondents the price to be taken is the price at which the respondents sold the goods to Messrs. Santlal Bansidhar. On the other hand, the case of the appellants is that the price that is to be considered is the price at which Messrs. Santlal Bansidhar sold to other wholesalers. The case of the appellants is that Messrs. Santlal Bansidhar are the sole selling agents or distributors of the respondents. It is pointed out that the respondents are closely related to the partners of Santlal Bansidhar. The relationship is as follows : The respondents are the two sons of Bansidhar Agarwalla since deceased and they constituted a partnership carried on under the name and style of Bansidhar Sankarlal Agarwalla, who are the owners of Olympia Rubber Works, the manufacturer of the goods. Sm. Ganga Debi, widow of Bansidhar Agarwalla, the mother of the respondents together with another son of Bansidhar form a partnership carried on under the name and style of Messrs. Santlal Bansidhar. At least they have a major share therein. The suggestion is that the sales to Messrs. Santlal Bansidhar constituted a domestic arrangement, calculated to keep the price down and Messrs. Santlal Bansidhar were nothing but the agents of respondents. Therefore, it is the sales made by them that are to be considered as sales in the open market and not the alleged sale made to them by the manufacturers. Our attention was drawn to Ext. A, annexed to the supplementary affidavit of Sunit Narayan Basu. Inspector of Central Excise, Calcutta and Orissa Collectorate affirmed on 14th August, 1961 appearing at pages 60 to 71 in Part I Vol. II of the paper book, where a comparative chart is given as to the prices at which goods have been sold to Santlal Bansidhar and the prices at which Santlal Bansidhar sold them to other wholesale dealers. It appears that in all these sales, there is a regular difference of about Rs. 2 in each transaction which does raise a great deal of suspicion in our mind. So far as the learned Judge in the Court below is concerned, he has come to the definite conclusion that it has not been proved that the place where Santlal Bansidhar carried on business and where they are said to

have sold the good was a market by itself, far less the nearest wholesale market. It has been held by the learned Judge that this fact was not admitted by the petitioners before him and it was not proved. Next the learned Judge proceeds to hold that Messrs. Santlal Bansidhar cannot be treated as a sole selling agent or stockist of the petitioners before him. although they have been purchasing almost the entire output from them and consequently the prices charged by Messrs. Santlal Bansidhar were irrelevant in considering the computation of duty. So far as the location of the wholesale market is concerned, I do not see how the learned Judge has held that there was no admission on the part of the respondents that the place of the business of Messrs. Santlal Bansidhar is the nearest wholesale market. In fact, there is an express admission to that effect contained in paragraph 10 of the affidavit-in-reply affirmed on behalf of the respondents on the 12th day of May, 1960, copy whereof is set out at pages 46 to 50 in Part I Vol. I of the paper book Paragraph 10 is set out below :-

"With reference to paragraph 11 of the said affidavit we deny that Messrs. Santlal Bansidhar are the sole selling agents or agents at all or the distributors or stockist of the petitioners. The prices at which the petitioners have sold the goods to the said Santlal Bansidhar are the correct wholesale cash prices envisaged in Section 4 of the Central Excises and Salt Act 1944. The nearest wholesale market from the place of manufacture of the goods is at Chitpur Road where the said goods have been sold in the wholesale market to the said Santlal Bansidhar. The sales in dispute made by the petitioners to the said Santlal Bansidhar were all out and out sales and the petitioners were and are in no way concerned with the prices at which the said Santlal Bansidhar sold to their purchasers. No benefit has ever accrued to the petitioners from sales by Santlal Bansidhar to their retailers nor have the petitioners ever been liable for any loss that may have arisen therefrom to the said Santlal Bansidhar."

4. It is somewhat strange that the business premises on Chitpure Road of Messrs. Santlal Bansidhar should be considered as the nearest wholesale market. But we have a clear admission to that effect on behalf of the respondents. What then is the position ? Is it possible, upon the materials placed before us to come to a conclusion as to whether the price paid by Messrs Santlal Bansidhar to the manufacturers is the correct wholesale price or is it the price that they have in their turn charged their purchasers? In my opinion, this is a strongly disputed question of fact, which is not possible to be determined in this jurisdiction and no attempt should be made to decide this issue without taking evidence. The facts alleged on behalf of the appellants raise strong suspicion. Messrs. Santlal Bansidhar belong to persons closely related to the respondents. The sales are made to them at a lower price, which is invariably in the neighbourhood of a margin of Rs 2. But while suspicion is raised, that is not proof. I do not think that any attempt should be made to determine such an issue in the writ jurisdiction. This, however, affects the respondents rather than the appellants because it is the respondents who filed the application under article 226 in the Court below and if it involves a matter which cannot be appropriately determined in this jurisdiction, it is they who must fail, leaving recourse to other forms of legal action open to them. This court has laid down a method for determining the value for purposes of assessment under Section 4 of the said Act. If the Excise authorities violate those principles, relief must be given. But if they try to follow those principles and there is a dispute as to facts which arise upon investigation, then in the absence of mala fides, it does not seem to be a matter

which can be agitated or settled in the writ jurisdiction in our opinion, the finding of the learned Judge upon this point cannot be supported. I next come to the point of limitation. The question of limitation arises in the following manner : The levy and refund or exemption from duty is dealt with in Chapter III of the Central Excise Rules, 1944 (hereinafter referred to as the "said rules") Rule 7 deals with recovery and provides that every person who produces or manufactures any excisable goods shall pay the duty or duties leviable on such goods at such time and place and to such persons as may be designated in, or under the authority of the said Rules Rule 8 deals with the power of the authorities to exempt from payment of duty in special cases Rule 9 provides that no excisable goods shall be removed from any place where they are produced or manufactured until the excise duty leviable thereon has been paid upon presentation of an application in proper form and obtaining the permission of the proper officer it also provides for opening of an account-current to be operated in certain cases to facilitate removal. Then we come to "provisional assessment" which was covered by 10B now substituted by Rule 9B as and from the 1st of August 1959. The two Rules are however, substantially the same. In this case we are concerned with Rule 10B which is set out below :-

"10B-(1) Notwithstanding anything contained in these rules.

(a) where the owner of any excisable goods makes and subscribes a declaration before the proper officer to the effect that he is unable for want of full information to state precisely the real value or description of such goods in the proper forms or

(b) where the owner of any good has furnished full information in regard to the real value or description of the goods, but the proper officer requires further proof in respect thereof

(c) where the proper officer deems it expedient to subject any excisable goods to any Chemical or other test, the proper officer may direct that the duty leviable on such goods may, pending the production of such information or proof of pending the completion of any such test, be assessed provisionally.

(2) When the owner of any goods in respect of which the duty has been assessed "provisionally under sub-rule (1) has paid such duty, the proper officer may make an order allowing the goods to be cleared for home consumption or for exportation, as the case may be and such order shall be sufficient authority for the removal of such goods by the owner."

5. Now we come to two important Rules which deal with the recovery of charges short-levied. These two Rules, are Rules 10 and 10A and are set out below :-

"10 Recovery of duties or charges short-levied or erroneously refunded. When duties in charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity description or value of such goods on the part of the owner or when any such duty or charge after having been levied has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge so short-levied or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case written demand by the proper officer being made within three months from the date on

which the duty of charge was paid or adjusted in the owners account-current, of any or from the date of, making the refund.

10-A. Residuary powers for recovery of sums due to Government. Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

6. The point of limitation arises in the following manner : I have already mentioned above that the practice followed was that from time to time the respondents issued a consolidated price-list which was confirmed by the appellants after investigation. Thereafter, goods were allowed to be taken out upon an application in A R. 1 from upon which an endorsement was made, showing the assessment if this assessment is a final assessment then Rule 10 applies and the period of limitation is three months from the date on which there was a short-levy or from the date when an adjustment was made in the account-current. It is not disputed that in the present case, if the assessments were final assessments then a certain portion of the claim is barred. What is urged is that all the assessments were provisional assessments, inasmuch as they were done in order to facilitate removal and the price was not finally determined by investigation in the nearest wholesale market. In the alternative, it is urged that the matter is governed by Rule 10A. In this particular case, the respondents were called upon to execute a bond in terms of the proviso to Rule 10B(2) on 22nd May, 1958. Therefore, the assessments subsequent to that are clearly provisional assessments. But assessments prior to it, are not provisional assessments, but final assessments. The reason is that, for a provisional assessment there are certain pre-conditions which are set out in Rule 10B(1) above Prior to the execution of the bond, these pre-conditions were not satisfied and the circumstances were similar to the facts in the case of AIR 1961 Calcutta 477. That the assessments prior to 22nd May, 1958 were not provisional assessments is clear from the endorsement of the Excise authorities. The learned Judge in the court below gave illustrative example which runs as follows :

"Checked with approved price list No.of 19 and duty and discount assessed accordingly. Further the petitioners not having had asked for clearance of the goods and provisional assessment under Rule 10B at any time prior to May 22, 1958 and not having had executed a bond in respect of such clearances under Rule 10B(2) proviso and further the respondents themselves not being in doubts about the value at the time of assessment and not having had themselves called for further evidence in proof of the real value, the story of provisional assessment prior to May 22, 1958 must be negated. I need not concern myself with the Justification of the demands of any, under rule 10A of the Central Excise Rules, because that power has not been invoked. Nor need I concern myself with the provision of Rule 9B, which did not come Into operation before August 1, 1959."

7. It is clear, therefore, that prior to 22nd May 1958 assessments were not provisional assessments. Mr. Roy Choudhury has frankly stated in court that the matter is at present covered by the National Tobacco Co.'s case, AIR 1961 Calcutta 477 and at the moment he had no fresh

arguments to offer.

8. The result is that in regard to the four notices that have been issued, a portion is barred and the rest is not barred. I set out below the detailed particulars of the period covered by the said notices which are barred and which are not barred :

	"Date of notice	Period	Barred	Not barred.
1.	28-1-58	1-10-57	1-10-57	28-10-57
		to	to	to
		31-12-57	27-10-57	31-12-57
				(notice within three months).
2.	13-8-58	1-1-58		Entire
		to		(notice within three months),
		31-1-58		
3.	18-7-59	4-6-58		Entire
		to		
		27 -9-58		(Provisional assessment covered by Bond).
4.	18-7-59	17-12-56	17-12-56	22-5-58
		to	to	to
		3-6-58	21-5-58	3-6-58
				(Provisional assessment covered by Bond)."

The final position therefore, is as follows : So far as items that are barred, we agree with the view of the court below that this application should succeed and that the appellant should be restrained from recovering the said amount. With regard to that portion which is not barred, we are unable to agree with the finding of the court below in our opinion this portion cannot be the subject matter of a writ application. So far as this application is concerned, it ought to be dismissed in respect of that part of claim which is not barred, without prejudice to the rights of the respondents to agitate the matter in proper proceedings.

9. For the reasons set out above the order will be that the appeal succeeds in part and that the part of the order which relates to the portion, which is not barred, is set aside and the application dismissed in respect thereof and the Rule discharged. The finding of the court below in respect of that portion which is barred, is upheld and the appeal is dismissed.

10. There will be no order as to costs.

Arun K. Mukherjea, J.

11. I agree.

Appeal dismissed.