

MYSORE HIGH COURT

Amco Batteries (P) Ltd

Vs

Assistant Collector

Writ Petn. No. 174 of 1961

(K.S. Hegde and Mir Iqbal Husain, JJ.)

12.10.1962

JUDGMENT

K. S. Hegde, J.

1. In this petition, under Articles 226 and 227 of the Constitution of India, the petitioner prays for a Writ of Certiorari, or any other appropriate Writ or Order, quashing the levy made by the First Respondent on 16-11-1959 as well as the Order of the Second Respondent in appeal made on 14-10-1960.

2. The petitioner is a Private Limited Company manufacturing Electric Batteries. The Company was started in 1955. Its factory as well as its office (both housed in the same building) is located just outside the limits of Bangalore City.

3. The facts found by the Assistant Collector of Central Excise, Bangalore, and affirmed by the Collector of Central Excise, Bangalore, and not disputed in the affidavit filed in this Court by the petitioner, are as follows : The petitioner (Messrs. Amco Batteries Limited, Bangalore) manufactures Electric Storage Batteries under three trade marks, i.e. "Amco", 'Oakes' and 'Speed'. "Amco" Batteries are marketed through a network of distributors, about fourteen in number, each of whom is the sole distributor for a specified zone in India : Messrs. Addison and Company (P) Limited, Bangalore, are the distributors for the Mysore State and parts of Andhra. Messrs Addison and Company, (P) Limited, Madras, are the distributors for the areas comprised in the old Madras State and also areas included in the former States of Cochin and Travencore. The Addisons and Company, Bangalore and Madras consume a major portion of the output of Amco Batteries. "Oakes" Batteries are manufactured by the petitioner, solely for Messrs. George Oakes (P) Limited, Bombay. The latter market these Batteries in Bangalore through Messrs. George Oakes (P) Limited, Bangalore. Messrs. George Oakes (P) Limited, Bangalore, have their own net-work of wholesale dealers through whom they push forward their sales of "Oakes" Batteries. "Speed" Batteries were being manufactured solely for Speed-A-Way Limited, Madras, but for sometime now these Batteries have not been manufactured. For the purpose of levying excise duty, in the past, the wholesale cash prices of these Batteries were determined on the basis of the ex-factory price charged by the petitioner to its distributors. It is alleged on behalf of the

petitioner and not denied by the respondents that the Ex-factory prices charged to all the distributors were and are the same.

4. On 1-3-1956, 6-5-1956 and 21-1-1957, the petitioner declared the wholesale price fixed by it for its various products as required by the Central Excise Rules and the same was intimated to the Authorities. The wholesale price so declared was accepted and excise duty levied accordingly till 10-12-1958. In about December 1958, the Excise Authorities intimated to the petitioner that the "wholesale price" declared by the petitioner cannot be accepted as correct as in their view the whole-sale market price at Bangalore is very much more than the wholesale price declared by the petitioner. This conclusion was arrived at on the ground that the Batteries manufactured by the petitioner have not got a wholesale market at the factory site and therefore the wholesale cash price ruling at Bangalore have to be taken into consideration. It is said that the wholesale prices charged by the petitioner to its distributors are very much less than the wholesale prices prevailing at Bangalore even after deducting the distributor's discount and incidental expenses. Incidentally it was mentioned "further, these two firms (Ms. Addison and Co. (P) Ltd., and Messrs. George Oakes (P) Limited), are associate firms with Messrs. Amco Batteries Limited". We are unable to find out the real significance of this observation. We are informed that the aforementioned two firms as well as the petitioner firm have some common directors. But it is not the case of the Central Excise Authorities that on that ground any concession was being shown to these firms. It is admitted that same Ex. factory price was and is charged to all the fourteen distributors. The goods manufactured by the petitioner are solely distributed by the aforementioned distributors, particular territory being assigned to each distributor.

5. The petitioner and the respondents are at issue as regards the true interpretation to be placed on Section 4(a) of the Central Excises and Salt Act, 1944. According to the petitioner, the case at hand is governed by the first part of Section 4 (a), whereas according to the respondents it is governed by the second part of that section.

Section 4 (a) reads :

"Where under this act, any article is chargeable with duty at a rate dependant on the value of the article, such value 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, * * * *"

In the instant case the "wholesale cash price" of the Batteries in question was not determined with reference to the sale of other batteries manufactured by other Companies. It was determined on the basis of the prices charged by distributors like Messrs. Addison and Company, (P) Limited, and Messrs. George Oakes (P) Limited, at Bangalore.

6. Dealing with Section 30 (a) of the Sea Customs Act (1878), which provision for our present purposes is in pari materia with Section 4 (a), the Judicial Committee observed in *Ford Motor Company of India, Limited v. Secretary of State*¹,

"The price upon which customs duty has been charged appears, therefore, to be a wholesale cash price, less trade discount, for which the goods under assessment were in fact sold at the time and place of importation. On this footing their Lordships must now consider the more general arguments for the appellants against the application of clause (a) to the shipment in question. "Goods of the like kind and quality" is a phrase which suggests other goods than those under assessment. Upon this is based the argument that one must either disregard the price fetched by the goods themselves or should look to it only to see what price other similar goods would have realised. Unless that is ascertainable, it is contended, that the conditions of clause (a) are not satisfied. If, for example, one may assume that there were in Bombay no Ford Model A vehicles left undisposed of from previous shipments, then on this view the correct test is to ask oneself whether, apart from and in addition to those which arrived by the s. s. "Alglo", further cars could have been sold in Bombay on or about 9th January 1929, and, if so, would they have fetched the same prices? If this be the true interpretation of the statutory test, there is difficulty in holding it applicable to the present case, and colour is certainly lent to the contention that clause (a) is intended only to have effect in the case of goods for which there is at the place of importation a market in the strict sense applicable only to staple commodities. But, in their Lordships' view, this is a misinterpretation of clause (a). The application of the clause does not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to the available supply has had effect upon the wholesale price. Ordinarily, at the time of making out the bill of entry there will not be an actual price relating to the goods themselves and complying with the requirements of clause (a). As a rule, therefore, the price appropriate to the goods under assessment will under the clause be deduced, if at all, from actual prices relating to other goods of like kind and quality. But if there is an actual price for the goods themselves at the time and place of importation and if it is a "wholesale cash price less trade discount", the clause is not inapplicable for want of sales of other goods. The clause can be applied distributively to each of the motor cars in this consignment and even if they are regarded collectively the clause is not defeated. A particular car may be sold at a price which, having regard to other transactions in such cars or to other circumstances, is too high or too low. In that sense the actual price in a particular instance does not necessarily or finally establish a wholesale price to satisfy clause (a) whether the particular car or cars sold be part of the shipment in question or not. But the goods under assessment may under clause (a) be considered as members of their own class even although at the time and place of importation there are no other members. The price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation."

¹ AIR 1938 PC 15 at page 19

Hence for determining the "wholesale cash price" of the goods in question the authorities could have, if other conditions mentioned in Section 4 (a) are held to have been fulfilled, levied duty on the basis of the wholesale cash price fetched at the Bangalore market.

7. But, then the question is whether the Batteries in question had a "wholesale market" at the factory site. It is only if there was no wholesale market at the factory site, the wholesale ruling price at the Bangalore Market, which undoubtedly is the nearest wholesale market to the factory site, can be taken into consideration. Interpreting Section 4 of the Central Excises and Salt Act, 1944, D. N. Sinha, J. in *National Tobacco Company of India Limited v. Collector of Central Excise*², held that

"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 3 factors, (i) the location where the calculation is to be made, (ii) the time at which the calculation should be made and (iii) the method of calculation".

According to the learned Judge 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 : 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. I respectfully accept the tests above laid down. In the instant case all the Batteries manufactured by the petitioner were delivered only to the distributors and that at a price fixed by the petitioner. The petitioner was not free to sell the articles to others and in fact no sales are proved to have been made to any one other than the authorized distributors. The distributors were free to sell to the customers at whatever price they pleased. In determining the price to be paid by the distributors, "wholesale cash prices" ruling in the nearest market (Bangalore) do not appear to have been taken into consideration. Hence the distributors cannot be considered as independent buyers. They are clearly favored buyers. Therefore, it cannot be said that there was a "wholesale cash market" at the factory site nor can the price charged to the distributors be considered as the "whole sale cash price" ruling at the factory site.

8. From the above discussion it follows that the present case is not governed by the first part of Section 4 (a). Therefore, the relevant criteria is the "wholesale cash price" prevailing at the time of the sales in question in the wholesale market nearest to the

² AIR 1961 Cal 477

factory site.

9. The Central Excise Authorities have held that the nearest wholesale market to the Factory site is the Bangalore market. This finding cannot be properly challenged. I agree with the same.

10. Conclusions reached by me receive support from the decision of the Privy Council in Ford

Motor Company of India, Limited's case, AIR 1938 PC 15 and the decision of the Calcutta High Court in National Tobacco Co. of India Ltd's case, AIR 1961 Calcutta 477.

11. But in determining the "wholesale cash price" of the Batteries in question on the relevant dates, the Excise Authorities have solely relied on the "wholesale cash price" charged by Messrs. Addison and Company (P) Ltd., and George Oakes (P) Ltd., to their wholesale customers. No deduction appears to have been given for the overhead charges and the incidental expenses incurred by Messrs. Addison and Company (P) Limited, and George Oakes (P) Limited. Further, no provision appears to have been made for the discount to which these Companies would have been ordinarily entitled to. The order passed by the Authorities does not show that the "wholesale cash price" prevailing in Bangalore on the dates the goods were moved out of the Factory or the prices prevailing at about that time, were taken into consideration. As observed in the National Tobacco Co.'s case AIR 1961 Calcutta 477, the determination of the value for the purpose of duty, should be 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 of the factory. If the Excise Authorities depend on the price list issued by Messrs. Addison and Co. (P) Ltd., and George Oakes (P) Ltd., those price lists must show the "wholesale cash price", prevailing on the relevant dates or at about those dates. Further from the prices shown in those lists, necessary deductions will have to be made. In this connection I may usefully quote a passage from the decision in The National Tobacco Co's case, AIR 1961 Calcutta 477. The relevant passage is available at page 481 of the report. It reads thus :

"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 exists at the site of the 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 sites 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."

I may add that in the instant case in determining the "wholesale cash price" of the Batteries in

question, the Authorities will have to deduct the expenses that were likely to have been incurred by Messrs. Addison and Co. (P) Ltd., and George Oakes (P) Ltd., and the discounts to which they are ordinarily entitled to. Quite clearly all those factors were not borne in mind by the Excise Authorities while making the impugned levy.

12. The contentions of Sri V. Krishnamurthy, the learned Counsel for the petitioner, that the impugned order is hit by Article 14 of the Constitution because different Collectors have adopted different basis for assessment and that no uniform rule has been applied in the matter of levying excise duties on Batteries, deserve no serious consideration. A law cannot be struck down under Article 14 merely because some officers have wrongly interpreted the relevant provisions.

13. For the reasons mentioned above, a Writ of certiorari will be issued quashing the impugned levy. Nothing in this order will prevent the respondents from making fresh assessment in accordance with law and in the light of the observations made above.

14. Under the circumstances of this case, there will be no order as to costs.
Order accordingly.