

PETITIONER:
INDIAN PISTON LIMITED

Vs.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE, MADRAS

DATE OF JUDGMENT 30/01/1990

BENCH:
KANIA, M.H.
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KANIA, M.H.
KULDIP SINGH (J)

CITATION:
1990 AIR 977 1990 SCR (1) 157
1990 SCC (1) 470 JT 1990 (1) 99
1990 SCALE (1) 79

ACT:

Central Excises and Salt Act, 1944/Central Excise Rules, 1944: Sections 4 and IIB/Rule 233B--Excise duty--Sales by assessee to distributors--Distributors treated as 'related persons' by Department--Price list filed with protest--An appeal distributors held 'independent buyers'--Refund on excess duty--Whether arises.

HEADNOTE:

The appellant was a manufacturer of motor vehicle parts failing under Item 34-A, and components for I.C. Engines failing under Item 68, of the Central Excise Tariff.

The marketing pattern of the appellant was that they sold goods in the wholesale to O.E. manufacturers, Transport Undertakings and Government Bodies, and the requirements of the replacement market were met by sale in the wholesale to other persons who were met by sale in the wholesale to other persons who were designated by them as distributors/ primary wholesale buyers on the basis of agreements with such distributors.

The Department took the view that sales by the appellant to its distributors would be considered as sales to 'related persons' on account of the amendment to sec. 4 of the Central Excises and Salt Act, 1944, which came into force from October 1 1975, and directed the filing of revised price lists showing a discount of 12 1/2% from the price at which the goods supplied by the appellant were sold by its distributors to independent buyers.

The appellant complied with this direction under protest taking up the contention that the distributors were also a class of independent buyers, which was however rejected by the Assistant Collector.

On appeal the Collector (Appeals) took the view that distributors were not related persons relying on this Court's decision in Union of India v. Bombay Tyres International Ltd., [1983] 14 ELT 1896.

The appellant then claimed refund of the excess amount of excise duty paid. This was rejected by the Assistant Collector on the ground that except in respect of sales to wholesale distributors/primary wholesalers and O.E. manufacturers, the excise duty had been paid by the appellant

voluntarily.

The Customs, Excise and Gold (Control) Appellate Tribunal dismissed the Appellant's appeal.

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In the appeal to this Court it was contended on behalf of the appellant that the language of section 4(1) of the Central Excises Act, indicates that there could be only one normal price for sales to independent distributors, and that as the letter of protest sent by the appellant covered the entire payment of excise duty in those cases where the normal price was fixed on the footing that the distributors of the appellant were related persons, no question of limitation would arise in considering the application of the appellant for refund.

On behalf of the respondent, it was contended that the protest made by the appellant must be read as limited to the cases of sales by the appellant to the wholesale distributors/primary wholesalers and to O.E. manufacturers and that the other categories of sales must be held not to be covered by the protest.

Allowing the appeal, this Court,

HELD: (1) In view of the fact that the distributor of the appellant were finally held not to be related persons, the excise duty collected in respect of the difference between the price at which the goods were sold by the appellant to the distributors and the price to which the said goods were sold by the distributors to independent buyers calculated as aforesaid, must be held to be excess duty. [162D-E]

Indian Oxygen Ltd. v. Collector of Central Excise, [1988] 36 E.L.T. 723, Collector of Central Excise, Madras v. Ashok Leyland Ltd., Madras, [1987] 29 E.L.T. 530 referred to.

(2) The protests filed by the appellant clearly took up the contention that its distributors could not be regarded as related persons and hence the protests lodged by the appellant must be held to cover all cases where the price at which the appellant sold its goods to its distributors was not regarded as the normal price on the ground that the distributors were related persons. [162E-F]

Indian Cements Ltd. v. Collector of Central Excise, [1989] 2 S.C.C. 676 referred to.

(3) Rule 233B of the Excise Rules does not prescribe any particular form of protest and hence it is not possible to say on the basis of this rule that the appellant-assessee in this case must be deemed to have paid the duty without protest. [163E-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1430-36(NM) of 1987.

From the Judgment and Order dated 23.4.1987 of the Custom Excise and Gold (Control) Appellate Tribunal, South Regional Tri-

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bunal, Madras in Appeal Nos. 174, to 176 and 240 to 243 of 1986 MAS in Order No. 247 of 1987.

Anil B. Divan, H.K. Dutt, S. Ramasubramaniam, Krishna Srinivasan and Ms. Midula Ray for the Appellant.

A.K. Ganguli, A. Subba Rao and P. Parmeshwaran for the Respondent.

The Judgment of the Court was delivered by

KANIA, J. These appeals arise from a judgment of the

Customs, Excise and Gold (Control) Appellate Tribunal (South Regional Bench) at Madras.

The facts necessary for the disposal of these appeals are as follows.

The appellant is a manufacturer of motor vehicle parts falling under Item 34-A of the Central Excise Tariff and components for I.C. Engines falling under Item 68 of the said Tariff. The period with which we are concerned in these appeals is the period from October 1, 1975 to July 21, 1984. The marketing pattern of the appellant was that they sold goods in the wholesale to O.E. manufacturers, Transport Undertakings and Government Bodies. The requirements of the replacement market were met by the appellant by sale in the wholesale to other persons who were designated by the appellant as distributors/primary wholesale buyers on the basis of agreements with such distributors. The amendment to section 4 of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Central Excises Act") came into force from October 1, 1975 and, as from that date, the Department took the view that sales by the appellant to its distributors would be considered as sales to related persons. The Department, therefore, directed the appellant to file price lists in Part IV in the form prescribed for sales to related persons. The appellant filed the price lists in Part II, Part IV and Part VI. The price lists filed in Part II related to sales to industrial buyers, Government Bodies and so on who were admittedly not related persons regarding the appellant. These price lists were duly approved'. It was regarding the price lists filed under Part IV that the Assistant Collector on the basis of the aforesaid view directed the appellant to file revised price lists showing a discount of 12-1/2% from the price at which the goods supplied by the appellant were sold by their distributors to independent buyers. The appellant complied with this direction under protest taking up the contention that the distributors were also a class of independent buyers. This claim was rejected by the Assistant Collector, who took the view that the distributors

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were related persons and hence the prices charged by these distributors to their purchasers should be taken as the assessable value. This was contested by the appellant before the Collector (Appeals) who by his order dated July 27, 1984 took the view that the distributors were not related persons, on the basis of the decision of this Court in the case of Union of India & Ors. v. Bombay Tyres International Ltd., [1983] 14 E.L.T. 1896. The appellant applied for a refund on the ground that the excise duty had been collected from the appellant on the footing that the distributors were related persons and that, in view of the finding that the distributors were not related persons, the excess amount should be refunded to it. This contention was rejected by the Assistant Collector and on the ground that except in respect of sales to wholesale distributors/primary wholesalers and O.E. manufacturers, the excise duty had been paid by the appellant voluntarily. Against this decision, the appellant preferred an appeal to the Tribunal. The Tribunal, however, confirmed the view of the Assistant Collector on the ground that the other modes of sale like depot transfers, retail sales, direct dealer sales, sales to transport undertakings and sales to Government bodies like transport undertakings had not figured as issues for determination before the excise authorities and the protest made by the appellant was only in respect of the assessable value regarding the said two categories of sales to wholesale distributors/ primary

wholesellers and to O.E. manufacturers. On the basis of these conclusions, the Tribunal dismissed the appeal of the appellant: The present appeals are directed against this decision of the Tribunal.

It was submitted by Mr. Divan, learned counsel for the appellant, that the decision of the Tribunal was erroneous and liable to be set aside as, for purposes of levy of excise duty on the sales in question only one price can be treated as the normal price and, as the distributors were held not to be related persons, it was the wholesale price at which the goods were sold by the appellant to the distributors which must be held to be the normal price. It was pointed out by him that all the circumstances show that the payment of excise duty was made under protest and that the returns were originally filed only on the basis of the single normal price, namely, the price at which the goods were sold by the appellant to its distributors. Learned counsel drew our attention to the provisions of section 4 of the Central Excises Act. The relevant part of section 4 runs as follows:

"4. Valuation of excisable goods for purposes of charging of duty of excise--(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference

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to value, such value shall, subject to the other provisions of this section, be deemed to be--

"(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale."

We are not concerned with the proviso to this section for the purposes of this appeal. Learned counsel submitted that the language of section 4(1) suggests that there can be only one normal price for sales to independent distributors.

Learned counsel for the appellant also drew our attention to the decision of this Court in *Indian Oxygen Ltd. v. Collector of Central Excise*, [1988] 36 E.L.T. 723. It has been observed by this Court in that judgment as follows (para 6 of the said report):

"It is necessary to reiterate that value for assessable goods must be determined in term of section 4 of the Act. The said section 4(1) provides that where the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale."

It may be noted that in the present case there was no contention that there was any consideration for the sale other than the price.

In *India Cements Ltd. v. Collector of Central Excise*, [1989] 2 S.C.C. 676 a Division Bench of this Court has taken the view that no particular form is prescribed for making up of protest. In that case, the Court took the view that an ordinary reading of the letter sent by the appellant showed that the appellant was not accepting the liability without protest and in view of this, the letter must be held to be in the nature of a protest. The Division Bench further held that in view of this, the question of limitation does not arise for refund of the duty (para 10 of the said report).

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It was submitted by learned counsel for the appellant that in the present case the letter of protest sent by the appellant, on a commonsense reading thereof, covered the entire payment of excise duty in those cases where the normal price was fixed on the footing that the distributors of the appellant were related persons and submitted that in view of this no question of limitation would arise in considering the application of the appellant for refund. The learned counsel drew our attention to the decision of the Special Bench of the Tribunal in Collector of Central Excise, Madras v. Ashok Leyland Ltd., Madras, [1987] 29 E.L.T. 530 where on similar facts a Special Bench of the Tribunal had taken the view that even removals for captive use and retail sales had to be assessed at the normal price available at the time and place of removal from their main dealers. The contention of the Department in that case that the removals were not the subject matter of the original adjudication by the Assistant Collector and hence the assessments had become final, was rejected.

In our opinion, the submission on behalf of the appellant is well-founded. In view of the fact that the distributors of the appellant were finally held not to be related persons regarding the appellant in cases where excise duty has been levied on the footing that the distributors of the appellant were related persons and hence, the price at which the goods were sold to them could not be regarded as the normal price and the excise duty collected in respect of the difference between the price at which the goods were sold by the appellant to its distributors and the price at which the said goods were sold by the distributors to independent buyers, calculated as aforesaid, must be held to be excess levy. The protests filed by the appellant clearly took up the contention that its distributors could not be regarded as related persons and hence the protests lodged by the appellant must be held to cover all cases where the price at which the appellant sold its goods to its distributors was not regarded as the normal price on the ground that the distributors were related persons.

It was submitted by Mr. Ganguly, learned counsel for the respondent, that the protest made by the appellant must be read as limited to the cases of sales by the appellant to its wholesale distributors/primary wholesalers and to O.E. manufacturers and that the other categories of sales like stock transfers, clearances to retail sellers and other wholesale sales to purchasers other than distributors must be held not to be covered by the protests. He placed strong reliance on the observation of this Court in Assistant Collector of Central Excise & Ors. v. Madras Rubber Factory Ltd. & Ors., [1987] 27 E.L.T. 553

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(S.C.) where it has been held (page 20 of the report) that the different prices can be normal prices for the purposes of the determination of the assessable value of an article. In that case, however, it must be appreciated that the separate price lists in respect of supplies made to the Government and other departments were filed by the assessee, the Madras Rubber Factory, distinct and different from the price lists in relation to dealers and it was held that since different price lists for different classes of buyers are specifically recognised under proviso (i) of section 4(1) of the Central Excises Act, therefore, merely because the product is sold at a lower price to the Government and its department that does not enable the MRF to contend that the difference in price with reference to an ordinary dealer

and the Government is a discount to the Government. The difference in price is not a discount but constitutes a normal price for the Government as a class of buyers and no deduction on this Head is admissible. It was, in these facts and circumstances, that the aforesaid conclusion was arrived at and it has no application to the case before us because it has not been shown to us that a distinct or different price list was filed regarding any particular category of buyers in respect of the sales in question.

Mr. Ganguly next drew our attention to Rule 233B of the Central Excises Rules, 1944 which lays down the procedure to be followed when duty is paid under protest. The provisions of this rule, however, are of no relevance here because it has not been pointed out to us as to how the appellant has failed to observe this rule in any particular regard so that the provisions of clause 8 of the rule can come into effect. This rule does not prescribe any particular form of protest and hence it is not possible to say on the basis of this rule that the appellant-assessee in this case must be deemed to have paid the duty without protest.

In the result, the appeal is allowed. The order of the Tribunal is set aside and it is held that the assessee is entitled to refund where excise duty has been assessed and collected from the assessee at a higher rate on the footing that the wholesale distributors of the assessee were persons related to it, that is, in respect of the other categories of sales, namely, retail sales, sales to dealers, sales to State Transport Undertakings and export clearances. Looking, however, to the facts and circumstances of the case, there will be no order as to costs of the appeals. The orders for costs already made shall, however, stand.

N.V.K.
allowed.

Appeal al-