Indian Oxygen Ltd vs Collector Of Central Excise on 28 July, 1988

Equivalent citations: 1988 AIR 1809, 1988 SCR SUPL. (1) 687, AIR 1988 SUPREME COURT 1809, 1988 SCC (SUPP) 658, (1988) 3 JT 291 (SC), (1988) 36 ELT 723

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji

PETITIONER:
INDIAN OXYGEN LTD.

Vs.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE.

DATE OF JUDGMENT28/07/1988

BENCH:
MUKHARJI, SABYASACHI (J)
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MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1988 AIR 1809 1988 SCR Supl. (1) 687
1988 SCC Supl. 658 JT 1988 (3) 291
1988 SCALE (2)291
CITATOR INFO :
D 1990 SC 977 (4)

ACT:
Central Excises and Salt Act, 1944 Section 4-Valuation of excisable goods-When ex-factory price is ascertainable, assessment to be made on that basis only-If ex-factory price is not ascertainable and assessment to be made ex-depots/service centres, deductions may be claimed towards charges for transportation, delivery and collection, and charges for loading within the premises, on the basis of actual evidence.

HEADNOTE:
The appellant has been manufacturing compressed oxygen

and dissolved acetylene, falling under tariff item No. 14H of the First Schedule to the Act. These items were sold to Government undertakings at the rates determined by DGS&D. In respect of other buyers the appellant charges prices on slab basis which is related to quantitative discount. These prices were found to be much more than the prices indicated in the approved price list. The appellant did not furnish quantities of the products sold from its depots/service centres. Apart from the declared price, the appellant charged delivery and collection charges, cylinder deposit and rentals.

The appellant explained that the difference in prices was due to special delivery and collection charges incurred for transporting the goods from the place of manufacture to the depot from where it was sold. The appellant's claim for abatements of account of freight and handling charges was not accepted as no evidence was produced for the same. In respect of the price lists submitted by the appellant for approval, show cause notices were issued. The appellant replied that in the past, under similar circumstances the claim for abatement had been upheld by the Department and therefore, there was no reason to deviate from the previous practice. The Assistant Collector rejected the plea and approved the price list after disallowing the abatement on account of freight and handling charges. The appellant preferred an appeal before the Collector of Central Excise (Appeals) which was dismissed. Thereafter both the appellant and the Assistant Collector filed separate appeals before the Customs Excise and Gold (Control) Appellate Tribunal.
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The Tribunal emphasised that the ex-factory prices were ascertainable and there was no scope of deduction from that price. However it directed that if ex-factory prices were not ascertainable and the goods were to be assessed ex-depot, then it would be for the appellant to claim on the basis of actual evidence, and remanded the case to the Assistant Collector to refix the assessable value accordingly. These appeals under section 35L(b) of the Act are against the Tribunal's decision.

Disposing of these appeals,

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HELD: 1. The cost of transportation from factory to the depot cannot normally be included in computation of the value under Section 4(1)(a) read with section 4(4)(d)(i) of the Act. Where the wholesale price is ascertainable at the factory gate, the question of transportation charges becomes entirely irrelevant. The cost of transportation from the factory gate to the place of delivery and transit expenses were not to be added to the wholesale price at factory gate for purpose of duty under the Act. It is clear from section 4 that the delivery and collection charges have nothing to do with the manufacture as they are for delivery of the filled cylinders and collection of the empty cylinders.

These charges have to be excluded from the assessable value. Insofar as the loading charges incurred for loading the goods within the factory are concerned, they are to be included in the assessable value, irrespective of who has paid for the same, but the loading expenses incurred outside the factory gate are excludible. Duty of excise is a tax on the manufacture, not a tax on the profits made by a dealer on transportation. [690F-H; 691A]

2. In the instant case, there is a clear finding that the ex-factory price was ascertainable. If once that is the position that should be the basis upon which the value is to be determined, the other expenses, costs or charges must be excluded. [693B]

Union of India & Ors. etc. etc. v. Bombay Tyre International Ltd. etc. etc., [1984] 1 SCR 347 referred to.

[This Court observed that the Tribunal's order stood modified accordingly and directed the Assistant Collector to re-fix the assessable value as indicated in this judgment.] [693C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 2801- 06 of 1987.

From the Judgment and Order dated 8.7.1987 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal Nos. E 1533, 1521, 1528-30 & 1531 of 1986and Order No.498 to 503 of 1987.

Soli J. Sorabji, V.J. Francis, N.M. Popli, Mrs. Nisha Bagchi and S. Ganesh for the Appellant.

Mrs. Indu Malhotra and P. Parmeshwaran for the Respondent.

The Judgment of the Court was delivered by SABYASACHI MUKHARJI, J. These are appeals under Section 35L(b) of the Central Excises & Salt Act, 1944 (hereinafter called 'the Act').

The appellant manufactures compressed Oxygen and dissolved acetylene falling under tariff item No. 14H of the First Schedule of the Act as it stood at the relevant time. The appellant had received showcause notice in respect of the period from 1.1.1984 to 31.1.1984 and also five other show-cause notices for different periods, in respect of the price lists submitted by the appellant seeking approval of the price list of gases in question. It was found by the Tribunal that the appellant manufactures and sells oxygen and D.A. Gases. These are sold from the factory of the appellant at Visakhapatanam and from their depot/service centres at Vijayawada, Rajamundry, Vadlapudi, Jeypore and Damanjodi. They sell their product to Government undertakings as per the rates determined by DGS & D, New Delhi. In respect of other buyers the appellant sell their product at various prices on slab basis. It is stated that the slab basis is related to what the manufacturers call a quantitative discount. According to the Tribunal, the revenue had undertaken verification of the prices charged

by the manufacturers at their depots and service centres. These were found to be much more than the prices indicated in the approved price list. It also observed that the manufacturers did not furnish to the department quantities of their product which were sold from their depots/service centres and that the appellant charged from their buyers, apart from the declared price list, the following:

(i) Delivery and collection charges (where applicable);

(ii) Cylinder deposit; and

(iii) Rentals.

The department's case was that these being additional charges, should form part of the assessable value.

It was urged on behalf of the revenue that the price list submitted by the manufacturers in respect of clearances from their Vijayawada depot the appellant claimed abatements on account of freight and handling charges in respect of which they did not produce any evidence. It was, therefore, held by the Department that no such deduction was admissible. It, however, appeared to the Tribunal that the manufacturers have admitted that separate prices were indicated for the same goods in respect of Visakhapatnam factory which is the place of manufacture and Vijayawada, a place about 400 Km. away which is only a depot. It was explained that the difference in the prices was in consideration of special delivery and collection charges which were admittedly incurred for transporting the goods from Visakhapatnam to Vijayawada.

The Tribunal noted that the appellant had not come forward to offer concrete evidence of actual freight charges etc. It, however, emphasised that the price at the factory gate is ascertainable. Assessment should, therefore, be made in terms of that price. Hence, there was no scope of deduction from that price. It, therefore, directed that if the ex-factory prices were not ascertainable and the goods were to be assessed ex-depot, then it would be for the manufacturer to claim on the basis of actual evidence. It remanded the case to the Asstt. Collector to refix the assessable-value as directed. It is necessary to reiterate the principle upon which the assessable-value will have to be determined in this case. The cost of transportation from factory at Visakhapatnam and the depot at Vijayawada cannot be included normally in computation of the value. The value has to be computed under Section 4(1)(a) read with Section 4(4)(d)(i) of the Act, Where the wholesale price is ascertainable at the factory gate, the question of transportation charges becomes entirely irrelevant. The cost of transportation from the factory gate to the place of delivery and transit expenses were not to be added to the wholesale price at factory gate for purposes of duty under the Act. In this case the price of the goods at the factory gate Visakhapatnam is known. It is clear from Section 4 that the delivery and collection charges have nothing to do with the manufacture as they are for delivery of the filled cylinders and collection of the empty cylinders. These charges have to be excluded from the assessable-value. Insofar as the loading charges incurred for loading the goods within the factory are concerned, they are to be included in the assessable-value, irrespective of who has paid for the same but the loading exepnses incurred outside the factory gate are excludible. Duty of excise is a tax on

the manufacture, not a tax on the profits made by a dealer on transportation.

It is necessary to reiterate that value for assessable goods must be determined in terms 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 therefore, 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 or removal, where the buyer is not a related person and the price is the sole consideration for the sale. "Place of removal" under section 4(4)(b) has been defined to mean a factory or any other place or premises of production or manufacture of the excisable goods or a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from which such goods are removed. The scope of determination of value has been explained and reiterated by this Court in Union of India and others etc. etc. v. Bombay Tyre International Ltd. etc. etc., [1984] 1 S.C.R. 347. Following the principle of the said case the Tribunal noted in the judgment under appeal that the price ex-factory is ascertainable. If once that is the position as the Tribunal rightly pointed out, the issue of deduction of rate from the prices ex-depots does not survive for the decision. But if the ex-factory prices were not ascertainable and the goods were to be assessable ex-depot, then it would be for the manufacturer to claim on the basis of actual evidence the deductions that should be admissible from the price list as per the provisions of the Act.

Counsel for the respondent, Ms. Indu Malhotra who argued this case with considerable ability before us drew our attention to the following observations in the Bombay Tyre International (supra) at pages 376 and 377 of the report:

> "Accordingly, we hold that pursuant to the old s. 4(a) the value of an excisable article for the purpose of the excise levy should be taken to be the price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of wholesale trade at the time and place of removal. Where, however, the excisable article is not sold by the assessee in wholesale trade but, for example, is consumed by the assessee in his own industry the case is one where under the old s. 4(a) the value must be determined as, the price at which the excisable article or an article of the like kind and quality is capable of being sold in wholesale trade at the time and place of removal.
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> Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place outside the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale trade at such place, after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place".

She also drew our attention to the observations of the Court at pages 391 and 392 of the Report:

> "Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently where the sale is effected at the factory gate, expenses incurred by the assessee up to the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organisation expenses including advertisement expenses can not be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery."

She contended that in the instant case, in view of the conduct of the dealer, there was doubt as to what was the real ex-factory price. If there was a finding that there was no real ex-factory price, then the aforesaid observations would have required serious examination. But in this case, the case has not proceeded on that basis. On the contrary, there is a clear finding that there was a ex-factory price which is ascertainable. If once that is the position that should be the basis upon which the value is to be determined, the other expenses, costs or charges must be excluded.

Inasmuch as that is the correct position in law, we direct that the Assistant Collector will re-fix the assessable value as indicated in this judgment. The Tribunal's judgment is modified accordingly. These appeals are disposed of. There will be no order as to costs.

G.N. Appeals disposed of.