

IN THE ISLAMABAD COURT, ISLAMABAD.
DEPARTMENT.

T.A. No. 24/2003

OIL AND GAS DEVELOPMENT COMPANY LTD. (OGDCL).

APPELLANT.....

VERSUS

COLLECTOR OF CENTRAL EXCISE & TAX, RAWALPINDI, ETC.

RESPONDENTS.....

APPELLANTS BY: Mr. Umair Majeed Malik, Advocate.

RESPONDENTS BY: Mr. Babar Bilal, Advocate.

DATE OF HEARING: 14.01.2020

LUBNA SALEEM PERVEZ; J. Present tax appeal, under section 36-C of the Central Excise Act, 1944, has been filed by the Appellant/Taxpayer against order dated 12.12.2002, passed by the Customs, Central Excise & Sales Tax Appellate Tribunal, Islamabad, on the appeal filed by Respondent / Department, vide Appeal No. 1107/2001. The Appellant in his appeal raised three questions, however, this Court, vide order dated 13.11.2018, preferred following question of law arising out of the impugned order for determination: -

"Whether the Tribunal has erred in applying section 4(2) of the Central Excise and Salt Act, 1944 ("Act") when the duty chargeable on crude oil produced by the Appellant was on ad valorem basis and not retail price?"

2. Before proceeding to argue on the abovementioned question of law, learned Counsel for Appellant referred order dated 18.12.2018 to respond to the preliminary objection raised by the Respondents regarding non-maintainability of this appeal on the ground that the appeal was not accompanied with Board resolution/authority letter or memorandum and articles of association of the Appellant Company. Learned Counsel referred the additional documents, placed

on record through application bearing C.M.No. 123 of 2019, and asserted that as per facts mentioned in the C.M. it is clear that the appeal was being competently signed by General Manager (Finance) and explained that the Appellant is a statutory organization established, vide Oil & Gas Development Ordinance, 1961, having Board of Directors (Sec 5) and Chairman (Sec 6), whereas, Section 26 ibid provides for delegation of power through special or general orders in writing. He then referred, office order dated 12.02.1994, issued to grant administrative and financial powers to Chairman in terms of revised schedule and submitted that Sr. No. 1 of the revised schedule authorize the Chairman to delegate any of the powers mentioned therein to subordinate officers as he may deem necessary for efficient running of the corporation. He stated that as per Sr. No. 5(5.1) of the revised schedule the Chairman is authorized to delegate powers to sign the Plaints, Written Statements, Applications, Affidavit, Counter Affidavit, Petition, Memorandum of Appeals and Compound/Compromises in the matters to be pending adjudication before Courts/Superior Courts, Tribunals and Authority(s). Per learned Counsel, vide office memorandums dated 28.02.1998 & 16.01.1999, the said powers were granted to Executive Director (Admin) and in his absence to the Head of Department and then to next senior official available in the Department. Learned Counsel further apprised that through Oil & Gas Development Corporation (Re-organization) Ordinance, 2001 dated 05.07.2001, the corporation was converted into a limited company and by virtue of its section 3 (3) above said office memorandum dated 16.01.1999 was duly protected. Thus, at the time of filing of this appeal General Manager (Finance), being the concerned head of the department, was legally authorized to sign the same.

3. We have heard the learned Counsel for the Appellant and have also perused the documents placed on record by the Appellant through C.M.A. No. 123/2019, and are of the considered view that the preliminary objection raised by the respondent regarding maintainability of the present appeal has

satisfactorily been answered, resultantly, the appeal is held to be maintainable and admitted for opinion on the question of law referred above.

4. Necessary facts for disposal of the case are that the Appellant at the relevant time was a body corporate, engaged in the business of production of crude petroleum oil and sale thereof to various refineries. The Respondent confronted Appellant with the short payment of Central Excise Duty to the tune of Rs. 13,631,436/- for the period July 1988 to June 1992 through show cause notice dated 29.06.1993, allegedly erroneously assigning higher value i.e. 12.5% of crude oil being share of Government of Pakistan as royalty for the purposes of calculation of excise duty as against value of 87.5% owned by the Appellant i.e. on the quantity of the crude oil sold to refineries. Respondent No. 2 vacated the show cause notice while passing Order-in-Original 54/2001 dated 27.03.2001, by accepting the calculation of duty at ad valorem basis, under section 4(1) read with section 3(2) of the Central Excise & Salt Act, 1944 (**hereinafter referred to as 'the Act 1944'**) adopted by the Appellant. The Respondent No. 1 challenged ONO dated 27.03.2001, before the Appellate Tribunal Customs, Central Excise & Sales Tax, Islamabad (**hereinafter referred to as 'the Appellate Tribunal'**), who vide order bearing Appeal No. 1107/2001 dated 12.12.2002, accepted the appeal of the Respondent and directed application of section 4(2) of the Act 1944 for the purposes of calculation of excise duty on the supplies of crude oil. The Appellant, being aggrieved of the order dated 12.12.2002, passed by the learned Appellate Tribunal filed the present tax appeal.

5. Learned Counsel for the Appellant submitted that section 3 of the Act 1944 is the charging section which provides for the levy and collection of excise duties on excisable goods at the rates prescribed in the First Schedule to the Act 1944. The production of crude oil during the period from 1988 to 1993 was classified under Tariff Heading No. 03.03 of the First Schedule to the Act 1944 and is chargeable to duty @ 5% *ad valorem* on sale to refineries. Learned

Counsel submitted that sale price of the petroleum products including crude oil is fixed by the Government and the Appellant is not authorized to deviate from that and has to sell the crude oil on such rates. Learned Counsel further submitted that the royalty @ 12.5% is payable to the Government, before discounted rate, while the remaining 87.5% are billed to refineries at the discounted rate. Per learned Counsel, the Appellant supply the crude oil either to the Government or to the oil refineries as it cannot be sold to retailers or general body of consumers. Thus, section 4(1) of the Act, 1944 is applicable for determination of its value for charging excise duty deemed to be its wholesale cash price. Learned Counsel also relied on the Central Excise General Order No. 4 of 1959 and contended that as per this order in case of supply of excisable goods to Government Departments the actual sale price to these Departments should be accepted for the purposes of levy of excise duty/or sales tax. He further argued that the Appellate Tribunal has misconstrued the provision of law for charging excise duty on the basis of maximum retail price on 87.5% of the value of crude oil sold to the refineries by the Appellant in term of section 4(2) of the Act 1944. The Learned Counsel relied on the judgment re: **Atlas Battery Ltd vs Superintendent, Central Excise & Land Customs reported as PLD 1984 SC 86**, whereby, the Hon'ble Supreme Court while discussing the retail price basis for determination of excise duty, has held that:-

"The two concepts are apparently distinct and operate entirely on different basis as observed in the order of the learned Secretary to Government of Pakistan dated 31-1-1975: "where such duty is levied at ad valorem basis, the basis of assessment would be value as defined in subsection (1) of section 4, where such duty is levied on retail price, the basis of assessment would be the retail price as defined in subsection (2) of section 4."

The learned Counsel in support of his contention also cited following observation from the judgment of Hon'ble Lahore High Court re: **Asif Amin Silk Mills vs D.C.C.E. & L.C reported as (PLD 1988 Lah 320):-**

"Under section 3(1) of the Central Excises and Salt Act, 1944, central excise duty is levied and collected in the manner prescribed on all excisable goods produced or manufactured in Pakistan as and at the rates set forth in the First Schedule thereto. Section 4 of the said Act provides the manner of valuation of excisable goods, subsection (1) deals with the determination of value for ad valorem assessment, subsection (2)

provides for determination of retail price and subsection (3) lays down the manner in which "charges" have to be determined in respect of excisable services specified in Part II of the First Schedule to the Act."

6. Learned Counsel for the Respondents did not controvert the facts of the case but vehemently opposed the arguments regarding application of section 4(1) of the Act 1944 to the circumstances of the Appellant's case. While supporting the impugned order of the Appellate Tribunal, learned Counsel submitted that provisions of section 4(2) of the Act 1944 has been rightly held to be applicable for determination of value on the basis of retail price of supplies made to the refineries being higher price for charging excise duty as in case of the Appellant there is more than one prices of the crude oil have been fixed.

7. Argument advanced by the learned Counsel for the parties have been heard and the orders passed by the authorities below along with relevant record have also been carefully examined.

8. The legal controversy raised in the instant appeal is regarding the interpretation of section 4(1) & 4(2) of the Act 1944 as both the provisions operates distinctly for determination of value and chargeability of central excise duty which subsection of Section 4 is applicable to the facts and circumstances of the case. Section 4(1) cater *ad valorem* basis for determining value while 4(2) provides determination on the basis of *retail price* for charging excise duty under the Act 1944. The legislative history of section 4 of the Act 1944 in brief is that Section 4 was substituted for the originally enacted section through Central Excise & Salt (Amendment) Ordinance 1961. Later on, Finance Act, 1967, applicable with effect from 28th January 1961. Section 4 of the Act 1944 is reproduced below:

Determination of the value for the purposes of duty.—(1) Where under this Act any article is chargeable with duty at the rate dependent on the value of articles, 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 to the general body of retail traders [or, if there is no general body of retail traders, the general body of consumers] on the day on which the article which is being assessed to duty is removed from the factory or the warehouse, as the case may be, without any

abatement or deduction whatever except the amount of duty and sales tax then payable.

The above section was re-numbered as sub-section (1) with the insertion of words mentioned in the brackets, vide Finance Act, 1969 and following subsection (2) was inserted:

"(2) where under this Act any article is chargeable with the duty at the rate dependent on the retail price of the article, the retail price shall be the price fixed by the manufacturer, inclusive of all charges and taxes, at which any particular brand or variety of such article should be sold to the general body of consumers or, if more than one such price is so fixed for the same brand or variety, the highest of such price."

This subsection (2) was then amended vide Finance Act, 1993 and then vide Finance Act, 1994 granting non-obstante powers over subsection (1) to Federal Government to declare the goods or classes of goods chargeable to excise duty based on retail price through notification in the official gazette and remained in the Act 1944 till it was repealed and Finance Act, 2005 was promulgated. For the purposes of deciding present reference application subsection (2) as inserted through Finance Act, 1969(*reproduced above*) will be referred as the tax period from July 1988 to June 1992 is involved and the show cause notice was issued on 29.06.1993.

Method for charging excise duty on *ad valorem* assessment of the excisable articles was enacted with the Act 1944 then the concept of charging of excise duty on the *retail price basis* of the article was introduced vide subsection (2) of the Act 1944 w.e.f 28th June 1969. The Hon'ble Supreme Court in their judgment re: **M/s. Al-Khair Gadoon Ltd vs Appellate Tribunal & Others reported as (2019 SCMR 2018)** has explained the distinction in application of both the methods as provided in section 4(1) & 4(2) of the Act 1944. The relevant excerpt is as follows:

7. During the relevant period under consideration of the Notices, there were two distinct methods provided in the Act to determine the value of excisable goods in cases where the Excise Duty payable thereon was dependent on its value. The essential features of the said two methods provided as follows:

Ad valorem Rule:

The first method, based on ad valorem assessment, was provided under subsection (1) of the Act. Under this method, Excise Duty is based on ad valorem assessment of the excisable article, which is to be determined by the Revenue Officer, keeping in view the following:

- i. The wholesale cash price of a like kind and quality article sold to the general body of retail traders or, if there is no general body of retail traders, then the general body of the consumers.*
- ii. Price of the said article to be determined is to be on the day the excisable articles are being removed from the factory or warehouse of the manufacturer.*
- iii. Price is to be of like article, without any deduction except the amount of duty and sales tax payable thereon.*

Retail Price Rule:

The second method, based on retail price of the excisable articles, was stipulated in the newly inserted subsection (2) of section 4 of the Act. However, this method only comes into effect if the Federal Government, by notification in the official gazette, declares the goods to be levied Excise Duty based on its retail price. The essentials of assessment of Excise Duty under this method of determination are provided as under:

- i. **The retail price of the excisable article was to be fixed by the manufacturer.***
- ii. **The retail price shall be inclusive of all charges and taxes, other than sales tax levied and collected under the Sales Tax Act, 1990.***
- iii. **The retail price should be the price which the particular brand or variety of such article may fetch in the general market.***
- iv. **In case there is more than one price for the same brand or variety, then the highest of such prices shall be considered.***
- v. **The retail price is to be legible and prominently indicated on each article or packet, container, package, cover or label thereof, as the case may be.***
- vi. **The discretion of the manufacturer to fix the retail price is to be exercised reasonably, and it is to remain within the scope provided in subsection (2) of section 4 of the Act. Failure to do so would give the assessing excise officer power to decide the correct value of the said excisable article."***

It is pertinent to note here that since the above cited case decided by the Hon'ble Supreme Court pertained to tax period after amendment made, vide Finance Act, 1994, however, essential features at serial No. (i) to (iv) above also apply to the method of charging excise duty on the basis of retail price inserted vide subsection (2) w.e.f 28th June 1969, being similar with amendment made vide Finance Act, 1994.

9. As per Scheme of Law, after determination of value under section 4 of excisable article the rate of excise duty is levied under the charging provision of section 3 of the Act 1944 at the rates specified in the First Schedule to the Act 1944. Section 3(2) of the Act 1944 grants power to the Central Board of Revenue (Now Federal Board of Revenue) for levying excise duty, through notification in official gazette, and it may fix tariff value of the excisable articles enumerated in the First Schedule as chargeable to duty on *ad valorem* basis which in the case of the Appellant, at the relevant period, was provided against Entry No. 03.03 ibid which is also reproduced below:

"03.03 Petroleum oils and oils obtained from Bituminous Mineral, **crude** 5% *ad val*

It is observed that the rate for charging excise duty on crude oil has been fixed for charging duty at *ad valorem assessment* under the law. The respondents in earlier proceedings and at appellate stages have not controverted its chargeability in terms of section 3 read with entry 03.03 of the First Schedule to the Act 1944, thus for the case under consideration, the determination of value of crude oil for charge of excise duty on *ad valorem* basis, in terms of section 4(1), cannot be rejected by the Respondents. It is also observed on perusal of the impugned order dated 12.12.2002, that the Appellate Tribunal while deciding the appeal has taken into consideration the amended provisions of section 4(2) of the Act 1944, for the tax period from July 1988 to June 1992, and applied maximum retail price on 87.5% share of crude oil supplied to refineries and held that the provision i.e. 4(2) did not make any distinction between Government or private share and the price.

110. We are of the firm view that Appellate Tribunal has erroneously invoked amended provision of section 4(2) of the Act 1944 to the facts and circumstances of the case and further has also misinterpreted the said section as the language

of amended provision provides that method for valuation on basis of *retail price*

Copy of the order is being sent to the concerned authorities for their information and necessary action. The order is being sent to the concerned authorities for their information and necessary action. The order is being sent to the concerned authorities for their information and necessary action.

gazette, declares the goods to be levied Excise Duty based on retail price, as held by Hon'ble Supreme Court in the above cited judgment reported as **2019 SCMR 2018**.

11. In view of the discussion made, hereinabove, and law laid down by the Hon'ble Supreme Court as well as High Court in judgments referred above, it is held that the impugned order passed the Appellate Tribunal dated 12.12.2002, is not sustainable in the eye of law and accordingly the question of law involved is answered in affirmative, in favour of the Appellant / Taxpayer.

12. Office is directed to send a copy of the decision to the Customs, Central Excise & Sales Tax Appellate Tribunal, Islamabad , under the seal of the Court as prescribed under the law.

(AAMER FAROOQ)
JUDGE

Adnan/*

(LUBNA SALEEM PERVEZ)
JUDGE